

## **Protecting Endangered Species: Plight of Right Whale Puts Spotlight on Issue**

By Kenneth J. Warren / The Legal Intelligencer

Last week, news media reported the birth of a calf to an Atlantic right whale known as Slalom. Having survived several harrowing encounters with fishing nets and lines that pose a grave danger to right whales, Slalom remains one of only approximately 100 female right whales in existence. Without design and implementation of aggressive conservation efforts, this endangered species may soon become extinct.

The condition of right whales is far from unique. Scientists estimate that approximately one million species are threatened with a similar fate. Pollution, habitat destruction and the effects of climate change on ecosystems pose grave threats to species survival. A commitment to preservation, restoration and enhancement of habitat is required to stem this loss.

The Endangered Species Act (ESA) provides tools to accomplish our nation's species conservation goal. Enacted in 1973 with overwhelming Congressional support, the ESA seeks to conserve endangered or threatened species and the ecosystems upon which they depend. When a species is listed pursuant to Section 4 of the ESA, the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (the services) may identify its critical habitat. Critical habitat includes locations occupied by the species that contain physical or biological features essential to the species' conservation and which may require special management considerations or protection. Critical habitat may also encompass areas unoccupied by the species yet essential for its conservation. The U.S. Supreme Court has cautioned that critical habitat is a subset of "habitat," but to date neither Congress nor the court has defined this term.

Two provisions of the ESA give teeth to the designation of critical habitat. Section 7 prohibits each federal agency from jeopardizing a listed species' existence or destroying or

adversely modifying its critical habitat. To comply with this requirement, federal agencies undertaking actions such as licensing or funding projects consult with the services for advice on whether jeopardy or adverse modification will occur and what reasonable and prudent alternatives exist. Although adverse modification of critical habitat may itself constitute a separate ESA violation, most often a finding of adverse modification is joined with a finding of jeopardy.

Section 9 of the ESA prohibits any “take” of an endangered species. Unlike Section 7 that applies only to federal actions, Section 9 applies to the public. Critical habitat designation may effectively limit development by placing developers on notice that their planned activities are likely to harm or kill at least one member of the protected species. At a minimum, designation encourages property owners to create and secure approval from the services of a habitat conservation plan to minimize and mitigate impacts.

A recent decision by the U.S. Court of Appeals for the First Circuit illustrates the controversy surrounding endangered species protection. In *District 4 Lodge of the International Association of Machinists and Aerospace Workers v. Raimondo*, 2021 WL 5317196 (1<sup>st</sup> Cir. November 16, 2021), lobster harvesters challenged the National Marine Fisheries Service’s seasonal closure of an area off the Maine coast to protect the right whale. Lobster harvesters suffering economic injury from the closure argued that the closure was arbitrary and capricious because, among other things, right whales had not been observed to congregate in the restricted area. The district court issued a preliminary injunction preventing the closure.

On appeal, the service argued that two statutes supported its decision. In its view, Section 7 of the ESA required the service to ensure that its fishing licenses are “not likely to jeopardize the continued existence” of any listed species, including the right whale. The potential for fishing

nets and lines to injure or kill one or more members of the endangered right whale population contravened this provision. Similarly, the Marine Mammal Protection Act sets a goal approaching a “zero mortality and serious injury rate” to marine mammals during commercial fishing operations, and requires the service to develop and implement a take-reduction plan to assist in the recovery or prevent the depletion of threatened or endangered marine mammals. These provisions likewise warranted closing the marine area to fishing.

The First Circuit found that notwithstanding the harvesters’ contentions, scientific modeling performed by the service was a sufficient substitute for actual observation of the presence of right whales. By utilizing the best evidence available to it, and updating model inputs as new information emerged, the service could properly rely on its model to support the fishing restriction. The court noted, “Congress did not require the agency to wait for more data, much less to wait until the whales are swimming among an aggregation of life-threatening lines.” Likewise, the absence of evidence of large numbers of whales congregating in the restriction area was not fatal: “Just a few whales can also pose a significant risk in the presence of a large number of lines.”

The lobster harvesters argued that at the preliminary injunction stage, the economic harm to them justified suspending the seasonal closure. The court disagreed, concluding that Congress chose to afford greater weight to the public interest in protecting endangered species such as the right whale. The First Circuit thus upheld the fishing restriction. As a last resort, the harvesters filed an emergency application with the U.S. Supreme Court, which Justice Stephen Breyer denied on Dec. 3.

The conflict between species conservation and economic interests exemplified by the *District 4* decision occurs frequently. Critical habitat designations for individual species



provoke litigation. See, e.g., *American Forest Resource Council v. Williams*, (D. D.C. 2021) (sustaining a decision by the Fish and Wildlife Service to delay the effective date of a Trump administration rule removing critical habitat designation to conserve the northern spotted owl). See also, Final Rule to Amend the Atlantic Large Whale Take Reduction Plan (Sept. 17, 2021).

Pursuing an approach friendly to development, the Trump administration issued regulations limiting designation of unoccupied critical habitat and confining “habitat,” and therefore critical habitat, to areas that contain conditions necessary to support a species’ life processes. On Oct. 27, the Biden administration published a proposed regulation to rescind this regulatory definition of habitat. The proposed rule recognizes that to be consistent with the ESA’s conservation goals, areas not currently in an optimal state to support a species may nonetheless be essential for its conservation. In addition, in light of the effect of climate change, the Biden administration may consider critical habitat to include areas that may become essential to the conservation of a species as ecosystems change and a species’ range extends to new areas.

Although the ESA’s approach of conserving endangered and threatened species one-by-one makes a meaningful contribution to biodiversity, this approach is not commensurate with the scope of the problem. The scientific resources necessary to evaluate species for listing, and the administrative burden of rulemaking, limit the listing of species to only a small number of the species that may become extinct. And only a small percentage of these species will have critical habitat designated. In light of the impact of human activities on ecosystems, and the additional stresses ecosystems face from climate change, the ESA is unlikely to stem the rising tide of species extinction.

Only by preserving and enhancing the integrity and productivity of ecosystems on a nationwide, and even global basis, can substantial progress be made in preserving biodiversity. To be sure, efforts to mitigate climate change and adapt to its impacts form part of the solution. The remainder depends on how we balance the value of conserving ecosystems against private property rights and economic interests. Participation of state and local governments with jurisdiction over the land use decisions working in partnership with the development community will have the largest impact on ecosystem protection. Ultimately, the views of the public may determine whether the values the ESA seeks to pursue will be realized.

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