

## Chapter 1

# The Endangered Species Act: Protecting Species at Risk, Risking Land Uses

Steven P. Quarles  
Thomas R. Lundquist<sup>1</sup>  
*Crowell & Moring LLP*  
Washington, D.C.

### Synopsis

§ 1.01.	<b>Introduction .....</b>	<b>4</b>
§ 1.02.	<b>Origins of Federal Regulation of Wildlife and the Endangered Species Act (ESA) .....</b>	<b>6</b>
§ 1.03.	<b>The ESA Is a “Different Animal” from, and More Feral than, Other Environmental Laws.....</b>	<b>9</b>
	[1] — Extraordinary Mandate .....	10
	[2] — Increasing Presence .....	10
	[3] — Unequivocal Terms .....	11
	[4] — Science Supreme .....	11
	[5] — Weak Scientific Standard and Data Drought .....	12
	[6] — A Biased Science .....	13
	[7] — Due Process Infirmities .....	14
	[8] — Controlling Land Uses and Behavior .....	15
	[9] — A Different Scale .....	16
	[10] — The Law’s Misdirection and Poorly Defined Concepts.....	16
	[11] — Agency Culture Shock and Lack of Resources .....	16
	[12] — The Appearance of a Failed Law.....	17
	[13] — A Tardy Start and Numerous Unresolved Issues .....	17
§ 1.04.	<b>Key ESA Provisions and Critical ESA Issues .....</b>	<b>19</b>
	[1] — Introduction .....	19
	[2] — How Animal and Plant Species and Their Habitats Receive the ESA’s Protection: Listing of Species and Designation of Critical Habitat .....	19
	[a] — Statutory and Regulatory Requirements Related to Species Listings and Critical Habitat Designations .....	19

---

<sup>1</sup> Steve Quarles is chair of, and Tom Lundquist is counsel to, the Environment and Natural Resources Group of the Washington, D.C. law firm of *Crowell & Moring LLP*.

[b] — Representative Issues Concerning Species Listings and Critical Habitat Designations..... 23

[3] — The Three Principal Standards of Behavior Under the ESA ..... 37

[4] — The ESA Section 9 “Take” Prohibition Standard ..... 37

    [a] — Statutory and Regulatory Requirements Related to the “Take” Prohibition..... 37

    [b] — Representative Issues Concerning the “Take” Prohibition..... 38

    [c] — Statutory and Regulatory Requirements, and Representative Issues, Related to “Incidental Take” ..... 42

[5] — The Two-Test Standard for ESA Section 7(a)(2) Compliance – Jeopardy to Listed Species and Destruction or Adverse Modification of Critical Habitat ..... 44

    [a] — Statutory and Regulatory Requirements Related to the Section 7(a)(2) Standard..... 44

    [b] — Representative Issues Concerning the Section 7(a)(2) Standard ..... 47

[6] — The ESA Sections 7(a)(1) and 4(f) Conservation or Recovery Standard ..... 54

    [a] — Statutory and Regulatory Requirements, and Representative Issues, Related to the Conservation or Recovery Standard ..... 54

[7] — “It’s The Law” – Enforcement of the ESA..... 56

    [a] — Statutory and Regulatory Requirements, and Representative Issues, Related to ESA Enforcement..... 56

**§ 1.05. Recommended Reading ..... 57**

**§ 1.01. Introduction.**

In this chapter, we attempt to accomplish three objectives. Given the chapter’s length, some readers may assert that we have adopted (at least) two objectives too many.

Be that as it may, our first objective is to present the Endangered Species Act of 1973 (ESA or Act)<sup>2</sup> to readers who may not yet have become

---

<sup>2</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531 *et seq.*

fully acquainted with it. Those readers should not perceive this unfamiliarity with the ESA as a predicament; to the contrary, they are the fortunate ones who lack full apprehension of the ESA precisely because the Act has not yet found them or their properties. That is, any species their properties currently may harbor likely exist elsewhere in good numbers, habitats, and health. We believe, however, that the ESA ultimately will pay uninvited visits to many, if not most, of these properties. We hold this belief based on experience. Take solely our mining clients: in the last few years we have worked with a gold mine in Nevada concerning the Lahontan cutthroat trout, a silver mine in Montana concerning the grizzly bear and bull trout, several quarries in California concerning the California condor, and coal mines in West Virginia concerning the Indiana bat, Virginia big-eared bat, and northern flying squirrel.

In pursuit of this first objective, we provide a brief historical tour to place the ESA in the context of more than a century of Congressional enactments and judicial decisions that established the predicate for the Act: federal authority to regulate land and water uses to benefit wildlife. Later in this chapter, to further accomplish this objective, we will discuss the basic provisions of the ESA and the standards and procedures they mandate.

Before providing this exegesis of the Act, however, we will move to our second objective, which is to explore the question why the ESA warrants our readers' attention. We will describe a few of the many factors that prompt us to characterize the Act as a "different animal" from, and more feral than, other environmental laws. These factors should persuade the reader that, if he or she is caught in the Act's fangs, claws, coils, or web—choose your fauna metaphor, the experience will not likely be agreeable. Moreover, we have found that environmental attorneys too often assume the ESA operates in a manner similar to other environmental laws; it does not: the ESA is idiosyncratic.

To serve our third objective, we will outline a number of the current or likely prospective issues that do or will confront those who seek either to implement or to obey the Endangered Species Act. We hope to alert the reader that, unlike a number of other environmental laws, much of the ESA remains unsettled, and surprisingly little of the Act has been routinized.

Accordingly, the issues that crowd the ESA are not esoteric; they are truly basic—so basic that we were tempted to include in the title for this chapter the phrase “Define Your Terms.” Many of the unresolved issues concern the very definitions of the ESA’s most essential terms—either definitions that are missing from the Act or its regulations and whose absence leaves the terms unfettered by legislatively- or administratively-imposed meaning, or definitions that can be found in the law or rules but fail to confer any rational or legally useful meaning to the terms they define.

The combination of this discussion of the factors that occasion the ESA’s singularity and description of the most fundamental issues related to the Act will, we anticipate, allow us to achieve our third objective. And that is to expose how great a state of flux the Act is in, how rapidly it is evolving, and how easily it can be steered in divergent, and sometimes contradictory, directions by courts, regulators, and motivated and mobilized advocates in the environmental and regulated communities.

### **§ 1.02.           Origins of Federal Regulation of Wildlife and the Endangered Species Act.**

The Endangered Species Act of 1973 was the culmination of more than seven decades of lawmaking—Congressional and judicial—that had eroded the states’ hegemony over wildlife in favor of increasing federal regulation to protect and manage living resources. The states captured the legal high ground in the last years of the 19th Century when, in its 1896 decision in *Geer v. Connecticut*, the Supreme Court declared wildlife to be state property.<sup>3</sup> The states’ long, but gradual, descent from the summit of exclusivity in the management of wildlife began just four years later. The new century was greeted by the first national law to address wildlife: the Lacey Act of 1900.<sup>4</sup> That statute served only to augment state law by declaring the interstate transportation of wild animals and other violations of state game laws to be federal offenses. Even so, the Lacey Act had the DNA of the ESA;

---

<sup>3</sup> *Geer v. Connecticut*, 161 U.S. 519 (1896).

<sup>4</sup> Lacey Act of 1900, 16 U.S.C. §§ 668d, 701.