How the Endangered Species Act Affects Development Projects

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Background

In the early days of environmental regulation in the United Sates, the country's interest in protecting wildlife had little to do with development or the dangers of habitat destruction. Instead, it arose from concerns about overhunting. We had seen the fate of the bison, driven close to extinction by 19th century hunters who had reduced the entire American bison population to some 500 head. We were also killing wild birds by the millions, some for meat, some for sport and some for the feathers used in ladies' hats.

The first response by the federal government was the Lacey Act, passed in 1900. According to that law, animals that had been killed in violation of state law could not be sold between states. Even if the act had been effective, it came too late for the passenger pigeon, which was extinct by 1914. Its demise was largely the result of hunting, but, for the first time, the important role of habitat loss, largely through deforestation, was widely acknowledged. Those two factors, the overt killing of wildlife, whether intentional or otherwise, and the indirect killing of wildlife through destruction of habitat, became the cornerstones of the modern regulations that began in the 1960s and that strongly affect development projects now.

The Endangered Species Act of 1973

Today, endangered species are protected through the Endangered Species Act (ESA), a bill signed into law by Richard Nixon in 1973. The ESA has gone through many changes over the years, but it has remained focused on the goal stated in the law's explicit expression of legislative purpose: the protection of endangered species and "the ecosystems on which they depend."

Developers tend to think of the Environmental Protection Agency (EPA) as the agency responsible for environmental enforcement, but that agency's mandate does not extend to the protection of endangered species. The ESA is administered by two agencies, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), with the FWS taking the lead. According to its own assessment, FWS is "the principal federal partner responsible for administering the Endangered Species Act."

It might be more accurate to say, however, that the FWS is the agency most likely to be involved with development projects simply because the FWS is responsible for all species except marine species. Freshwater fish are an FWS responsibility, and species with combined marine and freshwater habitats are jointly managed. Since most development projects do not occur in the marine environment, developers are unlikely to find themselves dealing with the NMFS.

Amendments to the ESA

Despite the ESA's consistency of purpose, the means employed to preserve endangered species have changed regularly over the years. Two amendments to the act are particularly important.

First, a 1978 amendment changed the roles of the FWS and NMFS. Under the law's original provisions, the agencies were authorized to designate zones of critical habitat when a species was considered endangered, and to take measures to protect that habitat. The 1978 amendment made that designation a requirement. Once a species qualified as threatened or endangered, that agency was required to designate the areas that constituted critical habitat for that species.

The 1978 amendment also provided for the inclusion of "economic impact" among the factors that an agency could consider when designating critical habitat. The amendment did not provide criteria for the kind or extent of economic impact that would make a difference and, despite the amendment's passage, the idea that economics would be a factor was controversial from the start. The House of Representatives itself called the provision "a loophole which could be readily abused."

From the development perspective, that loophole served a valuable purpose, but its tenure was short. In 1982, the ESA was further amended and economic impact was no longer to be considered as a factor in agency determinations.

While the 1982 amendment prevented the explicit consideration of economic impact, it opened the door for development in another way. Before 1982, the ESA allowed protected species to be "taken," the act's term for any killing or harm, only by research scientists. The amendment added the possibility that permits could be issued for takings that were incidental to development projects, provided that developers gave something in return. That "something" was the developer's obligation to provide a plan that would preserve critical habitat and minimize harm to protected species in order to obtain the necessary permits.

Habitat Conservation

Since the 1990s, the Habitat Conservation Plan (HCP) has been the most important hurdle that developers face when dealing with the ESA, as the act has come to impact development on private as well as federal lands.

The ESA was very much focused on federal involvement in its early years. In its current publications, the EPA maintains that the act requires the protection of endangered species "during any activity with federal involvement or subject to federal oversight," calling attention to federal management of storm water runoff under the Clean Water Act. While storm water runoff can affect many development projects, the ESA has been extended over the years, and private landowners and developers often fall within its purview. As the EPA points out, federal involvement is not always necessary. Even without it, "landowners must still insure that their proposed development activities will not result in a 'take' of any listed species and may need to develop a habitat conservation plan."

Bruce Babbitt, Secretary of the Interior during the Clinton administration, was instrumental in putting increased emphasis on Habitat Conservation Plans and in developing a framework for Candidate Conservation Agreements and Safe Harbor rules. Although Babbitt did not act out of sympathy with property development, he recognized the need for flexibility in the face of a Congress unsympathetic to the ESA, and the result was a regulatory regime that acknowledged the importance of development in the context of conservation.

For a developer, an HCP is required whenever a project entails incidental taking of protected species and the developer has applied for an Incidental Take Permit. The developer's receipt of such a permit brings the project within the scope of federal action. As a result, the ESA applies, even when the project is entirely private. An HCP then becomes part of the project's planning documentation. According to the FWS, applications must "describe the anticipated effects of the proposed taking; how those impacts will be minimized, or mitigated; and how the HCP is to be funded."

The submission of the developer's application is noted in the Federal Register and that notice triggers a period of up to 90 days for public comment. Should the application be granted, the FWS has a great deal of latitude to determine how long the permit will be in effect, with periods ranging from one year to over 30 years, and the FWS retains the power to revoke the permit at any time.

Safe Harbors, Candidate Conservation Agreements and No Surprises

The practical implications of the ESA for project development are always influenced by the environmental leanings of the federal administration in power. The administration of George W. Bush, for example, put severe limits on agency authority, creating an atmosphere that was more hospitable to development than that of the Clinton administration. Developers can still avail themselves of significant protections under the law, regardless of sentiment in Washington.

If a developer decides to forego obtaining an Incidental Take Permit, a Safe Harbor Agreement with the FWS allows for future takings of listed species and of species that have been proposed for listing. In return, the developer must develop the property in a way that will benefit the species in question.

Candidate Conservation Agreements operate to similar effect, but they concern species that are declining but have not yet been listed. In this case, the developer agrees to manage the property so as to benefit the unlisted species, and the FWS agrees that it will not impose additional burdens on the developer if the species joins the endangered list in the future.

When a developer obtains an Incidental Take Permit, the FWS has already agreed to the adequacy of the developer's proposed measures as part of the application process. What if those measures prove inadequate?

The "No Surprises" policy provides that the developer will not be required to take additional measures "if 'unforeseen circumstances' arise," so long as the developer is implementing the terms of the HCP in good faith," according to the FWS.

The "No Surprises" policy attracted considerable controversy when adopted by the FWS, largely because the concept of "unforeseen circumstances," without much further definition, seemed to leave an enormous loophole for development projects. In any development project, and especially in large ones, unforeseen circumstances are more the rule than the exception. The FWS justified its stance, however, by acknowledging economic necessity, stating that development projects could not go forward without "economic and regulatory certainty regarding the overall cost of species mitigation over the life of the permit." Simply put, the possibility of regulatory surprises would be intolerable for developers of large-scale projects. Economic considerations, rejected in theory in 1982, still find practical application to development projects under the ESA.