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**SECTION 7(a)(1) OF THE "NEW" ENDANGERED  
SPECIES ACT: REDISCOVERING AND REDEFINING  
THE UNTAPPED POWER OF FEDERAL AGENCIES'  
DUTY TO CONSERVE SPECIES**

By  
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*In the landmark TVA v. Hill decision, the Supreme Court suggested that section 7(a)(1) of the Endangered Species Act, which imposes a duty on federal agencies to conserve endangered and threatened species, could be a powerful force in species conservation. As Professor Ruhl discusses, however, the history of the provision since that case has not been so illustrious, largely because other ESA programs have proven more expedient in coercing federal and nonfederal interests toward species conservation. Those programs have come under attack in the courts and Congress, and indications are that section 7(a)(1), because of its potential breadth and flexibility, may take its rightful place as a centerpiece of the nation's species protection law. Professor Ruhl argues that to accomplish that result, the provision must be construed to require that all federal agencies share the burdens of species recovery and implemented with greater sensitivity toward nonfederal interests.*

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## I. INTRODUCTION

On September 27, 1994, twelve federal agencies joined with the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) in a Memorandum of Understanding (MOU) to confirm the agencies' "common goal of conserving species listed as threatened or endangered under the [Endangered Species Act] by protecting and managing their populations and the ecosystems upon which those populations depend."<sup>1</sup> The import of that agreement should not be under-

<sup>1</sup> *Memorandum of Understanding Between Federal Agencies on Implementation of the Endangered Species Act Signed Sept. 28, 1994*, [July-Dec.] Daily Env't Rep. (BNA) No. 188, at E-1 (Sept. 30, 1994) [hereinafter *MOU*]. The signatory agencies, in addition to FWS and

estimated. Between them, the fourteen MOU signatories are responsible for the management of almost six hundred million surface acres, hundreds of reservoir areas, and thousands of miles of river and stream corridors.<sup>2</sup> They implement dozens of federal environmental laws, applicable to both public and private entities, on both federal and nonfederal lands.<sup>3</sup> Their administrative programs form no less than the core of federal environmental law and policy. This Article explores the legal and policy significance of the agencies' decision to confirm and channel their species conservation efforts together through the MOU and, more broadly, through the duty imposed on federal agencies by the Endangered Species Act (ESA)<sup>4</sup> to conserve endangered and threatened species. Because the ESA itself is the subject of intense legislative reform efforts in the current Congress,<sup>5</sup> this Article also explores the impact those reform initiatives would have on administrative efforts to awaken the latent power of section 7(a)(1) of the ESA—the sleeping giant of the ESA programs.

Through the MOU, the federal agencies have signaled a new era of environmental policy by finding a lost zone of species protection law—the duty under section 7(a)(1) of the ESA to conserve threatened and endangered species.<sup>6</sup> That section directs that all federal agencies “shall, in consultation with and with the assistance of [FWS and NMFS], utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened spe-

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NMFS, include the U.S. Forest Service, the U.S. Department of Defense, the U.S. Army Corps of Engineers, the Bureau of Land Management, the Bureau of Mines, the Bureau of Reclamation, the Minerals Management Service, the National Park Service, the U.S. Coast Guard, the Federal Aviation Administration, the Federal Highway Administration, and the Environmental Protection Agency.

<sup>2</sup> Several of the signatory agencies have substantial public land and water resource management responsibilities, including the Bureau of Land Management (270 million surface acres in 29 states), the Bureau of Reclamation (300 reservoirs and several thousand miles of river and stream corridors), the U.S. Department of Defense (25 million surface acres), the U.S. Forest Service (191 million acres in 43 states), and the National Park Service (80 million acres in 367 units of the National Park System). *Id.* at E-2 to E-4.

<sup>3</sup> For example, the Environmental Protection Agency administers laws regulating water pollution (Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993)), air pollution (Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993)), solid waste management (Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993)), and remediation of contaminated properties (Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993)); the U.S. Army Corps of Engineers administers the program for permitting discharges of fill material in wetlands (Clean Water Act, 33 U.S.C. § 1344 (1988)); and the U.S. Coast Guard administers coastal pollution response authorities (Oil Pollution Act, 33 U.S.C. §§ 2701-2761 (Supp. V 1993)).

<sup>4</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994). The ESA delegates implementation authority to the Secretaries of Interior (for terrestrial and most freshwater species) and Commerce (for marine species), *id.* § 1532(15), who in turn have delegated that authority to FWS and NMFS respectively, 50 C.F.R. § 402.01(b) (1994).

<sup>5</sup> For a discussion of the backlash against the ESA in recent years in Congress and elsewhere, see *infra* text accompanying notes 151-67.

<sup>6</sup> 16 U.S.C. § 1536(a)(1) (1994).

cies . . . .”<sup>7</sup> Its closest ESA sibling, section 2(c)(1), “declare[s] . . . the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the ESA].”<sup>8</sup> Conservation under the ESA means “to use and the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.”<sup>9</sup> Those simple-sounding words have left small footprints on law and policy since the ESA was first enacted in 1973.

As the sparse case law has hinted, but never fulfilled, section 7(a)(1)’s species conservation duty has the potential to eclipse all other ESA programs. Agencies and environmental advocacy groups have largely ignored the provision’s potential as a tool for species protection policy. Federal agencies have seldom invoked section 7(a)(1), using it only when it could serve as a convenient shield to defend other program actions under the pretext of species protection. Advocacy groups have used the provision occasionally, as a sword to counter government actions alleged to be adverse to species conservation. This history leaves wide open the question of the extent to which section 7(a)(1), as its words suggest, imposes any duties on agencies to act on behalf of species conservation independent of their other primary mission programs. In other words, the use of section 7(a)(1) as a prod to compel agencies to implement policies and programs that promote species conservation has been largely untested.

Compared to section 7(a)(1), the core programs are brimming with regulatory clout and have been used accordingly to concentrate species protection powers in FWS and NMFS. Those programs have inherent limitations that can lead to rigidity, inflexibility, and insensitivity to socioeconomic consequences. As a result, the core programs have suffered and continue to suffer a staggering backlash from proponents of the property rights agenda.<sup>10</sup> By contrast, section 7(a)(1) has survived unscathed since the ESA was enacted in 1973. It has few limitations and unlimited flexibility, thus presenting an opportunity to FWS and NMFS to promote species protection goals without transgressing the new antiregulatory ethic. The breadth and depth of section 7(a)(1)’s duty to conserve may offer flexibility to a federal government that wishes to shape policies of biodiversity conservation and ecosystem management<sup>11</sup> without transgressing the emerging ethics of property rights and wise use.

The MOU did not come out of nowhere, nor should it be mistaken as being merely symbolic. As noted, Congress, state legislatures, courts, and the media have battered the other ESA regulatory programs used by FWS and NMFS. At the same time, FWS and NMFS have outlined bold new agendas aimed at placing them in the front lines of what, for lack of a

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* § 1531(c)(1).

<sup>9</sup> *Id.* § 1532(3).

<sup>10</sup> See *infra* text accompanying notes 151-67.

<sup>11</sup> For a discussion of emerging federal ecosystem management policies, see *infra* text accompanying notes 168-77.

better term, is called federal "ecosystem management" policy. Both these trends no doubt have contributed to the agencies' turn to section 7(a)(1) as the vanguard of a new ESA policy. It is not clear from the MOU, however, how far FWS, NMFS, and the other MOU agencies intend to carry section 7(a)(1).

The MOU suggests at the least that a new emphasis on species conservation is emerging, one that could test section 7(a)(1)'s action-forcing limits. The only construction that fulfills Congress's original legislative vision and harmonizes section 7(a)(1) with the other ESA provisions is that section 7(a)(1) imposes on all federal agencies a duty to initiate programs, either within or independent of their primary missions, which will implement the so-called recovery plans that FWS and NMFS develop under section 4 of the ESA to rescue species from endangered and threatened status. Section 4(f) of the ESA mandates that FWS and NMFS "shall develop and implement plans . . . for the conservation and survival of endangered species and threatened species . . ." <sup>12</sup> While such plans have been developed for most endangered and threatened species, few have been implemented to any significant extent. <sup>13</sup> FWS and NMFS's duty to implement recovery plans and all other federal agencies' duty to conserve species can be made meaningful only by linking the duty to conserve a species to the recovery plans developed for that species. That construction of section 7(a)(1) is fully consistent with the MOU. Therefore, the MOU may allow FWS and NMFS to avoid the beating they have taken over their enforcement of ESA, while still enabling the agencies to participate in an effective ecosystem protection program. However, if it is used in the rigid, coercive manner in which other ESA authorities have been used, the MOU, like those other authorities, may blow up in the agencies' faces.

Indeed, the ESA universe changed dramatically with the 1994 elections. Whereas it was recently widely posited by ESA devotees, perhaps smugly, that "for the foreseeable future, the ESA is likely to remain in its current form with the possibility of only modest alterations," <sup>14</sup> a growing bipartisan movement in Congress has made the only viable reform candidates those that change the way the ESA works down to its core. Yet, emerging from that legislative overhaul are themes that lead directly to section 7(a)(1) as a keystone of the new ESA, largely because of its potential breadth, flexibility, and noncoercive approach. If the leading initiatives in Congress prevail, federal agencies, not state, local, and private interests, will be required to take the lead in conservation efforts and will be expected to engage in precisely the type of interagency efforts that the MOU represents. And because the relevant provisions of section 7(a)(1) are left largely untouched by even the most aggressive of reform proposals seen to date, the history of the provision explored in this Article will remain germane, and the framework for efforts such as the MOU will remain in-

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<sup>12</sup> 16 U.S.C. § 1533(f)(1) (1994).

<sup>13</sup> See *infra* notes 31-35 and accompanying text.

<sup>14</sup> Donald J. Barry, *Amending the Endangered Species Act, The Ransom of Red Chief, and Other Related Topics*, 21 *Envtl. L.* 587, 603 (1991).

tact for the foreseeable future. The MOU, more than anything else, may be a harbinger of what is yet to come under the new ESA, and for the role that the federal agencies' section 7(a)(1) species conservation duty will play in that new world.

The ESA is at a crossroads like none it has ever faced. FWS and NMFS policies have evolved to take account of the new property rights agenda of those who have the power to change the ESA.<sup>15</sup> All the foundation needed for a new ESA is there, simply in terms of altered administrative policy. Regardless of what happens as the current Congress debates ESA reauthorization, a new ESA is emerging through sheer administrative will.

The new ESA is more conscious of ecosystem-wide conservation strategies, rather than single-species preservation efforts. The new ESA is developing innovative partnerships with state and local governments rather than relying on federal coercion through regulation. The new ESA understands that species conservation must provide opportunities to private property owners, rather than private property only providing opportunities for species conservation. These qualities of the new ESA are emerging through administrative reform, spurred on by the threat of legislative overhaul, and they blend perfectly with the qualities of section 7(a)(1). Moreover, because section 7(a)(1) is the one provision of the ESA most likely to be left intact when the legislative reform crusade is over, its history and the scope of the species conservation duty it conveys will be important facets in the future of both the ESA and the broader realm of environmental protection policy.

This Article presents, in Part II, a comparison of section 7(a)(1) to the other "core" ESA programs, showing that section 7(a)(1) has by comparison tremendous breadth but little substance. Part III examines how section 7(a)(1) has been interpreted by the agencies and the courts. Part IV explores the forces at work that portend an enlarged role for section 7(a)(1) in the future of ESA law and policy. Part V examines the MOU in detail and offers three models for determining whether and how, based on section 7(a)(1)'s history in courts and agencies, the provision can fulfill its potential as a shield to defend species protection policies, as a sword to influence agency action outcomes, and as a prod for compelling agency action. Finally, Part VI explores the ESA legislative reform initiatives currently in play in Congress,<sup>16</sup> to determine whether they would prohibit, permit, or promote the implementation of section 7(a)(1) advocated in this Article.

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<sup>15</sup> For a discussion of agency policy changes that address the property rights agenda, see *infra* text accompanying notes 172-77.

<sup>16</sup> In the Senate, two similar comprehensive ESA reform bills had been introduced as of this writing. See S. 768, 104th Cong., 1st Sess. (1995); S. 1364, 104th Cong., 1st Sess. (1995). The House of Representatives has seen several competing reform measures introduced since the summer 1995 recess. See H.R. 2275, 104th Cong., 1st Sess. (1995); H.R. 2364, 104th Cong., 1st Sess. (1995); H.R. 2374, 104th Cong., 1st Sess. (1995); H.R. 2444, 104th Cong., 1st Sess. (1995). For a discussion of the bills and their potential impacts on section 7(a)(1), see *infra* text accompanying notes 207-54.

## II. LEGAL SETTING: THE CONSERVATION MEMBER OF THE ESA FAMILY

An unprecedented groundswell of opposition to the ESA has emerged in recent years. The focal point of that sentiment, however, is not the section 7(a)(1) duty to conserve species, largely because section 7(a)(1) has lain idle in the hands of FWS and NMFS while they pursued the ESA's species protection objectives through other regulatory mechanisms. Thus, unlike its siblings, opponents have not accused section 7(a)(1) of stopping federal projects, imposing open-ended funding burdens on state and local governments, or stepping on private land owners' rights. Understandably, therefore, it is not in the spotlight of ESA reform proposals. A brief primer on the complete ESA family of regulatory powers illustrates not only why section 7(a)(1) historically has been a forgotten stepsister to its more aggressive siblings but also the characteristics that have recently made section 7(a)(1) so attractive to its agency parents.

### *A. Meet the Kids: Listings, Critical Habitat, Recovery Plans, Takes, Jeopardy, and Habitat Conservation Plans*

For all the controversy that surrounds the ESA, it is elegantly simple in structure. The great bulk of ESA law and policy, and the debate that focuses on it, flows from six provisions: 1) the listing under section 4(a)(1) of species as threatened or endangered;<sup>17</sup> 2) the designation under section 4(a)(3) of critical habitat for such species;<sup>18</sup> 3) the development and implementation under section 4(f) of recovery plans for listed species;<sup>19</sup> 4) the prohibitions under section 9(a) of takes of listed species;<sup>20</sup> 5) the restriction under section 7(a)(2) of federal projects that will jeopardize the continued existence of listed species;<sup>21</sup> and 6) the authorization under section 10(a)(1) of nonfederal acts that otherwise would violate section 9(a).<sup>22</sup> These form the core of the ESA regulatory program as it exists today. Because numerous comprehensive summaries of those core programs exist, the provisions are summarized in this Article only to the extent necessary to place section 7(a)(1) in its ESA context.<sup>23</sup>

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<sup>17</sup> 16 U.S.C. § 1533(a)(1) (1994).

<sup>18</sup> *Id.* § 1533(a)(3).

<sup>19</sup> *Id.* § 1533(f).

<sup>20</sup> *Id.* § 1538(a).

<sup>21</sup> *Id.* § 1536(a)(2).

<sup>22</sup> *Id.* § 1539(a)(1).

<sup>23</sup> For comprehensive discussions of the core ESA programs, see Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993); James C. Kilbourne, *The Endangered Species Act Under a Microscope: A Closeup Look from a Litigator's Perspective*, 21 ENVTL. L. 499 (1991); RICHARD LITTELL, *ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION* (1992); DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* (1989).



### 1. Section 4 Programs

The section 4 programs—species listing, critical habitat designations, and recovery plans—are the starting points for most ESA issues. Very little happens under the ESA until a species is listed; most everything else that can happen under the ESA depends on the terms under which the species is listed, including any critical habitat designation and recovery plan developed for the species. Hence, although no regulatory consequences are prescribed directly within the section 4 programs, all ESA regulatory consequences flow from the decisions made pursuant to section 4 authorities.

#### a. Listings

Section 4(a)(1) requires FWS and NMFS to designate any species of plant or animal whose continued existence is “endangered” or “threatened.”<sup>24</sup> The agencies must weigh a variety of factors in evaluating a species’ status, including loss of habitat, predation, disease, and any other “natural or manmade factors affecting [the species]’ continued existence,”<sup>25</sup> and must base their decision “solely on the . . . best scientific and commercial data available.”<sup>26</sup> The names of species designated as endangered or threatened must be published in a list, thus the term “listing” of species.<sup>27</sup>

#### b. Critical Habitat

Section 4(a)(3) requires FWS and NMFS to designate the “critical habitat” of listed species “to the maximum extent prudent and determinable.”<sup>28</sup> To qualify as critical habitat, an area must be “essential to the conservation of the species and . . . require special management considerations . . .”<sup>29</sup> Moreover, designation of an area as critical habitat,

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<sup>24</sup> 16 U.S.C. § 1533(a)(1) (1994). As of August 31, 1995, FWS and NMFS had classified 435 animal species and 527 plant species found in the United States as endangered or threatened. ENDANGERED SPECIES BULL., Sept.-Oct. 1995, at 24 (statistics compiled by FWS). For an overview of the definitions and procedures used for listing species, see Houck, *supra* note 23, at 280-96; ROHLF, *supra* note 23, at 37-49; J.B. Ruhl, *Section 4 of the ESA—The Cornerstone of Species Protection Law*, NAT. RESOURCES & ENV'T, Summer 1993, at 26.

<sup>25</sup> 16 U.S.C. § 1533(a)(1)(E) (1994).

<sup>26</sup> *Id.* § 1533(b)(1)(A). This limitation reflects Congress’s desire that “economic considerations have no relevance to determinations regarding the status of species . . .” H.R. CONF. REP. No. 835, 97th Cong., 2d Sess. 20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2861.

<sup>27</sup> 16 U.S.C. § 1533(c)(1) (1994). FWS and NMFS have published complete lists of endangered and threatened species. See 50 C.F.R. §§ 17.11 (wildlife), 17.12 (plants) (1994).

<sup>28</sup> 16 U.S.C. § 1533(a)(3) (1994). For an overview of the critical habitat designation process, see Houck, *supra* note 23, at 296-315; ROHLF, *supra* note 23, at 49-58; Ruhl, *supra* note 24, at 26-29; James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311 (1990); Katherine Simmons Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811 (1990).

<sup>29</sup> 16 U.S.C. § 1532(5)(A)(i) (1994).

unless necessary to prevent extinction, must confer benefits to the species that outweigh the social and economic benefits of not including the area as critical habitat.<sup>30</sup>

### c. Recovery Plans

Section 4(f) requires that FWS and NMFS "develop and implement plans . . . for the conservation and survival of endangered species and threatened species . . ." <sup>31</sup> Known as recovery plans, these species conservation planning instruments must both describe site-specific management actions and set forth objective, measurable criteria for determining the species' progress toward recovery.<sup>32</sup> FWS and NMFS must give priority to those species most likely to benefit from recovery plans, particularly those species threatened by "construction or other development projects or other forms of economic activity."<sup>33</sup> Although most listed species are covered by recovery plans,<sup>34</sup> funding constraints prevent comprehensive implementation of all prescribed recovery steps.<sup>35</sup>

## 2. Takes Under Section 9(a)

The most powerful regulatory consequence to flow from species listing, and perhaps the most powerful regulatory provision in all of environmental law, is found in the section 9(a) prohibition of "take" of listed species.<sup>36</sup> Unlike section 4, however, section 9(a) species protections dis-aggregate according to whether a species is plant or animal and whether it

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<sup>30</sup> *Id.* § 1533(b)(2).

<sup>31</sup> *Id.* § 1533(f). For an overview of the recovery planning process, see Houck, *supra* note 23, at 344-51; ROHLF, *supra* note 23, at 87-92.

<sup>32</sup> 16 U.S.C. § 1533(f)(1)(B)(i), (iii) (1994).

<sup>33</sup> *Id.* § 1533(f)(1)(A).

<sup>34</sup> As of August 31, 1995, 521 of the 962 listed species found in the United States were covered by one or more recovery plans. ENDANGERED SPECIES BULL., Sept.-Oct. 1995, at 24 (statistics compiled by FWS).

<sup>35</sup> In 1990 FWS estimated it would cost over \$4.6 billion to recover all then-listed species. COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY 156 (1990) (annual report, citing U.S. DEP'T OF INTERIOR, OFFICE OF THE INSPECTOR GENERAL, REP. NO. 90-98, AUDIT REPORT: THE ENDANGERED SPECIES PROGRAM, U.S. FISH & WILDLIFE SERVICE 11 (1990)). Studies have estimated that it would cost almost \$1 billion simply to implement the specific line-item dollar estimates made in the 306 recovery plans approved by 1993, but FWS requested only about \$84 million for that purpose for fiscal year 1995. NATIONAL WILDERNESS INST., GOING BROKE?: COSTS OF THE ENDANGERED SPECIES ACT AS REVEALED IN ENDANGERED SPECIES RECOVERY PLANS 1 (1994). FWS has been criticized for spending the vast majority of its recovery planning and implementation budget on 10 popular "calendar species." *See, e.g.*, Robert J. Barro, *Federal Protection—Only Cute Critters Need Apply*, WALL ST. J., Aug. 4, 1994, at A10 (observing that from 1989 through 1991, FWS distributed \$171 million on recovery efforts for just 10 species).

<sup>36</sup> 16 U.S.C. § 1538(a) (1994). For an overview of the take prohibition as implemented, see Federico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109 (1991); Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419 (1994); Kilbourne, *supra* note 23, at 572-84; ROHLF, *supra* note 23, at 59-71.

is listed as endangered or threatened. Thus, section 9(a)(1), the epicenter of ESA regulation, applies only to "endangered species of fish or wildlife," making it "unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or territorial sea of the United States . . ." <sup>37</sup> Only if FWS or NMFS expressly extends all or some of that level of protection to a threatened species of fish or wildlife, as authorized by section 4(d), will the species receive section 9(a)(1) protections. <sup>38</sup>

Plants receive less protection under section 9(a) than do fish and wildlife species and are not in any circumstance protected from take in the broad sense used in the context of fish and wildlife species. Rather, section 9(a)(2)(B) provides that endangered plants in areas under federal jurisdiction are protected from removal, malicious damage, or destruction. <sup>39</sup> Endangered plants on areas outside federal jurisdiction are protected only if removing, damaging, or destroying them would constitute a "knowing violation of any law or regulation of any State or . . . violation of a State criminal trespass law . . ." <sup>40</sup> As with fish and wildlife species, these protections extend to threatened plant species only pursuant to section 4(d). <sup>41</sup>

The real potency of section 9(a), of course, depends on the scope of what constitutes prohibited take. "Take" is defined as including the obvious, such as to hunt, shoot, wound, kill, trap, and capture, as well as the ambiguous, such as to harass and, the key term, "harm." <sup>42</sup> Harm is not defined in the statute, but FWS and NMFS define it by regulation as "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." <sup>43</sup>

Court interpretations of this regulation have gone through three phases, each brought about by the efforts of environmental or industry advocacy groups testing the limits of harm and each producing a different statutory construction. Initially, several cases involving evidence of close correlations between habitat degradation and species population decline

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<sup>37</sup> 16 U.S.C. § 1538(a)(1) (1994).

<sup>38</sup> Section 4(d) provides that "[t]he Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species . . ." *Id.* § 1533(d). FWS and NMFS have extended the full level of endangered species protection to all threatened species as the default position in the absence of a specific rule curtailing that level of protection for a particular threatened species. 50 C.F.R. § 17.31(a) (1994). For an overview of the use of section 4(d) to protect threatened species, see ROHLF, *supra* note 23, at 73-77; Keith Saxe, *Regulated Taking of Threatened Species Under the Endangered Species Act*, 39 HASTINGS L.J. 399 (1988).

<sup>39</sup> 16 U.S.C. § 1538(a)(2)(B) (1994). For an overview of the protection of plants under the ESA, see George Cameron Coggins & Anne Fleishel Harris, *The Greening of American Law?: The Recent Evolution of Federal Law for Preserving Floral Diversity*, 27 NAT. RESOURCES J. 247 (1987); ROHLF, *supra* note 23, at 71-72.

<sup>40</sup> 16 U.S.C. § 1538(a)(2)(B) (1994).

<sup>41</sup> *Id.* § 1533(d).

<sup>42</sup> *Id.* § 1532(19).

<sup>43</sup> 50 C.F.R. § 17.3 (1994).

suggested that the harm definition could be used to characterize habitat losses as take without evidence of particular injured species individuals—so-called “dead body” or “feet up” evidence.<sup>44</sup> Later, however, attempts by environmental advocacy groups to extend the umbrella of harm to cover indirectly caused secondary injuries to a species were rejected as impermissibly speculative. In one such case, the court rejected the allegation that a person who builds a house may have a cat that may get out of the house one day and may cross a field and, once on the other side, may eat an endangered mouse known to reside there, so the simple act of building the house effects a take of the mouse.<sup>45</sup>

Those two phases of litigation focused on the question of what constitutes evidence of whether habitat modification “actually kills or injures” the species. The playing field shifted in the third phase of harm litigation to the question of whether habitat modification itself could ever constitute take as a matter of law. In *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*,<sup>46</sup> the D.C. Court of Appeals held the harm definition contrary to legislative intent and thus invalid because, based on the other component terms defining take and the overall ESA structure, Congress meant for take to encompass only those actions that involve “direct [physical] action . . . against any member of the species.”<sup>47</sup> Because the harm definition, as implemented by the agencies and interpreted by the earlier court decisions, would have allowed a finding of take without a finding of such physical contact and “feet up” evidence, the court of appeals accepted the argument that the rule was facially invalid.<sup>48</sup> The importance of that ruling to the scope of the take prohibition, and its apparent conflict with earlier cases applying the harm definition as if valid, led the Supreme Court to accept review of the decision.<sup>49</sup>

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<sup>44</sup> See, e.g., *Sierra Club v. Yeutter*, 926 F.2d 429, 440 (5th Cir. 1991) (finding U.S. Forest Service timber management practices that impaired “sheltering” of the red-cockaded woodpecker constituted harm); *Palila v. Hawaii Dep’t of Land & Natural Resources*, 852 F.2d 1106, 1110-11 (9th Cir. 1988) (finding that destruction of habitat of endangered Hawaiian bird caused by nonnative sheep and goats constituted harm).

<sup>45</sup> *Morril v. Lujan*, 802 F. Supp. 424, 430-31 (S.D. Ala. 1992) (rejecting plaintiff’s cat and endangered mouse argument); see also *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993) (“[C]ourts have granted injunctive relief [under the harm rule] only where petitioners have shown that the alleged activity has actually harmed the species or if continued will actually, as opposed to potentially, cause harm to the species.”); *Swan View Coalition v. Turner*, 824 F. Supp. 923, 939 (D. Mont. 1992) (rejecting environmental groups’ claim that impairment to essential behavioral patterns resulting from road density in national forest actually injured or killed endangered gray wolf).

<sup>46</sup> 17 F.3d 1463 (D.C. Cir. 1994), *rev’d*, 115 S. Ct. 2407 (1995). For descriptions of the administrative and judicial developments leading up to and culminating in the *Sweet Home* case, see Steven G. Davison, *Alteration of Wildlife Habitat as a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155 (1995); *Gidari*, *supra* note 36; Beth S. Ginsberg, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon: A Clarion Call for Property Rights Advocates*, 25 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,478 (1995).

<sup>47</sup> 30 F.3d at 193.

<sup>48</sup> *Id.*

<sup>49</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 714 (1995) (petition for cert. granted).

The Court resolved the issue in favor of the second wave of the harm rule case law—upholding the rule, but focusing on the “actually kills or injures” language as the key to keeping the scope of harm within the legislatively intended meaning of take.<sup>50</sup> Indeed, the Court went so far as to say that “every term in the regulation’s definition of ‘harm’ is subservient to the phrase ‘an act which actually kills or injures wildlife.’”<sup>51</sup> The Court observed that the rule “did not need to include ‘actually’ to connote ‘but for’ causation, which the other words of the definition obviously require,”<sup>52</sup> and emphasized that the harm rule thus should “be read to incorporate ordinary requirements of proximate causation and foreseeability.”<sup>53</sup>

Thus, the *Sweet Home* case is significant as one of only two instances in which the Supreme Court has considered the substantive meaning of the ESA.<sup>54</sup> As in any case involving statutory construction, however, ultimately only Congress can clarify what it meant by reference to harm in the definition of take. The ESA reauthorization efforts in the current session of Congress suggest that the harm definition may indeed arise as a topic of debate. But regardless of Congress’s treatment of the harm definition rule, many observers have overestimated the rule’s effect on the overall scope and impact of the ESA in two respects. First, the weight of case law prior to the court of appeals decision in *Sweet Home* leaned toward imposing a heavy burden of proof on anyone claiming that harm had occurred as a result of habitat modification. The Supreme Court’s ruling solidifies that case law by adopting the “but for” standard of proof. It was hard to prove harm based only on habitat degradation before *Sweet Home*, and it will still be hard after the Supreme Court’s resurrection of the agency’s rule. On the other hand, there are many situations in which a proposed activity would involve direct physical impact to a listed species and thus would fall within the bull’s eye of the take definition regardless of the meaning of harm. Moreover, and more to the point of the examination of section 7(a)(1), there are other ESA programs that could be used to fill a large part of the species protection gap that would be left behind by a legislatively eviscerated harm definition. Section 7(a)(1) is one such program.

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<sup>50</sup> 115 S. Ct. 2407, 2414 n.13 (1995).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 2412 n.9. Justice O’Connor, who concurred in the majority result, appears to have filed her separate opinion principally to point out that the majority’s adoption of a “but for” standard of causation means that the broad interpretation of the harm rule espoused in the *Palila* case, *see supra* note 44 and accompanying text, was inconsistent with the regulation’s own terms. *Id.* at 2421 (O’Connor, J., concurring).

<sup>54</sup> The other case in which the Supreme Court has considered the substantive effect of the ESA is *Tennessee Valley Authority (TVA) v. Hill*, 437 U.S. 153 (1978), where the Court held that the ESA required that a nearly completed hydroelectric power generating dam project be suspended because of its effects on an endangered fish species. *See infra* notes 83-94 and accompanying text.

### 3. Jeopardy Under Section 7(a)(2)

Section 7(a)(2)<sup>55</sup> is the closest ESA sibling of section 7(a)(1), and clearly the larger of the two in terms of impact and history. Section 7(a)(1) is the first, last, and only place in section 7 that mentions any federal agency species conservation duty. Section 7(a)(2), by contrast, initiates a complicated set of provisions flowing from the duty of federal agencies to consult with FWS and NMFS 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 habitat of such species which is determined . . . to be critical."<sup>56</sup> The remainder of section 7 is devoted to describing how that consultation duty is to be satisfied procedurally and substantively, with absolutely no attention to the section 7(a)(1) species conservation consultation duty.

On its face, the jeopardy prohibition in section 7(a)(2) is both broader and narrower than the take prohibition in section 9(a). Unlike section 9(a), section 7(a)(2) applies to all listed species without requiring further action by FWS or NMFS. Threatened species and plant species are not given second class status in terms of protection from jeopardy. Section 7(a)(2) is narrow, however, because it restricts the jeopardy prohibition to federal actions and focuses on species-wide threats of jeopardy and adverse modification of critical habitat.<sup>57</sup> The jeopardy and adverse modification requirements, moreover, are considerably narrower than the scope of the take prohibition. Many individuals of some species could be killed, and much of their habitat destroyed, before the entire species would be placed in jeopardy or the species' critical habitat areas would be irreparably damaged.

Despite this limitation, the reach of section 7(a)(2)'s jeopardy prohibition is quite powerful, because it also serves as the procedure under which all federal actions subject to consultation can receive approval to cause prohibited take of a species which would fall short of causing jeopardy or adverse modification. The consultation procedure involves several feedback loops between the agency proposing the action (the "action agency") and the reviewing agency (FWS or NMFS). The action agency, if it con-

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<sup>55</sup> 16 U.S.C. § 1536(a)(2) (1994).

<sup>56</sup> *Id.* FWS and NMFS have issued joint regulations implementing the jeopardy consultation procedure, 50 C.F.R. pt. 402 (1994), and FWS has circulated a draft guidance manual for agency participation in the process, U.S. FISH & WILDLIFE SERV., DRAFT ENDANGERED SPECIES CONSULTATION HANDBOOK (730 FW 4A): PROCEDURES FOR CONDUCTING SECTION 7 CONSULTATIONS AND CONFERENCES (Nov. 1994). For an overview of the jeopardy consultation procedure, see Houck, *supra* note 23, at 315-29; ROHLF, *supra* note 23, at 105-69; Kilbourne, *supra* note 23, at 530-64.

<sup>57</sup> The federal action restriction is not so narrow after all when, as the provision requires, all the projects requiring federal *approval* under other federal laws are swept within the consultation requirement. Between 1988 and 1993, for example, over 70,000 consultations were conducted under section 7(a)(2), with about 2000 of these reaching the stage of having FWS or NMFS consider whether the proposed action would cause jeopardy. See Houck, *supra* note 23, at 318-19.

cludes the proposed action might take a species in violation of section 9(a), must supply a biological assessment to the reviewing agency.<sup>58</sup> The reviewing agency then renders a biological opinion evaluating the action's impact.<sup>59</sup> If the biological opinion is that take will occur, but not jeopardy or adverse modification, then under section 7(b)(4) the reviewing agency may authorize the take of the species subject to mandatory terms and conditions.<sup>60</sup> Hence, the procedure section 7(a)(2) sets in motion, while leading to very few findings of jeopardy or adverse modification that would threaten the viability of the proposed action,<sup>61</sup> also provides FWS and NMFS with a strong presence in any federal action that involves potential take in violation of section 9(a). Considering that the section 7(a)(2) jeopardy prohibition covers the large universe of projects carried out by nonfederal entities, but which require some form of federal approval to proceed, the reach of section 7(a)(2) is very long indeed.

#### 4. *Incidental Takes and Habitat Conservation Plans Under Section 10(a)*

Recognizing that not all development and other activities that could adversely affect listed species necessarily will experience a federal nexus triggering section 7(a)(2) jeopardy consultation, Congress amended the ESA in 1982 to add a procedure for providing take authorization to actions not covered by the federal agency consultation duty.<sup>62</sup> Section 10(a)(1) now provides that "[FWS and NMFS] may permit, under such conditions as [they] shall prescribe . . . any taking otherwise prohibited by [section 9(a)(1)(B)] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."<sup>63</sup> The applicant for such a permit must submit a "conservation plan" that convinces the agency that the proposed action "will, to the maximum extent practicable, minimize and mitigate the impacts of such taking" and "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild."<sup>64</sup> The

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<sup>58</sup> 16 U.S.C. § 1536(c) (1994).

<sup>59</sup> *Id.* § 1536(b)(1).

<sup>60</sup> *Id.* § 1536(b)(4).

<sup>61</sup> Fewer than 200 findings of jeopardy were issued from 1988 through 1993. See Houck, *supra* note 23, at 318.

<sup>62</sup> Congress was addressing "the concerns of private landowners who are faced with having otherwise lawful actions not requiring Federal permits prevented by section 9 prohibitions against taking." H.R. CONF. REP. NO. 835, 97th Cong., 2d Sess. 29 (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2870.

<sup>63</sup> 16 U.S.C. § 1539(a)(1)(B) (1994). FWS has issued regulations regarding section 10(a)(1) permitting procedures, 50 C.F.R. §§ 17.22(b), 17.32(b) (1994), and a proposed guidance manual providing a template for conservation plans and agency review thereof, U.S. FISH & WILDLIFE SERV., U.S. DEPT. OF INTERIOR, PRELIMINARY DRAFT HANDBOOK FOR HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING (Sept. 15, 1994) [hereinafter DRAFT HCP HANDBOOK]. For an overview of the section 10(a) permitting process, see J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Practical and Legal Limits of Species Protection*, 44 Sw. L.J. 1393 (1991); Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605 (1991).

<sup>64</sup> 16 U.S.C. § 1539(a)(2)(A)-(B) (1994).

permitting agency may also impose "such other measures . . . necessary and appropriate for the purposes of the plan."<sup>65</sup>

By comparison to its federal action sibling in section 7(a)(2), section 10(a)(1) has had a limited experience. One reason is that the section 7(a)(2) jeopardy consultation procedure, because of the sweeping scope of what constitutes "federal action," covers most significant projects and thus obviates the need for a section 10(a) permit in most instances. Only twenty section 10(a)(1) incidental take permits were requested through 1991,<sup>66</sup> and only thirty-six section 10(a)(1) permits had been issued by September 1994,<sup>67</sup> suggesting that very few projects require an incidental take authorization without having a sufficient federal nexus to obtain such authorization under section 7(a)(2). The role of section 10(a) is growing, however, as FWS turns to the vehicle of "regional" conservation plans as a method of providing a blanket permit to many potential individual applicants who might live in areas where urbanization has bumped up against species protection values.<sup>68</sup> Such regional plans are often funded in part by the private sector and are designed to dovetail with section 4(f) species recovery plans, thus alleviating the public funding shortages confronted by recovery planning efforts. Still, very few of the regional plans are in place,<sup>69</sup> and their application as a species conservation tool outside urban areas appears limited. The conservation planning experience gained under the regional planning effort may nonetheless provide useful lessons for dealing with species conservation generally.

### B. Introducing Section 7(a)(1) and the Duty to Conserve

The core ESA programs discussed in the previous section create a bundle of powers for FWS and NMFS that are potent but inflexible. For example, FWS may not consider the economic impacts of listing an animal species as endangered even though the agency knows that once the take prohibition begins those economic effects may be severe.<sup>70</sup> Even if it were

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<sup>65</sup> *Id.* § 1539(a)(2)(A)(iv).

<sup>66</sup> See U.S. GEN. ACCOUNTING OFFICE, NO. GAO/RCED-92-131BR, ENDANGERED SPECIES ACT: TYPES AND NUMBERS OF IMPLEMENTING ACTIONS 19 (May 1992) [hereinafter IMPLEMENTING ACTIONS].

<sup>67</sup> See U.S. GEN. ACCOUNTING OFFICE, NO. GAO/RCED 95-16, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 18-20 (Dec. 1994) [hereinafter SPECIES PROTECTION ON NONFEDERAL LANDS]; William E. Lehman, *Reconciling Conflicts Through Habitat Conservation Planning*, ENDANGERED SPECIES BULL., Jan.-Feb. 1995, at 16, 18. FWS claims, however, that there are approximately 150 pending or proposed section 10(a)(1) habitat conservation plans in the works. Lehman, *supra*, at 18.

<sup>68</sup> For materials providing an overview of the regional planning experience, see *supra* note 63.

<sup>69</sup> Only a handful of truly regional habitat conservation plans are approved and in place. See SPECIES PROTECTION ON NONFEDERAL LANDS, *supra* note 67, at 18-20.

<sup>70</sup> "[FWS and NMFS] shall make determinations [of endangered species status] solely on the basis of the best scientific and commercial data available to [them] after conducting a review of the status of the species and after taking into account those efforts, if any, being made . . . to protect such species . . ." 16 U.S.C. § 1533(b)(1)(A) (1994) (emphasis added). Economic impact must be considered when FWS and NMFS designate "critical habitat" for the species, and the agencies may exclude areas from the critical habitat if they determine



to attempt to temper those effects after the listing through the exercise of enforcement discretion, it could not prevent the aggressive use of the ESA's citizen suit provision to test the outer limits of the powerful take prohibition at the local level.<sup>71</sup> The result is that FWS essentially loses control of its species protection agenda in many instances, but necessarily feels the backlash when the regulated community revolts.

By contrast, section 7(a)(1) is divorced from those and other problems inherent in the core ESA programs. It requires in straightforward terms that federal agencies "carry[ ] out programs for the conservation of endangered species and threatened species . . . ."<sup>72</sup> That simple mandate has kept section 7(a)(1) intact to date and outside of the currently raging legislative debate on the ESA. The implementing agencies may possibly cultivate, channel, and control the potentially broad application of that duty to conserve in ways not possible under the core programs, thereby expanding the effectiveness of section 7(a)(1) without attracting the same backlash the core programs have suffered. Several key features of section 7(a)(1) illustrate this dual virtue of breadth and flexibility.

*1. Unlike Jeopardy Consultations Under Section 7(a)(2), the Duty to Conserve Species Under Section 7(a)(1) Applies to Federal Programs and Not Merely to Federal Actions*

Although the jeopardy consultation provisions of section 7(a)(2) impose a weighty burden on federal agencies and their permit applicants, the restriction of the consultation duty to individual agency actions limits the ability of federal agencies to distribute the burdens program-wide. When the brunt of species protection must be borne by projects considered case by case, difficult questions can arise: How should species protection conditions be distributed over time among the projects an agency approves, funds, or carries out? To what extent must economic and other distinctions between projects be factored into the analysis? How should FWS or NMFS coordinate a general species protection policy through the individualized decisions of a multitude of different action agencies operating within a region? Under section 7(a)(2), such questions are answered piecemeal, with respect to each individual agency action.<sup>73</sup>

Section 7(a)(1) offers the advantage of applying generally to the federal agencies' "authorities," requiring those authorities to be used to carry out species conservation "programs."<sup>74</sup> FWS and NMFS need not develop particularized terms and conditions of take under section 7(a)(1), as they must to implement the jeopardy consultation procedure under section

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that the economic benefits of exclusion outweigh the benefits of designating the area. *Id.* § 1533(b)(2). However, if the agencies determine that the species will become extinct if the area is not designated, economic benefits may not be considered. *Id.*

<sup>71</sup> *Id.* § 1540(g).

<sup>72</sup> *Id.* § 1536(a)(1).

<sup>73</sup> *Id.* § 1536(a)(2).

<sup>74</sup> *Id.* § 1536(a)(1).

7(a)(2). FWS and NMFS need not threaten, nor appear to threaten, the viability of an individual project under section 7(a)(1), as they might have to under a section 7(a)(2) jeopardy finding. And, at least according to section 7(a)(1)'s wording, FWS and NMFS need not wait until a federal agency proposes funding, approval, or implementation of an action before they may develop conservation measures under section 7(a)(1), as they must to trigger jeopardy consultation under section 7(a)(2). Section 7(a)(1) allows FWS and NMFS to work continuously with a federal agency to develop a program of species conservation that uses all the agency's authorities, is at the agency's disposal at all times, and does not depend on the presence of a particular project for implementation.

2. *Unlike Conservation Plans Under Section 10(a)(1) and Jeopardy Consultations Under Section 7(a)(2), the Duty to Conserve Species Under Section 7(a)(1) Applies Independent of Take and Jeopardy Findings*

When FWS or NMFS makes a finding that particular conduct will cause take to a species, it can subject both federal and nonfederal landholders within the entire range of the species to the prospect of seeking section 10(a) permits or section 7(a)(2) jeopardy consultations for all similar conduct, to avoid violating the take prohibition.<sup>75</sup> If FWS finds jeopardy of the species as the result of any particular consultation under section 7(a)(2), the agency may put itself in the position of having to deny incidental take authorizations sought in all other permit applications and consultations that present similar conditions. Given those all-or-nothing consequences, it is not surprising that take and jeopardy findings can lead to outcry from the regulated community.

Section 7(a)(1) offers the advantage of not relying on the agency to make findings, such as the existence of take or jeopardy, that have potentially dramatic, broadly applicable implications. The threshold for triggering the duty to conserve a species under section 7(a)(1) is simply that a species has been "listed pursuant to [section 4]."<sup>76</sup> The duty to conserve that follows from that listing action does not depend on a finding of take or jeopardy, nor does the decision to implement conservation measures increase the chances that a finding of take or jeopardy will be made under other ESA programs. Indeed, by encouraging (or requiring) conservation measures to take effect, section 7(a)(1) could forestall or even eliminate

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<sup>75</sup> For example, in Austin, Texas, the presence of nine endangered species in the historic path of urban growth, all listed since 1986, led the community in 1989 to begin working on a regional habitat conservation plan to attempt to resolve the economic development constraints imposed by the ESA. See Ruhl, *supra* note 63, at 1413-23. Estimates of the cost to local and private entities who would participate in the plan, which to this day remains in the planning and proposal stages, have reached \$200 million. J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555, 638 (1995), citing CITY OF AUSTIN, CONSERVE AS YOU GROW (CAYG) PLAN FUNDING ASSUMPTIONS 5 (Apr. 11, 1994) (on file with author).

<sup>76</sup> 16 U.S.C. § 1536(a)(1) (1994).

the conditions that would lead to such findings. Hence, the scope of section 7(a)(1) does not depend on the scope of the take prohibition. This means that it will not be affected by any reinterpretation of the harm definition by judicial decision, such as in the *Sweet Home* litigation, or by Congress during reauthorization. By disaggregating the duty to conserve from the more dire consequences of the take and jeopardy determinations, therefore, section 7(a)(1) offers maximal flexibility in species conservation planning.

3. *The Duty to Conserve Species Under Section 7(a)(1), Like Jeopardy Consultations Under Section 7(a)(2), Applies to Endangered and Threatened Animals and Plants*

Under the core ESA programs, plant species are protected only through the section 7(a)(2) jeopardy consultation procedure, which applies to both plant and animal species, or under section 9(a)(2), if state wildlife protection laws extend such protection.<sup>77</sup> Because of those limited protections, plants simply fall through the cracks of many ESA programs despite their important ecological functions and economic and aesthetic values.

Similarly, in the absence of FWS's general rule that extends full endangered species protection under section 9(a) to all threatened species,<sup>78</sup> threatened species would receive protection only in connection with section 7(a)(2) consultations, and even then only to the extent of protection against jeopardy. Indeed, because FWS has the discretion under section 4(d) to provide threatened species with all, some, or none of the section 9(a) protections, recently FWS has attempted to manage politically contentious species listing actions by making a threatened status listing followed by a specialized section 4(d) rule.<sup>79</sup>

The section 7(a)(1) duty to conserve species thus presents the additional advantage of throwing its full authority to all listed species—endangered or threatened, plant or animal. On its face, section 9(a) is stingy in the degree of protection afforded to plants and silent with respect to threatened species of any variety.<sup>80</sup> Section 4(d) can fill the gap for threatened species, and section 7(a)(2) consultation procedures fill any

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<sup>77</sup> *Id.* § 1538(a)(2)(B). Many states, however, have not enacted specific protections for endangered plants; among the states that have done so are Kentucky (KY. REV. STAT. ANN. § 146.610 (Michie 1992 & Supp. 1994)), Minnesota (MINN. STAT. ANN. § 84.0895 (West 1995)), New Mexico (N.M. STAT. ANN. § 75-6-1 (Michie 1994)), Vermont (VT. STAT. ANN. tit. 10, app. § 10 (1993 & Supp. 1995)), and Wisconsin (WIS. STAT. ANN. § 29.425 (West 1989 & Supp. 1995)).

<sup>78</sup> 50 C.F.R. § 17.31 (1994). This regulation was promulgated under authority of section 4(d) of the ESA. 16 U.S.C. § 1533(d) (1994).

<sup>79</sup> *See, e.g.*, Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher, 58 Fed. Reg. 65,088 (Dec. 10, 1993); Proposed Special Rule for the Conservation of the Northern Spotted Owl on Non-Federal Lands, 60 Fed. Reg. 9484 (Feb. 17, 1995).

<sup>80</sup> The only references to threatened species in section 9(a) are cross-references to regulations promulgated by the Secretary, that is, by FWS and NMFS; in effect, Congress passed the buck to the agencies to take whatever action they thought was apropos to a lesser threat of extinction. 16 U.S.C. § 1538(a)(1)(G), (2)(E) (1994).

gap left by the combined effects of sections 9(a) and 4(d), although only to the extent of jeopardy findings. Section 7(a)(1), however, covers all listed species, independent of the questions of take and jeopardy.

### C. Conclusion

The overall sweep of section 7(a)(1), therefore, is truly one of breadth and flexibility. Section 7(a)(1) applies to all listed species, but is not burdened by the rigid, potentially explosive take and jeopardy determinations. Section 7(a)(1) applies to all federal agency authorities and thus avoids the temporal and particularized focus of the section 7(a)(2) jeopardy consultation and section 10(a)(1) conservation plan procedures. Indeed, the only inherent limitation on section 7(a)(1), besides the question of how far it goes as an action-forcing mechanism, is that it applies only to the exercise (or potential for exercise) of federal authorities.<sup>81</sup> Of course, as evidenced by the scope of the MOU, that's not much of a limitation, given the extent and reach of federal authorities these days. For example, in the twelve years since section 10(a)(1) permitting procedure was added to the ESA, relatively few projects have had to seek section 10(a)(1) permitting approval instead of obtaining their incidental take authorization in connection with a section 7(a)(2) consultation.<sup>82</sup> A federal nexus is the rule today, not the exception.

To be sure, section 7(a)(1) poses practical limitations as a source of policy. The provision itself does not describe how FWS and NMFS are supposed to interact with the other agencies, or what authority FWS and NMFS have to direct, interfere with, or otherwise penalize actions of the other federal agencies that do not affirmatively conserve species. Although section 7 provides an elaborate description of the section 7(a)(2) jeopardy consultation procedure, none is provided for section 7(a)(1). There is also very little administrative implementation history for section 7(a)(1) prior to the MOU. Consequently, what little is known about section 7(a)(1) has evolved largely through case law, and any administrative effort to enhance its standing through such initiatives as the MOU would likely face a similar fate of definition by litigation. Hence, the history of section 7(a)(1) in the courts will be vitally important to influencing how FWS and NMFS can use the provision in the future as a central ESA policy tool.

### III. THE CONSERVATION EXPERIENCE TO DATE

The breadth and flexibility inherent in section 7(a)(1) suggests that, if it means anything in terms of providing an action-forcing influence over the use of federal agencies' authorities, the duty to conserve may provide an umbrella of species protection programs that depart from the coercive nature of the core ESA programs. The section 7(a)(1) species conservation umbrella would not depend on making the all-or-nothing take and

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<sup>81</sup> 16 U.S.C. § 1536(a)(1)-(4) (1994).

<sup>82</sup> From 1988 through 1993, over 70,000 projects were handled under section 7(a)(2) versus fewer than 40 under section 10(a). See *supra* text accompanying notes 57, 66-67.

jeopardy findings inherent in the core ESA programs, and thus might avoid generating the same degrees of economic dislocation at the individual project and local community levels that have inflamed such consternation over the ESA among the regulated community. The actual experience under section 7(a)(1) indicates, however, that its potential remains very much untapped and therefore untested.

Section 7(a)(1) did not have so inauspicious a beginning, however, as it shared the spotlight with section 7(a)(2) in the landmark *Tennessee Valley Authority (TVA) v. Hill* decision,<sup>83</sup> in which the Supreme Court blocked final construction and operation of an almost-completed hydroelectric power generating dam on the ground that the dam's impoundment of water would jeopardize the continued existence of the endangered snail darter.<sup>84</sup> The case is remembered most for its observation that the prohibition against jeopardy found in section 7(a)(2) is an "affirmative command" that "admits of no exception."<sup>85</sup> What has largely been forgotten about *TVA v. Hill*, however, is that the principal basis of the Court's interpretation of section 7(a)(2) is found in section 7(a)(1). In a lengthy exposition of the legislative history of section 7(a)(1) and its underlying policy, the Court traced the evolution of the duty to conserve through the bills considered by the 93d Congress.<sup>86</sup> Early versions of the ESA qualified federal agencies' duty to conserve species; for example, one version would have required agencies to conserve species only "insofar as is practicable and consistent with the[ir] primary purposes."<sup>87</sup> These conditions on the ex-

<sup>83</sup> 437 U.S. 153 (1978). For an overview of the full background and significance of the Court's decision, see Cheever, *supra* note 36, at 134-42; Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REF. 805 (1986).

<sup>84</sup> The snail darter (*percina (imostoma) tanasi*) was listed as endangered in October 1975, long after construction had begun on the Tellico Dam. Amendment Listing the Snail Darter as an Endangered Species, 40 Fed. Reg. 47,505-06 (Oct. 9, 1975).

<sup>85</sup> *TVA v. Hill*, 437 U.S. at 173.

<sup>86</sup> *Id.* at 174-88. For an overview of the legislative history of the ESA as enacted in 1973, see MICHAEL J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 318-83 (1983); George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act*, 51 N.D. L. REV. 315 (1975); William D. Palmer, *Endangered Species Protection: A History of Congressional Action*, 4 ENVTL. AFF. 255 (1975). For comprehensive legislative history source documents for the 1973 enactment, see SENATE COMM. ON COMMERCE, REPORT ON THE ENDANGERED SPECIES ACT OF 1973, S. REP. NO. 307, 93d Cong., 1st Sess. (1973), reprinted in 1973 U.S.C.C.A.N. 2989; HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, REPORT ON THE ENDANGERED AND THREATENED SPECIES ACT OF 1973, H.R. REP. NO. 412, 93d Cong., 1st Sess. (1973) [hereinafter HOUSE REPORT]; COMMITTEE OF CONFERENCE, REPORT ON THE ENDANGERED SPECIES ACT OF 1973, H.R. REP. NO. 740, 93d Cong., 1st Sess. (1973), reprinted in 1973 U.S.C.C.A.N. 3001 [hereinafter CONFERENCE REPORT].

<sup>87</sup> H.R. 4758, 93d Cong., 1st Sess. § 2(b) (1973); see also 437 U.S. at 181 n.26 (citing other bills with similar qualifying terms). Language of this ilk did not go unnoticed during the congressional debates. For example, Sierra Club representatives contended that the "consistent with the primary purpose" language in H.R. 4758 "could be construed to be a declaration of congressional policy that other agency purposes are necessarily more important than protection of endangered species and would always prevail if conflict were to occur." *Hearings on Endangered Species Act Before the Subcomm. of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 1st Sess. 335 (1973) (statement of the Sierra Club's Na-

tent of the duty to conserve were gradually weeded out of the bills; the Conference Committee's final version of the ESA contained no restrictions whatsoever.<sup>88</sup> The Court commented that "[w]hat is very significant in this sequence is that the final version of the 1973 Act carefully omitted all of the reservations" on the duty to conserve.<sup>89</sup>

That legislative history led the Court to conclude that the final provision's call for federal agencies to "carry[ ] out programs for the conservation of endangered . . . and threatened species"<sup>90</sup> is no less than "stringent, mandatory language"<sup>91</sup> that "reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species."<sup>92</sup> Nevertheless, because the dam would have eradicated the snail darter,<sup>93</sup> and thus plainly ran afoul of the prohibition against jeopardy found in section 7(a)(2), it was unnecessary for the Court to explore the limits of the duty to conserve species found in section 7(a)(1). The Court tapped the unyielding nature of section 7(a)(1) as justification for its equally unyielding construction of the prohibition against jeopardy.<sup>94</sup>

After *TVA v. Hill*, one might reasonably have concluded that section 7(a)(1) would become a centerpiece of ESA policy and regulation, but it did not. One indication of section 7(a)(1)'s small role in ESA law and history is that it is mentioned in relatively few legal commentaries on the ESA, and rarely with respect to whether and how its unfulfilled potential

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tional Wildlife Committee, presented by Richard Frank of the Sierra Club's Center for Law and Social Policy).

<sup>88</sup> The bill that originally passed the Senate would have required federal agencies to "carry out such programs as are practicable for the protection of species listed [under the ESA]." S. 1983, 93d Cong., 1st Sess. § 7(a) (1973). The bill that initially passed the House contained no such qualification. H.R. 37, 93d Cong., 1st Sess. § 7(a) (1973). The initial House report noted that section 7(a)(1) thereby "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." HOUSE REPORT, *supra* note 86, at 14. Although the Conference Committee adopted many provisions of the Senate version, it adopted the House version of section 7(a)(1), see CONFERENCE REPORT, *supra* note 86, at 23-28, reprinted in 1973 U.S.C.C.A.N. at 3001-07, with the House manager of the bill declaring that section 7(a)(1) would thereby "substantially amplif[y] the obligation of [federal agencies] to take steps within their power to carry out the purposes of this act," 119 CONG. REC. 42,913 (Dec. 20, 1973) (statement of Rep. John D. Dingell (D-Mich.)).

<sup>89</sup> *TVA v. Hill*, 437 U.S. at 182.

<sup>90</sup> 16 U.S.C. § 1536(a)(1) (1994).

<sup>91</sup> *TVA v. Hill*, 437 U.S. at 183.

<sup>92</sup> *Id.* at 185.

<sup>93</sup> *Id.* at 174. A second population of snail darters was unexpectedly found in 1980 in heavily polluted South Chickamauga Creek; subsequently, three more populations were found in nearby streams. CHARLES C. MANN & MARK L. PLUMMER, NOAH'S CHOICE 173 (1995).

<sup>94</sup> Since *TVA v. Hill*, courts rarely have used the powerful message and legislative history of section 7(a)(1) to propel decisions under other ESA provisions. See, e.g., *Defenders of Wildlife v. Environmental Protection Agency*, 882 F.2d 1294, 1299-301 (8th Cir. 1989) (pointing to section 7(a)(1) as imposing "substantial and continuing obligations on federal agencies," but restricting agencies' continued approval of certain strychnine compounds for above-ground use based on section 7(a)(2)'s take and jeopardy prohibitions).

might be realized.<sup>95</sup> In short, section 7(a)(1) has been the monumental underachiever of the ESA family in both its administrative history and in the courts. Moreover, unlike virtually all its ESA siblings, section 7(a)(1) is not the subject of FWS or NMFS implementing regulations. While the consultation procedures under section 7(a)(2) for jeopardy prevention are the subject of lengthy regulations and guidances, not only of FWS and NMFS<sup>96</sup> but also many of the federal action agencies who must consult with FWS and NMFS,<sup>97</sup> there is no equivalent in the rules of any action agency for the statutorily required species conservation consultation. Indeed, although the joint regulations of FWS and NMFS outlining the procedures that action agencies must follow for jeopardy consultations do contain a step in which FWS or NMFS may make species conservation recommendations in their biological opinions, following those recommendations is expressly described in the regulations as merely a discretionary option of the action agency.<sup>98</sup> Hence, FWS and NMFS appear in the past to have

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<sup>95</sup> See, e.g., James A. Bolin, Jr., *Of Razorbacks and Reservoirs: The Endangered Species Act's Protection of Endangered Colorado River Basin Fish*, 11 PACE ENVTL. L. REV. 35, 45-47 (1993); David N. Diner, *The Army and the Endangered Species Act: Who's Endangering Whom*, 143 MIL. L. REV. 161, 186-89 (1994); Robert L. Fischman, *Biological Diversity and Environmental Protection: Authorities to Reduce Risk*, 22 ENVTL. L. 435, 442 (1992); Thomas France & Jack Tuholske, *Stay the Hand: New Directions for the Endangered Species Act*, 7 PUB. LAND L. REV. 1 (1986); Houck, *supra* note 23, at 327; Kilbourne, *supra* note 23, at 564-72; Brian L. Kuehl, *Conservation Obligations Under the Endangered Species Act: A Case Study of the Yellowstone Grizzly Bear*, 64 U. COLO. L. REV. 607 (1993); John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 539-46 (1994); John A. Macleod et al., *The Endangered Species Act: A Comprehensive Evaluation for the Coal Industry*, 93 W. VA. L. REV. 673 (1991); Erin Pitts, *Natural Resources: The ESA and the Spotted Owl*, 21 ENVTL. L. 1175, 1184-87 (1991); Matthew J. Rizzo, *The Endangered Species Act and Federal Agency Inaction*, 13 ST. LOUIS U. PUB. L. REV. 855, 863-64 (1994); Pete Schenckan, *Citizen Suits Under the Endangered Species Act: Forcing Noah's Choice*, 26 ST. B. TEX. ENVTL. L.J. 4, 8 (1995); Susan K. Shutler & Elinor Coldburn, *Natural Resource Restoration: The Interface Between the Endangered Species Act and CERCLA's Natural Resources Damage Provision*, 24 ENVTL. L. 717, 730-34 (1994). The most, perhaps only, comprehensive discussions of the potential role of section 7(a)(1) available in the literature to date are in Kuehl, *supra*, at 626-38, and ROHLF, *supra* note 23, at 92-100. Their discussions do not draw any firm conclusions about the potential scope of section 7(a)(1) at its broadest, although their works predate many of the administrative, judicial, and legislative developments discussed in this Article that suggest that now is the time to do something substantive with section 7(a)(1).

<sup>96</sup> See *supra* note 56.

<sup>97</sup> See, e.g., 33 C.F.R. § 325.2(b)(5) (1995) (regulation requiring compliance with section 7(a)(2) to process permits for filling of wetlands under U.S. Army Corps of Engineers jurisdiction, under section 404 of the Clean Water Act).

<sup>98</sup> See 50 C.F.R. § 402.14(j) (1994) (formal consultation procedures); see, e.g., *Idaho Dep't of Fish & Game v. National Marine Fisheries Serv.*, 850 F. Supp. 886 (D. Or. 1994) (explaining the discretionary quality of conservation recommendations in the formal consultation procedures). FWS and NMFS justified that approach, and the decision not to promulgate regulations for section 7(a)(1), by interpreting section 7(a)(1) as "having a limited purpose under the Act: to authorize Federal agencies to factor endangered species conservation into their planning processes, regardless of other statutory directives." Interagency Cooperation; Final Rule, 51 Fed. Reg. 19,926, 19,934 (June 3, 1986); see generally Macleod et al., *supra* note 95, at 708 n.107 (asserting that FWS recommendations intended no legally binding effect); Kuehl, *supra* note 95, at 628 n.118 (arguing that FWS interpretation of section

thrown in the towel on the conservation consultation process, relegating it to a backwater of the jeopardy consultation process. Therefore, it's not surprising that section 7(a)(1) has not, until the MOU, surfaced as a policy theme for FWS, NMFS, or the action agencies in any significant regulatory initiatives.

Indeed, until the MOU, section 7(a)(1)'s species conservation duty has received more respect in the courts than from its agency parents. Although that duty has been the subject of only a handful of judicial discourses since *TVA v. Hill*,<sup>99</sup> the MOU should prompt some archaeological research of how section 7(a)(1) was applied in those decisions. The legislative history examined in *TVA v. Hill* led the Court to conclude that section 7(a)(1) is far more than what it has become—that Congress made a “conscious decision . . . to give endangered species priority over the ‘primary missions’ of federal agencies.”<sup>100</sup> The few other courts that have examined the provision since *TVA v. Hill* have concluded that section 7(a)(1) may indeed be available to act as a shield, a sword, or a prod to help federal agencies fulfill that legislative vision.

#### A. Section 7(a)(1) as a Shield

The use of section 7(a)(1) as a shield to defend prior agency action was demonstrated in *Carson-Truckee Water Conservancy District v. Watt*,<sup>101</sup> which involved the Department of Interior's (DOI) management of water from the Stampede Dam and Reservoir in California with the competing interests of tribal fishing rights, municipal and industrial water supply, and endangered species in mind. The dam impounds water from the Little Truckee River, which flows, as DOI releases it from the reservoir, into the Truckee River, through the cities of Reno and Sparks, Nevada, eventually emptying into Nevada's Pyramid Lake. The Pyramid Lake Paiute Indian Tribe (Tribe) Reservation surrounds Pyramid Lake and was established to enable the Tribe to take advantage of the lake's fishery. Pyramid Lake is also home to two endangered species of fish, the cui-ui, which exists nowhere else, and a population of cutthroat trout.

Reno and Sparks wanted DOI to sell them water from the Truckee River for municipal and industrial use.<sup>102</sup> DOI declined to do so on the

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7(a)(1) is contrary to congressional intent). Besides not comporting with the specific language of the provision, the agencies' 1986 interpretation has been implicitly rejected by the courts, see *infra* text accompanying notes 101-50, and appears to have been superseded by the policies expressed in the agencies' more recent MOU, see *infra* text accompanying notes 179-93.

<sup>99</sup> See *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985); *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in part, vacated in part sub nom.* *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991); *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (D.D.C. 1977).

<sup>100</sup> *TVA v. Hill*, 437 U.S. 153, 185 (1978).

<sup>101</sup> 549 F. Supp. 704 (D. Nev. 1982), *aff'd sub nom.* *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257 (9th Cir. 1984), *cert. denied*, 470 U.S. 1083 (1985).

<sup>102</sup> The ESA issues involved in the case were swimming in a sea of water rights allocation issues that have pitted the parties and other interests against each other for decades. See E. Lief Reid, *Ripples from the Truckee: The Case for Congressional Apportionment of Disputed Interstate Water Rights*, 14 STAN. ENVTL. L.J. 145 (1995).



ground that the diversion of water upriver from Pyramid Lake would breach DOI's water supply obligations to the Tribe and would be contrary to DOI's duty "to replenish the species so that they are no longer endangered or threatened with extinction."<sup>103</sup> The cities, on the other hand, argued that sufficient water existed to supply both the Tribe and the cities, that DOI's reclamation authorities required DOI to sell what the Tribe did not use to the cities, and that the ESA "does not prevent the Secretary from operating Stampede for [municipal and industrial] uses unless that operation would jeopardize the existence of the cui-ui fish and the . . . cutthroat trout."<sup>104</sup> In other words, the cities ignored section 7(a)(1); however, the courts did not.

The district court rejected the cities' position,<sup>105</sup> and the Ninth Circuit affirmed, characterizing section 7(a)(1) as "specifically direct[ing] that the Secretary 'shall' use programs administered by him to further the conservation purposes of the ESA."<sup>106</sup> According to the court, section 7(a)(2)'s jeopardy standard was inapposite because DOI had not proposed any specific project. The agency's discretion to refuse to sell water to the cities was shielded by section 7(a)(1), because that refusal was consistent with the section's directives.<sup>107</sup>

Thus, *Carson-Truckee* establishes that agencies may formulate the discretionary authority policies of their primary missions with species conservation in mind. DOI's decision whether to supply water to the cities was discretionary under its reclamation authorities.<sup>108</sup> Whatever other criteria may have been relevant for the court in reviewing DOI's exercise of discretion under its primary mission authorities, section 7(a)(1) added another—conservation of species. Therefore, agencies that make decisions in carrying out their primary mission programs that also advance ESA's conservation purposes will be protected against claims of acting arbitrarily or outside the scope of their authority. At the very least, section 7(a)(1) injects into all federal agencies' discretionary primary mission programs an additional review criterion—conservation of species. Section 7(a)(1) acts as a shield against judicial attack on decisions that further that ESA goal.

### B. Section 7(a)(1) as a Sword

Because DOI in the *Carson-Truckee* case had voluntarily chosen the alternative most beneficial to species conservation, the opinion did not need to reach the question of whether section 7(a)(1) would have re-

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<sup>103</sup> 549 F. Supp. at 708-09.

<sup>104</sup> *Id.* at 708.

<sup>105</sup> *Id.* at 709.

<sup>106</sup> *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 261 (9th Cir. 1984), *cert. denied*, 470 U.S. 1083 (1985).

<sup>107</sup> *Id.* The cities argued that section 7(a)(2) limited the Secretary's authority to jeopardy actions, but the court disagreed, citing section 7(a)(1) as granting the Secretary wide discretion to administer all programs in a way that furthers ESA's conservation purposes. *Id.* at 261-62.

<sup>108</sup> *Id.* at 260-61.

quired that alternative—that is, whether DOI would have been prevented from exercising whatever discretion it otherwise might have had to sell water to the cities. Section 7(a)(1) was DOI's shield against scrutiny in *Carson-Truckee*, but the duty to conserve may also be an effective sword against agency choices that do not promote species conservation.

After *Carson-Truckee*, the sword of section 7(a)(1) was taken up by the Ninth Circuit in *Pyramid Lake Paiute Tribe of Indians v. United States Department of the Navy*,<sup>109</sup> another case involving Pyramid Lake and the cui-ui. The Navy operated a pilot flight training range at a base located in the desert region through which the Truckee River flows. To suppress dust rising from the desert, the Navy leased lands contiguous to the base to farmers, with which came rights to use water from the Truckee for crop irrigation. The resulting croplands provided a dust buffer zone which greatly enhanced visibility for flight training pilots.

The Tribe filed suit alleging that the Navy's croplands lease program diverted excessive waters from the Truckee River, which reduced water levels at Pyramid Lake, thereby "imperil[ing] the continued viability of the cui-ui by contributing to a significant decrease in the water level at Pyramid Lake."<sup>110</sup> The Navy had consulted about the effects of its lease program with FWS pursuant to the section 7(a)(2) jeopardy consultation procedure, and FWS had issued a "no jeopardy" biological opinion. Because the Tribe had presented no new evidence suggesting jeopardy of the cui-ui was likely as a result of the cropland irrigation diversions, the court found that the "Navy's reliance on [FWS's] opinions in executing the out-lease program and ensuring compliance with section 7(a)(2) was not arbitrary and capricious."<sup>111</sup> That ruling, which demonstrates the limitations of the section 7(a)(2) jeopardy prohibition, left section 7(a)(1) as the Tribe's last resort.

The Ninth Circuit began its analysis by acknowledging that in *Carson-Truckee* it had "recognized that agencies have affirmative obligations to conserve under section 7(a)(1) . . . ."<sup>112</sup> But the Navy's lease program presented the *Pyramid Lake* court with a different question, and the court's answer was clear: "[I]f an alternative to the challenged action would be equally as effective at serving the government's interest, and at the same time would enhance conservation to an equal or greater degree than does the challenged action, then the agency must adopt the alternative."<sup>113</sup> The extent to which section 7(a)(1) acts as a sword to direct agency choices could not have been expressed more succinctly.

The Navy took the position that section 7(a)(1), although it "contains a congressional directive that agencies must act affirmatively in the interest of a listed species," nonetheless "was not 'intended to frustrate the agencies' accomplishment of their primary missions."<sup>114</sup> The court, point-

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<sup>109</sup> 898 F.2d 1410 (9th Cir. 1990).

<sup>110</sup> *Id.* at 1413.

<sup>111</sup> *Id.* at 1416.

<sup>112</sup> *Id.* at 1416-17.

<sup>113</sup> *Id.* at 1417.

<sup>114</sup> *Id.* (quoting Appellee's Brief at 20).

ing to the same legislative history the Supreme Court examined in *TVA v. Hill*, concluded that the Supreme Court had already "rejected such a proposition as being inconsistent with congressional intent."<sup>115</sup>

On the other hand, the court found the Tribe's view of section 7(a)(1) to be too unyielding. The Tribe sought to require the agency to choose the alternative with maximal conservation effects in all circumstances. The court disagreed, stating that "it would work to divest an agency of virtually all discretion in deciding how to fulfill its duty to conserve."<sup>116</sup> Rather, the court explained that *Carson-Truckee* recognized that agencies have "some discretion in ascertaining how best to fulfill the mandate to conserve under section 7(a)(1)."<sup>117</sup> As further evidence that section 7(a)(1) has some level of built-in discretion, the court cited the FWS regulation that leaves action agencies discretion to follow any conservation recommendations that FWS makes in a section 7(a)(2) jeopardy consultation.<sup>118</sup> To decide where to draw the line on the scope of that discretion, the court pointed to evidence that the elimination of the Navy's lease program would have had insignificant effects on the water volumes in the Truckee River and Pyramid Lake. At the very least, the elements that must be factored into the section 7(a)(1) calculus do not include measures that "will be insignificant in [their] impact"<sup>119</sup> or that will have only a "slight conservation effect, however insignificant."<sup>120</sup> However, the court did not address the question of when a measure may have such a significant conservation effect that the choice of the alternative using the measure becomes mandatory.

*Pyramid Lake* also did not consider the other end of the spectrum of choices—the situation in which an agency's other mandates impose non-discretionary duties on the agency that conflict with section 7(a)(1)'s conservation goals. The context of the "primary purposes" limitation, rejected in *Pyramid Lake* on the basis of *TVA v. Hill*, may depend on whether the measures implementing the agency's other purposes are discretionary. In *Pyramid Lake* those measures were discretionary, and the Tribe's proposed conservation measures were of insignificant effect; hence, the *Pyramid Lake* court was not faced with having to reconcile the sword-like effect of section 7(a)(1) with the anticonservation effects of another statute's strict mandate.

That conflict had been addressed obliquely many years before in *Defenders of Wildlife v. Andrus*,<sup>121</sup> in which a federal district court held that a FWS regulation allowing duck hunting during twilight hours did not adequately take into account the possibility of hunters misidentifying birds in the darkness and thus inadvertently shooting endangered waterfowl. The court, pointing to FWS's "affirmative duty to increase the population of

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1418.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (citing 50 C.F.R. § 402.14(j) (1988) (now codified at 50 C.F.R. § 402.14(j) (1994))).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1419.

<sup>121</sup> 428 F. Supp. 167 (D.D.C. 1977).

protected species" pursuant to section 7(a)(1),<sup>122</sup> found that the rule-making process had not adequately focused on the alleged threats to protected species resulting from twilight hunting and remanded the rule for further consideration of those factors. Consistent with the Ninth Circuit's subsequent decision in *Pyramid Lake*, the court noted that section 7(a)(1) would not require that twilight hunting be prohibited if it would lead to killing only a few of the protected species.<sup>123</sup> Instead, the court suggested that section 7(a)(1) would direct the regulatory outcome by requiring that "there must be evidence in the record that hunting hours under the new regulations are so fixed that such killing is kept to a minimum *consistent with other obligations imposed on the Service by Congress.*"<sup>124</sup>

Though not relying on *Defenders of Wildlife v. Andrus*, the court in *National Wildlife Federation v. Hodel*<sup>125</sup> reached a similar result with respect to agency discretion. FWS allowed the use of lead shot in hunting within several states in which bald eagles resided. The plaintiffs argued that the eagles consumed lead shot as they fed upon other migratory birds that either had consumed lead shot while feeding in marshes or were wounded by lead shot.<sup>126</sup> FWS attempted to defend its policy as a reasoned choice among options available under section 7(a)(1). Without precluding the possibility that agencies have some measure of discretion in how far to take the affirmative duty to conserve, the court found that the duty to conserve demands more than what FWS offered as the basis for exercising its discretion:

[D]efendants have not clearly identified the factors which the agency considers relevant to their choosing to authorize lead shot in the disputed areas. Moreover, assuming defendants correctly identified the factors which are relevant to their decision, defendants have failed to articulate a rational connection between the factors found and the choices that they made.<sup>127</sup>

Hence, the early case law, albeit sparse, would support the use of section 7(a)(1) as a sword requiring a federal agency to maximize use of *significant* conservation measures in its action selection and justify any departure from full attention to species conservation with relevant factors. Among the relevant factors justifying such a departure would be any countervailing, mandatory statutory directives found in other laws governing the agency's action.

Two more recent cases confirm this interpretation of section 7(a)(1) and illustrate its potency and limitations. In *Florida Key Deer v. Stickney*,<sup>128</sup> the plaintiffs challenged the Federal Emergency Management Agency's (FEMA) actions under the National Flood Insurance Program (NFIP). Following heavy flood destruction, FEMA had engaged in efforts

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<sup>122</sup> *Id.* at 170.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* (emphasis added).

<sup>125</sup> 23 Env't Rep. Cas. (BNA) 1089 (E.D. Cal. Aug. 26, 1985).

<sup>126</sup> *Id.* at 1090.

<sup>127</sup> *Id.* at 1092.

<sup>128</sup> 864 F. Supp. 1222 (S.D. Fla. 1994).

to issue and administer NFIP flood insurance in Monroe County, Florida, in the Florida Keys. Monroe County was the last remaining habitat of the endangered Florida Key deer,<sup>129</sup> and evidence indicated that redevelopment in the area would be substantially reduced if the community did not have access to NFIP flood insurance. Nothing in the NFIP prohibits consideration of impacts on endangered species or restricts FEMA from basing insurance administration decisions on that consideration. Indeed, FEMA's regulations require it to administer flood insurance "in a manner consistent with national environmental policies."<sup>130</sup> FEMA, however, had refused to consult with FWS prior to issuing flood insurance in the area.<sup>131</sup> Hence, acting on the now familiar foundation that "[s]ection 7(a)(1) of the ESA imposes an affirmative obligation on all federal agencies,"<sup>132</sup> the court found that "FEMA has failed to consider or undertake any action to fulfill its mandatory obligations under section 7(a)(1), and is therefore in violation of that provision of the ESA."<sup>133</sup> Clearly, therefore, in weighing how to administer the NFIP flood insurance program in the deer's habitat, the court expected FEMA to give weight to species conservation.

The limits of that principle were recently made crystal clear in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*,<sup>134</sup> in which the D.C. Circuit rejected efforts to make the Federal Energy Regulatory Commission (FERC) evaluate the need for wildlife-protective conditions in its annual licensing of two hydroelectric projects on Nebraska's Platte River. The plaintiff argued that section 7(a)(1) required FERC to do "whatever it takes" to protect endangered species, and therefore "any limitations on FERC's authority contained in the [Federal Power Act] are implicitly superseded by this general command."<sup>135</sup> The court held that 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."<sup>136</sup> *Platte River* has been cited more recently to mean that the "ESA does not empower an agency to do something . . . that it has no power to do under its enabling statute."<sup>137</sup>

Unlike the alternatives analysis under the National Environmental Policy Act (NEPA),<sup>138</sup> the alternatives analysis under section 7(a)(1) has a

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<sup>129</sup> *Id.* at 1229.

<sup>130</sup> Federal Emergency Management Agency General Policy, 44 C.F.R. § 10.4(a) (1994).

<sup>131</sup> *Florida Key Deer*, 864 F. Supp. at 1238.

<sup>132</sup> *Id.* at 1237.

<sup>133</sup> *Id.* at 1238.

<sup>134</sup> 962 F.2d 27 (D.C. Cir.), *reh'g denied*, 972 F.2d 1362 (D.C. Cir. 1992).

<sup>135</sup> *Id.* at 34.

<sup>136</sup> *Id.*

<sup>137</sup> *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1314 (W.D. Wash. 1994) (argument of Northwest Forest Resource Council, an association of loggers, mill owners, and others in the timber industry). The court held that the Forest Service properly exercised its discretion to manage logging practices with species conservation as a criterion. *Id.* at 1316.

<sup>138</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C), (E) (1988 & Supp. V 1993) (requiring only that alternatives to a proposed federal action be listed in an environmental impact statement).

substantive edge, tempered by the limits of each agency's scope of authority as conferred by its enabling act.<sup>139</sup> That edge remains sharp enough to place species conservation ahead of the discretionary decisions agencies are authorized to take in fulfillment of their primary missions. However, section 7(a)(1) does not cut off any of the nondiscretionary duties agencies are directed to take by other statutes, nor does it create powers not found in the agencies' primary authorities.

### C. Section 7(a)(1) as a Prod

Each of the cases discussed thus far arose from an agency action with something other than species conservation as its principal purpose. In other words, the agencies were exercising their "primary missions," and the only question was what constraints section 7(a)(1) placed on their discretion to do so. Those cases do not examine whether an agency may, or indeed must, take actions (within the scope of agency authority) that have species conservation as their principal aim, rather than as a mere ancillary component. After all, section 7(a)(1) does unambiguously say that agencies "shall . . . utilize their authorities . . . by carrying out programs for the conservation of endangered species and threatened species."<sup>140</sup> The provision does not say "only when carrying out actions pursuant to their primary missions" or "only when considering another duly authorized action."

By its plain terms, then, section 7(a)(1) appears in ombudsman-like form to engraft an additional mission onto all agencies' primary missions, that of species conservation. Although the majority did not have to reach that question in *TVA v. Hill*, the Supreme Court took no liberties with the statutory language in describing the plain meaning of the provision as "requir[ing] agencies to afford first priority to the declared national policy of saving endangered species."<sup>141</sup> Just as plainly, however, that is not how the agencies, particularly those other than FWS and NMFS, historically have applied section 7(a)(1).

If the agencies do intend by their MOU<sup>142</sup> to implement the apparent message of section 7(a)(1), its legislative history, and the theme of *TVA v. Hill*, nothing in the case law applying section 7(a)(1) discussed thus far would stand in their way. Indeed, only one case so far even considers an agency's attempt to implement a rule solely to satisfy section 7(a)(1). The court's opinion in that case, *Connor v. Andrus*,<sup>143</sup> is consistent with the conception of section 7(a)(1) as an action-forcing tool.

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<sup>139</sup> NEPA establishes an environmental impact review procedure for certain actions carried out, funded, or authorized by federal agencies. 42 U.S.C. § 4332(2)(C) (1988 & Supp. V 1993). However, "NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process . . ." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989).

<sup>140</sup> 16 U.S.C. § 1536(a)(1) (1994).

<sup>141</sup> *TVA v. Hill*, 437 U.S. 153, 185 (1978).

<sup>142</sup> See *supra* notes 1-2 and accompanying text.

<sup>143</sup> 453 F. Supp. 1037 (W.D. Tex. 1978).

In *Connor*, FWS issued a rule providing that "in order to provide greater protection to the endangered Mexican duck, all duck hunting is prohibited in designated portions of New Mexico and Texas."<sup>144</sup> This was not a rule like that involved in *Defenders of Wildlife v. Andrus*, in which FWS's rule allowing duck hunting was remanded for agency consideration of consistency with section 7(a)(1).<sup>145</sup> Rather, FWS's duck hunting ban was intended outright to serve FWS's conclusion that it must "insure the programs administered by the Service are used to further the purpose of the [ESA]."<sup>146</sup>

Although the court rejected FWS's rule, the basis for doing so was remarkably consistent with the interpretation of section 7(a)(1) as appending an affirmative duty to each agency's primary mission. The court acknowledged that under section 7(a)(1), FWS "has an affirmative duty . . . to bring endangered species to the point at which they may be removed from protected status."<sup>147</sup> However, just as with any other regulation promulgated to implement any agency mission, the court required FWS "to show a rational basis for [the] regulation."<sup>148</sup> For regulations designed to implement section 7(a)(1), that requirement means the agencies cannot "promulgat[e] regulations which do not attack the cause or causes of population depletion of a species."<sup>149</sup> Because the record in *Connor* indicated no direct benefit to the Mexican duck from the ban—indeed, if anything, that the hunting ban might be adverse to the species because it would lead to neglect or destruction of habitat used by ducks generally—the court remanded the rule to the agency for further consideration in light of the court's discourse on rule-making under section 7(a)(1).<sup>150</sup>

Significantly, the *Connor* court did not reject the agency's rule on the basis that section 7(a)(1) does not provide a mandate for agencies to act. Rather, the court treated section 7(a)(1) as extending the agency's rule-making authority to cover species conservation and affirmatively mandating that such authority be used. Even by its terms, section 7(a)(1) does not expand any agency's scope of jurisdiction beyond that described in its

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<sup>144</sup> Final Frameworks for Late Season Migratory Bird Hunting Regulations, 42 Fed. Reg. 45,310, 45,318 (Sept. 9, 1977), cited in *Connor*, 453 F. Supp. at 1039.

<sup>145</sup> See *supra* text accompanying notes 121-24.

<sup>146</sup> *Connor*, 453 F. Supp. at 1039.

<sup>147</sup> *Id.* at 1041.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 1041-42. Recently, a lawsuit was filed that would test the action-forcing qualities of section 7(a)(1) more directly than *Connor*. In *Sierra Club v. Glickman*, No. MO-95-CA-091 (W.D. Tex. filed Apr. 28, 1995), the plaintiffs allege that the United States Department of Agriculture (USDA) has failed to fulfill its duty to conserve species under section 7(a)(1) with respect to several endangered species existing in springs and streams fed by water from the Edwards Aquifer in central Texas. The complaint alleges that USDA's organic statutes give it the "power to develop and implement a coordinated, integrated, and comprehensive intra-agency program to protect the waters of the Edwards against contamination from agricultural production practices, specifically, excessive pumping from the Edwards," and that the agency's failure to develop and implement such a plan under its authorities violates section 7(a)(1). *Id.* at 14.

"primary mission" enabling statutes. Nor could section 7(a)(1) require an agency to initiate actions contrary to nondiscretionary duties prescribed by those other authorities. Consistent with *Connor*, however, section 7(a)(1) prods each federal agency to implement all species conservation measures that are within the scope of the agency's authority, but which do not necessarily depend for their initiation or effect on the agency proposing or taking an action pursuant to the agency's primary mission authorities.

Section 7(a)(1) has the potential, in that sense, to operate as a classic action-forcing provision. To be sure, that potential remains latent and untested, as even the FWS in *Connor* had acted on its own initiative. In no reported instance has section 7(a)(1) been used, in the absence of an agency proposal for action within its primary mission authority, to compel an agency to take a particular measure for no reason other than to promote species conservation. The MOU suggests, however, that the action-forcing potency of section 7(a)(1) may be tested soon, particularly in light of legal and policy developments that may make section 7(a)(1) a more attractive tool than its ESA siblings for defending the ESA's integrity while carrying out broad species protection goals.

#### IV. TRENDS LEADING TO INCREASED USE OF SECTION 7(a)(1) AS A POLICY TOOL

Knowing that section 7(a)(1) potentially offers a broad, flexible action-forcing mechanism to promote species conservation, why have FWS and NMFS not used it? Why have environmental advocacy groups also not attempted to shape ESA policy through section 7(a)(1)? The answer may be that the coercive regulatory force of the core ESA programs, although rigid in many respects, has been simply too easy to use instead. Beginning in 1994, however, FWS and NMFS face a dilemma unlike any they have yet encountered. The agencies have joined together to lead the charge for broader "ecosystem-minded" ESA implementation, but at the same time they see their core ESA programs—the very programs they would use to advance the ecosystem approach—coming under heavy fire in Congress and the courts. As these core programs come under attack, the agencies may see the writing on the wall and turn to section 7(a)(1) as the vanguard of a transformed ESA policy implementation approach. Section 7(a)(1) may very well escape the volleys aimed at other sections of the ESA and live on to provide the agencies a vehicle for ESA-style ecosystem management.

##### A. *The Attack of the "Wise Users"*

The ESA, once the apple of Congress's eye, has become the whipping boy of property rights advocates, who portray it as the embodiment of a federal land use regulatory framework run amok. Along with section 404 of the Clean Water Act,<sup>151</sup> which among other things regulates filling of

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<sup>151</sup> 33 U.S.C. § 1344 (1988 & Supp. V 1993).



wetlands, the ESA has become the target of a highly charged rhetoric over the appropriate limits of federal "land ethic"-based regulation of private property. Using the news media as well as judicial and legislative advocacy, the property rights forces have succeeded in putting the ESA and its supporters where they have never been before—on the defensive.

The ESA was enacted in 1973 basking in the warm glow of species protection sentiment,<sup>152</sup> and in its first judicial test, *TVA v. Hill*, the ESA got as ringing an endorsement as any environmental law ever received. Despite the popular ridicule focused on the law after *TVA v. Hill*, portraying the result in that case as a "fish over humans" folly,<sup>153</sup> the law survived its first congressional round of amendments in 1978 relatively unscathed, and amendments in 1979, 1982, and 1988 for the most part merely fine-tuned the operation of the ESA's core programs.<sup>154</sup> Even the anti-regulation philosophy of the Reagan and Bush Administrations could not stem the tide of substantial numbers of new species listings and critical habitat designation.<sup>155</sup> Thus, going into the initial congressional discussions of comprehensive reauthorization in 1992, it was fair to say that no one would have predicted a significant departure from the history in Congress of treating the ESA as something close to sacrosanct.<sup>156</sup>

That mood has simply evaporated. Preying on instances in which the ESA had been applied with what many would agree are irrational results,<sup>157</sup> a grass roots movement of property rights advocates has suc-

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<sup>152</sup> For a description of the legislative mood at the time the ESA was first enacted, see Cheever, *supra* note 36, at 128-30; Coggins, *supra* note 86, at 321; Palmer, *supra* note 86, at 268.

<sup>153</sup> See, e.g., Plater, *supra* note 83, at 849 (quoting Walter Cronkite's description of the case as "a classic conflict between energy and environment . . . , the little fish against the massive Tellico Dam" (ellipsis in original)).

<sup>154</sup> For a description of the effects the 1978, 1979, 1982, and 1988 amendments had on the ESA, see Cheever, *supra* note 36, at 138-43, 146-47, 149-50; LITTELL, *supra* note 23, at 10-13; *The 1978 Amendments to the Endangered Species Act*, 9 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,031 (Feb. 1979).

<sup>155</sup> Over 350 species were listed as endangered or threatened during the Reagan and Bush Administrations. See IMPLEMENTING ACTIONS, *supra* note 66, at 24-25 (May 1992).

<sup>156</sup> See Barry, *supra* note 14.

<sup>157</sup> My personal ESA practice experience is that FWS usually acts like what might be described in the business world as a "tough negotiator" when engaging in species listings and incidental take authorizations—in other words, they construe their authority as much in their favor as possible and ask for the most they think they can get. Presumably, Congress intended nothing less of the agency. Just as in the business world, however, there have been times when FWS has taken patently unreasonable positions. Indeed, many anecdotal histories of FWS's positions taken in listings and incidental take authorization matters have assumed legendary "horror story" proportions. See, e.g., *The Emotional Species Act*, WALL ST. J., Nov. 2, 1993, at A22 (tiny snail shuts down Idaho farming); *A Fairy Shrimp Tale*, WALL ST. J., Oct. 21, 1994, at A14 (tiny shrimp brings California irrigation to halt); Leslie Spencer, *No Dream House for Mr. Burris*, FORBES, July 18, 1994, at 78 (small songbird shuts down home construction in central Texas); Ike C. Sugg, *California Fires—Losing Houses, Saving Rats*, WALL ST. J., Nov. 10, 1993, at A20 (preservation of small rat leads to fires in California). Because each such instance involves no small measure of grief to one or several people, the "horror stories" have become influential in shaping the ESA reform debate, serving as the means of counterbalancing ESA proponents' "success stories" of species saved by caring

ceeded in making the ESA's regulated community a kind of poster child for the broader call for relief from federal regulation of private property rights. That theme has melded with the themes of increased attention to cost-benefit analysis in administrative policies and the elimination of unfunded federal mandates to form the cornerstones of the so-called "wise use" movement and its legislative agenda.<sup>158</sup>

Neither the message nor the potency of the wise use movement should be underestimated. Environmental advocacy groups seemed initially to marginalize the movement as comprised only of heretics and zealots.<sup>159</sup> That was a mistake. While the wise use movement may indeed include some radical thinkers, its message appeals very much to the mainstream in a world of increasing regulatory complexity and decreasing economic opportunities. The truth of the matter is that by the early 1990s the ESA, as interpreted by the agencies, environmental advocacy groups, and some courts, had begun to impose significant economic hardship on more businesses and individuals in more areas of the country than ever before.<sup>160</sup> Mainstream interests affected by the ESA, now larger in number

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landowners. The unfortunate result is that ESA reform is directed by a fairly small universe of emotional, hyperbolized examples presented from both sides of the debate.

<sup>158</sup> Ironically, the wise use movement is by far more "grass roots" than its environmentalist foes. For example, most of the literature about the wise use movement is found in highly rhetorical polemics issued by nationally organized environmental advocacy groups. *See, e.g., LET THE PEOPLE JUDGE* (John Echeverria & Raymond Booth Eby eds., 1995) (collection of essays and article reprints); *THE WILDERNESS SOC'Y, THE WISE USE MOVEMENT: STRATEGIC ANALYSIS AND FIFTY STATE REVIEW* (3d printing, revised Mar. 1993). Some national umbrella wise use groups are beginning to emerge, however, such as the Grass Roots ESA Coalition, which claims over 100 participating groups as diverse as the Alaska Loggers Association, the New Mexico Cattle Growers Association, the Sugar Cane Growers of Texas, and the Wyoming Wool Growers. *See GRASS ROOTS ESA COALITION NEWSLETTER*, May 8, 1995, at 1-2. There also appears to be a loose alliance of ideas, if not also of organization, between such groups and libertarian policy research and advocacy organizations, which levy strong criticism toward the regulatory clout of the ESA. *See, e.g., David A. Ridenour, To Save Wildlife, Scrap the Endangered Species Act*, *WALL ST. J.*, July 18, 1995, at A14 (opinions of author, officer of a national libertarian policy research organization, regarding the use of voluntary, incentive-based approaches to species conservation).

<sup>159</sup> For example, Pace University law professor John Humbach described the wise use movement in 1992 as "the last powerful gasp of a land-use ethic that is becoming obsolete." Thomas A. Lewis, *Cloaked in a Wise Disguise*, *NAT'L WILDLIFE*, Oct./Nov. 1992, at 4, 10, reprinted in *LET THE PEOPLE JUDGE*, *supra* note 158, at 13, 19.

<sup>160</sup> For example, at one stage in the negotiation of Austin, Texas's regional ESA permit and habitat conservation plan, *see supra* note 75, the plan the City of Austin proposed would have resulted in a development surcharge of about \$40,000 per acre of development in the habitat of the species covered by the plan; in most of the county that amount would be as much as 10 times the value of raw undeveloped land. *See Ruhl, supra* note 75, at 637 n.248. These and similar cost aberrations have led many commentators to question the economic sensibility of the ESA. *See, e.g., Charles C. Mann & Mark L. Plummer, The Butterfly Problem*, *ATLANTIC MONTHLY*, Jan. 1992, at 47; *see generally* MANN & PLUMMER, *supra* note 93. Indeed, one highly respected conservation organization, The Nature Conservancy, recently conducted an in-depth study of how the ESA has been implemented and found that "the information we received challenged our previous assumptions about how well the ESA has been working." *THE NATURE CONSERVANCY, THE WORKINGS OF THE ENDANGERED SPECIES ACT: A SUMMARY OF OUR FINDINGS 1* (Feb. 8, 1995). Their eight findings were

than ever before, captured and amplified the "wise use" theme—in a sense, took over the grass roots movement's agenda—and used it in judicial and legislative settings with the ESA as public enemy number one.<sup>161</sup>

For example, for almost two decades after its enactment, most litigation under the ESA was brought at the behest of environmental advocacy groups alleging that the agencies had failed to implement species protection measures adequately or that a regulated entity had violated the law. Although these efforts did not always succeed, and often were unabashed pretexts for broader antidevelopment agendas, the ESA case law was largely a story about the expansion of ESA regulatory authority and its consequences.<sup>162</sup> By contrast, since 1992 the courts have witnessed a tremendous surge of litigation brought against federal agencies by regulated entities seeking to constrict the ESA's influence, particularly the influence of the core programs. Thus, wise use advocates have challenged the broad regulatory features of the ESA, such as the harm definition involved in the *Sweet Home* case,<sup>163</sup> even specific species listings and critical habitat des-

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1. People question the scientific validity of the science used to implement the ESA.
  2. The ESA process is not scientifically targeted.
  3. Ad hoc decisionmaking is undermining credibility.
  4. Habitat conservation plans are worthwhile, but underutilized.
  5. Private lands prohibitions frustrate landowners.
  6. State and local governments are not involved enough in the administration of the ESA.
  7. Lack of information about the effects of the ESA leads to fear and frustration.
  8. Far more funding is needed, especially for land acquisition.

*Id.* at 2-7.

<sup>161</sup> As Jon Roush, president of the Wilderness Society and ardent wise use movement foe, observed in 1995, after it became evident that the wise use movement was not a flash in the pan:

[T]he Wise Use movement is only partly a grass roots movement. Its message appeals to a broad array of people and interests groups. WUMs include cattlemen, loggers, miners, private-property owners within national forests, off-road vehicle users, East Coast land developers, western water users, fishermen and shrimpers, recreational developers, and other users of natural resources. The diverse makeup of this group is one of its strengths. Politicians see it as a broad constituency. By supporting Wise Use interests, a politician can appeal to many groups at once. Politicians also like it because the issues involve big money. The WUMs favor the big-money side of the equation, and so the movement attracts big money.

Jon Roush, *Freedom and Responsibility: What We Can Learn from the Wise Use Movement*, in *LET THE PEOPLE JUDGE*, *supra* note 158, at 3, 3. Recently, several nationally organized and funded property rights groups have begun to publish longer, scholarly, policy-oriented manifestos of the principal ideals of the movement, suggesting that the movement's advocacy is transcending grass roots polemics. See, e.g., *LAND RIGHTS: THE 1990'S PROPERTY RIGHTS REBELLION* (Bruce Yandle ed., 1995) (collection of essays by scholars, national organization directors, and other policy commentators, discussing various facets of land rights).

<sup>162</sup> See, e.g., *TVA v. Hill*, 437 U.S. 153 (1978) (construing ESA section 7(a)(2) federal agency duty to avoid jeopardy as mandatory); *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (finding that destruction of habitat effected take of species in violation of ESA section 9(a)(1)); *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991) (finding FWS abused its discretion in not designating critical habitat for a listed species under ESA section 4).

<sup>163</sup> See *supra* text accompanying notes 46-54.

ignations are now routinely challenged on procedural and substantive grounds.<sup>164</sup> Although not all of these litigation efforts succeed, some have and others yet will, and their number and aggressiveness show no signs of slackening.

The onslaught has by no means been limited to the judicial arena. Efforts in Congress to contain the ESA have taken a quantum leap in the 104th Congress, the first two-chamber Republican Congress in forty years. Early in the session, a moratorium of additional species listings lasting through the fiscal year was enacted as a rider to a defense appropriations bill.<sup>165</sup> That unprecedented congressional intervention in ESA listings suggests that the ESA reform legislation introduced in the 103d Congress, which focused on fine-tuning the existing core structure of the law to make it less burdensome to the regulated community,<sup>166</sup> may come to be perceived as tame by comparison to what ultimately is enacted by the

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<sup>164</sup> See, e.g., *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995) (challenging listing of Bruneau Hot Springs snail); *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995) (challenging critical habitat for listed northern spotted owl); *Endangered Species Comm. of the Bldg. Indus. Ass'n of Southern Cal. v. Babbitt*, 852 F. Supp. 32 (D.D.C. 1994) (challenging listing of California gnatcatcher).

<sup>165</sup> H.R. 889, 104th Cong., 1st Sess. tit. II, ch. IV (1995) (enacted). The moratorium appears to have been extended by continuing resolution beyond the close of the fiscal year, see H.R.J. Res. 108, 104th Cong., 1st Sess. (1995); 141 CONG. REC. S14,638 (daily ed. Sept. 29, 1995) (statements of Sens. Mark Hatfield (R-Or.), Kay Bailey Hutchison (R-N.J.), Slade Gorton (R-Wash.), and Dirk Kempthorne (R-Idaho)); however, litigation over the status of the moratorium has been initiated in at least one court. See *Save Our Springs Legal Defense Fund, Inc. v. Babbitt*, No. MO-95-CA-230 (W.D. Tex. filed Oct. 30, 1995). Several bills would unquestionably extend the moratorium through 1996. See, e.g., H.R. 1977, 104th Cong., 1st Sess. tit. I (1995) (passed House and Senate) (extending moratorium period).

<sup>166</sup> For an overview of the competing reform bills introduced in the 103d Congress, see Nancy Kubasek et al., *The Endangered Species Act: Time for a New Approach?*, 24 ENVTL. L. 329 (1994). For a discussion of the ESA reform bills under consideration in the 104th Congress, see *infra* text accompanying notes 207-54. Based on those bills and the sentiment prevailing in the current Congress, there is little chance that Congress, if it does take action on the ESA, will do anything but curtail the potency of the core programs. See William K. Stevens, *Future of Endangered Species Act in Doubt as Law is Debated*, N.Y. TIMES, May 16, 1995, at B7. Evidence that the current DOI administration—only the second Democrat-appointed administration of the agency in the history of the ESA—saw that writing on the wall early in the 104th Congress came with a DOI news report, in which the administration itself for the first time advocated limited reform measures to the ESA as an effort to avoid wholesale revisions to the Act. See U.S. Dep't of Interior, News Release: Administration Proposes Endangered Species Act Exemptions for Small Landowners; "Guideposts for Reform" Would Give More Authority to States (Mar. 6, 1995). These "guideposts" have evolved into 10 principles DOI has espoused as administrative reforms of the ESA, thus forestalling the need for legislative attack. They are

1. Treat landowners fairly and with consideration.
2. Minimize social and economic impacts.
3. Create incentives for landowners to conserve species.
4. Provide quick, responsive answers and certainty to landowners.
5. Base ESA decisions on sound and objective scientific information.
6. Prevent species from becoming endangered or threatened.
7. Promptly recover and delist threatened or endangered species.
8. Provide State, Tribal, and local governments with opportunities to play a greater role in carrying out the ESA.

104th. In general, efforts in Congress to legislate property takings compensation triggers and award frameworks appear in almost all cases to have the ESA as their principal target,<sup>167</sup> and thus may have the effect of reining in the ESA without fundamentally altering its composition.

What does this mean for the ESA and, in particular, for section 7(a)(1)? First, regardless of the win-loss record of litigation efforts to constrain the ESA, it is clear that the FWS and NMFS will continue for the foreseeable future to operate the core ESA programs under the regulated community's lawsuit microscope. Indeed, to the extent that Congress does not significantly scale back ESA authority, one might expect the litigation front to open wider. Such a war of attrition will limit the agencies' use of the core programs in broader species protection contexts where flexibility, breadth of scope, and regulatory leverage are needed. Hence, listing one species as a means of protecting habitat for other species may prove ineffective in the long run as each listing must withstand closer procedural and substantive scrutiny.

Similarly, regardless of whether they enact any ESA reform bill, the 104th Congress has signaled that the basic ESA theme and approach no longer are exempt from harsh legislative scrutiny. The ESA symbolizes for many in the current Congress and those who elected them the epitome of federal regulatory excess. Congress might not undo the core ESA programs this session, or ever, but no longer is that outcome outside the bounds of possibility. That reality will no doubt check the force with which FWS and NMFS attempt to implement the core ESA programs. Through such administrative self-restraint, we are, for all practical purposes, witnessing the emergence of a "new" ESA even without specific congressional directive.

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9. Make effective use of limited public and private resources by focusing on groups of species dependent on the same habitat.
  10. Promote efficiency and consistency in the Departments of the Interior and Commerce.

*Making the ESA Work Better*, ENDANGERED SPECIES BULL., May-June 1995, at 4 (numbering added); see generally Scott H. Segal, *Laying Down with the Lion: Attempts to Reform the Endangered Species Act*, 25 ST. B. TEX. ENVTL. L.J. 189 (1995). One of the first official policies implementing the agenda of reforms came soon thereafter when DOI amended its general regulations for protection of threatened species to establish an exemption from the take regulations for individual home construction projects having negligible effects on species habitat. Proposed Rule. Exempting Certain Small Landowners and Low-Impact Activities from Endangered Species Act Requirements for Threatened Species, 60 Fed. Reg. 37,419 (July 20, 1995) (to be codified at 50 C.F.R. § 17.31).

<sup>167</sup> For example, the House passed a bill early in the 104th Congress that specifically identified the ESA as one of the laws that would require statutorily enforced property devaluation compensation procedures. H.R. 9, 104th Cong., 1st Sess. (1995). For an overview of that and other private property protection bills introduced in recent sessions of Congress, see ROBERT MELTZ, CONGRESSIONAL RESEARCH SERV., POINTS OF DIVERGENCE BETWEEN COMPENSATION PROVISIONS OF THE "PRIVATE PROPERTY OWNER'S BILL OF RIGHTS" (H.R. 3875) AND SUPREME COURT TAKINGS JURISPRUDENCE (July 31, 1994).

*B. The Emergence of the Ecosystem Management Theme*

Ironically, just as the onslaught on the ESA began, FWS and NMFS began efforts to expand the coercive effects of the ESA on private property, by supercharging the ESA into a vehicle for federal protection and management of ecosystems.<sup>168</sup> Their efforts, tied closely to the goal of biodiversity conservation,<sup>169</sup> only amplified the regulated community's resentment of the ESA and fueled the ESA core programs reform fires. The MOU may serve as a way out of that box.

Congress imbued the ESA with the purpose of providing "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."<sup>170</sup> That statement of purpose, however, is about where ecosystem thinking begins and ends in the ESA. Congress did not define "ecosystem," and did not imbue the core ESA programs with anything transcending a species-by-species focus. For those reasons, advocates of biodiversity conservation and ecosystem protection have criticized the ESA, branding it an ineffective policy tool.<sup>171</sup>

At about the same time that the wise use movement was evolving its agenda, FWS and NMFS began developing their agenda for taking the ESA into the ecosystem age. The agencies apparently thought that that could be accomplished using the existing core programs, because they initiated an agency-wide policy calling for all levels of the agencies to implement those programs with an ecosystem approach.<sup>172</sup> The agencies used their core programs aggressively in that respect at first: species listings were overtly designed to include ecosystem protection as a goal,<sup>173</sup> critical

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<sup>168</sup> "Species will be conserved best not by a species-by-species approach but by an ecosystem conservation strategy that transcends individual species." Notice of Interagency Cooperative Policy for the Ecosystem Approach to the Endangered Species Act, 59 Fed. Reg. 34,273, 34,274 (July 1, 1994) [hereinafter Interagency Cooperative Policy].

<sup>169</sup> *Id.*

<sup>170</sup> 16 U.S.C. § 1531(b) (1994).

<sup>171</sup> See, e.g., Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 *ECOLOGY L.Q.* 265 (1991); Andrew A. Smith et al., *The Endangered Species Act at Twenty: An Analytical Survey of Federal Endangered Species Protection*, 33 *NAT. RESOURCES J.* 1027 (1993); see generally NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT (1995) (comprehensive review of ESA effectiveness).

<sup>172</sup> See U.S. FISH & WILDLIFE SERV., U.S. DEP'T OF INTERIOR, AN ECOSYSTEM APPROACH TO FISH AND WILDLIFE CONSERVATION: AN APPROACH TO MORE EFFECTIVELY CONSERVE THE NATION'S BIODIVERSITY (Mar. 8, 1994). The agency's resolve in this respect has increased as more scientific research geared toward ecosystem-level dynamics reveals the dramatic impacts habitat loss has on biodiversity generally. See, e.g., National Biological Serv., U.S. Dep't of Interior, Biological Rep. No. 28, *Endangered Ecosystems of the United States: A Preliminary Assessment of Loss and Degradation* (1995); Scott K. Robinson et al., *Regional Forest Fragmentation and the Nesting Success of Migratory Birds*, 268 *SCIENCE* 1987 (1995).

<sup>173</sup> See, e.g., Determination of Threatened Status for the Delta Smelt, 58 Fed. Reg. 12,854 (Mar. 5, 1993) (protection of river and delta habitat of small fish); Final Rule to List Mexican Spotted Owl as a Threatened Species, 58 Fed. Reg. 14,248 (Mar. 16, 1993) (protection of owl habitat in five southwestern states). FWS has acknowledged it will take an "ecosystem approach" when listing species. See Interagency Cooperative Policy, *supra* note 168.

habitat designations grew in size to ecosystem dimensions;<sup>174</sup> recovery planning took on ecosystem management as an overt goal;<sup>175</sup> the regional emphasis of habitat conservation planning under section 10(a) was portrayed as having ecosystem-wide benefits.<sup>176</sup> Never mind that the coercive, top-down regulatory features of these measures played into the hands of the ESA reform proponents; the agencies seemed hell-bent on administratively transforming the Endangered *Species* Act into the Endangered *Ecosystem* Act.

More recently, perhaps as a defense to charges of undue intrusion on privately owned ecosystems, FWS in particular has injected a "partnership" theme into its ecosystem approach rhetoric.<sup>177</sup> The message appears to be that FWS hopes, through partnership with nonfederal landowners and economic interests, to balance the regulatory impact of the new ecosystem approach with sensitivity to property rights and economic development. That theme may be emerging most forcefully through the MOU.

#### V. THE MOU AND MODELS FOR USING THE DUTY TO CONSERVE AS A NEW POLICY TOOL

If any federal policy initiative needs flexibility and a framework for cooperation between federal and local interests, ecosystem management is the one. FWS appears to have realized as much in developing its partnership theme for ecosystem management programs. In the long run, the ESA may prove to be too narrowly focused to carry off that effort successfully. With other federal laws and agencies jostling in the ecosystem management policy frenzy, the current political climate suggests that a uniform federal ecosystem management law is sorely needed.<sup>178</sup> Given the improbability of Congress enacting such a law anytime soon—holding

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<sup>174</sup> See, e.g., Designation of Critical Habitat for Mojave Population of the Desert Tortoise, 59 Fed. Reg. 5820 (Feb. 8, 1994) (6.5 million acres in four southwestern states); Designation of Critical Habitat for Northern Spotted Owl, 57 Fed. Reg. 1796 (Jan. 15, 1992) (6.9 million acres in three Pacific Coast states).

<sup>175</sup> See, e.g., U.S. FISH & WILDLIFE SERV., U.S. DEP'T OF INTERIOR, DRAFT SAN MARCOS AND COMAL SPRINGS AND ASSOCIATED AQUATIC ECOSYSTEMS (REVISED) RECOVERY PLAN (Aug. 1, 1994) (first multi-species, ecosystem-oriented recovery plan proposal). FWS has identified recovery planning as an important component of its ecosystem management policy, stating it will develop and implement recovery plans "in a manner that conserves biotic diversity . . . of the ecosystems upon which the listed species depend." Interagency Cooperative Policy, *supra* note 168, at 34,274.

<sup>176</sup> See, e.g., DRAFT HCP HANDBOOK, *supra* note 63, at 5 (describing the habitat conservation planning process as assisting "overall biological diversity" and "a legal tool to protect listed species . . . at the local, regional, or ecosystem level").

<sup>177</sup> See Ira Michael Heyman, Property Rights and the Endangered Species Act: A Renascent Assault on Land Use Regulation, Address at McGeorge School of Law (Nov. 16, 1993), reprinted in 25 PAC. L.J. 157 (1994) (DOI official discusses agency's desire to include local input in ESA decision making).

<sup>178</sup> Elsewhere, I have advocated that a unified federal law defining ecosystem management goals and relying on state and local implementation is needed to bring order to federal policies and avoid federal over-regulation to the detriment of state and local autonomy. See Ruhl, *supra* note 75, at 566.

one's breath is not recommended—FWS and NMFS would be well advised to rediscover what the Supreme Court in *TVA v. Hill* said about the role of section 7(a)(1) in the ESA family.

The MOU, of course, suggests that FWS and NMFS have indeed rediscovered section 7(a)(1); however, the absence of any substantive discussion in the MOU of what the duty to conserve species means also suggests that the agencies don't know what to do with the untapped power of the provision. Having rediscovered section 7(a)(1), the agencies ought not sacrifice the opportunities it offers by molding it into the rigid framework under which they have operated the core ESA programs. Rather, the breadth and flexibility of section 7(a)(1) permit the agencies to fashion a program that does exactly what FWS calls for in its emerging theme of partnership with the regulated community. Depending on how passive or aggressive an approach the agencies take in that respect, they risk either throwing section 7(a)(1) to the wise use lions or neutralizing it back into permanent oblivion. If the agencies blend the proper amounts of regulatory policy with flexible implementation, however, they just may put section 7(a)(1) at the head of the ESA family and keep it there.

*A. The MOU—What It Does and Does Not Do for Section 7(a)(1)*

The principal significance of the MOU lies in the number and power of the signatory agencies and their open recognition of the "common goal of conserving species . . . by preserving and managing their populations and the ecosystems upon which those populations depend."<sup>179</sup> The MOU begins by recounting the important role each signatory agency plays in environmental and natural resources management and summarizing the relevant ESA provisions, including section 7(a)(1). The operative terms of the MOU then follow, under which each signatory agency promised to

1. Use its authorities to further the purposes of the ESA by carrying out programs for the conservation of Federally listed species, including implementing appropriate recovery actions that are identified in recovery plans.
2. Identify opportunities to conserve Federally listed species and the ecosystems upon which those species depend within its existing programs or authorities.
3. Determine whether its respective planning processes effectively help conserve threatened and endangered species and the ecosystems upon which those species depend.
4. Use existing programs, or establish a program if one does not currently exist, to evaluate, recognize, and reward the performance and achievements of personnel who are responsible for planning or implementing programs to conserve or recover listed species or the ecosystems upon which they depend.<sup>180</sup>

The MOU defines specific tasks the agencies, called the "Cooperators," will implement through two interagency working group structures. First, the agencies will establish regional interagency working groups in

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<sup>179</sup> MOU, *supra* note 1, at E-2.

<sup>180</sup> *Id.* at E-5.



identified geographical areas to "coordinate agency actions and create opportunities, and overcome barriers, to conserve [listed] species and the ecosystems upon which they depend."<sup>181</sup> The specific tasks relevant to section 7(a)(1) include helping FWS and NMFS develop recovery plans, cooperating to implement recovery plans, and exchanging research and information to promote effective species conservation.<sup>182</sup> The regional groups are also responsible for developing and taking actions "to implement the ESA with the appropriate involvement of the public, States, Indian Tribal governments, and local governments."<sup>183</sup> The Cooperators will also create a national interagency ESA working group to "identify and coordinate improvements in federal implementation of the ESA,"<sup>184</sup> which will include having each agency "[i]dentify ways to improve conservation of [listed] species . . . including the ecosystems upon which they depend, in agency planning processes and other agency programs."<sup>185</sup> The MOU thus enhances the role of the section 7(a)(1) species conservation duty and the signatory agencies' reliance on it; however, it fails to take many other initiatives that could maximize section 7(a)(1)'s structural advantages.

On the positive side, the MOU clearly enhances the role of section 7(a)(1) in ESA policy. First, the MOU solidifies the link between section 7(a)(1) and the agencies' new ecosystem management theme. At every mention of species conservation, the MOU adds the phrase "and the ecosystems upon which they depend,"<sup>186</sup> thus parroting the species conservation and ecosystem protection purposes stated in section 2(c) of the ESA.<sup>187</sup> Section 7(a)(1) is the principal means of implementing that goal—unlike section 2(c), it purports to impose affirmative duties on federal agencies. Hence, there can be no mistake that the MOU elevates section 7(a)(1) to a position of prominence in the ecosystem management agendas of FWS and NMFS.

Second, the MOU links section 7(a)(1) to the recovery planning and implementation features of the ESA. Section 4(f) of the ESA directs FWS and NMFS to develop and implement recovery plans, but is silent with respect to other agencies' roles in that process.<sup>188</sup> The MOU, by contrast, expressly recognizes that the other agencies have a duty to assist in developing and implementing recovery plans. That duty surely does not flow from the terms of the take prohibition of section 9,<sup>189</sup> or of the duty to consult on jeopardy under section 7(a)(2),<sup>190</sup> or of the recovery planning

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at E-5 to E-6.

<sup>183</sup> *Id.* at E-6.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at E-1.

<sup>187</sup> 16 U.S.C. § 1531(c) (1994).

<sup>188</sup> *Id.* § 1533(f).

<sup>189</sup> *Id.* § 1538(a).

<sup>190</sup> *Id.* § 1536(a)(2).

function in section 4(f) itself.<sup>191</sup> None of those provisions imposes anything like a duty to implement recovery plans on federal agencies outside of the Departments of Interior and Commerce.<sup>192</sup> Rather, the MOU could be interpreted as establishing that the signatory agencies' section 7(a)(1) species conservation duty includes a responsibility to implement recovery plans.<sup>193</sup> That defined role, particularly in light of FWS's new approach of developing ecosystem-wide recovery plans, would be certain to put section 7(a)(1) in the center of FWS's and NMFS's ecosystem management agenda.

Third, but most significant, the MOU recognizes the essential partnership that FWS must forge with nonfederal interests, which it has failed to forge under the core ESA programs. One can only hope that by its reference to implementing the agreement with "appropriate involvement" by those nonfederal stakeholders, the MOU really means "with their interests in mind." To avoid the trap that the core ESA programs have fallen into, the MOU must rigorously adhere to that ideal, or it too will alienate the constituencies most essential to species protection—nonfederal public and private land owners.

On the other hand, the MOU falls short in two significant respects. First, it fails to fully define what the duty to conserve species entails as an action-forcing mechanism, or even whether that duty can be such a mechanism. For example, must the agencies initiate recovery plan implementation programs, or simply consider recovery planning in the course of implementing their primary mission projects? The MOU does not say. Similarly, the MOU fails to provide much substance to the consultation element of section 7(a)(1). It may be that FWS and NMFS perceive the consultation requirement under section 7(a)(1) as applying only on a broad, program-wide basis between agencies, rather than including project-specific consultations in the style of section 7(a)(2) jeopardy consultations. If that is true, then the regional and national interagency workgroups the MOU establishes may suffice. But if section 7(a)(1) also requires consultation on specific agency actions, the MOU fails to fill the gap currently existing in the FWS and NMFS regulations—that is, it does not prescribe a consultation procedure for species conservation. Hence, the MOU conceptually places section 7(a)(1) in the vanguard of ecosystem management efforts at FWS and NMFS, but fails to tell us what that means at a practical level. It remains necessary, therefore, to explore what approaches FWS and NMFS could take to further define the scope of the federal agencies' duty to conserve species.

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<sup>191</sup> *Id.* § 1533(f).

<sup>192</sup> *Id.* § 1533(c).

<sup>193</sup> Although no written infrastructure yet exists within the MOU agencies to interpret the MOU in this way, officials within FWS have informally confirmed that this is the intended message of the MOU. Telephone Interview with Jay Slack, U.S. Fish & Wildlife Service, U.S. Department of Interior (Mar. 2, 1995). Officially, FWS has explained that the MOU represents "an unprecedented agreement to improve recovery implementation. Each agency agreed to identify opportunities for recovery and to using existing authorities toward that end." *Making the ESA Work Better*, *supra* note 166, at 7.

*B. Three Approaches for Filling in the Details of the MOU*

The MOU finally provides FWS and NMFS an opportunity to shape the content of section 7(a)(1) as a species protection mechanism. Notwithstanding the discretionary features the Ninth Circuit ascribed to section 7(a)(1) in *Pyramid Lake*,<sup>194</sup> the case law leaves the door open to fulfilling the provision's action-forcing mandate in a variety of ways. Whether and how far FWS and NMFS take that action-forcing approach may very well dictate how successful section 7(a)(1) becomes in the ESA family.

Of course, for any such approach to defining the substantive side of section 7(a)(1) to have effect, FWS and NMFS must formally integrate the duty to conserve into ESA procedure, by promulgating conservation consultation regulations similar to those applicable to the section 7(a)(2) jeopardy consultation regulations. To be effective, the conservation consultation duty would have to apply on two levels. First, each agency would consult with FWS and NMFS periodically on a programmatic level to determine if the agency's authorities are being used adequately to carry out programs for the conservation of listed species. Second, each agency would consult with FWS and NMFS on a project-specific level, much as they do now for jeopardy consultations, to ensure that projects fulfill the minimum required substantive duty of conservation. Just as they have for the section 7(a)(2) jeopardy consultation duty, FWS and NMFS would have the authority to implement those procedures necessary to make the conservation consultation duty a reality.<sup>195</sup> Those procedures are not yet in place, however, and until they are, the general "working group" approach of the MOU is likely to produce many fine sounding reports, but little action or impact.

Of course, putting those procedures in place would not answer the essential question of what the duty to conserve requires substantively for federal agencies. The MOU itself is silent on that matter. It specifies only that "nothing in this MOU obligate[s] the Cooperators to expend appropriations or enter into any contract or other obligations"; that it is "not intended to be enforceable by any party other than the signatories"; and that "participation . . . may be terminated with the 60-day written notice of any party to the other Cooperators."<sup>196</sup> Hence, only administrative policy evolution, and most likely more litigation, will define where the MOU takes section 7(a)(1). The three most likely paths of that evolution provide increasingly aggressive interpretations of the duty to conserve, with each finding some support in the case law as well as the text of the ESA, but

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<sup>194</sup> See *supra* text accompanying notes 109-20.

<sup>195</sup> Ostensibly, the regulations for interagency consultation cover all of the section 7(a) duties, including the duty to conserve. See 50 C.F.R. § 402.01 (1994). Those regulations, however, are devoted principally to the jeopardy consultation procedure; the only mention of conservation is in connection with the discretionary "conservation recommendations." *Id.* § 402.14(j).

<sup>196</sup> MOU, *supra* note 1, at E-7.

only one putting section 7(a)(1) in its proper place at the head of the ESA family.

*1. An Antibacksliding Approach—A Duty to Avoid Impeding Recovery*

The minimum approach the agencies could take, without completely eradicating the duty to conserve as an independent duty under the ESA, would be to bar federal agencies from taking action that would prevent or impede recovery of listed species. Such a criterion would offer advantages over the take and jeopardy prohibitions, because many actions falling short of those all-or-nothing conditions nonetheless may impede or prevent recovery. For example, a minimum viable population of a particular listed species may be capable of existing indefinitely in a defined habitat area, albeit in permanent endangered or threatened status. Federal agency actions, either project-specific or program-wide, which either reduce the amount of occupiable habitat to that minimum viable population size or prevent the area of occupiable habitat from enlarging, may not cause direct take or jeopardy to the species, but would very likely prevent that species from recovering.

Under such an approach, therefore, some additional conservation impacts would be felt beyond those caused by the take and jeopardy prohibitions. Federal programs promoting land use development would need to consider whether such development would have the effect of cutting off recovery opportunities for species in adjacent habitats. Any suitable habitat area that is currently unoccupied, but potentially occupiable by a species in need of expanded range for recovery, could gain significant protections not provided by any of the take or jeopardy provisions. For example, consider the case of the golden-cheeked warbler, an endangered migratory bird that nests in springtime only in the woodlands of central Texas.<sup>197</sup> If the harm definition had been construed in *Sweet Home*, or were rewritten by Congress, as not extending to habitat modification, the take prohibition would not prevent destruction of the warbler's woodland habitat after it had migrated to its winter home. Section 7(a)(1), however, could be used to prevent federal agencies from funding, authorizing, or carrying out any habitat destruction because such action would impede the species' recovery. Hence, even in its most passive form, section 7(a)(1) offers something not currently being provided by the core ESA programs.

On the other hand, using section 7(a)(1) only for the limited purpose of not impeding recovery fails to capture the action-forcing meaning of the provision, and clearly falls short of the ESA's definition of "conserving" as bringing species out of endangered or threatened status.<sup>198</sup> Agencies could avoid impeding recovery of a species and still do very little on its behalf. Moreover, this approach does not require an agency to initiate positive, free-standing conservation actions within the agency's authorities; it merely requires that the agency avoid causing any negative conservation

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<sup>197</sup> For a description of the habits of this small songbird, see U.S. FISH & WILDLIFE SERV., U.S. DEP'T OF INTERIOR, GOLDEN-CHEEKED WARBLER RECOVERY PLAN (1992).

<sup>198</sup> See 16 U.S.C. § 1532(3) (1994).

effects as a result of carrying out its primary mission actions. Hence, defining section 7(a)(1) as requiring merely that federal agencies not impede or prevent a listed species' recovery would not adequately satisfy the duty to conserve species.

## 2. *An Alternatives Analysis Approach—A Duty to Adopt Recovery-Friendly Actions*

An approach more faithful to section 7(a)(1) than simply requiring no recovery-impeding actions would be to adopt the calculus the Pyramid Lake Paiute Tribe proposed in *Pyramid Lake*: federal agencies must adopt the most recovery-friendly of any viable action alternatives.<sup>199</sup> However, that formula still provides little action-forcing effect; it also fails to respond to the need to define both how friendly is the minimum acceptable under section 7(a)(1) and how much agencies are required to consider cost and convenience.

To further develop the action-forcing feature of section 7(a)(1), therefore, the Tribe's approach could be amended to require that agencies must always generate a maximally recovery-friendly alternative for any proposed action. In other words, any time a federal agency contemplates an action, the agency would have to apply its authorities to develop an option that satisfies the agency's primary mission and at the same time provides the maximum amount of species conservation within the agency's authority, even if that means integrating components into the project that do not directly serve the primary mission of the project. The conservation consultation procedure would then require that the action agency select that "best conservation case" alternative unless it is demonstrated to be technologically or economically impracticable in light of the alternatives available to the agency. An agency wishing to depart from the best conservation case alternative would have to demonstrate it selected the practicable option that came closest to meeting that ideal level of conservation.

Although such an approach would create a benchmark for weighing agency compliance with the duty to conserve, and would inject some degree of action-forcing thought into the conservation consultation procedure, that approach would nonetheless fall short of satisfying section 7(a)(1). By hinging the best conservation case analysis on the presence of an agency action, the ESA would not take full advantage of the focus in section 7(a)(1) on action-forcing at the agency program level. Hence, while the best conservation case approach may effectively implement section 7(a)(1) for project-specific consultations, some additional benchmark would be needed for program-wide consultations. Moreover, the best conservation case option itself would be subject to no objective benchmark by which to compare the performance within an agency among different projects, and between agencies generally in how each responds to the

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<sup>199</sup> *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1417 (9th Cir. 1990). For a complete discussion of this case, see *supra* text accompanying notes 109-20.

duty to conserve. Thus, some broadly applicable notion of what constitutes conservation is needed.

### 3. *An Action-Forcing Approach—An Affirmative Duty to Advance Recovery Plans*

The most aggressive approach FWS and NMFS could take under section 7(a)(1) would respond to the gaps described for the passive and moderate approach models: require all federal agencies to maximize their use of programmatic and project-specific authorities to implement recovery plans.<sup>200</sup> Under this approach, not only would agencies choose recovery-friendly alternatives for each agency project, but they would use their authorities to develop recovery-friendly programs. These programs would be developed within or independent of (but not inconsistent with) each agency's primary mission actions, and would implement listed species recovery plans. FWS and NMFS would coordinate agencies' respective efforts through the programmatic consultations, and through project-specific consultations would ensure that those program-wide measures were being implemented. The only benchmarks needed for such analysis would be straightforward—what are the agencies' authorities and what do the pertinent recovery plans require?

On the one hand, such an approach appears to be the most faithful to the ESA's overall structure. Recovery plans are to be "develop[ed] and implement[ed] . . . for the conservation and survival of endangered species and threatened species."<sup>201</sup> Section 7(a)(1) imposes on federal agencies

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<sup>200</sup> Rohlf and Kuehl are the only other commentators to date who have pondered (in published writing) the connection between the species conservation duty and recovery plans. See ROHLF, *supra* note 23, at 98-99; Kuehl, *supra* note 95, at 635-37. Professor Rohlf observes that recovery plans "are the only other easily identifiable potential triggers for application of section 7(a)(1)." ROHLF, *supra* note 23, at 98. Kuehl posits that "[a]t the very least, courts should view recovery plans as persuasive authority" for what constitutes required conservation measures. Kuehl, *supra* note 95, at 637. In France and Tuholske's earlier work, without explicitly linking section 7(a)(1) to recovery plans or explaining the background statutory fabric for doing so, they postulated that section 7(a)(1) "demands all agencies of the federal government to work ceaselessly for the recovery of listed species." France & Tuholske, *supra* note 95, at 4. Hence, although no one has previously developed the rationale for and scope of the proposal to the extent provided in this Article, I appear not to be alone in advocating the leap forward for section 7(a)(1) in terms of its role in the ESA family. Given the angry reactions to the current enforcement of the ESA under the core programs, there is all the more reason to do so today than at the time of those earlier commentaries.

<sup>201</sup> 16 U.S.C. § 1533(f)(1) (1994). The section 4(f) recovery plan implementation duty is expressed with regard only to the Secretaries of Interior and Commerce. Most courts have interpreted the duty as discretionary. See, e.g., *National Wildlife Fed'n v. National Park Serv.*, 669 F. Supp. 384, 388-89 (D. Wyo. 1987); see generally Kuehl, *supra* note 95, at 636-37. Only one court has even come close to imposing that burden literally—that is, requiring that FWS and NMFS must implement and pay for all recovery planning items. See *Sierra Club v. Lujan*, 36 Env't Rep. Cas. (BNA) 1533, 1541 (W.D. Tex. Feb. 1, 1993) (holding that "[a]t least in the circumstances of this case, the ESA §4 duty to develop and implement a [recovery] plan is mandatory, not discretionary"). The court in that case did not fully articulate the factors for deciding when the section 4(f) recovery plan implementation duty is mandatory versus discretionary. Although the court identified section 7(a)(1) as imposing the duty to conserve

the duty to "carry[ ] out programs for the conservation of endangered species and threatened species."<sup>202</sup> Those provisions all but expressly reference each other. The MOU appears to recognize that sibling relationship as no other agency policy has before.

As the practice is now, however, recovery planning and the duty to conserve barely know each other, much less act like family. Indeed, the sad fate of recovery planning is that, because there is no realistic prospect of plans being implemented, these plans have become fanciful, unrealistically expensive propositions.<sup>203</sup> Recovery planning is not grounded in reality, because there is no reality to its implementation. The duty to conserve and recovery planning, however, could dovetail and ground each other in reality within the ESA family. With recovery planning as its benchmark, the duty to conserve would have substance and force. With the duty to conserve as its benchmark, recovery planning would have a real design and would likely come back down to earth.

On the other hand, if recovery planning were to remain as amorphous as it is today, linking the duty to conserve to recovery planning has the potential to run amok, and become a worse source of backlash from the regulated community than the core programs ever were.<sup>204</sup> It would be essential for FWS and NMFS to devise recovery plans acknowledging that federal agencies and, importantly, their permittees, are going to have to implement and pay for the recovery measures. Both section 4(f), governing the recovery planning process,<sup>205</sup> and section 7(a)(1), governing the duty to conserve,<sup>206</sup> are flexible enough to accommodate a reasoned, practicable approach to implementing the duty to conserve through implementation of recovery plans. If FWS and NMFS could maintain that flexibility, the link between recovery planning and the duty to conserve may make section 7(a)(1) the most prominent and successful member of the ESA family. With that prospect in mind, the last piece of the puzzle is an examination of what is in store for section 7(a)(1) in current congressional reform proposals.

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species, *id.* at 1542, it did not expressly link sections 7(a)(1) and 4(f), holding merely that FWS's failure to act "amounts to an abdication of the Federal Defendants' statutory responsibility to plan for the survival and recovery . . . of endangered and threatened species," *id.* at 1551. The court also did not consider whether part of FWS's and NMFS's duty to implement recovery plans involves a duty to consult with agencies under section 7(a)(1), as logically it should. Viewed that way, section 4(f) would not mean that the duty to finance and carry out recovery plans falls exclusively on FWS and NMFS.

<sup>202</sup> 16 U.S.C. § 1536(a)(1) (1994).

<sup>203</sup> FWS estimates it would cost over \$4.6 billion to fully recover all listed species. See *supra* note 35.

<sup>204</sup> See *supra* text accompanying notes 151-67.

<sup>205</sup> 16 U.S.C. § 1533(f) (1994).

<sup>206</sup> *Id.* § 1536(a)(1).

VI. SECTION 7(a)(1) IN THE 104TH CONGRESS—WILL THE DUTY TO CONSERVE  
RIPEN OR BE LEFT TO DIE ON THE VINE?

The 104th Congress will test whether the "new" ESA—the ESA transformed by administrative initiative—has arrived in time to forestall the legislature delivering its own new ESA. Prior sessions of Congress have posed threats to the basic structure of the statute, but each time partisan debate led ultimately to stalemate. In the 104th Congress, balance has evaporated substantially, opening the door to full scale assaults on the ESA's fundamental structure. Hence, while section 7(a)(1) previously had never been a target of reform initiatives, it is not certain to avoid that fate in the current culture.

Fortunately, section 7(a)(1) thus far has not suffered any significant attack in the 104th Congress. Indeed, the principal reform initiatives could be construed as strengthening the connection of section 7(a)(1) to federal agency conservation duties in some respects, while diluting the potency of the coercive ESA programs. Hence, the stage is set for section 7(a)(1) not only to survive the 104th Congress, but to emerge as a stronger member of the ESA family.

A. *Senate Bill 768*

Senate Bill 768, introduced by Senator Slade Gorton (R-Wash.),<sup>207</sup> takes aim at four principal ESA core program targets: the species listing and critical habitat designation processes and standards, the federal section 7(a)(2) jeopardy consultation process, the effect of the ESA structure on nonfederal lands, and the role and effect of recovery plans. In the species listing and critical habitat designation arena, Senate Bill 768 would inject independent peer review, tightened data collection and analysis standards, and some revised basic definitions into the process.<sup>208</sup> For federal jeopardy consultations, the bill would tighten procedural deadlines, enhance the role of nonfederal entities whose projects are affected by consultation requirements, and require cost-benefit analysis in all FWS and NMFS biological opinions.<sup>209</sup> For nonfederal landowners, the bill would nullify the effect of the Supreme Court's *Sweet Home* opinion,<sup>210</sup> thus limiting the reach of the ESA for nonfederal projects on nonfederal lands to instances of direct physical injury, and would allow nonfederal projects to seek consultation with FWS and NMFS prior to permitting procedures.<sup>211</sup>

What pulls all of those reforms together in Senate Bill 768, and what at the same time reduces the potency of the traditionally coercive ESA programs and enhances the potency of section 7(a)(1), are the revisions the bill proposes for recovery planning. The bill essentially would flip-flop

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<sup>207</sup> S. 768, 104th Cong., 1st Sess. (1995).

<sup>208</sup> *Id.* §§ 101-107 (proposed amendments to ESA § 4).

<sup>209</sup> *Id.* §§ 301-310 (proposed amendments to ESA § 7).

<sup>210</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995). For a detailed discussion of this case, see *supra* notes 46-53 and accompanying text.

<sup>211</sup> S. 768, 104th Cong., 1st Sess. §§ 401-406 (1995) (proposed amendments to ESA §§ 9, 10).



the ESA's structure, making recovery plans, renamed "conservation plans," the cornerstone of all other ESA programs rather than the afterthought that they are under the present statutory structure. The bill would do so by requiring FWS and NMFS, after consideration of an independent assessment and planning team's<sup>212</sup> evaluation of the biological status and potential regulatory and economic impacts of a newly listed species,<sup>213</sup> to declare a conservation objective, the options for which are limited to the following: 1) full recovery of the species; 2) conservation of the species up to a point justified by cost-benefit analysis; 3) no conservation beyond enforcement of the prohibitions against take and other conduct found in section 9(a); or 4) some level of conservation above the enforcement of the take prohibition, but less than any of the other options.<sup>214</sup>

If the agency declares a conservation objective requiring more than mere enforcement of the take prohibitions, the agency also must direct the independent assessment and planning team to prepare a conservation plan for the species.<sup>215</sup> At its core the conservation plan would resemble the current recovery planning process; however, the conservation plan would be based on a broader array of factors, including potential social dislocations of conservation options and other economic impacts.<sup>216</sup> Also, the conservation plan would include measures recommended to federal agencies to "avoid jeopardy,"<sup>217</sup> to any person to "avoid take of the species,"<sup>218</sup> and, of significance to section 7(a)(1), "for federal agencies to conserve the species under section 7(a)(1)."<sup>219</sup> Hence, by providing an additional reference to the duty to conserve, the bill would strengthen the notion that section 7(a)(1) imposes such a duty.

Indeed, the bill would not stop there with respect to section 7(a)(1). First, the bill would add to section 7 the general caveat, applicable to both section 7(a)(1) species conservation and section 7(a)(2) jeopardy consultation duties, that "the responsibilities of a federal agency under this section shall not supersede duties assigned to the federal agency by any other laws or by any treaties."<sup>220</sup> That provision further entrenches the duty to conserve by stating its limits; limits that were already in place under the case law as described in this Article. Second, and most consistent with the construction of section 7(a)(1) that is advocated in this Article, the bill would provide that "any federal agency that determines that the actions of the agency are consistent with the provisions of the conservation plan . . . or the conservation objective shall be considered to comply with sec-

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<sup>212</sup> The assessment and planning team would be appointed within 30 days of the species' listing from people within the agency, other federal agencies, and the private sector. *Id.* § 201(a)(2) (proposed ESA § 5(c)).

<sup>213</sup> *Id.* (proposed ESA § 5(d)).

<sup>214</sup> *Id.* (proposed ESA § 5(e)(2)(A)-(D)).

<sup>215</sup> *Id.* (proposed ESA § 5(g)).

<sup>216</sup> *Id.* (proposed ESA § 5(i)(1)-(12)).

<sup>217</sup> *Id.* (proposed ESA § 5(i)(9)(B)).

<sup>218</sup> *Id.* (proposed ESA § 5(i)(9)(C)).

<sup>219</sup> *Id.* (proposed ESA § 5(i)(9)(A)).

<sup>220</sup> *Id.* § 307(2) (proposed ESA § 7(a)(7)).

tion 7(a)(1) for the affected species."<sup>221</sup> Hence, Senate Bill 768 could be construed to tie the content of the conservation plan directly to the scope of the section 7(a)(1) duty.

The trouble with Senate Bill 768, of course, is that by entirely supplanting the existing ESA recovery planning structure with the conservation plan program, there is no precedent, judicial, administrative, or otherwise, for telling what conservation plans will involve and how they will be implemented. For example, how directive of the other federal agencies may FWS and NMFS be when "recommending" measures to comply with section 7(a)(1)? What will be the benchmark of federal agency "consistency" with those recommended measures? If these questions are answered, presumably in the courts, so as to limit the ability of FWS and NMFS to include specific, directive measures in conservation plans and so as to allow federal agencies substantial discretion in determining consistency, section 7(a)(1) will have been marginalized along with the other core ESA programs. Hence, while on its surface Senate Bill 768 appears consistent with the thesis of this Article, the potential is there for the duty to conserve to wither away.

### B. House Bill 2275

The story under House Bill 2275<sup>222</sup> is very much the same as it would be under Senate Bill 768, except in one important respect. Virtually all of the core program reforms made under Senate Bill 768 are made under House Bill 2275.<sup>223</sup> House Bill 2275 replaces the recovery planning function with the conservation plan program, as in Senate Bill 768.<sup>224</sup> House Bill 2275 makes similar changes in conservation plans compliance requirements. In particular, House Bill 2275 would adopt as the benchmark of compliance with section 7(a)(1) the standard of whether a federal action is "consistent with" a conservation plan.<sup>225</sup> To this extent, therefore, House Bill 2275 is similar to Senate Bill 768 in presenting no significant threats to the interpretation of section 7(a)(1) advocated in this Article.

House Bill 2275 departs significantly from Senate Bill 768, however, by restating both the conservation purpose of the ESA and the scope of the conservation duty itself. Under House Bill 2275, section 2(c) would be amended to require that federal agencies "seek to conserve and manage endangered species and threatened species and shall, *consistent with their primary missions*, utilize their authorities in furtherance of the purposes of this Act."<sup>226</sup> Section 7(a)(1) would be similarly amended so as to

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<sup>221</sup> *Id.* § 201(a)(2) (proposed ESA § 5(n)(1)).

<sup>222</sup> H.R. 2275, 104th Cong., 1st Sess. (1995).

<sup>223</sup> *See, e.g., id.* §§ 201 (proposed amendments to ESA § 9(a) altering take prohibition), 203 (proposed amendments to ESA § 10(a) incorporating voluntary consultation procedures). As introduced the bill would have nullified the effect of the Supreme Court's *Sweet Home* opinion in the manner of S. 768; however, the bill was revised in committee to temper that approach. *See infra* note 254 and accompanying text.

<sup>224</sup> *Id.* §§ 501-507 (proposed ESA § 5).

<sup>225</sup> *Id.* § 502(a) (proposed ESA § 5(d)(1)).

<sup>226</sup> *Id.* § 3(B) (proposed amendments to ESA § 2(c)) (emphasis added).

inject the "consistent with their primary missions" language directly into the scope of the conservation duty.<sup>227</sup> Senate Bill 768, by contrast, would merely confirm that section 7(a)(1) does not override conflicting statutory mandates, but does not purport in any way to limit the duty to conserve based on notions of promoting an agency's "primary missions."

Thus, House Bill 2275 resurrects the debate that concerned Congress in 1973 regarding whether to restrict section 7(a)(1) so as to require federal agencies to practice species conservation only "insofar as practicable and consistent with the[ir] primary purposes."<sup>228</sup> That debate was resolved in favor of the current version of section 7(a)(1), which contains no such limitation.<sup>229</sup> Indeed, the winnowing of such limitations from the successive bills leading to the final 1973 enactment was influential in leading the Supreme Court in *TVA v. Hill* to construe section 7(a)(1) as imposing a mandatory affirmative duty.<sup>230</sup> However, the meaning and impact of the lost "consistent with their primary purposes" language has never been evaluated by Congress or the Court. Witnesses from environmental groups testified in 1973 that the language could subordinate the conservation duty in cases where it would conflict with an agency's primary mission,<sup>231</sup> and the Court's focus on the excision of the passage from the early bills suggests that its retention could have altered the meaning of section 7(a)(1) in some way. But nowhere in the legislative history or the Court's opinion do we learn precisely what the difference would have been.

Indeed, as the preceding discussion of section 7(a)(1) case law illustrates,<sup>232</sup> the courts have essentially incorporated some degree of a "consistent with primary purposes" standard into section 7(a)(1) by refusing to require an agency to carry out conservation measures that would demand powers that the agency does not possess<sup>233</sup> or which would interfere with other mandatory obligations imposed on the agency.<sup>234</sup> It is not clear whether House Bill 2275 is intended merely to codify those decisions or to constrain section 7(a)(1) further, by subordinating the conservation duty whenever that duty might require an agency to exercise restraint in carrying out its primary missions. Of course, the construction resulting in the latter, more restrictive interpretation of section 7(a)(1) would be difficult to reconcile with the provision in House Bill 2275, also found in Senate Bill 768, that measures an agency's satisfaction of the conservation duty based on whether agency actions are "consistent with" the species conservation plan compiled under the proposed conservation planning program.

But what if the actions necessary for the agency to perform consistent with the conservation plan impose some restraints on the unfettered exercise of the agency's primary missions? To harmonize the two provi-

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<sup>227</sup> *Id.* § 401(a) (proposed amendments to ESA § 7).

<sup>228</sup> H.R. 4758, 93d Cong., 1st Sess. § 2(b) (1973); see also *supra* note 87.

<sup>229</sup> See *supra* note 88.

<sup>230</sup> See *supra* text accompanying notes 89-92.

<sup>231</sup> See *supra* note 87.

<sup>232</sup> See *supra* text accompanying notes 109-41.

<sup>233</sup> See *supra* text accompanying notes 134-39.

<sup>234</sup> See *supra* text accompanying notes 121-24.

sions, therefore, it would be necessary to limit the "consistent with primary missions" language to the circumstances already addressed in the case law—where the agency either has no power to implement the conservation measure or is required by other laws to implement actions that foreclose carrying out the conservation measure. Unfortunately, in the absence of more precise statutory language, the agencies and courts likely would be left with a muddled legislative history as their guide for the transition from the current role of section 7(a)(1) to the role envisioned in House Bill 2275.

### C. Senate Bill 1364

After Senate Bill 768 and House Bill 2275 were introduced, in late October 1995 Senator Dirk Kempthorne (R-Idaho), Chair of the Senate Environment and Public Works Committee's Drinking Water, Fisheries, and Wildlife Subcommittee, introduced a comprehensive ESA reform bill, Senate Bill 1364.<sup>235</sup> His proposed amendments, dubbed the Endangered Species Conservation Act of 1995, borrow heavily from the conservation planning models used in the previously introduced House and Senate bills,<sup>236</sup> but take a more aggressive approach to reform of the core ESA programs.<sup>237</sup> Thus, Senate Bill 1364 duplicates the approach taken in Senate Bill 768 and House Bill 2275 by basing federal agency compliance with section 7(a)(1) on the degree to which an agency action is "consistent" with recommended conservation measures set forth in a particular species' conservation plan.<sup>238</sup>

Senate Bill 1364 departs from Senate Bill 768, however, with respect to the degree to which it suppresses the species conservation duty when it potentially conflicts with other agency goals. The bill proposes to amend section 2(c)(1), which currently expresses the species conservation duty explicitly, by requiring agencies to "equally consider the conservation of species, preservation of economic growth, maintenance of a strong tax base, and protection against the diminishment of the use and value of private property."<sup>239</sup> In contrast, Senate Bill 768 merely prevents the species conservation duty from interfering with federal agencies' ability to fulfill their other statutory mandates, and House Bill 2275 only requires that duty to operate consistent with those other mandates. Under Senate Bill 1364, however, section 2(c)(1) might be construed by the courts and agencies to mean that an agency may forego species conservation initiatives whenever they would have significant adverse economic impacts, regardless of whether the measures conflict with or are consistent with the agency's other statutory missions. Such a cost-benefit analysis approach to species

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<sup>235</sup> S. 1364, 104th Cong., 1st Sess. (1995).

<sup>236</sup> See, e.g., *id.* § 5(a)(2) (proposed ESA § 5).

<sup>237</sup> See, e.g., *id.* §§ 3(16) (proposed amendment to ESA § 3(19), defining take to mean only acts that physically kill or injure); 15 (proposed ESA § 13, establishing an Endangered Species Commission to oversee species conservation recommendations); 17 (proposed ESA § 5, regarding minimization of impact on private property).

<sup>238</sup> See *id.* § 5(a)(2) (proposed ESA § 5(k)).

<sup>239</sup> *Id.* § 2(3) (proposed amendments to ESA § 2(c)(1)).

conservation, while not entirely subjugating the species conservation duty to other goals, would put the effectiveness of section 7(a)(1) largely in the hands of the individual agencies, who might be expected often to use that discretion to favor their primary missions over species conservation. The approach of Senate Bill 1364, therefore, has the potential to significantly alter the lay of the land for section 7(a)(1).

#### *D. House Bill 2374*

House Bill 2374,<sup>240</sup> introduced by Representative Wayne T. Gilchrest (R-Md.), presents the Democrats' and environmentalists' conception of an ESA reform bill that retains the basic fabric of the coercive core programs while tempering their impacts. House Bill 2374 would adopt peer review measures in the species listing program similar to those envisioned in Senate Bill 768 and House Bill 2275.<sup>241</sup> The focal points of this bill, however, are improved species conservation measures. First, the bill would introduce "voluntary conservation agreements" into the ESA program, under which FWS and NMFS could agree with state and local governments to implement measures designed to conserve species that are likely candidates for listing as endangered or threatened.<sup>242</sup> Where such voluntary agreements are in place, the federal government would agree to ensure that its actions, and actions it authorizes, are consistent with the measures detailed under the agreement.<sup>243</sup> The goal of such conservation agreements would be to prevent endangerment.<sup>244</sup>

If that goal is not met and a species is listed, the second major focus of House Bill 2374 comes into play: the strengthening of the recovery planning program. Rather than replacing recovery planning with the conservation planning approach used in Senate Bill 768 and House Bill 2275, however, House Bill 2374 focuses on improvements to the existing recovery planning structure. For example, the bill would reorient priorities in recovery planning toward regional, multi-species plans designed to promote biodiversity<sup>245</sup> and would require that plans specify measurable recovery criteria and steps to minimize the plan's adverse economic impacts.<sup>246</sup>

The new conservation agreement program and reformed recovery planning program envisioned in House Bill 2374, with their emphasis on conservation, could only boost the position of section 7(a)(1) as a principal member of the ESA family. Significantly, the bill proposes no changes to either section 7(a)(1) or section 2(c), the principal sources of the conservation duty. To be sure, House Bill 2374 leaves the core ESA programs more intact than would Senate Bill 768 or House Bill 2275, and hence they

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<sup>240</sup> H.R. 2374, 104th Cong., 1st Sess. (1995).

<sup>241</sup> *Id.* § 6(d) (proposed amendments to ESA § 4(b)).

<sup>242</sup> *Id.* § 5 (proposed ESA § 6(c)).

<sup>243</sup> *Id.* (proposed ESA § 6(d)).

<sup>244</sup> *Id.* (proposed ESA § 6(c)).

<sup>245</sup> *Id.* § 7(a) (proposed amendments to ESA § 5(a)).

<sup>246</sup> *Id.* (proposed ESA § 5(a)(3)).

would continue to compete with section 7(a)(1) for the attention of the agencies. But to the extent FWS and NMFS are serious about adopting flexible approaches to species protection in the future, House Bill 2374 would pave the way for section 7(a)(1) to fulfill the approach advocated here.<sup>247</sup>

#### E. House Bill 2364

House Bill 2364,<sup>248</sup> unlike the other reform bills, abandons the existing ESA structure altogether and proposes a new statutory framework focused on providing conservation incentives. The new law, introduced by freshman Representative John B. Shadegg (R-Ariz.) and dubbed "The Endangered Species Recovery and Conservation Incentive Act of 1995,"<sup>249</sup> would center around the development of recovery plans to be used within regulatory programs that, to say the least, tread softly on nonfederal property interests.<sup>250</sup> Recovery planning and implementation responsibility would rest principally on federal projects and permits involving direct federal expenditure of over \$2 million, severely curtailing the reach of the statute compared to the reach permitted under section 7(a)(2) of the ESA.<sup>251</sup> The new law would also adopt a more limited notion of conservation, restricting it to include only actions designed "to improve a negative trend in or to stabilize the condition of an endangered species."<sup>252</sup> Not surprisingly, House Bill 2364 includes no parallel to section 7(a)(1) requiring federal agencies broadly to use their authorities to promote species conservation. In short, were House Bill 2364 to be enacted, the approach for implementing species conservation advocated in this Article would be a dead letter.

#### F. Conclusion

The two live Senate bills and House Bill 2275 appear to be the leading and perhaps only viable vehicles for ESA reform at this writing. On October 12, 1995, the House Committee on Resources approved House Bill 2275 by a wide 27-17 margin and defeated all substitutes, including House Bill 2374 and House Bill 2364.<sup>253</sup> The only significant change the Committee made to House Bill 2275 involved tempering the revision of the harm

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<sup>247</sup> H.R. 2444, introduced by Congressman H. James (Jim) Saxton (R-N.J.) and regarded as the moderate Republicans' approach, mirrors H.R. 2374's proposed reform of the recovery planning program and, like H.R. 2374, proposes no direct changes to section 7(a)(1) or the species conservation duty.

<sup>248</sup> H.R. 2364, 104th Cong., 1st Sess. (1995).

<sup>249</sup> *Id.* § 1.

<sup>250</sup> For example, the law would reverse the *Sweet Home* decision's interpretation of the ESA's scope of take prohibitions, making intentionally killing or injuring listed species illegal only when effected by direct physical acts or their consequences. *Id.* § 6(a).

<sup>251</sup> *Id.* § 4(d)(2).

<sup>252</sup> *Id.* § 3(5).

<sup>253</sup> 141 CONG. REC. D1203, D1204 (daily ed. Oct. 13, 1995).

definition to codify the *Sweet Home* opinion rather than reverse it.<sup>254</sup> The Committee did not tinker with the manner in which House Bill 2275 as originally introduced addresses section 7(a)(1) or the duty to conserve. Hence the potential fate of section 7(a)(1) and the species conservation duty is a known quantity in the House.

On the Senate side, the two comprehensive reform bills are quite close in their proposed revisions to the language of section 7(a)(1) itself, but differ significantly in how they treat the species conservation duty relative to agencies' other statutory programs and agendas. Both bills link the scope of federal agency compliance with section 7(a)(1) to how "consistent" the agency actions are with the recommendations prescribed in a particular species' conservation plan. That revision, with nothing more, would serve to strengthen the link between species recovery and the duty to conserve. From there, Senate Bill 768 simply codifies existing case law by expressly precluding the duty to conserve from interfering with the agencies' other statutory mandates, whereas Senate Bill 1364, through its amendments to section 2(c)(1), appears to allow agencies to override the duty to conserve based on economic factors. House Bill 2275 requires the species conservation duty to operate consistent with each agency's primary missions, making Senate Bill 1364 and House Bill 2275 much closer in this respect. The battle ahead in Congress over section 7(a)(1) thus appears to be over the degree to which the species conservation duty will be rendered subservient to economic development agendas and the federal agencies' other statutory missions.

Regardless of which approach is taken—if Congress does anything at all on ESA this session—section 7(a)(1) seems destined to survive the prevailing ESA reform measures in far better shape than its siblings. All the remaining reform bills shift the ESA's focus decidedly towards species conservation and away from the core coercive programs under sections 9 (take prohibition), 10(a) (permitting), and 7(a)(2) (consultation). The signatories of the MOU were prescient in anticipating that shift and beginning now to lay the groundwork to support an expanded role for section 7(a)(1).

#### VII. CONCLUSION—A NEW ERA FOR THE DUTY TO CONSERVE SPECIES, OR JUST LIP SERVICE?

Enforcing section 7(a)(1) as a trigger requiring all federal agencies to implement listed species' recovery plans is the only construction that both fulfills the Supreme Court's vision of the ESA in *TVA v. Hill* and harmonizes the ESA provisions defining and embodying conservation. The Supreme Court expressly acknowledged that the duty to conserve species is an affirmative command that takes no back seat to agencies' primary

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<sup>254</sup> The language of the Committee's approved version defines harm to mean "an action that proximately and foreseeably kills or physically injures an identifiable member of an endangered species." *Id.* This approach comports with the Supreme Court's construction of the existing administrative definition, *see supra* text accompanying notes 47-53, and thus presumably would not require the agencies to depart from that regulatory text.

missions.<sup>255</sup> To give substance to that duty, the ESA's conservation family consists of four provisions: section 2(c) defines conservation as a primary legislative purpose;<sup>256</sup> section 3(3) defines conservation to mean recovery of species;<sup>257</sup> section 4(f) introduces the recovery plan mechanism as the means of defining how to conserve particular species;<sup>258</sup> and section 7(a)(1) closes the loop by imposing on all federal agencies the duty to conserve species.<sup>259</sup> Those provisions only make sense when read together, and make sense when read together only if section 7(a)(1) is understood to mean that the duty to conserve imposes the duty to implement recovery plans.

Ironically, just such a construction of section 7(a)(1)—one vesting it with power and position in the ESA—provides FWS and NMFS the flexibility they need to avoid disaster. The loudest squeaky wheels calling for a reassessment of the ESA have been the complaints of nonfederal regulated entities that the ESA imposes unfunded federal mandates and undue intrusions on private property rights.<sup>260</sup> Other critics of the ESA have pointed to FWS's and NMFS's paltry species recovery efforts—largely a matter of funding constraints—and wildly expensive recovery plans.<sup>261</sup> Linking section 7(a)(1) to recovery plan implementation dampens both sources of criticism. First, by spreading the burden of ESA recovery efforts over the entire federal government, more recovery funding would become available and federal agencies would have to demonstrate the same level and scope of species recovery efforts that they apparently expect of the nonfederal sector.<sup>262</sup> Second, by making other agencies liable for recovery plan implementation, recovery planning itself will become a more reality-bound venture, as the budgetary interests of the other federal agencies will cause them to bring their sources of expertise and information to the recovery planning table.<sup>263</sup> Overall, FWS and NMFS would be

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<sup>255</sup> *TVA v. Hill*, 437 U.S. 153, 185 (1978).

<sup>256</sup> 16 U.S.C. § 1531(c)(1) (1994).

<sup>257</sup> *Id.* § 1532(3).

<sup>258</sup> *Id.* § 1533(f).

<sup>259</sup> *Id.* § 1536(a)(1).

<sup>260</sup> See *supra* text accompanying notes 151-67.

<sup>261</sup> See *supra* text accompanying notes 34-35.

<sup>262</sup> See *supra* note 157 and text accompanying notes 172-77.

<sup>263</sup> As Professor Rohlf observed, "[o]bviously, reading the ESA's conservation mandate in sections 2(c) and 7(a)(1) to require all federal agencies to carry out the steps outlined in recovery plans would make preparation of the plans an extremely important process." ROHLF, *supra* note 23, at 99. One commentator has suggested that section 7(a)(1) cannot be construed as imposing an affirmative duty on federal agencies to implement recovery plans or to otherwise maximize species conservation, because to do so "would swallow the 'no jeopardy' duty of the ESA section 7(a)(2) and make it meaningless." Macleod et al., *supra* note 95, at 707. In other words, to avoid creating overlapping duties, section 7(a)(1) should be construed as operating only where section 7(a)(2) does not. That argument fails for three reasons. First, the jeopardy prohibition in section 7(a)(2) is stated as a negative duty (agencies may *not* jeopardize species) and thus cannot be understood as embodying the complete universe of *affirmative* duties federal agencies bear under the ESA. Second, Congress has imposed affirmative duties on federal agencies elsewhere within the ESA that overlap the jeopardy prohibition in section 7(a)(2). For example, federal agencies are prohibited in sec-



able to rely less on the core ESA programs and their coercive regulatory components.

In that regard, of course, it would be essential for FWS and NMFS not to simply transfer the coercive practices of the past over to the section 7(a)(1) program. The "ten principles" DOI has recently issued in an effort to ameliorate much of the backlash the ESA's core programs have borne<sup>264</sup> should guide the agencies' implementation of the MOU and section 7(a)(1) in general. The MOU must signal a truly cooperative venture between FWS, NMFS, and the other federal agencies, with particular attention and sensitivity to state, local, and private entities regulated by the other federal agencies and who thereby will feel some of the fallout of FWS and NMFS policies under section 7(a)(1). Indeed, there must also be a commitment by the other federal agencies not to foist the burdens of the duty to conserve off on the regulated community. Linking the duty to conserve to recovery plans, if implemented with those precautionary principles in mind, could go a long way toward demonstrating the "partnership" FWS and NMFS proclaim they want to bring about between federal and nonfederal parties.

The MOU, of course, does not contain the explicit syllogism advocated in this Article for linking the duty to conserve with recovery plan implementation. The MOU's references to recovery plans, however, suggest that FWS, NMFS, and the other signatory agencies are aware of the connections. Indeed, some of the signatory agencies have independently recognized section 7(a)(1) as a source of "cover" for implementing "ecosystem approach" policies,<sup>265</sup> but no agency has openly conceded a

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tion 9 from taking endangered species of fish and wildlife, and yet one could not possibly jeopardize a species without violating that take prohibition along the way toward causing such jeopardy. Congress thus consciously imposed overlapping duties within the ESA on federal agency behavior, and there is no reason to conclude Congress did not mean for an affirmative conservation duty under section 7(a)(1) to co-exist with the negative jeopardy duty under section 7(a)(2), notwithstanding that the two duties might be in operation at the same time in some contexts. Third, section 7(a)(1) would not swallow section 7(a)(2) in any event, because the conservation duty does not override an agency's conflicting mandatory duties, whereas section 7(a)(2) clearly does. Section 7(a)(2) is the *last* backstop of species protection in the ESA, while section 7(a)(1) is the *first*.

<sup>264</sup> See *supra* note 166.

<sup>265</sup> In particular, the Environmental Protection Agency (EPA) has recognized that section 7(a)(1) "require[s] all [f]ederal agencies to develop discretionary programs to conserve and recover these [listed] species." *Agreement Among the Environmental Protection Agency, Fish and Wildlife Service, and National Marine Fisheries Service Regarding Enhanced Protection and Recovery of Threatened and Endangered Species Under Section 303(c), 304(a), and 402 of the Clean Water Act 10* (Draft Oct. 20, 1993) (on file with author). EPA has commissioned, endorsed, and prepared studies advocating that section 7(a)(1) allows EPA to administer its pollution control authorities with ecosystem management goals in mind. See, e.g., ENVIRONMENTAL LAW INST., USING POLLUTION CONTROL AUTHORITIES TO PROTECT THREATENED AND ENDANGERED SPECIES AND REDUCE BIOLOGICAL RISK (1993) (EPA-commissioned); U.S. ENVTL. PROTECTION AGENCY, TOWARD A PLACE-DRIVEN APPROACH: THE EDGEWATER CONSENSUS ON AN EPA STRATEGY FOR ECOSYSTEM PROTECTION (Draft 1994) [hereinafter *EDGEWATER CONSENSUS*]; Fischman, *supra* note 95, at 441-43 (endorsed in *EDGEWATER CONSENSUS, supra*): The shield effect of section 7(a)(1), see *supra* text accompanying notes 101-08, likely will justify measures taken in this vein, at the very least.

*duty* to implement recovery plans. This may be an instance—a rarity indeed under the ESA—in which both advocates of stronger species protection and advocates of stronger economic development find it in their mutual best interests to encourage the agencies to accept a strong construction of the ESA. It remains to be seen whether the MOU becomes just a hollow promise of what the agencies could have done in that regard.

