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ANIMAL LAW FUNDAMENTALS

Wildlife: Related Acts and State Management Issues

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An Overview of Widlife Law in the United States

Introduction

The legal regulation of human interactions with wildlife—i.e., non-domesticated animals—takes many forms.[1] It operates at all levels of government within U.S. borders—local, state, federal, and tribal—as well as internationally. On the federal level alone, there are a multitude of statutes that bear on wildlife use and conservation: not simply statutes that have wildlife as their specific focus, but also broad regulatory regimes that include wildlife protection as one of many (and sometimes conflicting) objectives. Examples of such regulatory regimes include the federal land management statutes (including the National Forest Management Act, Federal Land Policy and Management Act, and the statutes governing the national park units and wildlife refuges); the anti-pollution laws (including the Clean Water Act, Clean Air Act, and Federal Insecticide, Fungicide, and Rodenticide Act); and laws prescribing the process of federal agency decision making and judicial review (such as the National Environmental Policy Act and the Administrative Procedure Act).

Addressing the full spectrum of such legal contexts and requirements is beyond the scope of this paper. The discussion that follows is instead designed to set forth a basic overview of how wildlife law has evolved in the U.S.—particularly as it pertains to the division of authority between the federal and state governments—and a summary of several of the most important federal wildlife conservation statutes: the Migratory Bird Treaty Act (MBTA), Endangered Species Act (ESA), and Marine Mammal Protection Act (MMPA).

[1] In some legal (and non-legal) contexts, wildlife may also be defined to include plants. This paper, however, will focus on the regulation of human interactions with wild animals.

Traditional State Regulation of Wildlife in the United States and the Origins of Federal Wildlife Regulation

To understand the legal status of wildlife in the United States, and how that status has evolved over time, one must appreciate how wildlife was treated for much of English history. Under English law, virtually all wildlife species were deemed by courts to be "owned" by the Crown. However, "they were owned in a sovereign rather than proprietary capacity," meaning that the monarch (and, increasingly, Parliament) was (at least in principle) "obligated to manage wildlife in the interests of the entire realm, rather than for the [monarch's] personal benefit." E. Freyfogle, D. Goble, *Wildlife Law: A Primer* (2009), at 23 (hereafter "Primer"). As a practical matter, this special status afforded to wild animals meant that, while English subjects could be granted a "'qualified property [interest] in animals feroe naturoe,'" i.e., the "'privilege of hunting, taking, and killing them in exclusion of other persons,'" that qualified interest could be "'restrained by positive laws enacted for . . . the supposed benefit of the community.'" *Geer v. Connecticut*, 161 U.S. 519, 526-27 (1895) (quoting Blackstone).

This assumption of a governmental right to regulate human interactions with wildlife in order to promote the interests of society as a whole was embraced by the American colonies and, subsequently, the individual States. As explained by the Supreme Court in an important (albeit eventually overruled) precedent:

> [u]ndoubtedly this attribute of government to control the taking of animals feroe naturoe, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the States with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution.

Geer, 161 U.S. at 528.

In *Geer*—which addressed the legal validity of a Connecticut statute prohibiting the transport of animals hunted within the State to areas outside the State—the Court stressed that the "power or control pledged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good." *Id.* at 529. Hence, "for the purposes of exercising this power, the State . . . represents its people, and the ownership is that of the people in their united sovereignty," so that "they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good." *Id.* (internal quotation omitted).

Based on this understanding of English common law, and its incorporation into the American legal system as conferring on the States a power (and even obligation) to treat wild animals as a "trust for the benefit of the people," the Supreme Court in *Geer* upheld the validity of the Connecticut statute at issue, and particularly its prohibition on the transport of hunted wildlife beyond state borders. In response to the contention that this prohibition violated Article 1, Section 8 of the U.S. Constitution—which grants Congress the exclusive authority to "regulate commerce . . . among the several states"—a majority of the Court held that "internal commerce may be distinct from interstate commerce," and that the "commerce in game, which the state law permitted, was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it." 161 U.S. at 532.

Justices Field and Harlan dissented as to the constitutionality of the Connecticut law although neither expressed any disagreement that States have a right (and obligation) to safeguard wildlife for the benefit of the State's citizens. Justice Field explained:

> I do not doubt the right of the State, by its legislation, to provide for the protection of wild game, so far as such protection is necessary for their preservation or for the comfort, health or security of its citizens, and does not contravene the power of Congress in the regulation of interstate commerce. But I do deny the authority of the State, in its legislation for the protection and preservation of game, to interfere in any respect with the paramount control of Congress in prescribing the terms by which its transportation to another State, when killed, shall be restricted to such conditions as the State may impose.

Id. at 541. Likewise, Justice Harlan—the "Great Dissenter"—wrote that "I do not question the power of the State to prescribe a period during which wild game within its limits may not be lawfully killed," but that sustaining Connecticut's prohibition on transport beyond State lines is "inconsistent with the freedom of interstate commerce which has been established by the Constitution of the United States." *Id*. at 543.

Although (as discussed below) the dissenting opinions of Justices Field and Harlan were ultimately vindicated on the interstate commerce question, the unanimous view of the Justices in *Geer* that States possess broad authority (and responsibility) to regulate the taking and killing of wildlife within State borders remains critical to the structure and evolution of wildlife law in the U.S. Although the federal government has, over time, occupied an increasingly vital role in the regulation and conservation of particular categories of wildlife deemed to have national import and value, the States (and, where applicable, tribal governments) continue to play a central role in regulating routine interactions between humans and wildlife – *e.g.*, by determining what kinds of animals may be hunted and fished; establishing rules for when, how, and to what extent those activities may occur; who may participate in them; what rights landowners may have to exclude such activities on their property; and the extent to which habitat necessary to protect wildlife may be developed.

In view of the ruling in *Geer*, it is unsurprising that the first significant federal law addressing wildlife—the Lacy Act, enacted in 1900—was carefully crafted by Congress so as not to intrude on assertions of State supremacy in the arena of wildlife regulation. *See* 31 Stat. 187.

Rather, the statute was focused on strengthening the enforcement of State wildlife laws by making it a federal crime to transport in interstate commerce the "dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed in violation of the laws" of a State. *Id.* § 3. The original Lacy Act also made it "unlawful for any person or persons to import into the United States any foreign wild animal or bird except under special permit from the United States Department of Agriculture." *Id.* § 2. These provisions—embodying fledgling federal efforts to advance wildlife protection and conservation as a national policy—were designed to effectuate the "object and purpose" of Congress to "aid in the restoration of such birds in those parts of the United States adopted thereto where the same have become scarce or extinct, and also to regulate the introduction of American or foreign birds or animals in localities where they have not heretofore existed." *Id.* § 1.

Since its enactment in 1900, the Lacy Act has been amended on several occasions so as to greatly expand both its reach and utility as a wildlife conservation measure. The statute now makes it unlawful not only to transport wildlife in interstate commerce that has been killed or taken in violation of State law, but also makes it a federal offense punishable under the Lacy Act's criminal provisions for any person to import, export, sell, receive, acquire or purchase wildlife that has been "taken, possessed, transported, or sold in violation" of any federal statute (such as the Endangered Species Act or the Migratory Bird Treaty Act), or Indian tribal law. *See* 16 U.S.C. § 3372(a). In addition, the statute now makes it unlawful to engage in the enumerated acts in violation of any *foreign* law, so long as the person subject to U.S. jurisdiction has done so in the course of foreign commerce. *Id.* The statute further makes it illegal to provide false information to federal authorities regarding wildlife that is intended for sale in interstate commerce. *Id.* §§ 3372(d)(2), 3373(d)(3)(A).

In one noteworthy recent case, Joseph Maldona-Passage—popularly known as "Joe Exotic" (and self-labeled the "Tiger King")—was convicted (among other criminal acts) of

violating the Lacy Act by falsely claiming that tigers and lions were being donated or transported to various facilities for exhibition only, when in fact they were being sold in interstate commerce. *See United States v. Joseph Maldonado-Passage*, No. CR-227-SLP (W. D. Okla., ECF No. 24, Superseding Indictment (Nov. 7, 2018); *see also United States v. Maldonado-Passage,* 4 F.4th 1097 (10th Cir. 2021) (recounting the history of the criminal proceedings and remanding a sentencing issue regarding the defendant's murder-for-hire scheme directed at animal activist Carole Baskin).

The significant strengthening of the Lacy Act over time parallels evolving conceptions of the federal government's role in preserving and protecting wildlife. In turn, the expansion of federal authority has been enabled by landmark Supreme Court rulings sustaining constitutional bases for the federal government to take an active, and often leading, part in the regulation of how wildlife is treated in the United States.

The Constitutional Underpinnings of Federal Wildlife Law and Concomitant Limitations on the States' Control of Wildlife Within their Borders

How did federal jurisprudence evolve from *Geer*—which declared States paramount in the regulation of wildlife and held that express prohibitions on transporting wildlife across State lines did not implicate the Commerce Clause of the Constitution—to a constitutional framework that could support such far-reaching laws as the ESA, MBTA, MMPA, modern Lacy Act, and many other laws that directly or indirectly serve to protect, and regulate human interactions with, wildlife? Although many Supreme Court rulings over the last century bear on, and reflect, this evolution, this paper will focus on several of the most critical decisions.

I.

First, in *Missouri v. Holland*, 252 U.S. 416 (1920), the Supreme Court sustained the constitutionality of the MBTA. That statute, as originally enacted in 1918, was designed to

implement a treaty entered into between the U.S. and Great Britain, acting on behalf of Canada. The treaty "recited that many species of birds in their annual migrations traversed certain parts of the United States and Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection." *Id*. at 431. The treaty called for establishment of closed seasons on hunting of migratory birds and "protection in other forms, and agreed that the two powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out." *Id*. The MBTA gave effect to the treaty by "prohibit[ing] the killing, capturing, or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations" issued by the federal government (at that time the Secretary of Agriculture). *Id*. at 431-32.

Missouri challenged the constitutionality of the MBTA, contending that it was an "unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant [in the form of a federal game warden] done and threatened under that authority invade the sovereign right of the State and contravenes its [sic] will manifested in statute." 252 U.S. at 382. Relying on *Geer*, Missouri argued that all birds found within State borders "were owned by the State in their sovereign capacity for the benefit of the people" and "this control was one that Congress had no power to displace" through the MBTA or otherwise. *Id*. at 432.

In an opinion authored by Oliver Wendell Holmes, the Supreme Court emphatically rejected Missouri's argument. The Court held that, in enacting the MBTA and entering into the underlying treaty with Great Britain, the federal government (acting through both Congress and the President) had properly exercised the power to make treaties (granted in Article II, § 2 of the Constitution), and "by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land." 252 U.S. at 432. The Court reasoned that, whether *Geer* (and rulings

following *Geer*) "were decided rightly or not they cannot be accepted as a test of the treaty power," which, the Court explained, invested the federal government with authority to act "for the national well-being" in a manner that transcends restrictions on ordinary legislation. *Id*. at 433.

In the course of upholding the constitutionality of the MBTA under the Treaty Clause, Justice Holmes made additional pronouncements that undergird an expansive federal role in wildlife conservation. He summarily dismissed the notion that Missouri's asserted "ownership" of migratory birds that "for the moment are within the state borders" could override Congress's constitutional powers:

> No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away.

Id. at 434.

At the same time, the Court declared a "national interest of very nearly the first magnitude" in the protection of migratory birds, and that this interest "can be protected only by national action in concert with that of another power." *Id*. at 435. In a ringing endorsement of a federal interest in wildlife protection, Justice Holmes stressed that

> [b]ut for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is in vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld.

Id. at 435.

In short, in *Missouri v. Holland*, the Supreme Court not only sustained the constitutionality of an expansive federal role in the protection of a wildlife resource—at the

expense of the State's assertion of an exclusive ownership interest—but the Court did so in stark terms declaiming that *only* the federal government is in a position to safeguard the paramount "national interest" in the protection and conservation of at least certain kinds of wildlife. This ruling constituted a dramatic shift away from the notion of unalloyed State sovereignty over wildlife as articulated in *Geer*.

II.

Second, in *Kleppe v. New Mexico*, 426 U.S. 529 (1976), the Supreme Court addressed the constitutionality of the Wild Free-Roaming Horses and Burros Act ("HBA"), which was enacted in 1971 to protect "all unbranded and unclaimed horses and burros on public lands of the United States, 16 U.S.C. § 1332(b), from "capture, branding, harassment, or death." *Id.* § 1331. The HBA directs the Secretaries of Agriculture and Interior (who, respectively, have ultimate jurisdiction over national forests and lands managed by the Bureau of Land management) "to protect and manage [the animals] as components of the public lands . . . in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." *Id.* § 1333(a).

In passing the HBA, Congress found that wild free-roaming horses and burros "are living symbols of the historic and pioneer spirit of the West," *id.* § 1331, and that "[t]hese animals have been cruelly captured and slain," including being "used for target practice and harassed for 'sport,'" but that "[i]n spite of public outrage, this bloody traffic continued unabated, and it is the firm belief of [Congress] that this senseless slaughter must be brought to an end." S. Rep. No. 92-242, at 1-2 (1971). Thus, the HBA was one of the first legislative enactments in which Congress sought to not only *conserve* the nation's wildlife for use by people, but also to address what Congress saw as *inhumane* treatment of the wildlife itself.

The HBA was challenged by the State of New Mexico—acting on behalf of a rancher (who was himself a holder of a federal grazing permit) complaining that wild burros were "molesting his cattle and eating their feed"—on similar grounds to those asserted in *Missouri v. Holland*,

namely, that the HBA was an unconstitutional and "impermissible intrusion on the sovereignty, legislative authority, and police power of the State and ha[d] wrongly infringed upon the State's traditional trustee powers over wild animals." 426 U.S. at 534, 541. In rejecting that argument, the Supreme Court unanimously held that Congress's assertion of authority over the wild horses and burros was supported by the Property Clause of the Constitution, which provides that "Congress shall have the Power to dispose and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2.

In an opinion written by Justice Thurgood Marshall, the Court relied on earlier cases affording the Property Clause an "expansive reading" in various contexts, including one early precedent in which the Court had upheld the federal government's authority, over a State's objection, to "kill deer that were damaging foliage in the national forests." *Kleppe*, 426 U.S. at 327 (citing *Hunt v. United States*, 278 U.S. 96 (1928)). In *Kleppe*, the Court extended those precedents to hold that, "[i]n our view, the 'complete power' that Congress has over public lands *necessarily includes the power to regulate and protect the wildlife living there*.'" *Id.* at 540-41 (emphasis added). The Court, however, was careful to make clear that this broad power does not mean that all State regulation of wildlife on public lands is necessarily displaced; instead, it signifies that State regulation cannot conflict with (*i.e.*, is preempted by) any superseding regulation asserted by the federal government pursuant to Congress's command. The Court explained that New Mexico's

> fear that the Property Clause totally exempts federal lands within state borders from state legislative powers, state police powers, and all rights and powers of local sovereignty and jurisdiction of the states is totally unfounded. The Federal Government does not assert exclusive jurisdiction over the public lands in New Mexico, and the State is free to enforce its [wildlife] laws on those lands. But where those state laws conflict with the Wild Free-Roaming Horses and Burros Act, or with other legislation passed pursuant to the Property Clause, the law is clear. The state laws must recede.

Id. at 543 (emphasis added).

III.

Third, the Court took a further step in shifting the balance of power over wildlife regulation to the federal government in *Hughes v. Oklahoma*, 441 U.S. 322 (1979). That case involved an Oklahoma statute that, as with the Connecticut statute at issue in *Geer*, expressly prohibited the transport of wildlife taken in the State (in particular, minnows) outside the State. As in prior cases, the State asserted "ownership" over wildlife caught within its territory and argued that the "wildlife of a state is peculiarly within the police power of the state, and the state has great latitude in determining what means are appropriate for its protection." *Id*. at 325. The Supreme Court not only squarely rejected this justification for Oklahoma's statute, but it took the opportunity to expressly overrule *Geer*. Adopting the dissenting views of Justices Holmes and Field in *Geer*, the Court explained that the "'ownership' language [cited by Oklahoma] must be understood as no more than a 19th century legal fiction expressing the importance to its people that a State have power to preserve and regulate the exploitation of an important resource" and that "[u]nder modern analysis, the question is simply whether the State has exercised its police power [over wildlife] in conformity with the federal laws and the Constitution." *Id*. at 335.

Consequently, in place of the formalistic approach taken in *Geer*—in which the State's purported "ownership" interest allowed it to condition the taking of wildlife in such a manner that the wildlife never entered into interstate commerce (and hence never implicated the Commerce Clause)—the Court in *Hughes* "conclude[d] that state regulations of wild animals should be considered according to the same general rule that applied to state regulations of other natural resources . . . ." *Id*. Once again, however, the Court was careful to emphasize that the "general rule we adopt in this case makes ample allowance for preserving, in ways not

inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th century legal fiction of state sovereignty." *Id*. at 335-36.

Applying the "general test" adopted in *Hughes* (and that remains applicable to all State regulation of wildlife), courts "must inquire (1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves as a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." *Id*. at 336.

In *Hughes*, the Supreme Court held that the Oklahoma law at issue could not pass constitutional muster under this test, because the statute "on its face discriminate[d] against interstate commerce," thus "invok[ing] the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Id*. at 337. While stating that "we consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens," the Court stressed that the "fiction of State ownership may no longer be used to force those outside the State to bear the full costs of 'conserving' the wild animals within its borders when equally effective nondiscriminatory conservation measures are available." *Id*. That, the Court held, was the case with the Oklahoma statute, as evidenced by the fact that the State placed virtually no limits on the number of minnows that could be taken in State waters while "forbid[ding] the transportation of any commercially significant number of natural minnows out of the State for sale." *Id*. at 338.

Taken together, these Supreme Court rulings establish the basic constitutional framework for the regulation of wildlife in the U.S. and, in particular, the division of authority between the federal and state governments over wildlife. While the States continue to have substantial

authority over (and trust obligations to protect) wildlife within their borders, the federal government has sweeping powers under the Property, Commerce, and Treaty Clauses (among others) that it can invoke to supplant State regulation when it elects to do so. As a practical matter, however, even when the federal government *could* assert exclusive jurisdiction, it has often declined to do so. For example, even on public lands, federal agencies generally defer to the States' regulation of hunting licenses, quotas, seasons, and practices—including in situations where the States authorize practices that are arguably detrimental not only to the wildlife itself but also to the public lands. *See, e.g.*, E. Glitzenstein, J. Fritschie, *The Forest Service's Bait and Switch: A Case Study on Bear Baiting and the Service's Struggle to Adopt a Reasoned Policy on a Controversial Hunting Practice within the National Forests*, 1 Animal L. 47 (1995) (detailing the Forest Service's deferral to Wyoming's allowance of bear baiting on national forests notwithstanding a plethora of adverse effects, including the habituation of bears to human presence, increase in bear-human conflicts, and pollution of national forest lands).

When the federal government *has* asserted its constitutional authority over wildlife that exists within, or crosses over, the nation's borders, the implications for wildlife—and for the people who interact with wildlife in any manner—are enormous. This is especially so with respect to migratory birds, marine mammals, and the thousands of species that have been formally listed as endangered or threatened under U.S. law.

The Migratory Bird Treaty Act

Statutory Background

In the early part of the 20th century the inherent limitations of State regulation of wildlife became indisputable when many migratory bird populations were decimated, sometimes to the point of extinction. Extreme overhunting—including for the millinery (*i.e.*, decorative hat) trade,

food consumption, and mere sport—was the prime culprit. The plight of the Passenger pigeon is both illustrative and particularly tragic. In the years prior to the Civil War, Passenger Pigeons flew in vast flocks, a "safety in numbers" evolutionary strategy that successfully deterred predators and outcompeted other animals for food resources. According to eyewitness accounts, the flocks were so massive—numbering in the millions—that they blotted out the sun and took hours to pass overhead. B. Yoeman, *Why the Passenger Pigeon Went Extinct*, Audubon Magazine (May-June 2014), https://audubon.org/magazine/-may-june2014/why-passenger-pigeon-went-extinct.

Yet by the late 1800s, the pigeons' numbers drastically plummeted. Their evolutionary advantage became a prescription for their demise when hunters—facilitated by post-Civil War expansions of the telegraph and railroad—found that they could easily locate and kill large numbers of the birds by shooting them or even just knocking them from the sky with poles. *Id.* According to contemporaneous accounts, hunters

> outflocked their quarry with brute force. They shot the pigeons and trapped them with nets, torched their roosts, and asphyxiated them with burning sulfur. They attacked the birds with rakes, pitchforks, and potatoes. They poisoned them with whiskey-soaked corn.

Id. Yet the more the pigeons declined, the fiercer and more determined became the efforts to destroy those remaining. *Id.* The last known wild pigeon was killed by a hunter in Ohio in 1900, and a female named Martha, the last of her kind, perished at the Cincinnati Zoo in 1914. *Id.*

The Carolina parakeet—the only parrot species native to the Eastern U.S.—was also driven to extinction during roughly the same time frame as the Passenger pigeon. Hunting again played a role, particularly given the parrots' "flocking behavior that led them to return immediately to a location where some of the birds had just been killed," which in turn "led to even more being shot by hunters as they gathered around the wounded and dead members of the flock." *The last Carolina Parakeet*, https://johnhames.audubon.org/last-carolina-parakeet. Compounding the hunting pressure, large areas of the bird's forest habitat were destroyed for agricultural

expansion. *Id*. The last known wild Carolina parakeet was killed in Florida in 1904, and the last captive bird, a male named Incas, died in 1918—in the very same cage in the Cincinnati Zoo in which Martha had passed away four years earlier. *Id*.

Principal Provisions of the MBTA

The plight of the Passenger pigeon, Carolina parakeet, and many other bird species led to public outcry and, ultimately, the first international treaty for the protection of migratory birds followed by enactment of the MBTA. As explained, the 1916 treaty between the U.S. and Great Britain, acting on behalf of Canada, required each signatory nation to establish a "uniform system of protection" for migratory birds. *See* Convention Between the United States and Great Britain for the Protection of Migratory Birds, proclamation, Aug. 16, 1916, 39 Stat. 1702 (the "Canada Convention"). The MBTA was enacted by Congress to fulfill that treaty obligation. Since then, the U.S. has entered into three additional treaties—with Mexico, Japan, and the former Soviet Union—and, on each occasion, the requirements of the treaties have been incorporated into domestic U.S. legislation through amendments to the MBTA. *See* Migratory Bird Treaty Act, amendment, 49 Stat. 1555 (June 20, 1936); Act of June 1, 1974, Pub. L. No. 93-300, 88 Stat. 190; North American Wetlands Conservation Act, Pub. L. No. 101-233, § 15, 103 Stat. 1968 (1989).

In its current form, Section 2 of the MBTA establishes a broad prohibition on the killing of migratory birds without authorization from the federal government. It provides that:

> [u]nless and except as permitted by regulations . . . it shall be unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, any part, nest, or egg of any such bird . . . included in the terms of the conventions . . . .

16 U.S.C. § 703(a). Any violation of the MBTA is a misdemeanor punishable by a fine of up to $ 15,000 and imprisonment for up to six months. *Id.* § 707(a). Any person who "knowingly . . . take[s] by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or

offer to barter such bird" commits a felony punishable by a fine of up to $ 2,000 and imprisonment of up to two years." *Id.* § 707(b).

To "carry out the purposes of the conventions, the MBTA authorizes the Secretary of the Interior—who has delegated the authority to the U.S. Fish and Wildlife Service ("FWS" or "Service")—to "determine when, to what extent, if at all, it is compatible with the terms of the conventions to allow the hutting, taking, capture, killing or possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same . . . ." *Id.* § 704(a). Any such regulations must give "due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds." *Id.*

The statute and implementing regulations also establish a "federal framework" pursuant to which individual States may authorize the hunting of enumerated game birds so long as the hunting is conducted in accordance with the federal framework and annual regulations issued by the FWS. *Id.* § 704(c); 50 C.F.R. § 20.100. Because migratory bird populations can vary from year to year—sometimes dramatically in response to weather conditions and other stochastic factors—the FWS's framework for establishing hunting limits and seasons is adjusted annually by regulation. *Id.* (explaining that the "development of these schedules involves annual data gathering programs to determine migratory game bird populations and trends, evaluations of habitat conditions, harvest information, and other factors having a bearing on the anticipated size of the fall flights of these birds").

To facilitate these decisions, the FWS has established four administrative "Flyways" that generally correlate with the routes that birds follow as they as the migrate between nesting and wintering locations: Atlantic, Mississippi, Central, and Pacific Flyways. The Service relies heavily on "Flyway Councils"—advisory committees that contain representatives from affected States,

among others—to adjust the annual hunting schedules. Although the general public is technically afforded an opportunity to comment, the compressed time frame dictated by the annual decision making means that, as a practical matter, the public generally has little input into hunting limits, lengths of seasons, and other determinations bearing on migratory bird conservation. *See, e.g.*, 86 Fed. Reg. 48,569 (Aug. 31, 2021) (prescribing the "seasons, hours, areas, and daily bag and possession limits for hunting migratory birds" during the 2021-22 season).

In addition to hunting, the FWS also authorizes other forms of taking migratory birds, including for scientific research and for "depredation" control. 50 C.F.R. § 21.41. For example, in response to complaints by fishermen and operators of aquaculture facilities that double-breasted cormorants were eating too many fish and thereby harming their commercial operations, the FWS issued a broad "Depredation Order" permitting State fish and wildlife agencies and other governmental entities to kill large numbers of cormorants to "prevent depredations on [a] public resource[]." 50 C.F.R. § 21.48(c)(1). When this Order was challenged by an animal protection group on the grounds that it violated the MBTA by improperly delegating the FWS's management authority to the Sates—and that it allowed cormorants to be killed merely for engaging in their natural feeding behaviors and without any evidence of harm to fish populations—the U.S. Court of Appeals for the Second Circuit rejected those arguments. *See Fund for Animals v. Kempthorne*, 538 F.3d 124 (2d Cir. 2008). The court held that the Depredation Order was lawful because it "restricts the species, locations, and means by which takings in response to such depredations could occur, thereby restricting the discretion that may be exercised by third parties acting under the Order." *Id.* at 133.

In contrast to conservation laws enacted more recently, the MBTA lacks a citizen suit provision authorizing members of the public to sue either alleged violators or the FWS for purported maladministration of its duties under the statute. Consequently, enforcement of the

statute is largely dependent on the FWS, an agency with limited funding and personnel, to investigate potential violations and refer matters to the U.S. Department of Justice for potential prosecution.

As occurred in the cormorant case, the FWS itself can be sued under the federal Administrative Procedure Act ("APA") when the Service issues a permit or takes some other action that allegedly runs afoul of the MBTA or the underlying treaties. With limited exceptions, the APA vests federal courts with broad authority to review the legality and rationality of federal agency actions. *See* 5 U.S.C. § 706 (empowering federal courts to "set aside" agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

In addition, in a landmark case, the U.S. Court of Appeals for the D.C. Circuit held that federal agencies that themselves take actions directed at migratory birds are subject to the MBTA's requirements, and hence may be sued under the APA when they act without authorization from the FWS. *See Humane Soc'y of the U.S. v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000). In that case, a controversial agency within the Department of Agriculture—now called "Wildlife Services"—that responds to public complaints about purportedly dangerous or otherwise problematic animals, had embarked on a program to kill Canada geese that had taken up residence in Virginia and were allegedly "interfer[ing] with the enjoyment of parks and ball fields," among other offenses. *Id.*[2] In response to the plaintiff's contention that the program was illegal because the agency had not received authorization from the FWS, the government argued that federal agencies are not bound by the requirements of the MBTA. The D.C. Circuit rejected that contention, reasoning that, "as legislation goes, § 703 [of the MBTA] contains broad and unqualified language—'at any time,' 'by any means,' 'in any manner,' 'any migratory bird,'" and hence:

[2] Although many Canada geese "are year-long residents, they are members of a species that migrates and therefore fall within the category of 'migratory birds' protected by the 1916 Treaty and the Act." *Glickman*, 217 F.3d at 884.

> [a]s § 703 is written, what matters is whether someone has killed or is attempting to kill or capture or take a protected bird, without a permit and outside of any designated hunting season. Nothing in § 703 turns on the identity of the perpetrator. There is no exemption in § 703 for farmers, or golf course superintendents, or ornithologists, or airport officials, or state officers, or federal agencies.

Id. at 885.

The Legal Controversy Over "Incidental" Take and Killing of Migratory Birds

For many years after the MBTA's enactment, the prime focus of federal regulators was on hunting and other human activities specifically directed at killing or capturing migratory birds. As the 20th century unfolded, however, "industrial activities emerged as the most significant threat to bird populations in the latter half of the century"; the FWS was therefore called on to investigate so-called "incidental takes and kills: among them oil pits, power-lines, contaminated waste pools, oils spills, commercial fishing lines and nets, and wind turbines." *Natural Resources Def. Council v. United States Department of the Interior*, 478 F. Supp. 3d 469, 473 (S.D.N.Y. 2020) (hereafter *NRDC*). Such activities—which are not intended to harm migratory birds but nonetheless foreseeably kill them in the millions each year—were occasionally the subject of criminal enforcement proceedings—generally after companies received repeated notices from the FWS that they were violating the law. *Id.* Far more frequently these unintended but predictable impacts were addressed through industry "best management practices" and similar guidance documents aimed at ameliorating harms to birds, and compliance with which was taken into consideration by the FWS and Department of Justice in the exercise of prosecutorial discretion. *Id.*

That longstanding practice changed abruptly in January 2017, when an acting Solicitor of the Department of the Interior in the Trump Administration issued a formal memorandum—known as the "Jorjani Opinion"—declaring that incidental take and killing, no matter how

devastating to bird populations, is *not* covered by the MBTA's safeguards. Rather, according to the Jorjani Opinion, only actions specifically "directed at" migratory birds—such as hunting and trapping—are covered by the Act's prohibitions and permitting requirements. *NRDC*, 478 F. Supp. 3d at 475-76. The Jorjani Opinion justified this dramatic shift in position on various legal and policy grounds, including a reading of the MBTA's legislative history as narrowly focused on hunting and an asserted inconsistency in the judicial precedents construing the statute that (purportedly) contributed to confusion by affected industries as to what the law does and does not encompass. *Id.* at 485-86.

When the Jorjani Opinion was challenged by conservation groups and various States (led by New York), federal district judge Valerie Caproni declared it to be unlawful and vacated it. Observing that "[i]t is not only a sin to kill a mockingbird, it is also a crime," *NRDC*, 478 F. Supp. 3d at 472 (citing H. Lee, *To Kill a Mockingbird* 103 (1960)), Judge Caproni held that the Jorjani Opinion contravenes the "MBTA's unambiguous prohibition on killing protected birds," which makes no distinction between intentional and incidental harm, and also "runs counter to the purpose of the MBTA to protect migratory bird populations." *Id.* at 480. As for the Jorjani Opinion's invocation of assertedly inconsistent precedents, the court held that the Opinion "vastly overstated Circuit disagreement and blurs the actual boundaries that have been drawn" by courts in criminal proceedings. *Id.* at 478.[3]

Undeterred by this judicial setback, in its waning days the Trump Administration issued a formal regulation adopting the very same interpretation of the MBTA that the court had found unlawful in setting aside the Jorjani Opinion. *See* 86 Fed. Reg. 1,134 (Jan. 7, 2021) (delineating

[3] Judge Caproni explained that most courts had upheld misdemeanor convictions for industrial activities that foreseeably resulted in the direct killing of migratory birds and that, while some courts had declined to extend the MBTA's protection to habitat destruction alone, the Fifth Circuit is the only Circuit court to hold that incidental take is not covered at all. *NRDC*, 478 F. Supp. 3d at 479 (citing *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015)). And in that case, the "Fifth Circuit interpreted only the term 'take'; the case 'did not present an opportunity to interpret 'kill'" because the indictment charged only illegal taking. *Id.* (quoting 801 F.3d at 489 n.10).

the "scope" of the MBTA as "apply[ing] only to actions directed at migratory birds, their nests, or their eggs" and providing that "[i]njury to or mortality of migratory birds that results from, but is not the purpose of, an action (*i.e.*, incidental taking or killing) is not prohibited by the [MBTA]"). The Biden Administration, however, which had declined to appeal the adverse ruling on the Jorjani Opinion, promptly embarked on a process to withdraw the rule and thus "return to implementing the MBTA as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent." 86 Fed. Reg. 24,573 (May 7, 2021). The revocation proposal stated that "[w]e have undertaken further review of the January 7 rule and have determined that the rule does not reflect the best reading of the MBTA's text, purpose, and history"; is "inconsistent with the majority of relevant court decisions addressing the issues, including the decision of the Southern District of New York that expressly rejected the rationale offered in the rule"; and also "raises serious concerns with a United States treaty partner," *i.e.*, Canada, which has publicly declared that that the January 7 rule runs counter to the treaty between the U.S. and Canada and "will result in further unmitigated risks to vulnerable populations protected under the Convention." *Id*. at 24,573, 24,576.

On October 4, 2021, the Biden Interior Department completed the rulemaking process by formally withdrawing the Trump Administration interpretation and reinstating the preexisting approach of relying on prosecutorial discretion to determine under what circumstances to enforce the MBTA against incidental take. At the same time, the FWS published an advance notice of proposed rulemaking announcing the Service's intention to embark on a new rulemaking aimed at establishing, for the first time in the history of the MBTA, a comprehensive system for regulating incidental take. The agency also issued a "Director's Memorandum" setting forth the Service's enforcement priorities. It explains that

> the Service will focus our enforcement efforts on specific types of activities that both foreseeably cause incidental take and where the proponent fails to implement known beneficial practices to avoid or minimize incidental take. Our intention through this

> policy is to apply a transparent and consistent approach to managing and prioritizing our enforcement of incidental take, taking into account the case law applicable in a given jurisdiction and the facts and circumstances of each case.

FWS, *Director's Order No. 225* (Incidental Take of Migratory Birds).

Given the uncertainty over what kind of incidental take permitting system the FWS may ultimately adopt, and the potential for industry challenges to any individual enforcement actions brought by the FWS, the law regarding the MBTA and incidental take is likely to remain in an unsettled state for the foreseeable future. It remains to be seen whether a ruling by the Supreme Court and/or Congressional action may bring this critical conservation question to a definitive conclusion.

Special Protection for Eagles

Two high-profile bird species—bald and golden eagles—are minimally affected by the administrative and legal twists and turns concerning the regulation of incidental take under the MBTA. This is because eagles are covered by both the MBTA and the Bald and Golden Eagle Protection Act ("BGEPA"), which prohibits the "take" of any eagle bald or golden eagle "at any time or in any manner" "without being permitted to do so" by the FWS. 16 U.S.C. § 668(a). The statute imposes strict liability, providing for civil penalties for any unauthorized take and criminal penalties for unlawful take caused "knowingly, or with wanton disregard." *Id.* §§ 668(a), (b). "Take" is defined to include "wound, kill . . . molest, *or disturb*," *id.* § 668c (emphasis added), and indisputably covers incidental take as well as intentional actions directed at eagles. *Id.*

BGEPA allows the FWS to issue permits authorizing the take or disturbance of bald and golden eagles, but only if such take "is compatible with the preservation" of eagles. *Id.* § 668a. Under recently revised regulations, to authorize any incidental take, the FWS must find, among other things, that the permit applicant "has applied all appropriate and practicable avoidance

and minimization measures to reduce impacts to eagles," and that the "direct and indirect effects of the take and required mitigation, together with the cumulative effects of other permitted take and additional factors affecting" eagle populations are "compatible with the preservation of bald eagles and golden eagles." 50 C.F.R. § 22.26(f).

The Endangered Species Act

Background of the ESA

When enacted in 1973, the ESA "represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA v. Hill*, 437 U.S. 153, 177 (1978). Before the ESA became law, Congress held hearings at which witnesses testified that species' extinctions were rapidly accelerating and that this "trend was something other than the process of natural selection"; rather, human activities had

> 'resulted in a dramatic rise in the number and severity of threats faced by the world's wildlife. The truth of this is apparent when one realizes that half of the recorded extinctions of mammals over the past 2,000 years have occurred in the most recent 50-year period.'

Id. at 176 (quoting 1973 House Hearings at 202).

As explained by the Supreme Court in its first ruling on the ESA, members of Congress decried the "irreplaceable loss to aesthetics, science, ecology, and the national heritage should more species disappear." *Id.* at 177. Thus, the "legislative proceedings in 1973 are, in fact, replete with expressions of concern over the risk that might lie in the loss of *any* endangered species." *Id.* at 177. The Senate Report preceding the law's enactment found that the "two major cause of extinction are hunting and destruction of natural habitat" and "[o]f these twin threats, Congress was informed that the greatest was destruction of natural habitats." *Id.* at 178-79 (internal quotation omitted). The ESA was therefore intended to address those threats and to establish a

national policy of "institutionalization of [] caution" in dealing with imperiled wildlife. *Id.* (internal quotation omitted).

As difficult as it is to imagine in this era of hyperpolarization, the ESA was passed by overwhelming bipartisan majorities in both the House and the Senate, and was signed into law by President Richard Nixon. In his signing statement, President Nixon spoke eloquently about the urgent need for, and ambitious goals of, the ESA:

> At a time when Americans are more concerned than ever with conserving our natural resources, this legislation provides the Federal Government with needed authority to protect an irreplaceable part of our national heritage – threatened wildlife . . . Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we share as Americans. I congratulate the 93d Congress for taking this important step toward protecting a heritage which we hold in trust to countless future generations of our fellow citizens.

Legislative History of the Endangered Species Act of 1973, 97th Cong., 2d Sess. 486 (1982 Committee Print).

When it enacted the ESA, Congress expressed its findings that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation"; that other such species "have been so depleted in numbers that they are in danger of or threatened with extinction"; and that these species "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. §§ 1531(a)(1)-(3) (emphasis added). Congress further found that "develop[ing] and maintain[ing] conservation programs which meet national and international standards is a key to meeting the Nation's international commitments" and to "better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants." *Id.* §§ 1531(a)(4), (5) (emphasis added). Given these Congressional findings, the purposes of the Act are to "provide a means whereby the

ecosystems upon which endangered species and threatened species depend may be conserved" and to "provide a program for the conservation of such endangered species and threatened species . . . ." *Id.* § 1531(b).

Listing of Species as Endangered or Threatened

Before any imperiled "species" may receive the ESA's protections, Section 4 of the statute requires that the species be formally "listed" as "endangered" or "threatened." 16 U.S.C. § 1533. An "endangered" species is "any species which is danger of extinction throughout all or a significant portion of its range," and a threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* §§ 1532(6), (20).[4]

The FWS, which has been delegated authority to implement the ESA with regard to most terrestrial species, and the National Marine Fisheries Service ("NMFS"), which has been delegated such authority with respect to most marine species (collectively referred to as the "Services"), must list a species as endangered or threatened based on the presence of any one of five factors, including the "present or threatened destruction, modification, or curtailment of its habitat or range"; the "inadequacy of existing regulatory mechanisms"; and/or any "other natural or manmade factors affecting its continued existence." *Id.* §§ 1533(a)(1)(A), (D), (E).

For purposes of the Act's protections, "the term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or

[4] A threshold listing issue that has received considerable attention in the courts is what it means for a species to be endangered or threatened in a "significant portion of its range." The Ninth Circuit has held that this phrase, while "inherently ambiguous," must be interpreted in such a manner that it affords an independent basis for listing. *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1141-42 (9th Cir. 2001). Consequently, courts have invalidated listing decisions that, as a legal or practical matter, "conflated the terms 'all' and 'significant portion'" in the ESA's definitions of "endangered" and "threatened" and "thereby impermissibly rendered the ESA's [significant portion of its range] language superfluous." *Ctr. for Biological Diversity v. Jewell*, 248 F. Supp. 2d 946, 952 (D. Ariz. 2017) (vacating the FWS's refusal to list the cactus ferruginous pygmy-owl because the agency had applied an unlawful approach in assessing whether the species is imperiled in a significant portion of its range).

wildlife which interbreeds when mature." *Id*. § 1532 § 1532(16). In evaluating whether a "distinct population segment" qualifies as a "species," the FWS has adopted a policy that analyzes the "[d]iscreteness of the population segment in relation to the remainder of the species to which it belongs," and the "significance of the population segment to the species to which it belongs." 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996).

Decisions on species listing must be made "solely on the basis of the best scientific and commercial data available." *Id*. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b)—a standard intended by Congress to foreclose the consideration of political or economic considerations. H.R. Conf. Rep. No. 97-835, at 20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2861.[5] The standard also means that the FWS or NMFS cannot require "conclusive" evidence of species' imperilment before listing a species. *E.g., Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670 (D.D.C. 1997) (remanding the FWS's refusal to list the Canada lynx as an endangered or threatened species because the Service applied too stringent an evidentiary standard). The "best available" standard also means that the Services are not required to engage in new surveys or otherwise engage in additional scientific research before making a decision on species listing. *See Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58 (D.C. Cir. 2000) (reversing a district court order requiring the FWS to conduct new surveys for the Queen Charlotte Goshawk before deciding on the species' listing, and holding that "[e]ven if the available scientific and commercial data were quite inconclusive, [the Service] may—indeed, must—still rely on it at that stage").

There are two procedural pathways to listing a species as endangered or threatened. One of the Services may pursue the listing process on its own. Alternatively, any "interested person"

[5] Given that the statutory standard clearly precludes consideration of non-economic factors, the Services' implementing regulations expressly provided for many years that listing decisions had to be made without any reference to such factors. However, in regulations adopted during the Trump Administration, the Services eliminated that prohibition. While conceding that Congress had intended to prevent listing decisions from being *based on* economic impacts or similar factors, the Trump Administration took the position that this did not prevent the Services from informing the public about them. This regulatory change, along with others adopted during the Trump Administration, have been challenged in court by conservation groups and various States, In addition, the Biden Administration has announced its intention to revisit and potentially rescind a number of these changes.

may petition for listing of a species. 16 U.S.C. § 1533(b)(3)(A). As a practical matter, the vast majority of species listings throughout the history of the ESA have occurred as a result of citizen petitions. In response to such a petition that "present[s] substantial information indicating that the petitioned action may be warranted," *id*., the Service must, within twelve months, make a determination of whether listing is "warranted," "not warranted," or warranted but "precluded" by work on other listing proposals of a higher priority. *Id*. § 1533(b)(3)(B).[6] Any "negative finding" (including any "warranted but precluded" finding) is "subject to judicial review" under the Act's citizen suit provision. *Id*. § 1533(b)(3)(C)(ii); *id*. § 1540(g).

When a Service finds that a petitioned listing is warranted, the agency must ordinarily afford the public an opportunity to comment, *id*. § 1533(b)(5), and then make a final decision within one year. *Id*. However, when a Service determines that there is an "emergency posing a significant risk to the well-being of any species," the agency may forgo advance public comment and immediately list the species for a limited period (240 days) while the normal rulemaking process is followed. *Id*. § 1533(b)(7). There have been very few emergency listings in the history of the Act. Courts have held that such decisions are entrusted to the sole discretion of the Services and that members of the public have no statutory right to petition for emergency listing.

To date, 2,244 species have been listed as threatened or endangered under the ESA, with 1,618 of those in the United States. This number will continue to grow as climate change becomes ever more severe and habitat destruction continues to shrink the places that wild animals need for their survival. In addition, many species (such as bees and other pollinators) are suffering the effects of harmful pesticides and other toxic chemicals. Still other species are

In addition, the Biden Administration has announced its intention to revisit and potentially rescind a number of these changes.
[6] Many species have languished in this "warranted but precluded status" for years—sometimes longer than a decade—before receiving the protections of the ESA. There are a number of reasons for this situation, but a principal one is that the Services simply lack the resources necessary to list in a timely manner all of the species in need of the Act's protections.

being hit hard by diseases connected to human activity. Populations of many bat species, for example, have plummeted as a result of White-nose syndrome, a deadly fungal disease likely spread by humans visiting bat hibernacula.

As more and more imperiled species are listed, increasing pressure will be put on the substantive safeguards incorporated into the ESA as the last line of defense against extinctions. As discussed below, those safeguards entail delineating species' "critical habitat"; prohibiting federal agency actions that jeopardize species or destroy their critical habitats; forbidding all actions that take any members of listed species without authorization; and developing recovery plans.

Designation of Critical Habitat

At the same time that a species is listed as endangered or threatened, the Service must ordinarily designate "critical habitat" for the species. The ESA defines critical habitat as potentially encompassing both presently occupied and unoccupied habitat. With respect to the former, the Act defines critical habitat as the "specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species; and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)1). Habitat that is not presently occupied by the species may be designated as "critical" only "upon a determination by the [Service] that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). "Conservation," in turn, means 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 ESA] are no longer necessary." *Id.* § 1532(3). Consequently, courts have held that the core purpose of critical habitat designation is to delineate those areas that must be protected in order for the species to be *recovered* to the point where it may be

taken off the protected list. *See, e.g,, Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004), *amended* 387 F.3d 968 ("The ESA's definition of 'conservation' speaks to the recovery" of a listed species.") (quotation omitted).

In sharp contrast to purely biologically-based listing decisions, the Services are mandated to take economic considerations into consideration in designating critical habitat. The ESA provides that the Services "shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). In addition, the Services "may exclude any area from critical habitat if [it] determines that that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id*.

Designation of a particular area as critical habitat is not tantamount to establishing a wildlife preserve or sanctuary for that area. Rather, critical habitat primarily comes into play in section 7(a)(2) of the ESA, which requires federal agencies to ensure that their actions do not jeopardize the continued existence of listed species *or* "result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). For many years, the Services largely avoided the designation of critical habitat on the grounds that the prohibition on federal agencies' jeopardizing species afforded them adequate protection, and that designating critical habitat would add little if anything to the protections embodied in section 7(a)(2). The Services reached this result based on implementing regulations that (at the time) defined what it meant to "jeopardize" a species' continued existence in terms that were largely synonymous with those

used to delineate what it means to destroy or adversely modify a species' critical habitat. *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 439 (5th Cir. 2001).[7]

Reviewing courts, however, found that this approach conflated the two distinct bases for discerning violations of section 7(a)(2), and did so by improperly discounting the role of critical habitat in the statutory scheme. As the Fifth Circuit held, because the ESA "defines 'critical habitat' as areas which are 'essential to the conservation' of listed species" and "'[c]onservation' is a much broader concept than mere survival"—i.e., it "speaks to the recovery of a threatened or endangered species"—"[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits." *Id*. at 441-42 (emphasis in original). Consequently, the Services' overly stringent standard for finding adverse modification or destruction of critical habitat also led the agencies to improperly downplay the potential benefits of critical habitat designation—and hence sidestep their obligations to designate such habitat in the first instance. *Id*. at 445; *see also Gifford Pinchot Task Force*, 378 F.3d at 1070.

In response to the courts' rejection of the Services' rationale for avoiding critical habitat designation, it is now far more commonplace for the Services to designate critical habitat when a species is listed. The Services have also revised their definition of "destruction or adverse modification" of critical habitat so that it no longer requires a finding of adverse effects to *both* survival *and* recovery; it now means "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." 50 C.F.R. § 402.02. While this revised definition removes a major impediment to critical habitat

[7] *See Sierra Club,* 245 F.3d at 439 (explaining that the Services defined "jeopardize the continued existence of" as an "action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of *both the survival and recovery* of a listed species in the wild," while similarly defining "destruction or adverse modification" of critical habitat as a "direct or indirect alteration that appreciably diminishes the value of critical habitat *for both the survival and recovery* of a listed species") (quotation omitted; emphasis in original).

designation, the requirement that a habitat-harming activity must diminish the value of critical habitat "*as a whole*" before restrictions can be placed on the activity erects yet another serious obstacle to the ability of critical habitat designation to further the recovery of imperiled species. *See infra* at ___.

The Supreme Court recently addressed two important issues regarding the designation of critical habitat. In *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018), the Court considered whether an area in which a species cannot presently survive may nonetheless be considered critical habitat. In that case, the FWS determined that designating presently *occupied* habitat for the dusky gopher frog was insufficient to provide for the frog's conservation. Accordingly, the Service designated an additional area of *unoccupied* habitat that contained certain physical features essential to support a frog population, but required some restoration work to render it usable by frogs. In response to a challenge by timber companies that owned the land at issue, the Court held that "'critical habitat' must also be 'habitat'"—a word that Congress had not defined in the ESA. *Id.* at 368-69. Because neither the FWS nor the courts below had considered what features of a presently unoccupied area would be sufficient to render it "habitat," the Court remanded for that issue to be resolved. *Id.*

The second issue addressed in *Weyerhaeuser* concerned how reviewing courts should review the FWS's consideration of economic impacts in determining whether to designate critical habitat. The government argued tha, because the ESA provides that the FWS "*may* exclude an area from critical habitat if [it] determines that that the benefits of exclusion outweigh the benefits of designation," this means that the weighing of costs and benefits of designation is entirely committed to the Service's discretion and hence not subject to judicial review. *Id.* at 370. The Supreme Court rejected that argument, holding that the timber company's claim that the Service had given short shrift to economic impacts is the "sort of claim

that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion under" the APA. *Id*. at 371

During the Trump Administration, the Services responded to *Weyerhaeuser* by making several changes to the ESA implementing regulations. First, the Services specified that they "will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(b)(2). Second, the Services adopted a new definition of "habitat" that is applicable solely to the designation of critical habitat. It provides that "[f]or the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species." 50 C.F.R. § 424.02. While this definition is broad enough to encompass areas that can support species only during certain times or certain portions of a species' life cycle, it effectively precludes designation of any areas that require even modest restoration efforts to render them usable as habitat. It also forecloses designating areas that are not usable as habitat at present but likely will become so in response to climate change. As a consequence of these drawbacks, conservation groups have sued over the revised critical habitat regulations, and the Biden administration recently published for public comment a proposal to withdraw the narrow definition of habitat and, instead, to revert to a case-by-case approach for assessing whether particular areas have sufficient characteristics to qualify for critical habitat designation.

The Section 7 Prohibition on Agency Actions that Jeopardize the Existence of Listed Species or Impair their Critical Habitat

Section 7(a)(2) of the ESA is perhaps the most far-reaching and powerful legal mechanism ever enacted by Congress for the conservation of imperiled wildlife. It commands that "[e]ach Federal agency shall, in consultation with and with the assistance of the [FWS or NMFS] insure

that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat for the species. 16 U.S.C. § 1536(a)(2). Hence, the provision imposes both a *procedural* obligation on "action agencies" to "consult" with agency experts on imperiled species, and a *substantive* obligation to avoid jeopardizing species or impairing their critical habitat. In carrying out these duties, both the action agencies and the Services must use the "best scientific and commercial data available." *Id*.

In an early test of the potency of section 7(a)(2), the Supreme Court considered whether the provision "require[d] a court to enjoin the operation of a virtually completed federal dam" when the Department of the Interior had "determined that operation of the dam would eradicate an endangered species" of fish, namely, the snail darter. *TVA v. Hill*, 437 U.S. at 156. After engaging in an exhaustive review of the legislative history leading up to the enactment of the ESA, the Supreme Court, in an opinion authored by Chief Justice Warren Burger, held that the ESA mandated precisely that result, notwithstanding the fact Congress had authorized construction of the Tellico Dam prior to enactment of the ESA and had continued to appropriate funds for the project following the statute's enactment. In one of the most famous passages in the annals of American environmental law, Chief Justice Burger opined:

> It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $ 100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter. *We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result*.

Id. at 172-73 (emphasis added).

In reaching that result, the Supreme Court reasoned that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act," the language of which "admits of no exception." *Id*. at 173. The Court also relied

heavily on the ESA's legislative history, which the Court read as "indicating beyond doubt that Congress intended endangered species to be afforded the highest of priorities," *id*. at 174, and to be handled with "institutionalized [] caution" by all agencies of the federal government. *Id*. at 178 (citation omitted).

In view of its reading of the language and purpose of the ESA, the Court held that section 7(a)(2) not only meant what it said, but that the courts had no choice but to implement that Congressional judgment through injunctive relief. In response to entreaties that halting the nearly completed Tellico Dam would offend "common sense and the public weal," the Court deemed that argument contrary to the judiciary's role in our tripartite system of government. *Id*. at 195. Chief Justice Burger admonished that, while "'[it] is emphatically the province and duty of the judicial department to say what the law is,'" *id*. at 194 (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)), it is "equally – and emphatically – the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *Id*. at 194. Consequently, "once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *Id*. Because "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities," the court was not empowered to "sit as a committee of review, nor . . . vested with the power of veto." *Id*.[8]

[8] In the penultimate paragraph in its opinion, Chief Justice Burger famously quoted the words attributed by Robert Bolt to Sir Thomas More: "'The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm *not* God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you -- where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast -- Man's laws, not God's -- and if you cut them down . . . d'you really think you could stand upright in the winds that would below then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.'" 437 U.S. at 194-95 (quoting R. Bolt, A Man for All Seasons, Act I, p. 147 (Three Plays, Heinemann ed. 1967)).

Congress responded to *TVA v. Hill* by amending the ESA, but without modifying the substance of section 7(a)(2) in any significant manner. First, Congress added a new provision to section 7 in an effort to prevent the kind of conflict between species and projects that led to *TVA v. Hill*. Section 7(d) now provide that, after the "initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation" of a project alternative that could avoid causing jeopardy to any affected species or impairing any critical habitat. 16 U.S.C. § 1536(d). In essence, this provision is designed to ensure that reasonable options remain on the table—such as relocating a proposed project to a less harmful site—until the consultation process concludes.

Second, Congress provided that a cabinet-level "Endangered Species Committee" (colloquially referred to as the "God squad") may grant an exemption to the section 7(a)(2) prohibition—thereby, in effect, authorizing the extinction of a species—when certain stringent criteria are satisfied. *See* 16 U.S.C. § 1536(h)(1)(A) (providing that the Committee may grant an exemption when "there are no reasonable and prudent alternatives to the agency action"; 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"; "the action is of regional or national significance"; and "neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d)"). However, the process that the Committee must follow to grant an exemption is so cumbersome—involving multiple procedural steps and trial-type proceedings—that it has

been invoked on only a handful of occasions, none of which has resulted in the authorized extinction of a species.[9]

While *TVA v. Hill* remains controlling precedent for all *discretionary* agency actions, the Supreme Court came to a different conclusion for nondiscretionary actions in *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) ("*NAHB*"). That case concerned the Environmental Protection Agency's transfer of Clean Water Act ("CWA") permitting authority to the State of Arizona. The CWA provides that EPA "shall" transfer permitting authority to the States when certain enumerated criteria are satisfied, and EPA had determined that Arizona satisfied the criteria. Consequently, EPA maintained that the transfer was mandatory irrespective of compliance with section 7 of the ESA. The Supreme Court agreed, explaining that the case "requires us to mediate a clash of seemingly categorical—and, at first glance, irreconcilable—legislative commands." *Id*. at 661. Because the CWA was enacted before the ESA, and in the Court's view compliance with Section 7 would impose a new potential obstacle to transfer not envisioned in the CWA, the Court applied the statutory construction principle that repeals by implication are disfavored. *Id*. In addition, the Court relied on an ESA implementing regulation stating that Section 7 applies to all "actions in which there is *discretionary* Federal involvement or control," 50 C.F.R. § 402.03 (emphasis added), which the Court construed to mean that *only* such actions implicate the obligation to consult and avoid jeopardy and destruction of critical habitat. *Id*. at 666.

The Supreme Court in *NAHB* Court distinguished *TVA v. Hill* on the grounds that the "construction project at issue in [that case], while expensive, was also discretionary," and that "[c]entral to the Court's decision was the conclusion that Congress did not *mandate* that the

[9] With regard to the Tellico dam itself, the Committee ultimately concluded that the criteria for an exemption could not be satisfied. Subsequently, however, more populations of snail darters were discovered and the species was recently deemed recovered and removed from the list of endangered and threatened species.

TVA put the dam into operation . . . .” 551 U.S. at 670 (emphasis added). Accordingly, the *NAHB* Court read *TVA* v. *Hill* as “supporting the position . . . that the ESA's no-jeopardy mandate applies to every *discretionary* agency action—regardless of the expense or burden its application might impose,” but “not speak[ing] to the question whether § 7(a)(2) applies to *non*-discretionary actions . . . .” *Id.* at 671 (emphasis added). Post-*NAHB*, therefore, a critical threshold question in every case involving a federal agency’s potential violation of Section 7 is whether the federal agency action is properly characterized as discretionary or non-discretionary.

When Section 7 *is* implicated, the ESA and implementing regulations set forth a detailed process for effectuating Section 7(a)(2)’s protective mandate. If an agency action “may” affect a listed species or critical habitat, the federal agency must pursue “formal consultation” with the FWS and/or NMFS, unless the relevant Service concurs in writing that the action is “not likely to adversely affect” the species or designated habitat. 50 C.F.R. § 402.14. Consultations that conclude with such a “not likely to adversely affect” finding are called “informal consultations.”

In contrast, “formal” consultation entails a rigorous collection and analysis of information bearing on the status of the species and the effect of the agency action. It culminates in the Service’s “biological opinion,” which analyzes how the agency action impacts listed species and critical habitat, and makes a finding as to whether the action will jeopardize the continued existence of any species or impair any designated critical habitat. If the biological opinion concludes that jeopardy or adverse modification will result, the Service “shall suggest those reasonable and prudent alternatives which [it] believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.” 16 U.S.C. § 1536(b)(3)(A).

If the Service concludes that an agency action will not jeopardize a listed species or impair critical habitat, but will nonetheless “take” one or more members of a species, the Service must

include in the biological opinion an "Incidental Take Statement" (ITS). *Id*. § 1536(b)(4). The ITS must "specif[y] the impact of such incidental taking on the species" as well as "reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize such impact." *Id*. The Supreme Court has held that a "Biological Opinion's Incidental Take Statement constitutes a permit authorizing the action agency to 'take' the endangered or threatened species so long as it respects the Service's 'terms and conditions.'" *Bennett v. Spear*, 520 U.S. 154, 170 (1997). Hence, while the "action agency is technically free to disregard the Biological Opinion and proceed with its proposed action," it "does so at its own peril (and that of its employees), for 'any person' who knowingly 'takes' an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment." *Id*. (citations omitted).

The ESA implementing regulations provide for "reinitiation" of Section 7 consultation under certain circumstances. When federal involvement in an action is ongoing, the action agency and the Service must reengage the process whenever (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) "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"; (3) the action is "modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion"; or (4) a new species is listed or critical habitat designated that may be affected by the action. 50 C.F.R. § 402.16.

The overwhelming majority of Section 7 consultations conclude without a finding that the action at issue will jeopardize a species or impair critical habitat. The most recent empirical study of the consultation process found that, of 88,290 consultations conducted between 2008 and 2015, 81,461 of them were informal, so that only about 8% of all consultations resulted in formal consultations, the process by which biological opinions are produced. *See* Jacob W. Malcolm & Ya-Wei Li*, Data Contradict Common Perceptions About a Controversial Provision of the Endangered Species Act*, 112 PNAS 15844-15849 (Dec. 29, 2015). Even in the relatively

rare circumstances in which formal consultation is pursued, the Services' issuance of final Biological Opinions finding that particular agency actions will jeopardize the continued existence of species is scarcer still. Between 2008 and 2015, out of 6,829 formal consultations, FWS issued a jeopardy opinion only *twice*, for a rate of just 0.03%. *Id* at 15848. This miniscule number of jeopardy findings is particularly striking since it occurred during a time frame in which the number of species listed as endangered or threatened *increased* by 318 species. *See* FWS, U.S. Federal Endangered and Threatened Species by Calendar Year, at https://ecos.fws.gov/ecp0/reports/species-listings-count-by-year-report.

There are a number of plausible reasons for the paucity of jeopardy opinions. One explanation is that the process is working as intended, i.e., action agencies and the Services, along with any private permit or license applicants, are using the process to forge compromises and adopt measures designed to avoid or mitigate adverse impacts while allowing projects to proceed. *See* Donald Barry et al., *For Conserving Listed Species, Talk is Cheaper Than We Think* (World Wildlife Fund) (1992), http://www.nativefishlab.net/library/textpdf/15635.pdf. A less benign explanation is that intense pressure is put on Service biologists to greenlight projects even when doing so may leave an imperiled species even worse off than before. In addition, there are very few *TVA v. Hill*-type scenarios in which a singe project is projected to cause the extinction of a species or destroy its entire critical habitat. Rather, federal actions almost invariably inflict piecemeal impacts on species and habitats. The consultation process is ill-equipped to address this "death by a thousand cuts" dynamic, particularly given the truncated consideration of *cumulative* effects that the Services take into account when evaluating individual projects and actions. The upshot is that, while the Section 7 process has certainly been successful in focusing agency attention on the plight of imperiled species, for many such

species, the process may simply be slowing rather than reversing their slide towards ultimate extinction.[10]

The Section 9 Take Prohibition and Section 10 Permits Allowing Take

Section 9 of the ESA makes it unlawful for "any person" to "take" any member of an endangered species in the absence of authorization by the relevant Service. *Id*. § 1538(a)(1)(B). "Take" is defined broadly to include, among other actions, to "harass," "harm," "wound," or "kill." *Id*. § 1532(18). However, the ESA's take prohibition does not automatically apply to species listed as threatened. Rather, section 4(d) provides that "[w]henever any species is listed as threatened, the [FWS or NMFS] shall issue such regulations as [it] deems necessary and advisable to provide for the conservation of such species," including by "prohibit[ing] with respect to any threatened species any act prohibited" for endangered species. 16 U.S.C. § 1533(d) (emphasis added).

Shortly after the ESA's enactment, the Service exercised its authority under section 4(d) by extending the prohibition on "take" to all threatened species for which the Service did not adopt a "special rule" applicable to a particular species. *See* 40 Fed. Reg. 44,412, 44,414 (Sept. 26, 1975). Thus, unless the FWS adopted such a tailored 4(d) rule, a threatened species received the same broad prohibition on unauthorized take as an endangered species. *Id*. During the Trump Administration, while acknowledging that this longstanding approach to section 4(d) represented a "reasonable approach" to implementation of the ESA, the Services eliminated the general prohibition on the take of threatened species for which the relevant Service has not

[10] Amendments to the Section 7 regulations adopted during the Trump Administration further limit the scope of impacts that that the Services consider in issuing biological opinions. These regulatory changes have been challenged by conservation organizations and the Biden Administration has also indicated that it intends to revisit some of the changes.

issued a species-specific 4(d) regulation. *See* 83 Fed. Reg. 35,174, 35,175, 35,177 (July 25, 2018) (proposed rule). The approach now in effect deprives threatened species of any protection from "take" unless and until a specific rule is adopted affirmatively extending such protections to a particular species. In effect, therefore, the regulatory presumption in favor of affording threatened species as much protection as endangered species has been reversed. Because the Services often list species as threatened that arguably warrant listing as endangered (such as species gravely imperiled by climate change), this regulatory change has potentially enormous practical consequences. As a result, conservation groups have sued over the new rule and it remains to be seen whether the Biden Administration will revert to the prior, more protective scheme for threatened species.

The Services have defined "harm" as used in the statutory definition of "take" to encompass "significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. In *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687 (1995), the Supreme Court rejected a claim by logging companies and landowners that the Services had exceeded their statutory authority by allowing the prohibition on take to be applied to habitat-altering activities that have as their unintended effect the killing or injuring of members of listed species. In an opinion authored by Justice Stevens, the Court reasoned that the plain meaning of "harm" supported the regulation, as did Congress's decision in 1982 to establish a mechanism for private parties to obtain permits for the "incidental" take of listed species – which would have pointless if such taking were not otherwise prohibited by the Act.

In an influential concurring opinion in *Sweet Home*, Justice O'Conner agreed with the majority on the validity of the regulation. At the same time, she emphasized that "I see no indication that Congress, in enacting [the take prohibition] intended to dispense with ordinary principles of proximate causation," so that "private parties should be held liable . . . only if their

habitat-modifying actions proximately"—i.e., "foreseeably"—cause death or injury to protected animals." *Id*. at 712-13; *id*. at 713 ("In my view, then, the 'harm' regulation applies where significant habitat modification, by impairing essential behaviors, proximately (foreseeably) causes actual death or injury to identifiable animals that are protected under the [ESA].").

The Services' regulations define "[[h]arass" as used in the "take" definition to mean an "intentional or negligent 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 which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3. When applied to captive animals, this definition excludes "generally accepted . . . animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act." *Id*. The regulation therefore requires that two distinct (albeit related) requirements be satisfied: the practices at issue must *both* constitute "generally accepted . . . animal husbandry practices" for the particular species at issue, *and* the practices must at least satisfy the "minimum standards for facilities and care" that have been established by the U.S. Department of Agriculture in its implementation of the Animal Welfare Act. *Id*.

Exceptions to the Take Prohibition in the ESA

Whether a species is listed as endangered or threatened, the ESA provides that the FWS or NMFS may, under specified circumstances, authorize take that would otherwise be prohibited. For all actions with a federal nexus—either carried out by a federal agency directly, or funded or permitted by an agency—both agencies and private parties can obtain immunity from the take prohibition through compliance with the Section 7 consultation process. Any action that complies with the terms and conditions prescribed in an incidental take statement in a biological opinion is not considered a prohibited taking under Section 9 of the ESA. *See* 16 U.S.C. § 1536(o)(2).

For all other actions—*i.e.*, those lacking any federal connection sufficient to trigger the Section 7 consultation process and substantive requirements—Section 10 provides a process for obtaining authorization to take members of listed species so long as certain rigid criteria are satisfied. Section 10(a)(1)(A) allows for the issuances of permits to engage in an "otherwise" prohibited take "for scientific purposes or to enhance the propagation or survival of the affected species . . . ." 16 U.S.C. § 1539(a)(1)(A). The statute specifies, as one example of such an "enhancement" permit, those "acts necessary for the establishment and maintenance of experimental populations" established in accordance with a separate section of the Act. *Id*. That provision—section 10(j)—defines an "experimental population" as one that is "wholly separate geographically from nonexperimental populations of the same species," and provides that the Service "may authorize release" of such a population "outside the current range" of the species "if the [Service] determines that such release will further the conservation of the species." *Id* §§ 1539(j)(1), (2)(A). Experimental populations are generally entitled to the same legal protections as "threatened" species under the Act, except that those populations not deemed "essential to the continued existence of" the species are afforded less protection, e.g., critical habitat is not designated for such species. *Id*. § 10(j)(2)(B).

Section 10 also authorizes the Services to issue permits for any take that is "incidental to and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). Anyone seeking to obtain such an "incidental take permit" ("ITP") must satisfy stringent criteria, including that the permit applicant "will, to the maximum extent practicable, minimize and mitigate the impacts of such taking," and that the "taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." *Id*. §§ 1539(2)(B)(ii), (iv). The permit applicant must also prepare a "conservation plan"—commonly known as a Habitat Conservation Plan ("HCP") that commits the applicant to setting forth

measures designed to offset, "to the maximum extent practicable," the adverse impacts associated with the activity at issue. *Id.*

The ESA affords the public a right to comment on each application for an enhancement permit or an ITP/HCP, and the statute further provides that all "[i]nformation received by the [Service] as part of any application shall be available to the public as a matter of public record at every stage" of the permit proceeding. *Id.* § 1539(c); *see also Gerber v. Norton*, 294 F.3d 173, 181-82 (D.C. Cir. 2002) (holding that the FWS violated section 10 by failing to provide the public with a "critically important" map of a "mitigate site" relied on by a project developer to offset adverse impacts on the Delmarva fox squirrel). Nonetheless, as a practical matter, by the time that an ITP/HCP is released for public comment, the project proponent and Service may have already engaged in extensive discussions regarding the substance of those documents. Consequently, the ability of public comments to influence the content of take permit and/or conservation plans is often quite limited.

Recovery and Delisting

The ESA has proven to be extremely successful in forestalling the extinction of species that gain the statute's protections. Only a small number of species have been lost while under the Act's protections. On the other hand, the ESA has proven far less proficient in improving the lot of species to the point where they can be deemed biologically recovered and removed from the endangered and threatened lists. One reason for this state of affairs is that, by the time most species are listed, their populations have declined so drastically that anything approximating true "recovery" is extraordinarily difficult, if not impossible, to achieve as a practical matter. Another reason is that, while the statute has powerful legal mechanisms for preventing the imminent extinction of species, that has not proven to be the case for the ESA's provisions aimed at bringing about species recovery.

For example, as noted earlier, the Services for many years sought to sidestep the designation of "critical habitat," which is one of the Congressionally-mandated tools for furthering the "conservation"—i.e., recovery—of endangered and threatened species. *See supra* at ____. Although the designation of critical habitat is now far more commonplace when a species is listed, by defining the "adverse modification" of such habitat (within the meaning of section 7(a)(2) of the Act) as an "alteration that appreciably diminishes the value of critical habitat *as a whole* for the conservation of a listed species," 50 C.F.R. § 402.02 (emphasis added), the Services have made it extraordinarily difficult to find that any particular action will run afoul of the substantive prohibitions on agency actions that impede species' conservation by impairing their critical habitats. Consequently, the Services' longstanding and ongoing hostility to the critical habitat component of the statute has dramatically undermined the ability of critical habitat to further the recovery of imperiled species.

The Services have likewise blunted the force of section 4(f) of the Act, which provides, which narrow exceptions, for the development and implementation of "recovery plans" for all listed species. Such plans are required to contain specific elements, including a "description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of species," and "objective, measurable criteria which, when met, would result in a determination" that the species has recovered to the point where it may be removed from the list of endangered and threatened species. 16 U.S.C. §§ 1533(f)(1)(B)(i), (ii).

Although the ESA requires that the Services "*shall* develop and implement" such recovery plans, *id*. § 1533(f)(1) (emphasis added), the Services have taken the position that the plans are merely hortatory, with no binding legal effect on either the Services themselves or other federal agencies. Not surprisingly, therefore, even very detailed, ambitious recovery plans are often honored more in the breach than the observance. In one important case, the D.C. Circuit sustained the FWS's position that the West Virginia flying squirrel could be declared

recovered—and hence entirely stripped of the safeguards of the ESA—although the "objective, measurable" recovery criteria set forth in the Service's own recovery plan for the species had, as the FWS concededly, not been satisfied. *See Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2002). At the same time, the Court declared that "as long as a species is listed as endangered, the [Service] *is* obligated to work toward the goals set in its recovery plan." *Id* at 437 (emphasis added).

ESA Citizen Suits

The ESA contains a citizen suit provision that embodies an "authorization of remarkable breadth when compared with the language Congress ordinarily uses" in such provisions. *Bennett v. Spear*, 520 U.S. 154, 165 (1997). The Act provides that "any person may commence a civil suit" to enforce the Act's safeguards for endangered and threatened species. 16 U.S.C. § 1540(g)(1). As explained by the Supreme Court, the "obvious purpose" of this provision "is to encourage enforcement by so-called 'private attorneys general'—evidenced by its elimination of the usual amount-in-controversy and diversity-of-citizenship requirements, [and] its provision for recovery of the costs of litigation (including even expert witness fees) . . . ." *Bennett*, 520 U.S. at 165. Consequently, although plaintiffs must (as always) satisfy Article III standing requirements to bring suit under the ESA, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that Defenders of Wildlife had not adequately demonstrated how its members would be harmed by impacts to species overseas), Congress dispensed with any requirement to demonstrate that a particular alleged injury falls within the "zone of interests" Congress intended to protected. *Bennett*, 520 U.S. at 154.

In *Bennett v. Spear*, the Supreme Court also parsed the language of the citizen suit provision in determining which specific violations of the Act are encompassed within the citizen suit provision. The Court held that, as worded by Congress, although the citizen suit provision

covers all violations of the Act by entities *other than the Services*—such as violations of the section 9 take prohibition by nonfederal entities and violations of the section 7 no-jeopardy prohibition by federal action agencies—it does *not* apply to "all failures of the [Services] to meet [their] administrative responsibilities" under the Act. *Id*. at 166, 173. With respect to the Service's duties under the ESA, the Court construed the citizen suit provision as encompassing only the Services' failure to carry out their responsibilities under section 4, e.g., those pertaining to listing and designation of critical habitat. *Id*. at 171-72. As for claims that a Service has been derelict in carrying out any other duties under the Act—which the Court characterized as allegations of "maladministration" of the ESA—the Court held that the ESA citizen suit provision does not extend to such conduct. *Id*. at 173-74.

At the same time, however, the Court held that such maladministration claims *may* be brought under the Administrative Procedure Act ("APA") so long as the APA's requirements are satisfied. *Id*. at 174-178. In particular, the Court ruled that a Biological Opinion issued by one of the Services at the end of the Section 7 consultation process constitutes a "final agency action" that may be challenged under the APA. *Id*. at 177-178 (explaining that a "Biological Opinion and accompanying Incidental Take Statement" satisfy the criteria for final agency action because they alter the legal regime to which the action agency is subject, authorizing it take the endangered species if (but only if) it complies with the prescribed conditions").[11]

Citizen enforcement has been critical to implementation of the ESA. The vast majority of species listings and critical habitat designations have resulted from citizen petitions followed by lawsuits to enforce the statutory deadlines for responding to such petitions. The task of enforcing the section 9 prohibition on the unauthorized take of listed species has also fallen to

[11] The myriad legal and practical issues that arise in enforcing the ESA through the ESA citizen suit provision and/or the APA are discussed extensively in E. Glitzenstein, *Endangered Species Act: Law Policy and Perspectives* (American Bar Association 2021) (chapter on Citizen Suits).

citizen groups because the federal government has largely abdicated any role in such enforcement. In effect, rather than serving merely a supplementary enforcement role, the "private attorneys' general" empowered by the ESA citizen suit provision have become the principal means of ensuring that the Act's "important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Com.*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

The Marine Mammal Protection Act

General Purposes and Management Mandates Embodied in the MMPA

The MMPA was enacted in 1972 in response to the public outrage over the indiscriminate killing and other forms of mistreatment of marine mammals. *See* H.R. Rep. No. 92-707, at 12. The MMPA's passage stemmed from public pressure that was aimed not only at preventing population declines, but also at alleviating animal suffering and maintaining fully functioning ecosystems. *See, e.g.,* M. Bean, *The Evolution of National Wildlife Law*, at 109-110 (Third ed. 1997) (explaining that one of the principal groups lobbying for the MMPA "comprised those who believed that marine mammals, because of their apparent intelligence and highly developed social systems, ought to be left undisturbed and made off-limits to human use").

Accordingly, in enacting the MMPA, Congress established lofty goals that go well beyond preserving species or populations in isolation. The statute is predicated on legislative findings that "species *and population stocks*" of marine mammals "should not be permitted to diminish beyond the point at which they cease to be a *significant functioning element in the ecosystem of which they are a part* and, consistent with this major objective, they should not be permitted to dimmish below their optimum sustainable population." 16 U.S.C. 1361(2) (emphasis added).

"Population stocks" are therefore the "fundamental unit[s] of legally-mandated conservation" under the MMPA. NMFS, *Guidelines for Preparing Stock Assessment Reports Pursuant to Section 117 of the Marine Mammal Protection Act* (Feb. 2016 Revisions), at 3 (hereafter "Stock Assessment Guidelines).

In turn, a "population stock" is defined by the statute as any "group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreeds when mature." *Id*. § 1362(11). Because this definition affords limited guidance, NMFS (which implements the MMPA with regard to whales, dolphins, porpoises, seals, and sea lions) and FWS (which implements the statute with respect to manatees, walrus, sea otters, and polar bears), *see id*. § 1362(12), have developed detailed guidance for determining the existence of population stocks for management purposes. Pursuant to this guidance, "[m]any different types of information can be used to identify stocks of a species," including distribution and movements, population trends, morphology, life history, genetics, acoustic call types, and distinct oceanographic habitats." Stock Assessment Guidelines at 3.

The MMPA defines the "optimum sustainable population" (OSP) that should be maintained for each species or population stock as the "number of animals which will result in the *maximum productivity of the population or the species*, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element." 16 U.S.C. § 1362(9) (emphasis added). In keeping with the MMPA's emphasis on maintaining fully intact ecosystems and thriving marine mammal populations, this definition is much broader than the traditional concept of managing the exploitation (i.e., hunting and fishing) of wildlife populations merely to ensure a "maximum sustained yield" for commercial purposes. Bean, *Wildlife Law*, at 113; *see also Kokechik v. Fishermen's Ass'n v. Sec'y of Commerce*, 839 F.2d 795, 800, 802 (D.C. Cir. 1988) (explaining that the "interest in maintaining healthy populations of marine mammals comes first" under the statute).

To facilitate the ability of a species or stock to reach and maintain its OSP, the Services are required to issue and update "stock assessments" for each marine mammal stock that occurs in U.S. waters. 16 U.S.C. § 1386(a). The assessment must, among other elements, set forth a "potential biological removal level" (PBR) for each stock. *Id.* § 1386(a)(5). The PBR, which is crucial to the Services' management decisions, is defined by the statute as the "maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing the stock to reach or maintain its optimum sustainable population." *Id.* § 1362(20).

Each assessment must also determine whether the population stock should be classified as "strategic." Stock Assessment Guidelines at 12. A "strategic stock," which necessitates special management consideration, is a stock (1) "for which the level of direct human-caused mortality exceeds" the PBR established for that stock; (2) "is declining and is likely to be listed as a threatened species under the [Endangered Species Act] within the foreseeable future"; or (3) is already listed as endangered or threatened under the ESA *or* is separately designated as "depleted" under the MMPA. 16 U.S.C. § 1362(19) (emphasis added); *see also id.* § 1362(1) (defining a "depleted" species or stock to include those that the Services have determined is below its optimum sustainable population or is listed as an endangered or threatened species under the ESA); *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litigation*, 818 F. Supp. 2d 240, 253-54 (D.D.C. 2011) (holding that the listing of the polar bear as a threatened species under the ESA automatically rendered it "depleted" for purposes of the MMPA's restrictions on the taking and importation of depleted species and populations).[12]

[12] In the case of the polar bear, the species' threatened listing under the ESA, and hence "depleted" status under the MMPA, meant that hunters could not lawfully import their polar bear "trophies" into the U.S. *See In re Polar Bear Endangered Species Act Listing*, 818 F. Supp. 2d at 254.

The MMPA's General "Moratorium" on the "Take" of Marine Mammals

To accomplish its objectives, the MMPA establishes a general "moratorium" on the "taking and importation" of marine mammals. 16 U.S.C. §§ 1371(a), 1372(a). With enumerated exceptions (described further below), the statute makes it "unlawful" for "any person or vessel or other conveyance to take any marine mammal in waters or on land under the jurisdiction of the United States." *Id.* § 1372(a)(2)(A).[13]

The term "take" is defined by the MMPA to mean "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." *Id.* § 1362(13). For most activities subject to regulation under the statute, "[h]arassment" is very broadly defined to "mean[] any act of pursuit, torment, or annoyance" that "has the potential to injure a marine mammal or marine mammal stock in the wild" (labeled "Level A harassment") or that "has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding or sheltering" (labeled "Level B harassment)." *Id.* §§ 1362(18)(A)(i), (ii); (C), (D).[14]

Exceptions to the "Take" Moratorium

Notwithstanding Congress's adoption of a "moratorium" on the taking of marine mammals, the MMPA—both as originally crafted and as amended over the ensuring decades—

[13] The statute also generally makes it unlawful for any person to (1) possess, transport, purchase, or sell any marine mammal or marine mammal part taken in violation of the statute; or (2) import into the U.S. any marine mammal that is "pregnant at the time of taking"; "nursing at the time of taking, or less than eight months old, whichever occurs later"; been designated as a "depleted species or stock"; or has been "taken in a manner deemed inhumane" by FWS or NMFS. 16 U.S.C. §§ 1372(a)(3), (b).

[14] The statute contains less protective definitions of "harassment" insofar as "military readiness activit[ies]," and certain "scientific research activit[ies] conducted by or on behalf of the Federal government," are concerned. *See* 16 U.S.C. §§ 1362(18)(B), (C), (D) (providing that for such activities, "Level A harassment" means "any act that injures or has the *significant* potential to injure a marine mammal or marine mammal stock in the wild," and that "Level B harassment" means "any act that disturbs or is likely to disturb a marine mammal stock by causing disruption of natural behavioral patterns . . . to a point *where such behavioral patterns are abandoned or significantly altered.*") (emphasis added).

contains various ways in which activities affecting marine mammals, including harmful activities, may be authorized by the Services.

I.

First, the MMPA provides that, for all activities other than commercial fishing, the relevant Service "shall allow, during periods of not more than five consecutive years, the incidental, but not intentional, taking by citizens while engaging in that activity within that region of small numbers of marine mammals of a species or population stock . . . ." 16 U.S.C. § 1371(a)(5)(A)(i). To authorize any such incidental taking for a "specified activity," the Service must find that the "total of such taking during each five-year (or less) period" will have only a "negligible impact on such species or stock," and must issue regulations prescribing the "permissible methods of taking . . . and other means of effecting the least practicable adverse impact on such species or stock and its habitat . . . ." *Id.* §§ 1371(a)(5)(A)(i)(I), (II)(aa).[15]

Where "harassment" is the only form of take that is anticipated for a particular activity, the Services "shall authorize, for periods of not more than 1 year" the incidental take by harassment of small numbers of marine mammals of a species or population stock . . . ." *Id.* § 1371(a)(5)(D). Again, any such authorization is contingent on the Service's finding that the harassment will have only a "negligible impact" on the species or stock, and on the issuance of regulations prescribing the "permissible methods of taking by harassment pursuant to such activity . . . ." *Id.* §§ 1371(a)(5)(D)(i)(I), (II).

II.

Second, the MMPA was amended in 1994 to set forth specialized requirements and procedures for the incidental taking of marine mammals by commercial fishing operations. *See*

[15] With regard to "military readiness activities," incidental take authorizations may be issued for up to seven years and the Services are required to consult with the Department of Defense regarding the practicability of measures for minimizing impacts on marine mammals. 16 U.S.C. § 1371(a)(5)(A)(ii).

16 U.S.C. § 1387. The 1994 amendments set forth an "immediate goal that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate within 7 years [following adoption of the amendment]." *Id.* § 1387(a)(1). To accomplish that goal, Congress required NMFS to place fisheries into one of three categories based on the level of risk to marine mammals. *Id.* § 1387(c)(1)(A) (delineating the categories as fisheries that have (1) "frequent incidental mortality and serious injury to marine mammals"; (2) "occasional incidental mortality and serious injury"; or (3) a "remote likelihood of or no known incidental mortality or serious injury").

To be relieved of liability for the incidental taking of marine mammals in connection with any such fisheries, all fishing vessels must register with, and obtain authorization from, NMFS. To do so, the vessels must, among other requirements, comply with "any applicable take reduction plan" prepared by NMFS. *Id* § 1387(c)(3)(iv). NMFS is required to "develop and implement" such "take reduction plans" "to assist in the recovery or prevent the depletion of each strategic stock which interacts with" those commercial fisheries that pose the highest risks to marine mammals. *Id.* § 1387(f)(1). NMFS may also develop and implement such plans for other (i.e., non-strategic) stocks when NMFS determines that a fishery "has a high level of mortality and serious injury across a number of such marine mammal stocks." *Id.*

III.

Third, the Services may, subject to various restrictions and procedural requirements, issue permits for the "taking, and importation for purposes of scientific research, public display, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock . . . ." 16 U.S.C. § 1371(a)(1); *see also id.* § 1374. With regard to any species or stock designated as "depleted," such permits may only be issued for scientific research, photography, or to enhance the survival or recovery of the species or stock. *Id.* § 1371(a)(3)(B).

All permits must, among other elements, specify the "number and kind of animals which are authorized to be taken or imported" and the location and manner" of their taking or importation—"which manner must be determined by the [Service] to be humane." *Id*. §§ 1374(b)(2)(A), (B).[16] In addition, a permit may be issued "for the purpose of public display" of a marine mammal if the permit recipient "offers a program for education or conservation purposes that is based on professionally recognized standards of the public display community" and is "registered or holds a license issued under" the Animal Welfare Act. *Id*. §§ 1374(b)(2)(A)(i), (ii).

IV.

Fourth, the Services are "authorized and directed" to "determine when, to what extent, if at all, and by what means, it is compatible with [the MMPA] to waive" the moratorium on taking "so as to allow taking, or importing of any marine mammal . . . ." 16 U.S.C. § 1371(a)(3)A). A waiver may be granted only if the Service is "assured that the taking of such marine mammals is in accord with sound principles of resource protection and conservation as provided in the purposes and policies" of the MMPA, and if the Service adopts "suitable regulations" that give "due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements" of the affected species or stocks. *Id*. Such regulations "must be made on the record after opportunity for an agency hearing," which means that, for any waiver to be granted, there must be a trial-type proceeding involving live testimony and opportunities for cross-examination before an administrative law judge. *Id*. § 1373(d).

Due to the time-consuming and procedurally complex nature of the waiver process, and the more efficient routes to take authorization available for most activities that harm marine

[16] "Humane" is defined by the MMPA to mean the "method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved." 16 U.S.C. § 1362(4).

mammals, it is unsurprising that very waivers have ever been sought, let alone granted. In practical effect, it is the sole recourse available only to those who wish to engage in the hunting of marine mammals or the importation for commercial purposes of products derived from marine mammals. *See* Bean, *Wildlife Law*, at 121.

A controversial example one such waiver request involves the ongoing effort by the Makah Tribe to resume the hunting of gray whales off the coast of Washington State. Although the Makah have a right to hunt whales under an 1855 treaty with the U.S., the Tribe ceased whaling in the 1920s. Seventy years later, however, the Tribe undertook to resume its historic whaling practice, including by having its interests represented by the U.S. government before the International Whaling Commission (IWC)—an international body that establishes quotas for aboriginal subsistence whaling undertaken by native groups in the nations that are signatories to the International Convention for the Regulation of Whaling (ICRW).[17]

When animal protection groups challenged the proposed hunts in federal court, both the Makah Tribe and the federal government took the position that the Tribe's resumption of whaling had been approved by the IWC and that this was sufficient for the Tribe to resume whaling. However, the Ninth Circuit held that, to be lawful under U.S. law, the hunt also must be approved in accordance with the provisions of the MMPA. *See Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2002). The court held that neither the Tribe's treaty right, nor the ICRW, exempted the Tribe from MMPA compliance. *Id.* at 494-98. Rather, "to pursue any treaty rights for whaling, [the Tribe] must comply with the process prescribed in the MMPA for authorizing a 'take' because it is the procedure that ensures the Tribe's whaling will not frustrate the conservation goals of the MMPA." *Id.* at 501 n.26.

[17] The ICRW, which was established in 1946 to restrict and regulate whaling, created the IWC, which is comprised of one member from each of the ratifying countries. The IWC is authorized to establish international whaling regulations and annual whaling quotas. The U.S. implements the Convention domestically through the Whaling Convention Act (WCA), 16 U.S.C. § 916 et seq.

Consequently, the Tribe is presently in the process of pursuing a "waiver" of the MMPA's moratorium. *See* 84 Fed. Reg. 13,604 (April 5, 2019). NMFS has proposed to grant the waiver on the grounds that the hunt, with certain restrictions on how, when, and where hunting may occur, will not affect the ability of the eastern North Pacific stock of gray whales—the one targeted by the hunt—to maintain its OSP. *Id*. Animal protection groups are challenging the proposed waiver on the grounds (among other) that the hunts threaten a smaller group of whales that congregate near the coast of Washington and (according to the groups) satisfy the criteria for designation as a separate protected population stock. In addition, the animal protection groups contend that Makah hunters may inadvertently kill, injure, or harass a member of the western North Pacific stock of gray whales, which is listed as endangered under the ESA and hence "depleted" under the MMPA. If NMFS, following the adjudicatory hearing required for a waiver to be approved, issues final regulations authorizing a waiver of the moratorium, the Tribe will then be in a position to obtain a permit to conduct whaling off the coast of the contiguous U.S. for the first time in many decades.

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