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Item Type	Article
Authors	Gerson, Sara
Publisher	UC Berkeley School of Law
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Download date	2026-07-01 11:12:18
Link to Item	http://hdl.handle.net/20.500.12424/175798

Who Can Enforce the Endangered Species Act’s Command for Federal Agencies to Carry Out Conservation Programs?

Sara Gersen*

In Florida Key Deer v. Paulison, the Eleventh Circuit held that federal agencies cannot meet the Endangered Species Act’s (ESA’s) command to “carry[] out programs for the conservation of endangered species” with programs of “insignificant effect.” Since the enactment of the ESA, courts have taken a variety of approaches to this requirement, which is found in section 7(a)(1) of the ESA. While some prior interpretations have rendered section 7(a)(1) effectively unenforceable, the Florida Key Deer decision belongs to a line of cases that reads meaningful procedural requirements into the section. Although the Eleventh Circuit has made an important contribution to the jurisprudence of ESA section 7(a)(1) by establishing a “significant effect” benchmark for compliance, this Note argues that effective conservation programs cannot be implemented as the result of litigation alone. The ESA’s goals cannot be realized without executive leadership because of the unique competencies of the executive branch.

Introduction.....	408
I. The Statutory Framework of the ESA	411
A. Statutory Purposes	411
B. The Major Mandates of the ESA	411
C. Recovery Planning	414
D. Section 7(a)(1)	415
II. Trends in Judicial Interpretation of the ESA	415
A. A Promising Start: <i>TVA v. Hill</i>	415
B. Section 7(a)(1) Fails to Force Agency Action	417

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1. Section 7(a)(1) Is Not an Effective Catalyst for Conservation Programs.....	417
2. Section 7(a)(1) “Authorizes” Federal Agencies to Protect Species	420
C. Section 7(a)(1) as a Procedural Mandate	421
1. Early Adoption of a Procedural Approach.....	421
2. <i>Sierra Club v. Glickman</i> : Rediscovering the Procedural Element of Section 7(a)(1).....	421
III. <i>Florida Key Deer</i>	422
A. Procedural History and Lower Court Decisions	423
B. Appellate Decision.....	424
IV. Opportunities for the Courts and Political Branches to Enforce Section 7(a)(1) and Achieve Species Recovery.....	427
A. The Problem of Reactive Conservation Measures	427
1. Reactive Conservation Measures Are an Inadequate Way to Meet Recovery Goals.	427
2. Congress Intended Proactive Measures	429
B. Giving Teeth to Section 7(a)(1).....	430
1. Forcing Compliance with Section 7(a)(1) through Court-Enforced Procedural Requirements	430
2. Congressional Oversight—An Unreliable Tool.....	433
3. Executive Orders Could Ensure Agencies Carry Out Conservation Programs.....	434
Conclusion	438

INTRODUCTION

The Endangered Species Act (ESA or “the Act”) is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”¹ While the ESA’s complex framework is well-suited for protecting species from destructive forces, it has largely failed to achieve its ambitious goal of species recovery. Although the ESA has helped prevent further harm to endangered species, it has not allowed the populations of many species to grow to the point that they no longer require protection.² One major reason for this failure is that it has not prompted the kinds of major recovery programs that might allow large numbers of species to be removed from the

1. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

2. When I refer to “species recovery,” I use the term in the same sense as the Fish and Wildlife Service: “Recovery is the process by which the decline of an endangered or threatened species is arrested or reversed, and threats to its survival are neutralized, so that its long-term survival in nature can be ensured.” FISH & WILDLIFE SERV., U.S. DEP’T OF THE INTERIOR, POLICY AND GUIDELINES FOR PLANNING AND COORDINATING RECOVERY OF ENDANGERED AND THREATENED SPECIES 1 (1990), available at <http://www.fws.gov/endangered/pdfs/Recovery/90guide.pdf>.

Endangered Species List. Instead, the Act's most significant provisions operate reactively, limiting harms to species without promoting steps that would affirmatively bolster their populations. Section 7(a)(1) of the ESA provides a potentially powerful, yet currently under-utilized, tool for creating an effective species-recovery strategy.³ The conservation programs authorized by section 7(a)(1) could provide an important framework for meeting conservation and biodiversity goals by demanding coordinated, forward-looking action.⁴

The ESA sets up a framework generally devoted to preventing specific harms to imperiled species, as opposed to seeking opportunities to bolster species populations. The Act has two main protective measures—first, no individual may harm a protected species, and second, no federal agency may act in a way that might jeopardize a protected species. Although the ESA currently mandates that the Department of the Interior develop a recovery plan for every endangered species, this mandate has not been fully implemented. To date, resources for species recovery have been directed at a small minority of endangered species and most species have not benefited from recovery planning efforts.⁵ Even though the ESA's protective measures have helped many endangered species avoid extinction, the federal government's failure to adequately promote species recovery creates a gap that prevents it from achieving the Act's goals.

Section 7(a)(1) may present an unrealized opportunity to develop effective recovery measures. A plain reading of section 7(a)(1) suggests that all federal agencies are required to develop programs to affirmatively promote conservation in order to protect listed species:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.⁶

Indeed, the ESA's legislative history confirms that Congress originally intended to force federal agencies to affirmatively adopt programs that would conserve species, as noted by the Supreme Court in *Tennessee Valley Authority (TVA) v. Hill*.⁷

Yet section 7(a)(1) has proven to be a weak statutory tool for demanding such agency action. Instead, some courts have restricted the role of section 7(a)(1) to providing statutory authority for agency conservation measures,

3. See Endangered Species Act of 1973 § 7(a)(1), 16 U.S.C. § 1536(a)(1) (2006).

4. See *id.*

5. See *infra* Part I.C.

6. 16 U.S.C. § 1536(a)(1).

7. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 183–84 (1978).

rather than a mandate that agencies undertake conservation measures.⁸ Plaintiffs' attempts to use section 7(a)(1) to demand that agencies implement specific conservation programs have been undermined by judicial deference to agencies' decisions on how to exercise their statutory powers.⁹ Further, courts have held that section 7(a)(1) does not provide agencies with any additional authority.¹⁰

Nonetheless, some courts have been willing to impose meaningful duties to comply with section 7(a)(1) by demanding that agencies follow the procedures indicated by the statute. Most recently, *Sierra Club v. Glickman*¹¹ and *Florida Key Deer v. Paulison*,¹² have honored section 7(a)(1)'s purpose by reviewing the agencies' affirmative duties. Still, the cases do not provide a consistent vision of how compliance with section 7(a)(1) may be enforced judicially. Because section 7(a)(1)'s promise of effective conservation programming probably cannot be achieved through litigation alone, an effort fueled by political will within the executive branch is necessary to successfully implement the commands of the ESA.

This Note surveys two bodies of law—the statutory provisions of the ESA as a whole and the case law interpreting section 7(a)(1) directly. Part I outlines the major provisions of the ESA, revealing the gaps in the Act's mandates that prevent Congress' ambitious recovery goals from being achieved. Part II discusses the history of judicial interpretations of section 7(a)(1) and that section's potential to force agencies to proactively adopt conservation programs. Part III continues that discussion, focusing on the recent contribution to section 7(a)(1) case law made by *Florida Key Deer v. Paulison*. Finally, Part IV explores the importance of prospective conservation efforts and what can be done to make section 7(a)(1) duties more meaningful and enforceable, concluding that decisive leadership from the executive branch is necessary to protect species most effectively.

8. See, e.g., *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257 (9th Cir. 1984); *Strahan v. Linnon*, 967 F. Supp. 581, 596 (D. Mass. 1997) (finding that conservation plans are “voluntary measures,” citing regulations governing FWS recommendations in the 7(a)(2) consultation process. *Interagency Cooperation—Endangered Species Act of 1973, as Amended*, 51 Fed. Reg. 19,926, 19,931, 19,934 (June 3, 1986) (to be codified at 50 C.F.R. pt. 402)).

9. See, e.g., *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1418 (9th Cir. 1990); *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 136 (D.D.C. 2001); *Coal for Sustainable Res., Inc. v. U.S. Forest Serv.*, 48 F. Supp. 2d 1303, 1315 (D. Wyo. 1999) (“The case law is well settled that federal agencies are accorded discretion in determining how to fulfill their § 1536(a)(1) obligations.”) (citation omitted).

10. See, e.g., *Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27, 33 (D.C. Cir. 1992); *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1314 (W.D. Wash. 1994).

11. 156 F.3d 606 (5th Cir. 1998).

12. 522 F.3d 1133 (11th Cir. 2008).

I. THE STATUTORY FRAMEWORK OF THE ESA

The ESA sets forth a bundle of ambitious provisions that are meant to achieve the sweeping statutory purposes. Yet while the statute aims to promote species recovery, its primary mandates are reactive in nature. The most powerful and actively enforced provisions of the Act focus on preventing activities that would threaten species, but do not affirmatively advance recovery. Section 7(a)(1) is unique for demanding programs that work proactively to bolster species populations.

A. *Statutory Purposes*

Congress recognized that endangered species of plants and wildlife “are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”¹³ Accordingly, the stated purpose of the ESA is “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.”¹⁴ The ESA defines conservation as, “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 this Act are no longer necessary.”¹⁵ Reading these two sections together, it is clear that Congress aimed to achieve “conservation,” which is essentially defined as species recovery.

B. *The Major Mandates of the ESA*

The major provisions of the ESA, which have been the subject of prominent litigation and large-scale enforcement efforts, share a common feature: they are triggered by serious harm to protected species and aim to minimize that harm. Species become eligible for protection once their numbers dwindle to dangerous levels.¹⁶ At that point, the most substantial burdens imposed by the ESA are that nobody may “take,” or harm, an endangered species¹⁷ and that no federal agency may undertake an action that will jeopardize the continued existence of a species.¹⁸

The protections of the ESA apply to species that are listed as either “endangered” or “threatened.”¹⁹ The Secretary of the Interior is charged with maintaining a list of most of the endangered and threatened species; the Secretary of Commerce is responsible for the listing process for certain marine

13. Endangered Species Act of 1973 § 2, 16 U.S.C § 1531(a)(3) (2006).

14. *Id.* § 1531(b).

15. *Id.* § 1532(3).

16. *See id.* § 1533(a)(1).

17. *Id.* § 1538(a)(1)(B). “Take” includes “harm.” *Id.* § 1532(19).

18. *Id.* § 1536(a)(2).

19. *Id.* § 1533(a)(1).

species.²⁰ The decision to list a species is guided by the following statutory definitions: an endangered species is “any species which is in danger of extinction throughout all or a significant portion of its range,”²¹ while a threatened species is “any species which is likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range.”²² With respect to listing decisions and other responsibilities under the ESA, the Fish and Wildlife Service (FWS) represents the Secretary of the Interior and the National Marine Fisheries Service (NMFS) represents the Secretary of Commerce.²³

At the time that a species is listed, the respective secretary must also designate the species’ critical habitat.²⁴ This is area that is “essential for the conservation of the species” and may include a portion of the species’ current habitat, all of its habitat, or areas that are expected to support the future expansion of the species’ territory.²⁵

The critical habitat designation guides federal agencies in fulfilling their obligations under the ESA. In particular, federal agencies must be mindful of the impacts of their activities on critical habitat so that they do not violate section 7(a)(2), which commands each federal agency, in consultation with and with the assistance of the Secretary of the Interior or Commerce, to “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 [critical] habitat of such species.”²⁶

The 1978 amendments to the ESA formalized the consultation process and added a procedure to exempt certain projects from section 7(a)(2)’s strict demands.²⁷ To insure that agency actions do not jeopardize species, agencies have the option of seeking, through consultation with the Secretary, a “biological opinion” issued by the Secretary, regarding a proposed action’s impact on wildlife.²⁸ In the biological opinion, “[i]f jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing

20. Ray Vaughan, *State of Extinction: The Case of the Alabama Sturgeon and Ways Opponents of the Endangered Species Act Thwart Protection for Rare Species*, 46 ALA. L. REV. 569, 571 (1995).

21. 16 U.S.C. § 1532(6).

22. *Id.* § 1532(20). The Secretary’s listing decisions must be made “solely on the basis of the best scientific and commercial data available to him.” *Id.* § 1533(b)(1)(A).

23. See HOLLY DOREMUS ET AL., ENVIRONMENTAL POLICY LAW 306 (5th ed. 2008).

24. *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9 (D.D.C. 2002).

25. Endangered Species Act of 1973, 16 U.S.C. § 1532(5)(A) (2006).

26. *Id.* § 1536(a)(2).

27. Jan Hasselman, *Holes in the Endangered Species Act Safety Net: The Role of Agency “Discretion” in Section 7 Consultation*, 25 STAN. ENVTL. L.J. 125, 139–41 (2006).

28. 16 U.S.C. § 1536(b).

the agency action.”²⁹ Accordingly, the finding of jeopardy or adverse modification triggers obligations for the agency to comply with alternatives that will avoid jeopardy. Though an agency may seek an exemption for a project for which there is no reasonable and prudent alternative,³⁰ agencies usually manage to comply with the ESA by adopting alternatives.³¹

The ESA applies to private parties through section 9, which makes it unlawful for any party to “take” an endangered species.³² The statute defines the term “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”³³ Further, the regulatory definition promulgated by the Fish and Wildlife Service clarifies that “harm” may be perpetrated by “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”³⁴ If, however, FWS deems that the take would not “appreciably reduce the likelihood of the survival and recovery of the species in the wild,” the “incidental” take is permissible as long as the actor obtains a permit.³⁵

Thus, the ESA, when properly enforced,³⁶ provides multiple options for reining in threats to biodiversity. In fact, the Act has been quite successful in preventing endangered species from becoming extinct. According to one estimate, the ESA has prevented 227 extinctions.³⁷ But Congress aimed to do

29. *Id.* § 1536(b)(3)(A). A project that may kill or harm an endangered species does not automatically trigger a jeopardy finding. These “incidental” takes that do not jeopardize the continued existence of a species are permissible with a permit from FWS. *Id.* § 1536(b)(4).

30. *Id.* § 1536(h)(1)(A)(i). After the issuance of a final biological opinion, the federal agency proposing the project may begin the process of seeking an exemption. *Id.* § 1536(g)(2)(A). The authority to grant the exemption is held by the seven-member Endangered Species Committee, which must base its decision on (1) whether “no reasonable and prudent alternatives to the agency action,” (2) the benefits of the action clearly outweigh the benefits of alternatives that do not jeopardize endangered species, (3) the action is of regional or national significance, and (4) there has been no irreversible commitment of resources to the project. *Id.* § 1536(h)(1)(A).

31. Jared des Rosiers, *The Exemption Process under the Endangered Species Act: How the “God Squad” Works and Why*, 66 NOTRE DAME L. REV. 825, 858 (1991).

32. Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1)(B) (2006).

33. *Id.* § 1532(19). The ESA does not specify any prohibitions on activities affecting threatened species. Rather, the Secretary is authorized to “issue such regulations as he deems necessary and advisable to provide for the conservation” of threatened species. *Id.* § 1533(d). The Secretary may promulgate generic regulations that apply to all threatened species, or choose to target the conservation of a threatened species with “special rules.” *Sweet Home Chapter of Cmty. for a Great Oregon v. Babbitt*, 1 F.3d 1, 6 (D.C. Cir. 1993) (upholding 50 C.F.R. § 17.31(a)).

34. 50 C.F.R. § 17.3 (2007). This regulatory definition was upheld by the Supreme Court in *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 710–711 (1995).

35. 16 U.S.C. § 1539(a)(2)(B)(iv).

36. All of the ESA’s provisions may be enforced either publicly, by the Secretaries and the Attorney General, or through private citizen suits. *Id.* § 1540. In cases initiated by citizen suits, courts may award attorneys’ fees as they deem appropriate. *Id.*

37. J. Michael Scott et al., *By the Numbers*, in 1 THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE 16, 31 (Dale D. Goble et al. eds., 2006) (citing M.W.

more than help maintain fragile populations of endangered species in the face of destructive forces; the goal of the ESA is species recovery.³⁸ The ultimate success of the ESA depends on whether widespread recovery is achieved, either through the take and jeopardy provisions—which have been given real force by judicial and executive action—or through the reinvigoration of some other ESA provisions.

C. Recovery Planning

FWS and NMFS are charged with developing recovery plans for each species, indicating how the threats to the species will be removed so that it can be delisted.³⁹ Each plan should include recovery targets, required tasks, and estimates of the costs and time needed to achieve recovery.⁴⁰ Although the ESA does not mandate a timeline for completing the plans, FWS policy is to attempt to complete a plan for a species within three years of its listing.⁴¹ This deadline, however, is seldom met.⁴²

Few listed species receive any substantial benefit from FWS or NMFS recovery programs. The long delays in developing recovery plans have left many species without a plan on the books, forcing wildlife groups to petition the agencies to prepare recovery plans where they are most urgently needed.⁴³ The slow pace of recovery plan development is partly due to the modest funding allotted to such planning.⁴⁴ Further, even once a species has a recovery plan, it is not guaranteed to have a well-resourced recovery program because program funding is distributed unevenly among species; in 1995, just six listed species received over half the funding for state and federal recovery expenditures.⁴⁵ The planning process has been criticized for allowing agencies to target species recovery funds based on political and social pressure rather

Schwartz, *Choosing the Appropriate Scale of Reserve for Conservation*, 30 ANN. REV. OF ECOLOGY & SYSTEMATICS 83, 108 (1999)).

38. See *supra* Part I.A.

39. See 16 U.S.C. § 1533(f)(1).

40. *Id.* § 1533(f)(1)(B).

41. D. Noah Greenwald et al., *The Listing Record*, in 1 THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE 51, 62–63 (Dale D. Goble et al. eds., 2006).

42. See *id.*

43. See, e.g., NATURAL RES. DEF. COUNCIL & DEFENDERS OF WILDLIFE, A PETITION TO PREPARE A RECOVERY PLAN UNDER THE ENDANGERED SPECIES ACT FOR THE GRAY WOLF 7 (2008), available at http://www.defenders.org/resources/publications/programs_and_policy/wildlife_conservation/imperiled_species/wolf/petition_to_prepare_a_recovery_plan_for_the_gray_wolf.pdf.

44. Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 278, 347 (1993).

45. Peter Kareiva et al., *Nongovernmental Organizations*, in 1 THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE 176, 190 (Dale D. Goble et al. eds., 2006). Over \$100 million was spent on four salmon species, while four hundred species shared \$4 million the same year. *Id.*

than biological diversity needs.⁴⁶ For these reasons, the recovery planning process has not yielded widespread benefits for endangered species.

D. Section 7(a)(1)

Section 7(a)(1) is the only provision in the ESA that without qualification commands federal agencies other than FWS and NMFS to implement conservation programs. It instructs all agencies to consult with the Secretary and “carr[y] out programs for the conservation of endangered species and threatened species.”⁴⁷ This blanket requirement applies regardless of whether their activities jeopardize a species or whether they have taken a species. Yet the language of section 7(a)(1) is as vague as it is sweeping; the provision places an affirmative duty on *all* federal agencies, yet lacks any details about what the required programs should look like. Further, the judiciary has failed to develop a consistent approach to the section in the face of its ambiguity. Generally, courts have recognized the validity of agency conservation programs as fulfilling the section’s affirmative duty.⁴⁸ But despite the directive that agencies “shall” carry out conservation programs, the judiciary has been hesitant to impose broad substantive requirements under section 7(a)(1) when agencies fail to act.⁴⁹ Consequently, section 7(a)(1) has not realized its potential to force proactive conservation programming and thereby fill the gaps in the ESA’s otherwise reactive framework.

II. TRENDS IN JUDICIAL INTERPRETATION OF THE ESA

A. *A Promising Start: TVA v. Hill*

The Supreme Court interpreted the ESA for the first time in *TVA v. Hill*, the infamous “snail darter case.”⁵⁰ Deciding that the federally-funded Tellico Dam construction violated section 7(a)(2) by jeopardizing a small, endangered fish, the Court blocked a major project that was designed to bring electricity to twenty thousand people.⁵¹ Although the Court’s holding relied on section 7(a)(2)’s jeopardy provisions, its extensive treatment of the ESA’s legislative history is illuminating in an inquiry into the meaning of section 7(a)(1).

46. *Id.* at 178–180, 190.

47. Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536(a)(1) (2006).

48. *See* *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 68 n.12 (2003); *Allegheny Def. Project, Inc. v. United States Forest Service*, 2003 U.S. Dist. LEXIS 27151, 106.

49. *See, e.g.*, *Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm’n*, 962 F.2d 27 (D.C. Cir. 1992); *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. 1291, 1313 (W.D. Wash. 1994); *Nw. Envtl. Advocates v. EPA*, 268 F. Supp. 2d 1255, 1273 (D. Or. 2003).

50. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

51. *Id.* at 157, 192–93.

Much of the legislative history referenced in the decision is even more relevant to the provisions of 7(a)(1) than 7(a)(2). Perhaps most tellingly, the Court recounts a speech in which the House manager of the bill, Representative Dingell, explains that section 7 “‘substantially [amplifies] the obligation of [federal agencies] to take steps within their power to carry out the purposes of this act.’”⁵² Then, giving the threatened grizzly bear as an example, Dingell states that if the ESA is enacted, a department secretary

*will have to take action to see that this situation is not permitted to worsen, and that these bears are not driven to extinction. The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and every agency of government is committed to see that those purposes are carried out [The] agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.*⁵³

The Court also referred to the House Committee’s report, which stated, “‘This subsection [section 7] *requires* the Secretary and the heads of all other Federal departments and agencies to use their authorities in order to carry out programs for the protection of endangered species’”⁵⁴—a statement that is much more relevant to the text of section 7(a)(1) than 7(a)(2). As previously discussed, section 7(a)(1) demands that federal agencies carry out conservation programs, while section 7(a)(2) merely prohibits agencies from jeopardizing species. Although the ruling centered on section 7(a)(2), the Court seemed to take very deliberate steps to assure consistency with the entire Act.⁵⁵

Though *TVA v. Hill* did not force the Court to decide when the ESA mandates affirmative recovery programming to protect an endangered species like the grizzly, lower courts might have been influenced by the great weight given by the Court to the ESA’s legislative history. The tone of *TVA v. Hill* suggests that a strong statutory imperative should be read into section 7(a)(1). After all, a majority of the Court seemed to agree with the notion that the law commits every federal agency to take action to conserve the grizzly bear.⁵⁶ The logical extension of the idea that federal agencies must protect the grizzly, a

52. *Id.* at 183 (brackets added by the Court) (quoting 119 CONG. REC. 42913 (1973)).

53. *Id.* at 184 (brackets and emphasis added by the Court) (quoting 119 CONG. REC. 42913 (1973)).

54. *Id.* at 182–83 (emphasis added by the Court) (quoting H.R. REP. NO. 93-412, at 14 (1973)).

55. *See id.*

56. *See generally id.* At the same time, it is difficult for lower courts to flesh out a coherent ESA jurisprudence if attitudes toward the ESA shift on the Supreme Court itself. The Court seemed to signal such a shift in *National Association of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007). In that case, the Court limited the reach of section 7(a)(2), holding that it is reasonable to interpret the ESA’s jeopardy provisions to cover only discretionary agency action. *Id.* at 2534–35. Unlike in *TVA v. Hill*, the Court gave scant attention to the sweeping congressional ambitions that ushered the ESA into existence, focusing instead on a narrow textual interpretation. *Id.* The dissent, however, invoked *TVA v. Hill* and congressional intent in its protest of the new class of “exceptions” that were being written into the ESA. *Id.* at 2538–39 (Stevens, J., dissenting).

species that is not specifically named in the statute, is that section 7(a)(1) demands protections for every endangered species. Thus, the Court seemed to endorse an interpretation of section 7(a)(1) that is more coercive than what is demanded by the Act's plain language and leaves less discretion for the agencies.

B. Section 7(a)(1) Fails to Force Agency Action

Despite the promise of *TVA v. Hill*, most attempts to use section 7(a)(1) to compel protective agency actions have failed.⁵⁷ These cases have imposed various limitations on section 7(a)(1)'s mandate. They have also offered a clear alternative vision for the section's meaning: that it merely authorizes, rather than mandates, federal conservation programs to be undertaken at the agencies' discretion.

1. Section 7(a)(1) Is Not an Effective Catalyst for Conservation Programs

Courts have invoked several legal rationales when refusing to command the creation of conservation programs under section 7(a)(1). Consequently, as Professor Ruhl describes it, section 7(a)(1) has not been used historically as an effective "prod" to agency action, even though it may have other roles in furthering the purposes of the ESA.⁵⁸

First, courts generally defer to agencies when they decide not to issue rules.⁵⁹ For instance, in one case where plaintiffs sought to force the Navy to incorporate measures that would benefit an endangered fish into an irrigation project, the Ninth Circuit refused to issue an injunction.⁶⁰ Instead, the court

57. See, e.g., *Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992); *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1313 (W.D. Wash. 1994); *Nw. Envtl. Advocates v. EPA*, 268 F. Supp. 2d 1255, 1273 (D. Or. 2003).

58. J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Refining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1135-37 (1995).

59. See, e.g., *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410 (9th Cir. 1990); see also *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 918 (D.C. Cir. 2008); *Nw. Envtl. Advocates*, 268 F. Supp. 2d 1255; *Strahan v. Linnon*, 967 F. Supp. 581, 596 (D. Mass. 1997) (holding that the Coast Guard properly exercised its discretion to fulfill the "requirements" of section 7(a)(1) through a separate initiative). In the same section, the court called conservation plans under section 7(a)(1) "voluntary measures," citing the regulations governing the voluntary recommendations FWS and NMFS make during the 7(a)(2) consultation process, without providing any reasoning for why those regulations ought to apply to the section 7(a)(1) conservation programs. *Strahan*, 967 F. Supp. at 596 (citing *Interagency Cooperation—Endangered Species Act of 1973, as Amended*, 51 Fed. Reg. 19,926, 19,931, 19,934 (June 3, 1986) (to be codified at 50 C.F.R. pt. 402)). Despite the court's acknowledgement that section 7(a)(1) places requirements on agencies, the case has been cited for the proposition that plans under 7(a)(1) are "voluntary measures." *Hawksbill Sea Turtle v. FEMA*, 11 F. Supp. 2d 529, 542 (D.V.I. 1998).

60. See generally *Pyramid Lake*, 898 F.2d 1410.

held that even though the Navy had an affirmative duty to conserve under section 7(a)(1), the agency had discretion concerning how to fulfill that duty.⁶¹ The court reasoned that it should defer to agency decision making rather than force the agency to incorporate specific conservation programs into a particular project.⁶² However, this rationale is unconvincing. Agency interpretations of their duties under the ESA do not warrant much deference from the bench because, aside from FWS and NMFS, agencies are not specifically charged to implement the ESA and do not have unique expertise regarding its meaning.⁶³

Another rationale for limiting section 7(a)(1)'s action-forcing power is that the section does not confer additional statutory authority on agencies beyond that contained in their organic acts.⁶⁴ For instance, in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*, the D.C. Circuit denied review of a decision that had been issued on remand, respecting the district court's holding that the Federal Energy Regulatory Commission was not required to analyze the need for conservation measures in its annual licensing of two hydroelectric power plants in Nebraska.⁶⁵ According to the court in that case, section 7(a)(1) "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act."⁶⁶ This case has been cited several times to support the proposition that "[the] ESA does not empower an agency to do something . . . that it has no power to do under its enabling statute."⁶⁷

More recently, the Supreme Court ruled that duties under section 7(a)(2) are only triggered by discretionary actions,⁶⁸ suggesting that the ESA does not expand agency discretionary authority. Consequently, the rule that section 7(a)(1) does not expand agency authority will probably remain good law under the Court's current approach to the ESA.

To work within this rule, courts must determine the extent of an agency's statutory authority. As seen in *Platte River*, agency organic statutes often set unclear boundaries for agency authority and disputes over the scope of authority may only be resolved through the often-unpredictable process

61. *Id.* at 1418.

62. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

63. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 896 (2001).

64. *Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27, 34 (D.C. Cir. 1992).

65. *Id.* at 30, 34.

66. *Id.* at 34 (citation omitted).

67. *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1314 (W.D. Wash. 1994); see also *Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995); *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 299 (5th Cir. 1998).

68. *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2536 (2007).

of judicial statutory interpretation. In that case, environmental petitioners argued that the Federal Power Act granted the Federal Energy Regulatory Commission (FERC) authority to modify a power plant's license to impose conditions to protect wildlife.⁶⁹ The plaintiff argued that FERC must consider environmental interests, citing the Federal Power Act's provision governing "[g]eneral powers of the Commission," and that all licenses must be part of a comprehensive plan that adequately protects wildlife, citing the provision on "[c]onditions of license generally."⁷⁰ The court disagreed, holding that, according to another provision, hydropower licenses can only be modified "upon mutual agreement between the licensee and the Commission."⁷¹

Platte River epitomizes the role of the court in setting the boundaries of agency authority when an agency's organic statute is complex and ambiguous. Statutory interpretation is often contentious,⁷² and when statutes are unclear, interested parties may face unpredictable outcomes. Defining agency authority to carry out conservation programs will be a persistent problem because courts must interpret complex statutes whose drafters probably paid little attention to the precise scope of authority for environmental initiatives.

A final barrier to courts requiring conservation programs under section 7(a)(1) is the argument that agencies have met their section 7(a)(1) duties through other, unrelated conservation programs. In one case, the Oregon District Court held that the EPA fulfilled its duties under section 7(a)(1) by participating in a different conservation program than the one demanded by the plaintiffs, even though the agency's program did not protect the species that was at issue in the suit.⁷³ Similarly, the Minnesota District Court accepted that the EPA and the Department of the Interior had complied with section 7(a)(1), reasoning that the court should "not substitute its judgment for the agency's in deciding as a general matter that the totality of defendant's actions taken to protect threatened and endangered species were insufficient."⁷⁴ Plaintiffs challenged a decision to permit the use of a certain pesticide because of its effect on several species, and included a claim that the defendant agencies must carry out programs under section 7(a)(1).⁷⁵ The court was satisfied by the agencies' current efforts, including its meager consideration of biodiversity in the contested opinion and its other programs to increase the population of one of the species the plaintiff was concerned about, the black-footed ferret. The decision emphasized the agencies' "broad" discretion under section 7(a)(1) and

69. *Platte River*, 962 F.2d at 32.

70. *Id.*

71. *Id.* (citing 16 U.S.C. § 799).

72. *Accord* WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 689 (4th ed. 2007).

73. *Nw. Env'tl. Advocates v. EPA*, 268 F. Supp. 2d 1255, 1273 (D. Or. 2003).

74. *Defenders of Wildlife v. Adm'r, EPA*, 688 F. Supp. 1334, 1352 (D. Minn. 1988), *aff'd in part, rev'd in part on other grounds*, 882 F.2d 1294 (8th Cir. 1989).

75. *Id.*

did not inquire into the effectiveness of these initiatives.⁷⁶ Perhaps even more troubling, the court did not require that the agency conservation efforts be carried out in consultation with FWS, as commanded by statute.⁷⁷

The vague mandate of section 7(a)(1) may give agencies the discretion to take aggressive steps toward species recovery, yet the ambiguous language also hinders court oversight. As a result, courts often interpret section 7(a)(1)'s lack of explicit instruction as failing to provide adequate authority to force agency action and defer to the agency's own interpretation of the statute. These court decisions defined the section 7(a)(1) duties such that they are easily satisfied by actions that the agency is already taking. If these precedents are followed, it would be impossible for plaintiffs to demand that programs pursuant to section 7(a)(1) be effective and comprehensive enough to protect all species affected by an agency's activities.

2. Section 7(a)(1) "Authorizes" Federal Agencies to Protect Species

Though section 7(a)(1) has rarely been used to "prod" agencies into action, it has been an effective "shield" for agency conservation programs.⁷⁸ For instance, the Tenth Circuit found that 7(a)(1) "authorizes" an agency to trap wolves and transplant them to Yellowstone and Idaho and to continue the protective measures until they are no longer necessary.⁷⁹ In holding that the mandate of section 7(a)(1) supports conservation measures the agency has elected to undertake, however, courts generally do not discuss what the section's affirmative duty is.⁸⁰

By providing legal protection to an agency's existing conservation programs, section 7(a)(1) has helped allow the conservation of endangered species. Yet, the rulings in favor of "authorized" programs do not offer any useful precedents for plaintiffs who seek more aggressive conservation strategies. Indeed the term "authorize" denotes that the statute merely gives permission to agencies to carry out such programs, rather than imposing a mandate that they do so.

76. *Id.*

77. *Id.*

78. Ruhl, *supra* note 58, at 1129–30.

79. Wyoming Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224, 1231 (10th Cir. 2000).

80. *See, e.g.*, Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 262 n.5 (9th Cir. 1984) ("because the Secretary actively seeks to use the project for conservation purposes, we need not consider the extent of his affirmative obligations under ESA").

C. *Section 7(a)(1) as a Procedural Mandate*

1. *Early Adoption of a Procedural Approach*

Although there have not been enough cases interpreting section 7(a)(1) in the years immediately after the ESA's passage to document a consensus regarding its proper interpretation, at least one early case held that section 7(a)(1) imposed certain judicially reviewable procedural requirements on agencies. In *National Wildlife Federation v. Hodel*, a district court relied on the Administrative Procedure Act's "arbitrary and capricious" standard to review a section 7(a)(1) suit against FWS.⁸¹ Under this standard, the court would only uphold agency decisions if the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made."⁸² Relying on established administrative law principles, the court asserted its authority to review section 7(a)(1) suits and demand agency compliance.⁸³ While this type of review grants agencies a great deal of discretion over the substance of their decisions, one of its great assets is that it forces agencies to *do something*. By demanding that agencies document a coherent decision-making process in their attempts to comply with section 7(a)(1), the *Hodel* court may have found an effective means to ensure that agencies carry out programs that affirmatively seek to boost species populations.

2. *Sierra Club v. Glickman: Rediscovering the Procedural Element of Section 7(a)(1)*

After a long period in which courts across the country tended to interpret section 7(a)(1) narrowly, the Fifth Circuit ruled in *Sierra Club v. Glickman* that agencies face a meaningful duty under section 7(a)(1) to conserve species and that the process of meeting this duty was judicially reviewable.⁸⁴ In that case, the court upheld an injunction that required the U.S. Department of Agriculture (USDA) to consult with FWS and develop "an organized program utilizing USDA's authorities for the conservation of" species dependent on an aquifer that the USDA proposed to alter.⁸⁵ Despite the USDA's claims that there was no opportunity for judicial review because there was "no law to apply," the

81. *Nat'l Wildlife Fed'n v. Hodel*, 23 *Env't Rep. Cas.* (BNA) 1089, 9–10 (E.D. Cal. 1985).

82. *Id.* at 10 (citing *Baltimore Gas & Electric Co. v. National Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983)).

83. *Id.*

84. *Sierra Club v. Glickman*, 156 F.3d 606, 617 (5th Cir. 1998).

85. *Id.* at 612.

court held that there was law to apply, and the statutory directive was unambiguous.⁸⁶

The Fifth Circuit was greatly influenced by *TVA v. Hill*'s discussion of legislative history. Its reading of that case led it to perhaps the most demanding judicial interpretation to date of section 7(a)(1)—that it requires a program for each endangered species.

Surely if each federal agency is required to take whatever action necessary to conserve the grizzly bear, then each federal agency must also be required to take whatever actions are necessary to ensure the survival of each endangered and threatened species. If Congress was solely concerned with the conservation of the grizzly bear, it could have written a statute much more narrow in scope.⁸⁷

This mandate may seem onerous, but the court did not specify what the agency's conservation program should look like.⁸⁸

Instead, the court opted for a procedural rule to force compliance with section 7(a)(1). The court recognized the agency's discretion in formulating its conservation programs pursuant to section 7(a)(1), but demanded that such programs be reviewable by requiring the agency to develop a record showing that it considered relevant factors.⁸⁹ This rule is similar to the basic administrative law principle relied on in *National Wildlife Federation v. Hodel*.⁹⁰ Both cases demand that agencies base their decisions on relevant factors as they carry out their section 7(a)(1) duties, creating a role for courts to oversee agencies' actions under that section.⁹¹ Judicial review of procedural aspects of agency decision making opened the possibility of meaningful enforcement of section 7(a)(1). Into this legal landscape, *Florida Key Deer v. Paulison* introduced a new standard for measuring compliance with section 7(a)(1).

III. FLORIDA KEY DEER

The 2008 decision in *Florida Key Deer v. Paulison*⁹² is the latest in a series of suits about the Federal Emergency Management Agency's (FEMA's) obligations to protect species in the course of operating the National Flood Insurance Program (NFIP). The litigation began in 1990, and resulted in an injunction in 1994 that required FEMA to consult with FWS in order to fulfill its section 7(a)(1) obligations.⁹³ Most recently, the Eleventh Circuit decided

86. *Id.* at 617.

87. *Id.* at 616.

88. *See id.*

89. *Id.* at 618.

90. *Nat'l Wildlife Fed'n v. Hodel*, 23 *Env't Rep. Cas.* (BNA) 1089, 10–11 (E.D. Cal. 1985).

91. *Id.*; *see also Sierra Club v. Glickman*, 156 F.3d 606 at 618.

92. *Fla. Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008).

93. *Id.* at 1139.

that the statute's affirmative duty cannot be met by a conservation program with "insignificant effect."⁹⁴

A. *Procedural History and Lower Court Decisions*

This series of litigation was prompted by FEMA's operation of the NFIP in Monroe County, Florida.⁹⁵ The environmental organization plaintiffs claimed that by providing affordable flood insurance in Monroe County, FEMA's actions encouraged development and potentially jeopardized the existence of the Florida Key deer and seven other endangered species.⁹⁶ Plaintiffs also complained that FEMA had failed to comply with section 7(a)(1) because it had not carried out any conservation programs.⁹⁷ The district court agreed, ordering FEMA to consult with FWS as the remedy for both failing to consult pursuant to section 7(a)(2) and for failing "to consider or undertake *any* action to fulfill its mandatory obligations under Section 7(a)(1)."⁹⁸

Attempting to comply with the injunction, FEMA consulted with FWS.⁹⁹ The resulting biological opinion sheds light on the plight of the Key deer and the other species that were threatened by the NFIP. According to FWS, loss of habitat has decreased the population of the Key deer population and "[t]he main threat to the continued existence if the Key deer is the alteration of habitat caused by residential and commercial construction activities."¹⁰⁰ Likewise, the prospect of habitat loss threatened the populations of the Key-Largo cotton mouse, Key Largo woodrat, the lower Keys marsh rabbit, the Schaus swallowtail butterfly, and the Silver rice rat.¹⁰¹ By providing low-cost flood insurance within the suitable habitats of these listed species, and thus facilitating additional development in their scarce habitat, the NFIP risked jeopardizing their continued existence.

Ultimately, FWS recommended a set of reasonable and prudent alternatives (RPAs) to the administration of the NFIP.¹⁰² FEMA adopted all of the RPAs in 1997, expecting to achieve full compliance with the ESA.¹⁰³ One set of RPAs addressed the jeopardy issues presented by section 7(a)(2), s related to the endangered species populations of Monroe County.¹⁰⁴ For example, the RPAs required FWS review of new developments within the

94. *Id.* at 1147.

95. Statutory authority for the program comes from the National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001–4129 (2006).

96. *Paulison*, 522 F.3d at 1139.

97. *Id.* at 1147.

98. *Fla. Key Deer v. Stickney*, 864 F. Supp. 1222, 1238 (S.D. Fla. 1994).

99. *Fla. Key Deer v. Brown*, 364 F. Supp. 2d 1345, 1348 (S.D. Fla. 2005).

100. *Brown*, 386 F. Supp. 2d at 1287 (quoting the biological opinion).

101. *Id.* at 1286.

102. *Paulison*, 522 F.3d at 1139.

103. *Id.* at 1139–40.

104. *Id.* at 1139–40.

suitable habitat of listed species there.¹⁰⁵ The RPAs also included “conservation recommendations” to comply with section 7(a)(1).¹⁰⁶ To that end, “FWS recommended that FEMA provide incentives in the form of reduced insurance premiums for completion of a comprehensive, county-wide habitat conservation plan.”¹⁰⁷ In response, FEMA altered its Community Rating System (CRS) in 1997 to give communities the option to receive preferential insurance rates by developing conservation plans.¹⁰⁸ Nonetheless, there is no evidence that any community participated in the voluntary program by the time the parties briefed the court for the 2008 *Florida Key Deer* decision. There is no reason to believe that any community developed a conservation plan or altered its behavior in response to the new incentives in the CRS.

In 1998, the wildlife organizations filed an amended complaint to challenge the adequacy of the RPAs and added FWS as a defendant.¹⁰⁹ In 2005, the district court granted the plaintiffs’ motion for summary judgment.¹¹⁰ The court held, first, that neither agency had satisfied its obligations under 7(a)(2) and, second, that FEMA had failed to carry out its duties under 7(a)(1) because Monroe County does not participate in the CRS program and the agency cannot fulfill its section 7(a)(1) obligations with a program that has “no effect.”¹¹¹ The agency had neglected a “specific, rather than a generalized duty to conserve species.”¹¹² Ultimately, the court placed an injunction on FEMA, stopping it from issuing insurance for any new development in listed species’ habitat in Monroe County.¹¹³

B. Appellate Decision

On appeal, the Eleventh Circuit agreed that the adoption of conservation incentives in the CRS did not satisfy FEMA’s duty to carry out conservation programs under the ESA, reasoning that a program with “insignificant effect” cannot satisfy section 7(a)(1).¹¹⁴ Since no localities had participated in the program, the CRS could not have had any effect.¹¹⁵ At the same time, the court

105. *Id.* at 1139.

106. *Id.* at 1140.

107. *Id.*

108. The main purpose of the CRS is to provide incentives for effective floodplain management and reduce risk from flood damage. FEMA, The National Flood Insurance Program, <http://www.fema.gov/about/programs/nfip/index.shtm> (last visited Mar. 6, 2009). Communities have participated in the CRS by pursuing flood-related activities, even if the conservation elements that were added incident to this litigation have been ignored. FEMA, Community Rating System, <http://www.fema.gov/business/nfip/crs.shtm> (last visited Mar. 6, 2009).

109. *Paulison*, 522 F.3d at 1140.

110. *Id.*

111. *Fla. Key Deer v. Brown*, 364 F. Supp. 2d 1345, 1361 (S.D. Fla. 2005).

112. *Id.*

113. *Brown*, 386 F. Supp. 2d at 1294.

114. *Paulison*, 522 F.3d at 1147 (citation omitted).

115. *Id.*

crafted a narrower holding than the district court by refusing to hold that there was a specific duty to conserve species under section 7(a)(1).¹¹⁶

The *Florida Key Deer* court framed the questions presented as “[w]hether section 7(a)(1) of the ESA requires agencies to develop species- and location-specific conservation programs” and “whether the modified community rating system program adopted by FEMA satisfies its obligations under section 7(a)(1).”¹¹⁷ The court based its approach to the section 7(a)(1) question on its survey of the different approaches taken in its sister circuits, focusing on the Fifth Circuit’s imposition of “a specific obligation upon all federal agencies to carry out programs to conserve each endangered and threatened species”¹¹⁸ and the Ninth and D.C. Circuits’ emphasis on a “general requirement, the specifics of which are subject to the discretionary authority of each federal agency.”¹¹⁹ The court described the difference in the two approaches as being a matter of how much discretion is given to the agency, and deliberately did not take a position on that question.¹²⁰ Instead, the court adopted the narrow rule that “while agencies might have discretion in selecting a particular program to conserve . . . they must in fact carry out a program to conserve, and not an ‘insignificant’ measure that does not, or is not reasonably likely to, conserve endangered or threatened species.”¹²¹ In presenting its holding, the court recognized a major circuit split in section 7(a)(1) jurisprudence and avoided aligning itself with either the Fifth or Ninth Circuit.¹²² Though the narrow holding leaves uncertainty about the law in the Eleventh Circuit, the court may have preferred uncertainty in a broad, controversial ruling.

The court’s formulation of this rule relied heavily on *Pyramid Lake*, in which the plaintiffs contended that section 7(a)(1) requires an agency to adopt the least harmful alternative to any program that may harm an endangered species and demanded that the Navy adopt a particular conservation program.¹²³ The Ninth Circuit rejected that argument, and in dicta explained that even if the plaintiff’s understanding of section 7(a)(1) were correct, it would be unable to favor the plaintiff’s version of the program because it would have an “insignificant effect” on the endangered cui-cui fish.¹²⁴

Although the idea for the “insignificant effect” standard emerged from the inconspicuous dicta of *Pyramid Lake*, it proved to be a useful tool for the Eleventh Circuit. By refusing to recognize a conservation program with no

116. *Id.* at 1146.

117. *Id.* at 1145–46.

118. *Id.* at 1146 (citing *Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir. 1998)).

119. *Id.*

120. *Id.*

121. *Id.* at 1147.

122. *Id.* at 1146–47.

123. *Id.*

124. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of the Navy*, 898 F.2d 1410, 1417–18 (9th Cir. 1990).

impact on conservation as satisfying an agency's section 7(a)(1) duties, the court established a formula meant to prevent agencies from developing sham programs that supposedly conserve species pursuant to section 7(a)(1). As stated by the court, "[t]o hold otherwise would turn the modest command of section 7(a)(1) into no command at all by allowing agencies to satisfy their obligations with what amounts to total inaction."¹²⁵ Accordingly, FEMA could not meet its section 7(a)(1) duties by instituting a conservation incentive program with "no effect whatsoever," even after nearly a decade of existence.¹²⁶

In order to judge whether the "insignificant effects" test will lead to more meaningful enforcement of the ESA's command to carry out conservation programs, it is necessary to examine how the *Florida Key Deer* precedent may be received by agencies and future courts. Ultimately, the judicial demand for programs that achieve more than "insignificant effects" may prove too vague to force agency action in any significant way. After all, there will probably be difficult line-drawing problems in any attempt to distinguish "significant" from "insignificant" effects. If courts take any change on the ground *at all* to be a sign of greater than insignificant effects—such as a single community enrolling in a revamped CRS incentive program—then the test can be satisfied with little benefit to endangered species. Also, because the "insignificant effects" test examines the impact of conservation programs and not their content or design, it cannot guide agencies on what programs under section 7(a)(1) should look like. Thus, many questions about the meaning of section 7(a)(1) remain. If the courts do not clarify section 7(a)(1), the political branches should take up that role.

In addition to its ruling regarding section 7(a)(1), the court issued several separate holdings on the section 7(a)(2) consultation process. First, the court decided that the NFIP was subject to consultations under section 7(a)(2).¹²⁷ Noting that the Supreme Court recently ruled that agencies were not obliged to consult with FWS before performing nondiscretionary actions, FEMA had argued that the NFIP should not be subject to the consultation process because the National Flood Insurance Act (NFIA) did not grant the agency discretion in issuing flood insurance.¹²⁸ The court, however, found that FEMA had sufficient discretion under the NFIA to protect endangered species.¹²⁹ Accordingly, the court required FEMA to consult with FWS to avoid jeopardy.¹³⁰ Also, the court held that FEMA is not required to independently

125. *Paulison*, 522 F.3d at 1147.

126. *Id.*

127. *Id.* at 1141.

128. *Id.* at 1141–44. FEMA's argument was based on *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2536 (2007).

129. *Paulison*, 522 F.3d at 1143–44.

130. *Id.* at 1145.

analyze FWS' proposed RPAs before implementing them.¹³¹ Though the court was generally comfortable with an agency's reliance on FWS' expert analysis, it also stated that if the proposed RPAs "are arbitrary and capricious, an agency's decision to adopt them is likewise arbitrary and capricious and may be challenged."¹³²

IV. OPPORTUNITIES FOR THE COURTS AND POLITICAL BRANCHES TO ENFORCE SECTION 7(A)(1) AND ACHIEVE SPECIES RECOVERY

A. *The Problem of Reactive Conservation Measures*

The ESA's general approach to protecting biological diversity is to prevent and mitigate harm to listed species. This reactive approach to species protection is problematic in two main respects. First, merely reacting to threats to species as they arise and attempting to minimize harm will not effectively allow population recovery. Second, sole reliance on reactive measures is not in accord with the congressional intent of the ESA. By determining the impact of these reactive measures, we can develop a sense of the need for proactive programs.

1. *Reactive Conservation Measures Are an Inadequate Way to Meet Recovery Goals.*

The disappointing history of species recovery under the ESA is a consequence of the fundamental inadequacy of a reactive strategy.¹³³ First, halting actions that harm species may stop populations from further deteriorating, but it does little to improve the status quo.¹³⁴ As previously discussed,¹³⁵ the take and jeopardy provisions of the ESA have successfully slowed the rate of extinction, so they make an important contribution to biological diversity protection. In the case of the Key deer, for instance, habitat loss has imperiled the species' existence; the ESA's take and jeopardy provisions can help reduce the dangers of further habitat loss by restricting private action that would destroy habitat and demanding that federal agencies choose reasonable and prudent alternatives to actions that would destroy habitat. Yet given the habitat loss that has already taken place, the Key deer

131. *Id.* at 1147–48.

132. *Id.* at 1145 (footnote omitted).

133. *See, e.g.,* Ruhl, *supra* note 58; Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 *ECOLOGY L.Q.* 1 (1996); Mark L Shaffer et al., *Proactive Habitat Conservation*, in 1 *THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE* 286 (Dale D. Goble et al. eds., 2006); John Charles Kunich, *Species & Habitat Conservation: The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 *ENVTL. L.* 501 (1994).

134. *See* Cheever, *supra* note 133, at 14–15.

135. *See supra* Part I.B.

cannot recover to sustainable levels if the only remedy is to simply fight to maintain the current amount of habitat.

Second, the effectiveness of the ESA approach is limited because agencies react to single, isolated threats to species, while species survival usually depends on several complex factors.¹³⁶ This system yields piecemeal measures that rarely lead to recovery. Because ESA enforcement is normally only triggered by take or jeopardy, the ESA mechanism is driven by the happenstance of what potentially dangerous projects are planned by the federal government and by private activities that harm protected species. The government is left in the position of the little Dutch boy who tries to save the dam by scrambling to plug holes as they appear; without a broad, strategic plan for increasing species populations, the ESA can only counter threats to biological diversity as they arise—and they arise continuously, with no guarantee that monitoring and enforcement mechanisms can mitigate harms. The ESA does not provide an opportunity for conservation biologists to independently evaluate and implement the measures that would most effectively and economically increase species populations.

Third, this piecemeal approach does not facilitate coordination between the various agencies that are forced to adopt protective measures to avoid jeopardy. Many of the greatest threats to endangered species cannot be solved without coordination among a number of agencies, none of whom may be solely responsible for the threat, and perhaps none of whom could shoulder the burden of protection in its own. By combining the different capacities of various agencies to work toward a single goal, more complex problems can be tackled. A good example of this kind of problem is global warming. The threat that climate change poses to endangered species is well documented, and so it would be fitting for the key federal statute protecting biodiversity to play an important role.¹³⁷ Although it would be appropriate for the ESA to address the unique dangers that this complex problem creates for imperiled species, it would be extraordinarily cumbersome to use jeopardy claims—the one mechanism that is currently available to force agency action—to direct the kind of coordinated agency action that is needed.

Fourth, the failure of the reactive approach to species protection is revealed by the history of biological diversity losses since the passage of the ESA. There are currently 1207 listed animal species and 747 plant species.¹³⁸

136. Cheever, *supra* note 133, at 12–13. Cheever argues that recovery planning is a more appropriate trigger for ESA enforcement. *Id.* at 59–60.

137. For a more thorough discussion of the relationship between the ESA and climate change, see J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. REV. 1 (2008) (describing the many ways that climate change affects species and arguing that the EPA should help species find “bridges” to new suitable habitat, but that resources should not be devoted to protecting species that cannot survive anticipated climate change).

138. These figures, which are periodically updated, include both endangered and threatened species. Fish & Wildlife Service, Endangered Species Program, Species Information,

Because of continued habitat loss—the biggest danger to biological diversity in the United States—current projections hold that over five thousand species “may eventually need to be listed.”¹³⁹ In the first thirty years of the ESA’s history, only thirteen species had recovered enough to be removed from the endangered species list.¹⁴⁰

2. Congress Intended Proactive Measures

Further, Congress intended the ESA to force agencies to actively promote biological diversity. The Supreme Court provided important insight into this aspect of the ESA in *TVA v. Hill*.¹⁴¹ As discussed above, the Act’s agency-enforcing power is supported most by the text of section 7(a)(1), although the Court formally relied on 7(a)(2).¹⁴² Though section 7(a)(1) plainly supports the notion that the ESA “requires the Secretary and the heads of other Federal departments and agencies to use their authorities in order to carry out programs for the protection of endangered species,” the Court clarified section 7(a)(1) by analyzing the ESA’s legislative history and offering its opinion on what statements are indicative of the general will that ushered the ESA into being.¹⁴³ In this process, Representative Dingell’s statement that agencies would be required to implement programs to save the grizzlies emerged as representative of congressional will.¹⁴⁴ Though subsequent courts are not bound to adopt this reasoning when respecting the precedent of *TVA v. Hill*, other courts ought to follow the Court’s example and give force to congressional intent.

The affirmative conservation programs demanded by section 7(a)(1) offer further advantages over the provisions of the ESA that are now actively enforced. Actions under 7(a)(1) may avoid the kinds of popular backlash ignited by some ESA enforcement because agencies may take economic effects into account when deciding how to carry out conservation programs.¹⁴⁵ Additionally, unlike section 10(a) conservation plans and consultations under section 7(a)(2), obligations under section 7(a)(1) apply independent of take and jeopardy findings.¹⁴⁶ This gives agencies much flexibility.¹⁴⁷

<http://www.fws.gov/endangered/wildlife.html#Species> (click “Animals” and “Plants” buttons) (last visited Mar. 06, 2009).

139. Shaffer et al., *supra* note 133, at 286 (citing L.L. Master et al., *Vanishing Assets: Conservation Status of U.S. Species*, in PRECIOUS HERITAGE: THE STATUS OF BIODIVERSITY IN THE UNITED STATES (B.A. Stein et al. eds., 2000)).

140. Scott et al., *supra* note 37, at 32.

141. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 182–84 (1978).

142. See *supra* Part II.A.

143. *Tenn. Valley Auth.*, 437 U.S. at 182–83 (emphasis added by the Court) (quoting H.R. REP. NO. 93-412, at 14 (1973)).

144. *Id.* at 183–84.

145. Ruhl, *supra* note 58, at 1122.

146. *Id.* at 1122–23.

B. *Giving Teeth to Section 7(a)(1)*

Section 7(a)(1) may fill major gaps in the ESA framework by authorizing conservation programs that proactively address ecological needs. Yet, there remains a looming question about the best way of realizing the promise of section 7(a)(1). The renewed judicial assertiveness in *Glickman* and *Florida Key Deer* suggests that judicial enforcement of the procedural requirements implicit in section 7(a)(1) may be the key to forcing agency compliance. This strategy, however, is inadequate for several reasons described below. Instead, leadership within the executive branch will be necessary to successfully carry out programs as commanded by section 7(a)(1). If the president, FWS, and NMFS have the political will to protect biological diversity, the statutory framework of section 7(a)(1) can guide a successful effort.

1. *Forcing Compliance with Section 7(a)(1) through Court-Enforced Procedural Requirements*

Following the examples of *National Wildlife Federation v. Hodel* (NWF), *Sierra Club v. Glickman*, and *Florida Key Deer*, courts may demand that agencies demonstrate compliance with section 7(a)(1) with certain procedural steps. That is, courts could require agencies to identify the factors considered in fulfilling their section 7(a)(1) duties and the rational relationship between the relevant factors and the chosen actions.¹⁴⁸ Or, courts may choose to order consultations with the FWS or NMFS.¹⁴⁹

At first glance, this strategy may seem quite appealing. These procedural requirements are supported by the statute,¹⁵⁰ so courts should not hesitate to impose them. Implicit in section 7(a)(1)'s command that federal agencies carry out conservation programs in consultation with FWS is the notion that agencies must consult with FWS. Indeed, courts generally interpret the term "shall" as unequivocally demanding agency action, so the hard questions should not be about whether action is required, but rather what kind of action must be taken.¹⁵¹ By imposing procedural rather than substantive requirements, courts can push agencies to act without fear that these procedural requirements infringe on traditional agency prerogatives. Thus, the Fifth Circuit's and the

147. This kind of flexibility should help agencies develop cost-effective recovery programs, target species that can benefit most from programs, and initiate programs before species populations become urgently low.

148. This is similar to the procedural requirements imposed in *National Wildlife Federation v. Hodel*, 23 Env't Rep. Cas. (BNA) 1089 (E.D. Cal. 1985) and *Sierra Club v. Glickman*, 156 F.3d 606, 618 (5th Cir. 1998).

149. See, e.g., *Sierra Club v. Glickman*, 156 F.3d at 612; Fla. Key Deer v. Stickney, 864 F. Supp. 1222 (S.D. Fla. 1994).

150. See Endangered Species Act § 2, 16 U.S.C. § 1536(a)(1) (2006).

151. See, e.g., *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984).

Eleventh Circuit's upholding procedural requirements for section 7(a)(1) compliance may prove to be the start of a trend in ESA jurisprudence, though only time will tell if other circuits follow their approach.¹⁵²

Of the two types of procedural requirements that courts have read into section 7(a)(1), the requirement that agencies consult with FWS and NMFS may be more effective in encouraging beneficial conservation programs. Because of their unique roles in the ESA framework, FWS and NMFS have valuable expertise regarding the needs of endangered and threatened species.¹⁵³ Additionally, if agencies consult with these expert agencies before deciding on a general plan for their conservation programs, FWS and NMFS will be able to coordinate the conservation efforts of the various agencies.

Further, if agencies begin to expect that courts will demand compliance with the procedural aspects of 7(a)(1), they may begin to seek consultation with FWS and NMFS on their own.¹⁵⁴ If consultation occurs on a large scale, it may prove easy for the Services to coordinate agency action and achieve optimal results. In that case, FWS or NMFS might face an incentive to promulgate regulations under section 7(a)(1), so that it can regularize its agency consultations and work more efficiently.¹⁵⁵

Despite these potential benefits, there are several reasons why judicial oversight alone is an unsatisfactory guarantee that agencies will carry out effective conservation programs. First, enforcement of judicial decisions will likely be complicated and rely on agency discretion throughout the implementation process. Second, judicial oversight without any substantive standards for conservation programs may not yield adequate results. Finally, many agencies that neglect to carry out conservation programs may never be brought to court in the first place, because environmental plaintiffs may decide to focus their scarce resources on cases where jeopardy is at issue.

One major difficulty with judicial oversight is that it will be hard to prevent agencies from dragging their feet in carrying out programs to the courts' satisfaction. Whereas courts can issue injunctions against projects that violate section 7(a)(2), agencies do not face a similarly strong incentive to carry out adequate conservation programs under section 7(a)(1); noncompliance with

152. Wary of claims of judicial activism, the other circuits may be more comfortable adopting requirements that the Fifth and Eleventh Circuits have already imposed.

153. See *supra* Part I.B.

154. When NEPA was first passed, many agencies ignored the Act's procedural mandate. After litigation forced some high profile agencies, like the Army Corps of Engineers, to comply with NEPA, counsel within other agencies, like the National Science Foundation, took note and suggested that steps be taken to ensure compliance. Allan F. Wichelman, *Administrative Agency Implementation of the National Environmental Policy Act of 1969: A Conceptual Framework for Explaining Differential Response*, 16 NAT. RESOURCES J. 263, 274-75 (1976).

155. Although the ESA assigns identical duties to FWS and NMFS for terrestrial and marine species, respectively, I focus on FWS throughout the rest of this Note because it is responsible for the majority of listed species.

section 7(a)(1) would not put an agency's normal activities at risk because those activities are not contingent upon carrying out conservation programs.

A second problem with relying entirely on the procedural elements of section 7(a)(1) to force conservation programming is that the goals of ESA are less likely to be met if section 7(a)(1) is never given any coherent, substantive content. *Glickman* suggests that there must be some recognition of substantive requirements from section 7(a)(1), noting that Congress must have intended for each endangered species to benefit from conservation programming.¹⁵⁶ Assuming that the section has some substantive requirement, or that it should, then it follows that some judicial review of section 7(a)(1)'s substantive requirements is probably appropriate. Yet at this point, there does not appear to be any judicial review mechanism that courts could use to guarantee that species do not fall through the cracks of conservation programming.¹⁵⁷ Though the ambiguity of section 7(a)(1) gives agencies the flexibility to innovate and tailor programs to their expertise, it frustrates substantial judicial review.

At the same time, *Florida Key Deer* shows ways in which limited substantive review is both possible and useful. *Florida Key Deer*'s rule that a conservation program cannot satisfy an agency's section 7(a)(1) duties if it has an "insignificant effect" might be considered a substantive requirement, forcing courts to inquire into what a program accomplishes.¹⁵⁸ This standard indicates whether an agency has finally achieved compliance and complements the role of the previously discussed procedural requirements. Courts can use the procedural requirements to monitor an agency's progress as it heads down the track to compliance, but an examination of the conservation program itself is necessary to decide when the duty has been fulfilled. This rule is entirely a judicial invention, but is nonetheless useful for giving force to congressional intent by precluding agencies from claiming compliance with sham programs. FEMA's CRS—a program that existed on paper, but did not do a thing to benefit the Key deer—did not further congressional intent and should not have been allowed to satisfy section 7(a)(1), even though FEMA followed proper procedure by developing a "conservation program" in consultation with FWS.¹⁵⁹ Thus, another way of framing the role of the "insignificant effect" standard is that it answers the following question: What counts as a "program[]" for the conservation of endangered species" under section 7(a)(1)?

Finally, the parties in *NWF v. Hodel*, *Glickman*, and *Florida Key Deer* all came to court because federal actions allegedly jeopardized endangered species. It is unclear whether plaintiffs would ever initiate a suit to enforce

156. *Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir. 1998).

157. Since the ESA does not stipulate which agencies are responsible for conserving which species, there is simply nobody to sue when potential plaintiffs are concerned that a particular species is being neglected.

158. *See Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1147 (11th Cir. 2008).

159. *See id.* at 1145–47.

section 7(a)(1) in the absence of any issues relating to section 7(a)(2). Indeed, there will probably rarely be sufficient incentive to file a citizen suit to enforce section 7(a)(1) alone because plaintiffs will probably never be able to demand that an agency carry out a specific conservation program. Litigation is an expensive, time-consuming endeavor, which environmental plaintiffs are probably unlikely to pursue if the only possible remedy is force an agency to *do something* that passes the “insignificant effects” test. This standard could be met by projects of infinite variety, and so plaintiffs cannot be certain the agency will develop a project that, in the plaintiffs’ view, is ambitious enough or targets the species or regions of greatest concern.

For all these reasons, a strategy that focuses on litigation may lead to sporadic and inconsistent enforcement. Even if the courts do demand some form of compliance with section 7(a)(1), immediate executive action would help make the resultant conservation programs more effective.

2. *Congressional Oversight—An Unreliable Tool*

Unlike executive oversight, congressional oversight is not a good tool for encouraging general compliance with section 7(a)(1). In the overall scheme of our government, Congress’s role is to pass laws, but since it cannot implement laws itself, Congress often assigns agencies the task of executing the laws.¹⁶⁰ Accordingly, Congress’s main role in endangered species protection is writing and reforming the ESA. By writing an extremely vague command into section 7(a)(1), Congress has given agencies a great deal of discretion in how to comply with the statute; Congress cannot later demand specific actions that were not originally required by statute.

Although Congress has a few options for using its authority to demand species protection under section 7(a)(1), none are promising. Congress may amend the ESA and refine the requirements of section 7(a)(1) to include concrete, substantive goals. Unfortunately, this is not a very realistic option because of the many political and procedural barriers to passing legislation.¹⁶¹

More informal oversight options are also unlikely to be pursued because responsibility for agency oversight generally falls upon congressional subcommittees, whose goals align with the primary missions of the agencies they oversee. This may be an effective system for ensuring that the agencies accomplish their primary missions, but can neglect unrelated goals like environmental protection. For instance, the subcommittee responsible for

160. ESKRIDGE ET AL., *supra* note 72, at 1117.

161. In order to enact an amendment to a statute, a bill must be drafted and introduced in one house of Congress, survive a committee mark up, be calendared for floor debate, and pass. *See* ESKRIDGE ET AL., *supra* note 72, at 25. Then, the bill is introduced in the other house, where it must also survive committee and pass a floor vote. *Id.* The bill must be sent to a conference committee unless the two houses pass an identical version of the bill, and then be signed into law by the president. *Id.* Over 90 percent of the bills that are introduced in Congress fail to become laws. *Id.* at 5.

overseeing FEMA probably prioritizes emergency preparedness over developing an effective CRS. Since resources for oversight are limited, these priorities determine which issues will receive the subcommittee's time and effort, and which issues will be ignored. Given the inadequacy of Congress' various options, Congress is generally a poor vehicle for demanding compliance with section 7(a)(1).

3. *Executive Orders Could Ensure Agencies Carry Out Conservation Programs*

The president should issue executive orders to accomplish the goals of section 7(a)(1), exercising his institutional control over the executive agencies to ensure effective conservation programming. The orders should first direct FWS and NMFS to develop general guidelines for how the section 7(a)(1) consultation will work and what kinds of conservation programs should be developed.¹⁶² Second, they should direct all other federal agencies to consult with FWS. Finally, FWS should review the various programs to make sure they are protecting biodiversity and not mere shams. This process within the executive branch must be backed by political will, which could make this proposal unrealistic in some administrations. But in the right political environment, section 7(a)(1) may create the statutory framework for important change.

Of course, the effectiveness of executive orders depends on their content. The first key component of the executive orders concerns timing. Agencies should be given a timeline for complying with section 7(a)(1) that sets out when consultation with FWS or NMFS must begin, when the conservation program planning must be completed, and when the program must be in place.

Second, even though conservation programs are designed in consultation with FWS, agency participation in program development must be channeled toward important goals. The various federal agencies should also evaluate how their programs affect endangered species, including an examination of impacts that fall short of take or jeopardy.¹⁶³ Harnessing that knowledge, agencies can

162. These agencies currently do not offer any general guidance to agencies on fulfilling section 7(a)(1) duties. Current FWS regulations state, "[t]he Service notes that it is beyond the scope of these regulations to address how other Federal agencies should implement and exercise their authority to carry out conservation programs for listed species under section 7(a)(1). However, the Service stands ready to assist any Federal agency in developing and carrying out conservation programs." Interagency Cooperation Final Rule, 51 Fed. Reg. 19,926, 19,929 (June 3, 1986) (to be codified at 50 C.F.R. pt. 402).

163. The necessary institutions for gathering this knowledge should already be in place, because NEPA requires agencies to study the environmental impacts of their major projects. *See* National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(A)–(C) (2006). Individual agencies are responsible for developing their own implementing procedures for NEPA. *Id.* FEMA has already concentrated relevant environmental information in the hands of a designated Environmental Officer for the sake of NEPA compliance. *See* 44 C.F.R. § 10.5(b) (2007).

be active participants in the consultation process and see that their conservation programs have a logical relationship to their primary activities.

Finally, agency participation can have important impacts on the agencies themselves. Another reason it is important for agencies to participate throughout the process of program development and implementation is that they can build capacity for species protection. The greater the exposure of agency staff to this process, the greater their capacity will be to run the programs effectively. Familiarity with the rationales behind a program's design will also help the agency staff adapt the programs to changed conditions.

Further, agency participation has the potential to make the imperative to conserve species more rooted in agency culture generally.¹⁶⁴ If agency staff form personal relationships with conservation professionals at FWS or NMFS and learn about the fragility of endangered species, they may be more receptive to complying with section 7(a)(1). Staff might develop a sense of ownership over their agency's programs and take pride in their success.

For instance, FEMA could realize that it promotes development in fragile ecosystems by subsidizing flood insurance and work toward creating an incentive program for sustainable development that can be incorporated into its normal activities. The CRS itself is in some ways a model for how a successful section 7(a)(1) program might look, even though the provisions of the CRS proved so unattractive as to render the program meaningless. Key aspects of the program were otherwise commendable: the program was easily administrable because it fit within the agency's activities; the agency administering the program was probably the body with the most expertise on the relationship between flood insurance and land development; and the CRS was available to localities with critical biodiversity needs. Upon review, FWS and FEMA should have discovered that the program was ineffective and revised it accordingly.

FWS and NMFS also have unique areas of expertise that must be utilized fully to most effectively achieve conservation planning. FWS and NMFS have the greatest knowledge of species populations and habitat needs,¹⁶⁵ so it would be appropriate to assign them the task of setting priorities for which species should benefit first from conservation programs under section 7(a)(1). As the consultants for all programs, they are also well-suited to develop mechanisms

164. One of NEPA's major goals was to alter agency culture by making all federal agencies more sensitive to environmental concerns. See Eric Biber, *Too Many Things To Do: How To Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 35-36. This goal may have been accomplished by forcing diversification of agency staff. *Id.* at 37-38. While there is some evidence that NEPA has changed the way agencies approach environmental problems, the notion remains controversial. See *id.* 38-40.

165. FWS has had the opportunity to develop its capacity to evaluate threats to biological diversity and monitor species populations through jeopardy consultations with various agencies; in one five-year period, FWS conducted more than 94,000 informal and 2,700 formal jeopardy consultations. See DOREMUS, *supra* note 23, at 307.

for coordinating the various programs and to learn from such efforts. Ideally, multiple agencies would contribute to large-scale programs. Large, coordinated efforts could spread key information through several participating agencies, take advantage of economies of scale, and avoid redundancy. Also, FWS and NMFS should make sure that each endangered species benefits from at least one conservation program, so that no species falls through the cracks and the congressional purpose of aiding each species is respected. With all this in mind, FWS and NMFS should promulgate rules under section 7(a)(1) to facilitate effective, coordinated conservation programming.

Given the complexity of the problems and the bureaucratic inertia that will likely frustrate conservation programs, coordination is likely to be quite challenging. The challenges to effective coordination are generally greatest in the critical early phases of any project. Hopefully, however, effective early coordination may also produce incentives for further agency cooperation. If well-coordinated programs yield efficient results, then allocating a set amount of resources to those projects could allow agencies to claim credit for the most progress. For instance, if FWS knows that a locality has committed to long-term participation in FEMA's CRS and will provide habitat for native endangered species, FWS could pressure agencies that control nearby land to reserve some contiguous tracts for uses that are compatible with species habitat. In that case, the agency set-aside and the CRS participation might protect a greater population together than they could independently. At the same time, the hardest aspect of this proposal is finding ways to make agencies respond to species protection incentives at all.

Through careful institutional design, it may be possible to make agencies more responsive to the species recovery imperative, especially if FWS can influence other agencies through what some commentators have called "interagency lobbying."¹⁶⁶ By positioning FWS as a "lobbyist" that shapes the policies of other agencies, the other agencies may eventually internalize the goals of conservation and species protection.¹⁶⁷ There are various ways that FWS might be given some leverage over its sister agencies, and thus act as an effective lobbyist. For instance, some actions associated with an agency's primary mission might be made contingent with FWS consultation. Or, agency planning boards may be forced to include representatives from FWS. If the

166. See, e.g., J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005).

167. See generally *id.* The statutorily directed consultation process was a clever means by which Congress could accomplish this. Although agencies often neglect secondary mandates for their primary mandate, "agencies can be prompted to take their secondary missions more seriously when Congress enhances interagency lobbying by increasing the power of other agencies, which derive relevant expertise and interests from their own statutory mandates, to lobby the implementing agency." *Id.* at 2221. By demanding inter-agency consultation, "Congress transforms an interstatute conflict that the agency can ignore into an intrastatute conflict that it cannot." *Id.*

primary agency goals and FWS's conservation goals are ever irreconcilable, the president is empowered to decide how to resolve conflicts.¹⁶⁸

Although the shallow history of conservation programming under section 7(a)(1) has not given us any model of successful inter-agency lobbying, there are lessons to be learned from programs that were attempted under the recovery planning process. In the 1980s, FWS attempted to implement a recovery program for the newly rediscovered black-footed ferret in cooperation with the Wyoming Game and Fish Department.¹⁶⁹ The state agency was given operation control over the program, "despite evidence that Wyoming had a weak commitment to the ESA."¹⁷⁰ Coordination between the two agencies devolved because of the complex institutional relationship between the state and federal agencies and the divergent interests of the two agencies. As a result, Wyoming Game and Fish structured its program primarily to gain control over information and decisions, rather than to save the ferrets, and this refusal to cooperate contributed to the overall failure of the program.¹⁷¹ This example illustrates the need for inter-agency lobbying; FWS should have the opportunity to counter the tendency of other agencies to focus exclusively on their own agendas.

Conservation programs carried out under section 7(a)(1) have the potential to avoid these pernicious inter-agency conflicts because the ESA's command to consult with FWS and NMFS can lead to a productive lobbying relationship. Through a continuous consultation process that entails contact with conservation-supportive personnel and the acquisition of knowledge about biodiversity, other federal agencies could learn to incorporate conservation into their missions. Finally, the consultation process provides an opportunity for judicial review. Courts that find procedural requirements to be the most appropriate way of enforcing section 7(a)(1) can look to the consultation process and still demand certain targets be met, as in *Sierra Club v. Glickman*'s requirement that the administrative record of the consultation process indicate that the agency based its decisions on relevant factors.¹⁷² This gives agencies an incentive to take the consultation process seriously.

My optimism that FWS can develop regulations to force compliance with an ambiguous environmental statute is grounded in other environmental laws' success in similar situations. Most notably, the National Environmental Policy Act (NEPA) incorporated environmental protection into the mandate of each federal agency by instructing agencies to conduct environmental impact

168. *Id.* at 2233.

169. Tim W. Clark & Richard L. Wallace, *Keys to Effective Conservation*, in 1 THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE 221, 223 (Dale D. Goble et al. eds., 2006).

170. *Id.*

171. *Id.* at 224.

172. 156 F.3d 606, 618 (5th Cir. 1998).

studies.¹⁷³ The law is designed to be self-implementing, directing agencies to develop their own methods for compliance and establishing the Council on Environmental Quality (CEQ) to assist the agencies in carrying out NEPA.¹⁷⁴ Congressional expectations, however, were not met and NEPA was initially ignored by most agencies. Under the command of an executive order, the CEQ issued detailed guidelines for how NEPA would be implemented. The resultant guidelines have played a key role in directing agency compliance with NEPA.¹⁷⁵ Guidelines issued by FWS can similarly push agencies toward compliance with section 7(a)(1), largely because FWS guidance is necessary to tell the agencies what compliance with section 7(a)(1) *means*.

One argument that may tend to limit the scope of this proposal is the notion that section 7(a)(1) does not confer any additional authority on federal agencies. But it should also be noted that the plain meaning of section 7(a)(1) does not set any limitation on agency authority. Rather, each federal agency is commanded to carry out conservation programs, and since all federal agencies presumably did not have the preexisting authority to proactively conserve endangered species, it seems that the section must expand agency authority to conserve species. Thus, courts should abandon the rule that section 7(a)(1) does not confer any additional authority. This rule was likely first developed by courts under the fear of limitless agency authority. But if the agencies are acting in accord with the guidance of executive orders and FWS rules, agency power will not spin out of control.

CONCLUSION

By prompting conservation programs that respond to ecological need, section 7(a)(1) may fill important gaps in the ESA framework. Until now, the ESA's role has been largely limited to punishing harm to endangered species and demanding that federal actions do not jeopardize species. This reactive approach has blunted threats to species, but has not provided an avenue by which endangered species can recover from their precarious positions. Although section 7(a)(1) has received little attention up to this point, it may be the key to addressing the failures of the ESA's generally reactive approach.

The plain language of section 7(a)(1) commands all federal agencies to "carr[y] out programs for the conservation of endangered species and threatened species."¹⁷⁶ The section's great ambiguity has rendered courts reluctant to demand that agencies carry out specific conservation programs. Yet, the clarity of the statute's command allows courts to easily recognize that

173. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(A)–(C) (2006).

174. Wichelman, *supra* note 154, at 263–264.

175. See DOREMUS, *supra* note 23, at 230 (citing Dinah Bear, *NEPA at 19: A Primer on an Old Law with Solutions to New Problems*, 19 ENVTL. L. REP. 10060, 10061–65 (1989)).

176. Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536(a)(1) (2006).

there is some “affirmative duty” stemming from section 7(a)(1). Taking the next logical step, some courts have demanded agencies demonstrate compliance with section 7(a)(1) by imposing procedural requirements.¹⁷⁷ Only one circuit places any major substantive requirements on an agency’s compliance with 7(a)(1).¹⁷⁸

Finding a way to give section 7(a)(1) more power will address the enormous ecological need for prospective conservation action. This may be done through widespread judicial imposition of procedural requirements. However, executive leadership will yield more effective conservation programming, especially if the President demands action from the federal agencies that have the capacity to protect biodiversity, while using the FWS to guide program implementation. If there is political will within the executive branch to take these steps, meaningful compliance with section 7(a)(1) is possible.

177. See e.g., Nat’l Wildlife Fed’n v. Hodel, 23 Env’t Rep. Cas. (BNA) 1089 (E.D. Cal. 1985); Florida Key Deer v. Paulison 522 F.3d 1133 (11th Cir. 2008).

178. See Sierra Club v. Glickman, 156 F.3d 606 (5th Cir. 1998).

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