

4-24-2015

Subverting Congress' Intent: The Recent Misapplication of Section 10 of the Endangered Species Act and Its Consequent Impacts on Sensitive Wildlife and Habitat

William S. Eubanks II

Meyer, Glitzenstein & Crystal, eubanks.bill@gmail.com

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/ealr>

 Part of the [Administrative Law Commons](#), [Animal Law Commons](#), and the [Environmental Law Commons](#)

Recommended Citation

William S. Eubanks II, *Subverting Congress' Intent: The Recent Misapplication of Section 10 of the Endangered Species Act and Its Consequent Impacts on Sensitive Wildlife and Habitat*, 42 B.C. Envtl. Aff. L. Rev. 259 (2015), <http://lawdigitalcommons.bc.edu/ealr/vol42/iss2/2>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

SUBVERTING CONGRESS' INTENT: THE RECENT MISAPPLICATION OF SECTION 10 OF THE ENDANGERED SPECIES ACT AND ITS CONSEQUENT IMPACTS ON SENSITIVE WILDLIFE AND HABITAT

WILLIAM S. EUBANKS II*

Abstract: Section 9 of the Endangered Species Act, or the ESA, strictly prohibits any person or other entity from “taking” any endangered or threatened species, whether purposefully or incidentally. In section 10 of the ESA, Congress created two distinct permit mechanisms to allow the U.S. Fish and Wildlife Service, or FWS, to authorize take in certain limited circumstances—namely recovery permits for purely scientific research and incidental take permits, or ITPs, for non-scientific endeavors where such taking is incidental to, and not the purpose of, an otherwise lawful activity. Because scientific research benefitting the species at issue is not a primary objective of the second type of permit, Congress created a carefully calibrated permitting regime for ITPs. These permits provide certain safeguards that ensure extensive public comment opportunities and environmental review under the National Environmental Policy Act—safeguards that, naturally, are less extensive for scientific permits. In recent years, however, the FWS has, in various instances, conflated the distinct purposes of these two statutory permitting schemes. The agency has issued recovery permits to entities seeking authorization for incidental takes rather than scientific research, which has resulted in the issuance of permits to developers with far less public scrutiny and review than Congress intended. This Article analyzes the applicable legislative history and statutory text, assesses recent examples of the conflation of these two distinct permitting schemes, and examines the public policy rationales against the agency’s continued short-circuiting of congressional safeguards through the issuance of recovery permits for incidental takes that are not tantamount to pure scientific research.

© 2015, William S. Eubanks II. All rights reserved.

* Partner at Meyer Glitzenstein & Crystal, a Washington, D.C. public interest environmental law firm; Summer Faculty Member, Vermont Law School; Adjunct Associate Professor of Law, American University Washington College of Law; Professorial Lecturer in Law, George Washington University Law School.

INTRODUCTION

As our nation's preeminent wildlife conservation and habitat protection law, the Endangered Species Act ("ESA" or the "Act")¹ "represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."² The law carries out this ambitious agenda through its many substantive requirements imposed on Federal, State, and private entities.³ These obligations seek to minimize harm to ESA-protected species and their habitats, as well as to mitigate any unavoidable harm that may occur despite all reasonable minimization efforts.⁴

Most notable of these obligations is the ESA's "take" prohibition—found in section 9 of the Act. Section 9 is a strict liability provision that Congress enacted to bolster species survival and recovery by preventing *all* forms of lethal and non-lethal "take" of ESA-protected species.⁵ Congress has created only a few limited exceptions to the take prohibition. In the original ESA enacted in 1973, Congress created the section 7 interagency process, through which federal projects that were found not to jeopardize the continued existence of a listed species were authorized by the consulting agency, effectively providing the action agency with an authorization for incidental take.⁶ The original Act also created the section 10 scientific recovery permit ("SRP") process to support scientific research efforts aimed at species survival and recov-

¹ See Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2012).

² *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

³ See, e.g., 16 U.S.C. §§ 1536(a)(2), (b)(4)(C)(ii), 1539(a)(2)(A)(ii).

⁴ See *id.* §§ 1536(a)(2), (b)(4)(C)(ii) (requiring, through inter-agency consultation, "reasonable and prudent measures that the Secretary [of Interior] considers necessary or appropriate to minimize such impact"), 1539(a)(2)(A)(ii) (requiring in the incidental take permit process that, "the applicant . . . submit . . . to the Secretary a conservation plan that specifies . . . what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps").

⁵ See *id.* §§ 1531(b) (noting that the purpose of the Act is to provide a means for the conservation of endangered and threatened species and the ecosystems on which they depend), 1532(19) (defining "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"), 1538(a)(1)(B) (explaining that, "it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States").

⁶ See Pub. L. No. 93-205, 87 Stat. 884, 892 (1973) (codified as amended at 16 U.S.C. § 1536 (2012)). Under the interagency consultation process, the FWS conducted a biological assessment to determine whether the proposed federal project would jeopardize the continued existence of a listed species. See *id.* Upon a conclusion by the consulting agency that the action would not jeopardize the species, the action agency could go forward with the project subject to the terms and conditions imposed by the consulting agency. Congress memorialized this practice of allowing non-jeopardizing incidental take by federal agencies, by codifying the requirement of an "incidental take statement" in the 1978 Amendments that remains in effect today. See Pub. L. No. 95-632, 92 Stat. 3751, 3752–53 (codified as amended at 16 U.S.C. § 1536); 16 U.S.C. § 1536(a)–(c).

ery.⁷ In its 1982 ESA amendments, Congress established a new process whereby non-federal actors seeking to conduct otherwise lawful activities that would result in harm to ESA-listed species could obtain a different type of section 10 permit—called an “incidental take permit” or “ITP”—to allow these private activities to proceed subject to certain conditions (not unlike those applying to federal agencies in the section 7 process⁸).⁹

The agencies responsible for administering the ESA, through delegation from their parent agencies, are the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”).¹⁰ For several decades, the FWS and NMFS administered the two distinct section 10 permitting programs—SRPs and ITPs—consistent with the carefully calibrated approach that Congress built into that provision of the ESA.¹¹ This implementation included:

- (1) considering for SRPs only pure scientific research activities while relegating private activities for other purposes to the ITP process;
- (2) requiring more rigorous conditions for issuance of ITPs than for SRPs because of their fundamental differences; and
- (3) providing extensive public participation opportunities with respect to ITP applications, which is not always necessary for SRPs because of their very different purposes and covered activities.¹²

In recent years, however, the FWS has abruptly changed course and has, in various instances, conflated the distinct purposes behind these two statutory

⁷ 87 Stat. at 896 (codified as amended at 16 U.S.C. § 1539(a)(1)(A) (2012)).

⁸ Compare 16 U.S.C. § 1539(a) (providing that the Secretary may issue an incidental take permit when the impact, steps to mitigate impacts, alternative actions, and other necessary or appropriate measures for the otherwise lawful activity have been considered), with 16 U.S.C. § 1536(a)(2), (b)(4) (providing that the Secretary may permit the agency action when, upon consultation with affected States and the agency, he has concluded that the incidental take is not likely to jeopardize the endangered or threatened species or result in destruction or adverse modification of their habitats).

⁹ Endangered Species Act Amendments of 1982, Pub. L. No. 92-304, 96 Stat. 1411, 1422 (codified as amended at 16 U.S.C. § 1539(a)(1)(B)).

¹⁰ Andrew A. Smith et al., *The Endangered Species Act at Twenty: An Analytical Survey of Federal Endangered Species Protection*, 33 NAT. RESOURCES J. 1027, 1036 (1993); *Laws & Regulations: Summary of the Endangered Species Act*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/laws-regulations/summary-endangered-species-act> (last updated Nov. 12, 2014), archived at <http://perma.cc/4BCS-BNDW>.

¹¹ See 50 C.F.R. §§ 222.307–.308 (2015) (providing the procedures for the incidental take permit program and procedures for the scientific recovery permit program); Endangered and Threatened Species; Regulations Consolidation, 64 Fed. Reg. 14,052, 14,052 (Mar. 23, 1999) (codified at 15 C.F.R. pt. 902, 50 C.F.R. pts. 217, 220–227, 648, 679, 697) (introducing the two distinct programs).

¹² Compare 50 C.F.R. § 222.307 (providing the permit process for incidental taking of species), with *id.* § 222.308 (providing the permit process for scientific purposes).

permitting schemes.¹³ In the process, the FWS has issued recovery permits to entities seeking authorization for incidental take rather than purely scientific research, which has resulted in permits being issued to developers with far less public scrutiny and participation than would otherwise be the case.¹⁴

This Article provides an analysis of the applicable legislative history, statutory text, and past implementation of the ESA,¹⁵ assesses recent examples of the FWS's conflation of these two distinct permitting schemes,¹⁶ and examines the public policy rationales against the agency continuing to short-circuit congressional safeguards when considering issuance of SRPs for activities that would be unlawful under the ESA without an ITP.¹⁷

I. THE HISTORY OF THE ESA: STATUTORY TEXT, LEGISLATIVE HISTORY, AND FLASHPOINT CASES

The ESA is a complex, technical statute that has been the subject of various detailed treatises.¹⁸ This Part distills the fundamentals of pertinent ESA provisions by focusing on the ESA's text and germane portions of the legislative history that help shed light on Congress' reasons for including certain provisions in the Act.

A. The 1973 Act

Long characterized as “the pit bull of federal environmental statutes,”¹⁹ the ESA is the result of Congress' determination in 1973 that at-risk wildlife and plant species, as well as the habitat they require for survival and recovery, needed legislative safeguards to curb the effects of human development.²⁰ Underlying Congress' passage of the ESA was its finding that, “these species of

¹³ See *infra* notes 172–253 and accompanying text.

¹⁴ See *infra* notes 172–253 and accompanying text.

¹⁵ See *infra* notes 18–171 and accompanying text.

¹⁶ See *infra* notes 172–253 and accompanying text.

¹⁷ See *infra* notes 254–269 and accompanying text.

¹⁸ William S. Eubanks II, *Chapter 11: Agriculture and the Endangered Species Act*, in *FOOD, AGRICULTURE, AND ENVIRONMENTAL LAW 185* (Mary Jane Angelo et al. eds., 2014) (citing *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* (Donald C. Baur & W. Robert Irvin eds., 2010)). See generally *ENDANGERED SPECIES DESKBOOK* (Lawrence Liebesman & Rafe Petersen eds., 2010) (treatise discussing the ESA).

¹⁹ Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 *ENVTL. L.* 605, 605 (1991) (quoting an address delivered on April 6, 1990, by Donald Barry, Majority Counsel, House of Representatives Committee on Merchant Marine and Fisheries).

²⁰ “[V]arious species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.” 16 U.S.C. § 1531(a)(1) (2012) (providing congressional findings serving as the basis for the ESA).

fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”²¹

The U.S. Supreme Court reinforced this point in 1978, several years after the ESA’s enactment, in *TVA v. Hill*, holding that, “the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as ‘incalculable.’”²² Because, as a matter of logic, the “incalculable” value of these species cannot be outweighed by any economic value (or loss thereof), Congress elevates species protection above private development wherever an irreconcilable conflict arises.²³ Noting this salient fact, the Supreme Court explained that, “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’”²⁴ This policy has the express purpose of “halt[ing] and revers[ing] the trend toward species extinction, *whatever the cost.*”²⁵

In order to provide the critical support necessary to stave off extinction and promote recovery for these at-risk species that were viewed as having “incalculable” value, Congress created various procedures under the ESA designed to bring science to bear on all actions anticipated to adversely affect ESA-protected species.²⁶ It also built into the Act prohibitions against harming listed species and mechanisms for enforcing these restrictions.²⁷ Thus, Congress crafted in the ESA a holistic statutory scheme in which all provisions aim to both independently and cumulatively further the policy of institutionalized caution to protect species and habitats, as that policy was “reflected not only in the stated policies of the Act, but in literally every section of the statute.”²⁸ Congress referred to this overall program in the statute, explaining that the “purposes” of the Act “are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,

²¹ *Id.* § 1531(a)(3).

²² *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 (1978).

²³ *See id.* (reasoning that, because the species must be viewed as having “incalculable” value, the ESA does not permit courts to make utilitarian calculations by placing economic value on a species or the public burden of preserving that species).

²⁴ *Id.* at 194.

²⁵ *Id.* at 184, 194 (emphasis added).

²⁶ *See* 16 U.S.C. § 1536(a)(2) (2012) (requiring agencies to consider the best scientific data available in determining when an action is likely to jeopardize a species); *TVA v. Hill*, 437 U.S. at 184–85 (explaining that specific provisions of the ESA reflect Congress’ policy goal of preventing extinction).

²⁷ *See, e.g.*, 16 U.S.C. §§ 1532(19) (defining “take” to include to “harm”), 1536(a)(2), 1538(a)(1)(B) (prohibiting a “take” of any listed species).

²⁸ *TVA v. Hill*, 437 U.S. at 184, 194.

[and] to provide a program for the conservation of such endangered species and threatened species.”²⁹

To administer this program of species and habitat conservation,³⁰ Congress tasked the Interior Department and the Commerce Department with the primary responsibility for implementing the ESA,³¹ which those agencies delegated to the FWS and NMFS, respectively.³² Congress specified that the species subject to the Act’s jurisdiction are those deemed by the FWS or NMFS as rising to the level of “endangered”—i.e., “any species which is in danger of extinction throughout all or a significant portion of its range”³³—or those species rising to the level of “threatened”—i.e., “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”³⁴ To determine which species satisfy the threshold for “endangered” or “threatened,” Congress provided a detailed process in section 4 of the Act, under which the FWS or NMFS analyzes each species under review by assessing five key threats that may be impeding the species’ survival and/or recovery prospects.³⁵ These factors include the “destruction, modification, or curtailment of its habitat or range[;] overutilization for commercial, recreational, scientific, or educational purposes[;] disease or predation[;] the inadequacy of existing regulatory mechanisms[;] and other natural or manmade factors affecting its continued existence.”³⁶ Absent very limited circumstances, if the FWS or NMFS determines that a species meets the statutory criteria for an “endangered” or “threatened” species, that species is added to the list of endangered and threatened species and is immediately afforded the full protections of the Act.³⁷

²⁹ 16 U.S.C. § 1531(b).

³⁰ *Id.* § 1532(3) (defining “conserve,” “conserving,” and “conservation” to mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to th[e] [ESA] are no longer necessary”); see also H.R. REP. NO. 93-740, at 2–3 (1973), reprinted in A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 427–28 (1982) (defining “conserve,” “conserving,” and “conservation” in the bill that would become the ESA).

³¹ 16 U.S.C. § 1532(15); Smith et al., *supra* note 10, at 1036.

³² Smith et al., *supra* note 10, at 1036.

³³ 16 U.S.C. §§ 1532(6)(2012) (defining “endangered species”), 1538(a)(1) (prohibiting certain acts with respect to endangered species); see also H.R. REP. NO. 93-740, at 3 (defining “endangered species”).

³⁴ 16 U.S.C. §§ 1532(20) (defining “threatened species”), 1538(a)(1)(G) (prohibiting the violation of any regulation with respect to threatened species); see also H.R. REP. NO. 93-740 (defining “threatened species”).

³⁵ 16 U.S.C. § 1533(a)(1).

³⁶ *Id.*

³⁷ As enacted by Congress in the 1973 ESA (and as is the case today), the only limited circumstances where listed wildlife species are not afforded the full protections of the Act are when the FWS or NMFS determines that, “regulations” are “necessary and advisable to provide for the conservation”

In enacting the ESA, Congress viewed those substantive and procedural protections as crucial for putting endangered and threatened species on the path to recovery.³⁸ Perhaps the most pivotal provision for species conservation—and consequently the most unforgiving—is the section 9 strict prohibition on the unauthorized “take” by *any* “person” of *any* member of *any* ESA-listed species.³⁹ In that provision, Congress made clear in defining “Prohibited Acts” that,

Except as provided in sections [6 and 10] of this title, with respect to any endangered species of fish or wildlife listed pursuant to section [4] of this title[,] it is unlawful for *any person* subject to the jurisdiction of the United States to . . . take *any such species* within the United States or the territorial sea of the United States.⁴⁰

The statute further delineates the broad contours of the take prohibition by defining “person[s]” subject to the Act’s provisions as any “individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government.”⁴¹ The spectrum of activities covered by the take prohibition is equally broad. The ESA defines the term “take” as “harass, harm, pursue, hunt,

of a *threatened* species—a provision with no force as to endangered wildlife species. *See id.* § 1533(c) (providing that the Secretary must publish the list of species that he has determined to be threatened), 1533(d) (providing that when a species has been listed as threatened the Secretary promulgates regulations according to what he deems “necessary and advisable to provide for the conservation of such species”). Moreover, listed plant species receive lesser protections than listed wildlife species, as listed plants are “not subject to the take prohibition in [section 9 of the ESA], but instead are subject to less stringent prohibitions on the import, transport, or sale of endangered or threatened plant species and on removal of listed plants from federal lands.” Eubanks, *supra* note 18, at 187 & n.33; *see also* Sandra B. Zellmer & Scott A. Johnson, *Biodiversity in McElligot’s Pool*, 38 IDAHO L. REV. 473, 481 (2002) (explaining, as a shortcoming of the ESA, the fact that, “the statute fails to protect plant species on private lands”); Holly Wheeler, *Chapter 12: Plants*, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 247, 249–51 (Donald C. Baur & W. Robert Irvin, eds., 2d ed. 2010).

³⁸ *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184–85 (1978) (explaining that the prohibitions and requirements Congress included in every part of the ESA show Congress’ intent to prevent species extinction).

³⁹ 16 U.S.C. § 1538(a)(1)(B) (2012) (emphases added).

⁴⁰ *Id.* (emphases added).

⁴¹ *Id.* §§ 1532(13) (defining “person”), 1538(a)(1) (providing that the “take” prohibition applies to *any person*); *see also* Strahan v. Coxe, 127 F.3d 155, 163–66 (1st Cir. 1997) (holding a state agency liable under section 9 of the ESA for promulgating and administering a regulatory licensing scheme that serves as a proximate cause of takes of endangered right whales); H.R. REP. NO. 93-740, at 3 (1973), *reprinted in* A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, *supra* note 30, at 428.

shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct,” with respect to an ESA-listed species.⁴²

In the ESA, Congress initially created only two very limited exceptions to the take prohibition. The first mechanism for permitting an otherwise unlawful take is found in section 7, in which Congress provided that federal agencies undertaking, funding, or authorizing an activity that may result in take of listed species must first “consult” with the FWS or NMFS to determine the extent of the activity’s effect on listed species or habitat.⁴³ Specifically, section 7 requires that each federal agency “tak[e] such action necessary to insure that actions authorized, funded, or carried out by them is not likely to jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of [critical] habitat of such species.”⁴⁴ To satisfy this “jeopardy” mandate, the agency seeking to proceed with—or authorize or fund—a project that is expected to take a listed species (the “action agency”), must engage with the FWS or NMFS (the “consulting agency”) in “formal consultation” to determine the anticipated effects of the action on listed species to confirm that the action will not result in jeopardy.⁴⁵

At the conclusion of the consultation process, assuming the agency activity can be undertaken in such a manner as to avoid species jeopardy, the FWS or NMFS issues a biological opinion authorizing the action agency to proceed, subject to any terms and conditions imposed by the consulting agency to min-

⁴² 16 U.S.C. § 1532(19); *see also* H.R. REP. NO. 93-740, at 4 (defining the term “take” in the bill that would become the ESA). The FWS has further defined the “harm” and “harass” forms of take via formal regulations, defining the former as “an act which actually kills or injures wildlife[,] . . . [which] may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding[,] or sheltering,” and the latter as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3 (2015).

⁴³ *See* 16 U.S.C. § 1536 (requiring federal agencies to consult with the Secretary of the Interior to ensure that agency actions are not likely to jeopardize endangered species or their habitats, and providing the terms for granting exemptions from the ESA); H.R. REP. NO. 93-740, at 10.

⁴⁴ H.R. REP. NO. 93-740, at 10. Although Congress has not defined “jeopardize” as used in section 7, the FWS and NMFS have jointly defined the term in regulations as follows: “[j]eopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02 (2015).

⁴⁵ *See* Daniel J. Rohlf, *Jeopardy Under the Endangered Species Act: Playing a Game Protected Species Can’t Win*, 41 WASHBURN L. J. 114, 119–21 (2001) (describing the formal consultation process).

imize and mitigate the take.⁴⁶ These mandatory terms and conditions are found in the section of a biological opinion called an “incidental take statement,” which serves as formal authorization from the FWS or NMFS for the action agency to proceed with the activity despite the fact that listed species will be taken.⁴⁷ The action agency could thus receive this authorization provided that (1) the action agency—and any third party funded or licensed by the action agency—strictly adheres to the terms and conditions of the incidental take statement,⁴⁸ and (2) the level of take authorized by the FWS or NMFS is not exceeded during the implementation of the activity.⁴⁹

In the 1973 Act, Congress did not set forth any similar incidental take framework for authorizing private activities anticipated to take listed species where such activities have no federal nexus.⁵⁰ Instead, the only other limited exception to the take prohibition was in section 10, which contained a process by which the FWS or NMFS could issue “permits” for “any act otherwise prohibited by section 9 of this Act for scientific purposes or to enhance the propagation or survival of the affected species.”⁵¹ Although the section 10 permit mechanism encompasses two distinct types of conservation-focused activities—those aimed at scientific research efforts aiding in species recovery and those seeking to breed listed species in order to increase population numbers in the wild to stave off extinction—Congress made it expressly clear that such recovery or enhancement permits could only issue for activities the sole purpose of which was to ameliorate the status of an at-risk species by seeking to eliminate or otherwise mitigate the threats facing it.⁵²

⁴⁶ See generally 16 U.S.C. § 1536(a)–(c) (2012) (providing the requirements of the formal consultation process); see also 50 C.F.R. § 402.14 (providing further explication of the requirements of the formal consultation process).

⁴⁷ See 16 U.S.C. § 1536(b)(4).

⁴⁸ See *id.*; 50 C.F.R. § 402.14(g)(7).

⁴⁹ See 50 C.F.R. § 402.16(a) (“If the amount or extent of taking specified in the incidental take statement is exceeded, . . . [r]einitiation of formal consultation [is required and shall be requested by the [f]ederal agency or by the Service, where discretionary [f]ederal involvement or control over the action has been retained or is authorized by law.”).

⁵⁰ Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 896 (codified as amended at 16 U.S.C. § 1539) (providing two exceptions to the take prohibition that did not include incidental take authorization).

⁵¹ *Id.*; H.R. REP. NO. 93-740, at 14 (1973), reprinted in A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, *supra* note 30, at 439. These types of permits existed in predecessor legislation to the ESA. See A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, *supra* note 30, at 1 (explaining that 1969 legislation concerning endangered species protection contained “[l]imited exceptions for scientific, educational, zoological or propagational purposes . . . under strict permitting procedures”).

⁵² See, e.g., H.R. REP. NO. 93-412, at 17 (“Any such activities to encourage propagation or survival may take place in captivity . . . so long as this is found to provide the *most practicable and realistic opportunity to encourage the development of the species concerned.*”).

Indeed, Congress explicitly recognized in the statute the importance of both scientific research and propagation activities in achieving species recovery, explaining in the definition of “conserve” that agencies must use “all methods and procedures which are necessary” to achieve recovery.⁵³ Such methods include “all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation.”⁵⁴ Hence, Congress plainly intended in section 10 that the FWS and NMFS grant recovery or enhancement permits for legitimate scientific and propagation endeavors, so that the Act’s take prohibition would not stymie efforts to save and recover listed species on the brink of extinction.⁵⁵

The final provision of the 1973 Act worth noting is Congress’ inclusion of a citizen suit provision in section 11(g).⁵⁶ To ensure that the ESA is appropriately enforced, Congress mandated that, “any person may commence a civil suit . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this [Act] or regulation issued under the authority thereof.”⁵⁷ In reviewing this provision, the Supreme Court explained that it is “an authorization of remarkable breadth when compared with the language Congress ordinarily uses” when creating private rights of action in environmental statutes.⁵⁸ As such, the Court stated, “the obvious purpose of the particular provision in question is to encourage enforcement by so-called ‘private attorneys general.’”⁵⁹ Not surprisingly, therefore, the existence of this broad citizen suit provision and the ever-present threat of litigation have played a critical role in reinforcing the objectives of the Act and ensuring compliance with the take prohibition and the specific mechanisms set forth by the Act for obtaining take authorization.⁶⁰

⁵³ 16 U.S.C. § 1532(3) (2012) (defining “conserve” to include, “to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary”); see also H.R. REP. NO. 93-470, at 2-3 (1973), reprinted in A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, *supra* note 30, at 427-28 (defining “conserve” in the bill that would become the ESA).

⁵⁴ 16 U.S.C. § 1532(3); see H.R. REP. NO. 93-470, at 3.

⁵⁵ See 16 U.S.C. § 1532(3).

⁵⁶ *Id.* § 1540(g); see also H.R. REP. NO. 93-470, at 18-19 (providing for a citizen suit in the bill that would become the ESA).

⁵⁷ 16 U.S.C. § 1540(g)(1)(A); see also H.R. REP. NO. 93-470, at 18 (providing for a citizen suit in the bill that would become the ESA).

⁵⁸ *Bennett v. Spear*, 520 U.S. 154, 164-65 (1997).

⁵⁹ *Id.* at 165.

⁶⁰ See Kirsten Nathanson et al., *Developments in ESA Citizen Suits and Citizen Enforcement of Wildlife Laws*, NAT. RESOURCES & ENV’T, Winter 2015, at 15, 15.

B. TVA v. Hill and the 1978 Amendments

After nearly five years of implementation of the ESA without a need for statutory amendment, one high-profile ESA controversy landed before the Supreme Court and resulted in ramifications that are still being felt today: the case of *TVA v. Hill*.⁶¹

The legal battle pitted the highly imperiled snail darter—a “three-inch, tannish colored fish” listed as endangered by the FWS—against the Tennessee Valley Authority’s (“TVA”) attempts to complete construction and operation of the Tellico Dam on the Little Tennessee River.⁶² As “a wholly owned public corporation of the United States,” TVA began constructing the Tellico Dam in 1967—six years before Congress passed the ESA—upon receiving funds from Congress to carry out the work.⁶³ By the time the case reached the Supreme Court in 1978, the dam had yet to open.⁶⁴ “[D]espite the fact that construction ha[d] been virtually completed and the dam [wa]s essentially ready for operation,” two things stood in the way: “a tangle of lawsuits and administrative proceedings” and the 1973 discovery of the snail darter and its subsequent ESA listing in 1975.⁶⁵

Congress certainly did not help clarify how TVA and the FWS should proceed under the circumstances, where an explicit conflict existed between a congressionally funded hydroelectric project and a species protected by a recently enacted federal law.⁶⁶ Rather than amend the ESA to reconcile this conflict, Congress held hearings in 1975 and then simply appropriated additional federal funds to TVA for further dam construction.⁶⁷ In the wake of that action, in February of 1976, a group of citizen plaintiffs filed suit under the ESA’s citizen suit provision, “seeking to enjoin completion of the dam and impound-

⁶¹ 437 U.S. 153, 153 (1978) (decided in 1978, five years after the enactment of the ESA); Nathanson et al., *supra* note 60, at 15.

⁶² *TVA v. Hill*, 437 U.S. at 156–59. For a more detailed discussion of the Tellico Dam saga, see Zygmunt Plater, *Classic Lessons from a Little Fish in a Pork Barrel: Featuring the Notorious Story of the Endangered Snail Darter and the TVA’s Last Dam*, 32 UTAH ENVTL. L. REV. 211 (2012).

⁶³ *TVA v. Hill*, 437 U.S. at 157.

⁶⁴ *Id.* at 157–61.

⁶⁵ *Id.*

⁶⁶ *See id.* at 163–64 (explaining that in response to TVA’s argument that the ESA should not prevent a project that was “authorized, funded, and substantially constructed before the Act,” Congress approved the TVA general budget in 1975, despite the violation of the newly enacted ESA of 1973).

⁶⁷ *Id.* The result of the hearing was a June 20, 1975, report by the House Committee on Appropriations, which stated the following regarding its recommendation for \$29 million to be appropriated for the completion of the dam: “The Committee directs that the project, for which an environmental impact statement has been completed and provided [to] the Committee, should be completed as promptly as possible” H. R. REP. NO. 94-319, at 76 (1975).

ment of the reservoir on the ground that those actions would violate the Act by directly causing the extinction of the species.”⁶⁸

After a bench trial, the district court ultimately found that completion of the Tellico Dam would “result in the adverse modification, if not complete destruction, of the snail darter’s critical habitat,” making it “highly probable” that, “the continued existence of the snail darter” would be “jeopardize[d].”⁶⁹ Despite this finding, however, the court denied the injunction sought by the plaintiffs, reasoning that Congress could not have intended for a nearly complete project to be permanently shelved because of the belated discovery of an ESA-listed species that would be eradicated by project completion.⁷⁰

On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed the district court, halting the project and ordering “that a permanent injunction issue halting all activities incident to the Tellico Project which may destroy or modify the critical habitat of the snail darter.”⁷¹ The Sixth Circuit challenged Congress to resolve the controversy it had created, expressly enjoining the project “until Congress, by appropriate legislation, exempt[ed] Tellico from compliance with the Act or the snail darter ha[d] been deleted from the list of endangered species or its critical habitat materially redefined.”⁷²

As with many epic legal sagas, this one was not complete until the Supreme Court had the final say on the legal questions presented.⁷³ In reviewing the case, the Court summarized the conundrum created by Congress’ competing priorities in the ESA and appropriations bills as follows:

It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.⁷⁴

⁶⁸ *TVA v. Hill*, 437 U.S. at 164.

⁶⁹ *Hill v. Tenn. Valley Auth.*, 419 F. Supp. 753, 757 (D. Tenn. 1976).

⁷⁰ *Id.* at 758–63.

⁷¹ *Hill v. Tenn. Valley Auth.*, 549 F.2d 1064, 1075 (6th Cir. 1977).

⁷² *Id.*

⁷³ *See, e.g.*, U.S. CONST. art. III, §§ 1–2.

⁷⁴ *TVA v. Hill*, 437 U.S. at 172–73.

Relying on the fact that, “[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in [section] 7 of the [ESA]”—indeed, the “language admits of no exception”—the Court held that it had no choice but to rule in favor of the snail darter, given the patent ESA violation.⁷⁵ The Court thus permanently enjoined the project because “examination of the language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”⁷⁶ Echoing the Sixth Circuit’s call for Congress to amend the Act should it disagree with the result of literal application of the ESA, the Court explained that, “[i]t is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated.”⁷⁷ The dissenting justices also urged Congress to amend the ESA to inject flexibility, asserting that they “have little doubt that Congress will amend the [ESA] to prevent the grave consequences made possible by [the majority’s] decision.”⁷⁸

Congress did not wait long to pick up the gauntlet thrown down by the Court; it immediately “began to craft and pass elaborate amendment provisions for ESA [section] 7” and other provisions of the Act, as a means of making the ESA less rigid.⁷⁹ With respect to section 7, Congress made sweeping revisions that both fleshed out the interagency consultation process and added an element of flexibility that did not exist in the 1973 Act.⁸⁰ Congress created a limited exemption for federally authorized or funded projects—such as the nearly-

⁷⁵ *Id.* at 173.

⁷⁶ *Id.* at 174.

⁷⁷ *Id.* at 185. Of course, the majority’s view was that Congress appeared to have sanctioned, in the ESA, certain financial project losses due to application of the ESA’s provisions. *See id.* at 185–86. The majority stated,

[W]e discern no hint in the deliberations of Congress relating to the 1973 Act that would compel a different result than we reach here. Indeed, the repeated expressions of congressional concern over what it saw as the potentially enormous danger presented by the eradication of *any* endangered species suggest how the balance would have been struck had the issue been presented to Congress in 1973. Furthermore, it is clear Congress foresaw that [section] 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act.

Id.

⁷⁸ *Id.* at 210 (Powell, J., dissenting); *see also* Plater, *supra* note 62, at 230 & n.59 (“[T]he citizens themselves had argued” that, “an injunction from the Court would and should be the catalyst for ‘a remand to legislature,’ forcing Congress to do what the farmers had so long hoped for, an objective analysis of the true merits of the pork barrel dam versus the rich resources of the river and its valley . . .”).

⁷⁹ *See* Plater, *supra* note 62, at 230–31.

⁸⁰ *See id.*; *see also* H.R. REP. NO. 95-1804, at 1, 2–10 (1978), *reprinted* in A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, *supra* note 30, at 1192, 1193–1201 (providing a process by which the acting agency must consult with the Secretary of FWS and establishing a committee that could exempt a take from ESA requirements).

completed Tellico Dam—that could proceed under certain circumstances,⁸¹ despite the fact that such projects would “jeopardize the continued existence” of the species at issue.⁸² The former set of amendments were relatively benign and provided clear guidance to action agencies, as well as to the FWS and NMFS, as to their specific obligations during the formal consultation process.⁸³ The latter set of amendments, however, created for the first time, the “Endangered Species Committee”—colloquially referred to as the “God Squad” because of the power wielded by the committee of Cabinet-level department heads.⁸⁴ The God Squad can review applications for an exemption from the requirements of section 7, and grant such exemptions if certain condi-

⁸¹ Plater, *supra* note 62, at 230–31 (explaining that the ESA created the Endangered Species Committee to decide when an exemption may be granted, based on the public interests of allowing the agency action). The conference report describes the process of applying for an exemption permit and the conditions under which the Committee will grant the exemption as when,

[T]here are no reasonable and prudent alternatives to the agency action[;] . . . the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; and . . . the action is of regional or national significance.

H.R. REP. NO. 95-1804, at 5–8. It further states that the Committee must also “establish . . . such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.” *Id.*

⁸² Plater, *supra* note 62, at 230–31; *see also* H.R. REP. NO. 95-1804, at 1, 2–10 (providing specifications of the process by which an agency may apply for an exemption where the “agency action may jeopardize the continued existence of any endangered or threatened species”).

⁸³ *See* 16 U.S.C. § 1536(a)–(d) (2012); *see also* H.R. REP. NO. 95-1804, at 2–3 (describing the requirements of the interagency consultation process).

⁸⁴ 16 U.S.C. § 1536(e)–(p); *see also* H.R. REP. NO. 95-1804, at 3–10 (describing the Endangered Species Committee and the circumstances in which it may grant exemptions); Plater, *supra* note 62, at 230–31 (describing the power of the “God Squad”). It is important to note that although the God Squad exemption process was created to serve broader purposes under the Act than merely resolving the Tellico Dam project, Congress’ short-term intent was clear: “[t]he conflict between the snail darter and the Tellico Dam was the [s]ection 7 God [Squad’s] first assignment.” Plater, *supra* note 62, at 231. In that first exercise of the God Squad procedure, on the basis of an economic study, “the God Squad unanimously determined the dam project, even with 95% of its budget spent, still did not make sufficient economic sense to justify spending even the last 5% of its appropriated costs.” *Id.* Despite the God Squad’s verdict, Congress took matters into its own hands. “[I]n forty-two seconds in an emptying House chamber, TVA’s pro-dam public works allies slipped a rider onto an appropriations bill repealing all laws hindering the Tellico Dam, and ordered the reservoir’s completion.” *Id.* at 232 & n.64; *see also* Presidential Statement on Signing H.R. 4388 into Law, II PUB. PAPERS 1760–61 (Sept. 25, 1979) (enacted), *reprinted in* A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, *supra* note 30, at 1301–02 (explaining that the appropriations Act overturned the careful decision of the Endangered Species Committee that had unanimously determined that the project was not economically viable and expressing regret at signing the bill). As a result, “the TVA was ultimately able to finish the dam, close the gates, and flood the valley on November 28, 1979.” Plater, *supra* note 62, at 233.

tions are satisfied.⁸⁵ When the dust settled from the 1978 ESA amendments, “[s]ection 7 [had] mushroomed from its 1973 text of 129 words to its present total of [4603]”—an increase of more than 3500 percent.⁸⁶

Accordingly, as the 1970s came to a close, Congress had created only three limited exceptions to the statute’s strict liability take prohibition: (1) non-jeopardizing federal projects (or projects authorized or funded by federal agencies) that had been permitted to proceed and granted authorization under the section 7 consultation process;⁸⁷ (2) jeopardizing federal projects (or projects authorized or funded by federal agencies) for which the God Squad had granted an exemption from the ESA’s requirements;⁸⁸ and (3) scientific research and species propagation efforts that had received section 10 recovery or enhancement permits from the FWS or NMFS.⁸⁹ As such, there was no mechanism available for exempting species take for projects that lacked a federal nexus,⁹⁰ which became Congress’ focal point with regard to the ESA in the early 1980s.

C. The 1982 Amendments: Creation of the ITP Process

Two key events in the early 1980s spurred Congress into action regarding the ESA; this time to address a unique species take situation not covered by the section 7 interagency consultation process or the section 10 recovery or enhancement permit process: a private, State, or other project lacking a federal

⁸⁵ 16 U.S.C. § 1536(e)–(p).

⁸⁶ Plater, *supra* note 62, at 231. Although not directly germane to the narrow focus of this Article, Congress made other revisions to the ESA in 1978 that strengthened the protections afforded to listed species. *See, e.g.*, 16 U.S.C. § 1532(5) (defining “critical habitat” for purposes of section 1533). Most notably, Congress included a new provision in section 4 of the Act requiring that the FWS or NMFS designate critical habitat for a species concurrent with ESA listing, and included a complementary provision in section 3 of the Act defining “critical habitat.” *See id.* § 1533(a)(3)(A) (requiring the Secretary to designate the habitat of endangered or threatened species as “critical habitat” in certain circumstances); *see also* H.R. REP. NO. 95-1804, at 1–2, 13–16 (defining “critical habitat” and creating the requirement of designating a “critical habitat” and providing the specifications of this determination). Congress also imposed an obligation on the FWS and NMFS to prepare recovery plans that would set forth specific guidelines and objectives for achieving species recovery. 16 U.S.C. § 1533(f); *see also* H.R. REP. NO. 95-1804, at 15 (providing for the development and implementation of recovery plans).

⁸⁷ *See* Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 892 (1973) (codified as amended at 16 U.S.C. § 1536); *see also supra* note 6 and accompanying text (describing the specific interagency consultation process that included the consulting agency authorizing incidental take when a federal project was found not to jeopardize the continued existence of a listed species).

⁸⁸ *See* Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751, 3752–53 (codified as amended at 16 U.S.C. § 1533) (establishing the Endangered Species Committee and the requirements for exemptions).

⁸⁹ *See* Endangered Species Act, 87 Stat. at 896 (codified as amended at 16 U.S.C. § 1539(a)(1)(A)).

⁹⁰ U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK 1-1 (1996), available at http://www.nmfs.noaa.gov/pr/pdfs/laws/hcp_handbook.pdf, archived at <http://perma.cc/G96M-GRCW>.

nexus that would incidentally affect a listed species. The first event was another controversial court ruling in the case of *Palila v. Hawaii Department of Land and Natural Resources*, and the second event was a collaborative compromise to resolve a development conflict with listed species.⁹¹

1. The Case of *Palila v. Hawaii Department of Land and Natural Resources*

In 1979, in *Palila*, conservation organizations sued the State of Hawaii, challenging the State's management of feral sheep and goats for sport hunting purposes.⁹² The organizations argued that the feral animals were destroying critical habitat in the mamane-naio forest for the endangered Palila (an endemic bird species found only in Hawaii) and thereby causing "harm" to the species, in violation of section 9 of the ESA.⁹³ As the district court observed: "[t]he bird has evolved in the mamane-naio ecosystem over the centuries and is uniquely adapted to feeding upon the mamane," "[t]he mamane trees provide food, shelter and nest sites for the Palila," and "[t]he naio trees are of secondary importance as nest sites."⁹⁴ The State did not dispute that its management of the feral game animals was adversely affecting the Palila's critical habitat.⁹⁵ Rather, the State primarily argued that section 9 had no applicability to the State because such enforcement is precluded by the Tenth Amendment to the U.S. Constitution.⁹⁶ The district court rejected this argument as groundless in light of the ESA's statutory scheme.⁹⁷ In turn, the court ordered the State "to initiate steps for complete removal of feral sheep and goats from the Palila's critical habitat within two years."⁹⁸

The State appealed the district court decision to the U.S. Court of Appeals for the Ninth Circuit.⁹⁹ The Ninth Circuit affirmed the lower court's decision, noting that the ESA "prohibits the taking of any endangered species" without exception, in light of the fact that the State's management of feral animals

⁹¹ See *infra* notes 92–114 and accompanying text.

⁹² *Palila v. Haw. Dep't of Land & Natural Res. (Palila I)*, 471 F. Supp. 985, 987 (D. Haw. 1979).

⁹³ *Id.* at 987–89.

⁹⁴ *Id.* at 989.

⁹⁵ See *id.* at 990–91. The court explained that the defendants understood the impact of the game animals on the ecosystem, resulting from the animals consuming seedlings and shoots of the mamane, and thus preventing regeneration of the forest. *Id.* at 991. The court further explained that, "Plaintiffs have shown (and defendants have produced no substantial evidence to the contrary) that the Palila requires all of its designated critical habitat in order to survive as a species and that the feral sheep and goats maintained by defendants are the major cause of that habitat's degradation." *Id.*

⁹⁶ *Id.* at 992.

⁹⁷ *Id.* at 992–99.

⁹⁸ *Palila v. Haw. Dep't of Land & Natural Res. (Palila II)*, 639 F.2d 495, 497 (9th Cir. 1981); *Palila I*, 471 F. Supp. at 999.

⁹⁹ *Palila II*, 639 F.2d at 495–96 (stating that the district court had granted summary judgment in favor of the plaintiffs and noting that two issues had been raised on appeal).

lacks any federal nexus.¹⁰⁰ Hence, the court explained that, “[t]he only facts material to this case are those relating to the questions whether the Palila is an endangered species and, if so, whether the defendants’ actions amounted to a taking.”¹⁰¹ Reviewing those questions, the court held that, “[t]he defendants’ action in maintaining feral sheep and goats in the critical habitat is a violation of the Act since it was shown that the Palila was endangered by the activity,” and thus found that, “complete eradication of the feral animals is necessary to prevent harm to the Palila.”¹⁰² This ruling—the first successful section 9 citizen enforcement action against a project lacking a federal nexus—had ripple effects felt far and wide by States and private landowners.¹⁰³

2. The Grand Compromise: The San Bruno Mountain HCP

Around the time the Ninth Circuit issued its landmark ruling in *Palila*, various stakeholders were negotiating in California in an attempt to avoid ESA litigation concerning another activity lacking a federal nexus that would take listed species.¹⁰⁴ At issue was the fate of San Bruno Mountain, where a private developer seeking to construct commercial and residential units on the mountain faced opposition from environmental organizations seeking to conserve the mountain to protect the dozens of unique wildlife species inhabiting it.¹⁰⁵ The developer—Visitacion Associates—purchased practically all of the land on the mountain in the early 1970s, and planned to “develop approximately [7655] residential units and 2,000,000 square feet of office and commercial space.”¹⁰⁶ In response to consequent public opposition, San Mateo County adopted a new management plan for San Bruno Mountain that would permit less commercial and residential development, while preserving the remainder

¹⁰⁰ See *id.* at 497.

¹⁰¹ See *id.*

¹⁰² *Id.* at 497–98.

¹⁰³ Another round of litigation over the Palila followed, in which the Ninth Circuit again found the State of Hawaii to be acting in violation of the ESA. See *Palila v. Haw. Dep’t of Land & Natural Res. (Palila III)*, 852 F.2d 1106, 1106–10 (9th Cir. 1988). Although irrelevant to the focus of this Article, it is worth noting that at least one Supreme Court justice has called into question whether, as the Ninth Circuit held in the second round of litigation, the “harm” form of take encompasses activities that only indirectly cause the harm contemplated in 50 C.F.R. § 17.3. See *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Ore.*, 515 U.S. 687, 713–14 (1995) (O’Connor, J., concurring).

¹⁰⁴ See *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 979 (9th Cir. 1985).

¹⁰⁵ See *id.* For a more detailed discussion of the history of the San Bruno conservation plan, see Craig A. Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STANFORD ENVTL. L. J. 1, 18–24 (1991), and Lindell Marsh, *Conservation Planning Under the Endangered Species Act: A New Paradigm for Conserving Biological Diversity*, 8 TULANE ENVTL. L. J. 97, 98–111 (1994).

¹⁰⁶ *Friends of Endangered Species*, 760 F.2d at 979.

of the mountain as open space.¹⁰⁷ After litigating against the County over this scaled-back development plan, Visitacion Associates settled the suit in 1980 and agreed to develop approximately one-third of the mountain and to sell or donate the remaining two-thirds of the mountain specifically for use as a public park.¹⁰⁸

Despite reaching this settlement, their work was far from over. “Shortly after the settlement was reached, the [FWS] found that the Mission Blue butterfly, which was on the endangered species list, inhabited the Mountain.”¹⁰⁹ Although there was no mechanism available in the ESA to authorize any takes by a project of this sort in the absence of a federal nexus,¹¹⁰ stakeholder groups nevertheless “formed the San Bruno Mountain Steering Committee to formulate a plan that would both protect the endangered species and allow some development of the Mountain.”¹¹¹ The committee included representatives from Visitacion, landowners, the County, and three cities that would be affected by the outcome, as well as officials from the FWS and the California Department of Fish and Game.¹¹²

On the basis of a detailed biological study overseen by the committee, in 1981 the committee began preparing what it called a “habitat conservation plan,” which set forth the specific commitments made by each party, along with an implementing agreement that executed the plan and bound the committee members to its terms.¹¹³ The final terms of the plan “dedicated 793 privately owned acres to local agencies as permanent open space, preserved 81% of the open space on the Mountain as undisturbed habitat with another 3% of open space to be restored after temporary disturbances during construction,” “required lot owners on the Mountain to contribute \$60,000 annually to finance a permanent habitat conservation program” supervised by the county, and limited construction disturbance to “only 14% of the present habitat of the Mountain’s population of Mission Blue butterflies.”¹¹⁴

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See *supra* notes 87–90 and accompanying text.

¹¹¹ *Friends of Endangered Species*, 760 F.2d at 979.

¹¹² *Id.* at 979–80.

¹¹³ *Id.* at 980.

¹¹⁴ *Id.*

3. Congress' 1982 Amendments to the ESA

To many, the result of the hard-fought compromise over San Bruno Mountain seemed to be a win-win for developers and the species.¹¹⁵ To make it a reality, however, the approach needed Congress' blessing, because the ESA did not permit any non-federal activities to take listed species, regardless of any proposed measures aimed at minimizing or mitigating the take associated with those activities (or even if the project would have a net benefit for the species).¹¹⁶ Thus, committee members urged Congress to formally adopt a new exemption to the take prohibition that would permit private development projects—or others like them that lack a federal nexus—to obtain take authorization from the FWS or NMFS, so long as certain conditions are satisfied.¹¹⁷

Agreeing that this was a sound approach and was consistent with the Act's objectives, in 1982 Congress amended the Act to create the incidental take permit ("ITP") program, which authorized the FWS and NMFS to permit "any taking otherwise prohibited by section [9 of the ESA] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."¹¹⁸ In designing the ITP permit scheme, Congress cited favorably to the San Bruno Mountain conservation plan.¹¹⁹ It went so far as to adopt "the San Bruno Mountain plan [a]s the model for this long term permit," against which "the adequacy of similar conservation plans should be measured."¹²⁰ Not surprisingly, therefore, Congress designated as a key feature of the ITP process the development of a habitat conservation plan ("HCP"), and institutionally built into the ESA what it viewed as the four primary strengths of the San Bruno Mountain plan:

- (1) "[P]reserv[ing] sufficient habitat to allow for enhancement of the survival of the species";
- (2) "establish[ing] . . . a funding program [that] will provide permanent on-going funding for important habitat management and enhancement activities";

¹¹⁵ *Id.* (explaining that the San Bruno Mountain HCP "provide[d] an approach by which habitat protection and real estate development on the Mountain would take place at the same time").

¹¹⁶ See *supra* notes 87–90 and accompanying text.

¹¹⁷ See *Endangered Species Act Reauthorization and Oversight: Hearing on H.R. 97-32 Before the Subcomm. on Fisheries & Wildlife Conservation & the Env't of the Comm. on Merchant Marine & Fisheries*, 97th Cong. 340 (1982) (statement of Lindell Marsh) ("I think it is important to stress the need for some kind of statement in the [A]ct that this is the kind of process that can be used and that the [f]ederal [g]overnment condones and encourages it.")

¹¹⁸ 16 U.S.C. § 1539(a)(1)(B) (2012); H.R. REP. NO. 97-835, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2870.

¹¹⁹ H.R. REP. NO. 97-835, at 30–31.

¹²⁰ *Id.*

- (3) establishing “a permanent institutional structure to insure uniform protection and conservation of the habitat . . . despite the division of the habitat by the overlapping jurisdiction of various governmental agencies and the complex pattern of private and public ownership”; and
- (4) “ensur[ing] that all elements of the plan will be implemented” through a formal agreement.¹²¹

By injecting rigorous requirements into the ITP issuance criteria,¹²² Congress made clear that, “[o]btaining an ITP, and thus immunity from section 9 take prohibitions, . . . requires much more than just asking for one.”¹²³ For example, ITP applicants must specify in their HCP:

- (i) [T]he impact which will likely result from such taking; (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.¹²⁴

Moreover, because the FWS’s or NMFS’s issuance of an ITP to a third party is itself necessarily a “major [f]ederal action . . . significantly affecting the quality of the human environment” through its authorization of development-related activities,¹²⁵ the issuing agency must prepare an environmental impact statement under the National Environmental Policy Act (“NEPA”) and solicit public comment on the ITP and NEPA analysis prior to ITP issuance.¹²⁶ In addition, because the FWS or NMFS is serving the role of an action agency in issuing an ITP, the issuing agency must also “self-consult” pursuant to section 7 of the ESA, to ensure that ITP issuance will not “jeopardize the continued existence” of any listed species.¹²⁷ Finally, after reviewing the HCP, the NEPA

¹²¹ *Id.* at 32.

¹²² See 16 U.S.C. § 1539(a)(2) (requiring any ITP applicant to submit a conservation plan with certain specifications to the Secretary).

¹²³ Wheeler, *supra* note 37, at 222.

¹²⁴ 16 U.S.C. § 1539(a)(2)(A) (2012); H.R. REP. NO. 97-835, at 13.

¹²⁵ See National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (2012); Rohlf, *supra* note 45, at 125.

¹²⁶ See, e.g., Wheeler, *supra* note 37, at 223.

¹²⁷ *Id.*; see also 16 U.S.C. § 1536(a)(2) (requiring the action agency to consult the Secretary to ensure that the action 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”); H.R. REP. NO. 97-567, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2831 (explaining the decision to retain the duty for any action agency to consult the Secretary). The fact that the ITP process

analysis, and the biological opinion, the issuing agency must, before an ITP can issue, make specific findings that:

(i) [T]he taking will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the applicant will ensure that adequate funding for the plan will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (v) the measures, if any, required [as necessary and appropriate] will be met.¹²⁸

In creating the ITP process, Congress made clear its view that this type of permit is distinct from any pre-1982 exemptions in the ESA for federal projects under section 7 or recovery or enhancement efforts under section 10.¹²⁹ For example, the Senate Report explained that the amendment “should lead to resolution of potential conflicts between endangered species and *the actions of private developers*, while at the same time encouraging these developers to become more actively involved in the conservation of these species.”¹³⁰ Likewise, the House Report explained that the ITP provision specifically applies to situations where “the unintentional taking may occur on *private lands owned by a developer* who has no need of a federal permit” because “these individuals have no access to the consultation and exemption provisions of the Act” but are “subject to the taking prohibitions of Section 9.”¹³¹ Thus, the ITP process

requires section 7 self-consultation is critical for attaching the ESA jeopardy standard to ITP permits. See Rohlf, *supra* note 45, at 114, 120, 125. One commentator has explained that, “the jeopardy standard provides the bottom line for the ESA’s section 10 process for issuing permits authorizing ‘incidental take,’ which in recent years has become the federal government’s key regulatory mechanism for influencing non-federal actions that affect protected species,” because,

The ESA actually requires two jeopardy analyses before FWS or NMFS can approve an HCP and issue an [ITP:] [f]irst, among section 10’s list of findings required for issuance of an incidental take permit, the Services must find that the taking, if approved, “will not appreciably reduce the likelihood of the survival and recovery of the species in the wild” [and second, the] issuance of an [ITP] constitutes a federal action that obviously may affect one or more listed species [therefore requiring that the] FWS or NMFS must engage in section 7 consultation (with itself) prior to issuing such a permit.

Id.

¹²⁸ 16 U.S.C. § 1539(a)(2)(B); see also Wheeler, *supra* note 37, at 223 (describing the process an ITP applicant must go through to obtain a permit).

¹²⁹ See, e.g., S. REP. NO. 97-418, at 10 (1982); H.R. REP. NO. 97-567, at 15; H.R. REP. NO. 97-835, at 29 (1982) (Conf. Rep.), reprinted in 1982 U.S.C.C.A.N. 2860, 2870; see also U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., *supra* note 90, at 1-2.

¹³⁰ S. REP. NO. 97-418, at 10 (emphasis added).

¹³¹ H.R. 6133, 97th Cong. (1982) (emphasis added). During the floor debate, Congressman Forsythe stated,

“establishes a procedure” that “addresses the concerns of *private landowners* who are faced with having otherwise lawful actions not requiring [f]ederal permits prevented by section 9 prohibitions against taking.”¹³²

Accordingly, as made plain by Congress in amending the ESA, an ITP was created because it is the *only* mechanism for authorizing take where the underlying *purpose* of the project at issue is private development.¹³³ As such, what defines ITP eligibility is the *purpose* of the activity at issue.¹³⁴ Thus, in Congress’ eyes, the *only* means by which a private development project lacking a federal nexus—or, by the same token, a State or local development project or management scheme lacking a federal nexus—may proceed, despite the fact that the project will incidentally take a listed species, is by first obtaining an ITP.¹³⁵ Indeed, as Congress explained, the fact that a private development project will result in *net benefits* to a listed species—through mitigation measures, scientific research, or other efforts—does not negate the requirement that an ITP must be obtained prior to project construction and operation.¹³⁶

It is against this backdrop that the remainder of this Article analyzes the Fish and Wildlife Service’s misapplication of section 10.¹³⁷

II. THE FWS’S HISTORICAL IMPLEMENTATION OF SECTION 10 OF THE ESA

Soon after Congress’ creation of the incidental take permit (“ITP”) program under the Endangered Species Act (“ESA”) in 1982, the U.S. Fish and

Other *businessmen* confront a different problem [from that facing federal projects that will take listed species]. Their projects occur *on private lands and they are, therefore, unable to enter into the consultation and exemption process*. They are, however, still governed by the section 9 prohibitions of the act. For these *businessmen*, H.R. 6133 creates a special permit procedure whereby they may be given a permit to take endangered species if the taking is incidental to, and not the purpose of, the project in question and the taking is not likely to jeopardize the continued existence of the species.

128 CONG. REC. H3246 (daily ed. June 8, 1982) (statement of Congressman Forsythe) (emphasis added).

¹³² H.R. REP. NO. 97-835, at 29.

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *Id.* (explaining that this amendment provides a way for private landowners to conduct otherwise lawful actions that violate section 9 take prohibitions, provided that the landowners follow the procedures for receiving a permit and the action “will not jeopardize the continued existence of the species”).

¹³⁶ S. REP. NO. 97-418, at 10 (1982) (recognizing that, “[i]n some cases, the overall effect of a project can be beneficial to a species, even though some incidental taking may occur” pursuant to an FWS- or NMS-approved ITP).

¹³⁷ Congress amended the ESA in 1988 and 2004, though neither of those amendments are germane to the substance of this Article. *See Endangered Species Act*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/laws-policies/esa-history.html> (last updated July 15, 2013), *archived at* <http://perma.cc/6BVA-QRM9>.

Wildlife Service (“FWS”) issued the first-ever ITP and approved the underlying habitat conservation plan (“HCP”) for development of San Bruno Mountain.¹³⁸ The HCP included many of the minimization and mitigation hallmarks that are still seen in HCPs today. It “contain[ed] various measures to ‘minimize and mitigate’ the impact of the project upon the Mission Blue butterfly,” including “the permanent protection of [eighty-six percent] of the Mission Blue’s habitat,” “funding for the Plan would yield \$60,000 annually, which would be used to halt the apparent incursion of brush and gorse into the habitat and permit the re-establishment of grasslands for the butterfly,” and “continuing and comprehensive restrictions on land development and significant financial incentives[,] . . . [which] should play a significant role in enhancing the protection of endangered species on the Mountain.”¹³⁹ In evaluating the adequacy of the ITP and HCP, the FWS prepared an Environmental Assessment (“EA”) under the National Environmental Policy Act (“NEPA”) analyzing the environmental impacts of issuing the ITP and the agency also engaged in section 7 self-consultation, which culminated in a biological opinion concluding that the ITP would not result in jeopardy to the listed species residing on San Bruno Mountain.¹⁴⁰ Although a local conservation organization challenged the FWS’s issuance of the San Bruno Mountain ITP as arbitrary and capricious and being based on flawed biological surveys, the U.S. Court of Appeals for the Ninth Circuit ultimately resolved the issue in the FWS’s favor.¹⁴¹ The court held that the ITP would not result in jeopardy to any listed species and the mitigation efforts were sufficient to avoid the FWS’s duty to prepare an environmental impact statement because the ITP likely would not result in significant impacts, as that term is defined under NEPA.¹⁴²

Perhaps because of the protracted and expensive legal wrangling that followed the FWS’s issuance of the model ITP (the “San Bruno Mountain ITP”), very few ITPs were sought in the first decade after Congress created the ITP

¹³⁸ See Issuance of Permit for Incidental Take of Endangered Species, 48 Fed. Reg. 10,136, 10,136 (Mar. 10, 1983); CNTY. OF SAN MATEO PARKS DEP’T, SAN BRUNO MOUNTAIN HABITAT CONSERVATION PLAN (1982), available at http://parks.smcgov.org/sites/parks.smcgov.org/files/documents/files/SBM_HCP_Final_Volume1_November1982.pdf, archived at <http://perma.cc/CZB5-T43W>.

¹³⁹ Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 984 (9th Cir. 1985).

¹⁴⁰ *Id.* at 980–81.

¹⁴¹ *Id.* at 981–89.

¹⁴² *Id.* It should be noted that because ITPs are often in place for long durations of thirty years or more, many of the earliest ITPs—including the San Bruno Mountain ITP—are still in existence. See *San Bruno Mountain Habitat Conservation Plan (HCP)*, CNTY. OF SAN MATEO PARKS DEP’T, <https://parks.smcgov.org/documents/san-bruno-mountain-habitat-conservation-plan-hcp> (last visited Apr. 1, 2015), archived at <https://perma.cc/65LM-URB9> (explaining that San Mateo County “administers the San Bruno Mountain HCP by reporting to the HCP Trustees . . . and interacting with the [FWS]”).

process.¹⁴³ By 1992, only fourteen ITPs, including the San Bruno Mountain ITP, had been issued.¹⁴⁴ With the ITP program on life support, “interest was revived by the Clinton administration,” which viewed the ITP process—with certain regulatory reforms—as a means of “modify[ing] the ESA’s perceived inflexibility and stimulat[ing] private sector involvement in conservation.”¹⁴⁵ The Clinton administration saw “fostering a cooperative partnership with private landowners and developers . . . as critical to preserving endangered species, given that more than half of endangered or threatened species occupied habitats that over [eighty] percent of the time were found on private or state lands.”¹⁴⁶

Interior Secretary Bruce Babbitt forcefully led this effort to reform the ITP process to encourage greater participation by private landowners and developers, starting with the 1994 joint “No Surprises” policy of the FWS and the National Marine Fisheries Service (“NMFS”), which was finalized in 1998.¹⁴⁷ The focal point of this new policy was to provide assurances to ITP permit-holders that unforeseen circumstances would not cause additional financial burdens after an ITP was secured.¹⁴⁸ The issuing legislation stated:

If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the [HCP’s] operating conservation program, the Director will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee.¹⁴⁹

During this same time period, the FWS and NMFS jointly issued their HCP Handbook, which provided critical guidance for private landowners and developers on understanding the nuances of the ITP process.¹⁵⁰ In 2000, the FWS

¹⁴³ See Wheeler, *supra* note 37, at 224–25 (describing the “lackluster performance” of the HCP program after the San Bruno Mountain litigation).

¹⁴⁴ U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., *supra* note 90, at i; see also Wheeler, *supra* note 37, at 223–24 (describing the initial hesitance to the use of HCPs); John Kostyack, NWF v. Babbitt: *Victory for Smart Growth and Imperiled Wildlife*, 31 ENVTL. L. REP. 10,712, 10,713 (2001) (noting the fourteen pre-1993 ITPs in the context of the shift toward more HCPs during the Clinton administration).

¹⁴⁵ Wheeler, *supra* note 37, at 224.

¹⁴⁶ *Id.*

¹⁴⁷ Notice of Availability of Preliminary Draft Handbook for Habitat Conservation Planning and Incidental Take Permit Processing, 59 Fed. Reg. 65,782 (Dec. 21, 1994) (memorializing the No Surprises Policy); Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed. Reg. 8859, 8860 (Feb. 23, 1998) (codified at 50 C.F.R. § 17.32(b)(5) (2015)).

¹⁴⁸ 50 C.F.R. § 17.32(b)(5)(ii).

¹⁴⁹ *Id.*

¹⁵⁰ See U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., *supra* note 90, at i–ii.

and NMFS supplemented the HCP Handbook, which, among other things, extended the minimum public comment period on most ITP-HCPs from thirty days to sixty days, and ninety days for “large HCPs,”¹⁵¹ “[b]ecause of the concern that [thirty days] does not provide enough time for members of the public to review and provide meaningful comments.”¹⁵²

As scholars have explained, and as the numbers justify, “the effects of these additional assurances and guidance were profound.”¹⁵³ In contrast to the fourteen ITPs issued between 1982 and 1992 covering a modest amount of acreage, 177 ITPs were issued between 1993 and 2000 covering nearly 27 million acres in twenty-two States and Puerto Rico—a more than 1300% increase in the number of ITPs issued before 1993 and a more than 4400% increase in the amount of acreage conserved by pre-1993 HCPs.¹⁵⁴ The ITP-HCP surge set in motion by the 1990s policy reforms did not slow down in the 2000s, as the Bush administration issued 424 ITPs covering more than 22 million acres in twenty-three States and Puerto Rico.¹⁵⁵ Thus, in only fifteen years, Secretary Babbitt’s reforms led to the enrollment of approximately 48 million acres of private, State, and municipal land into the ITP-HCP program—more than 2.1% of the overall land area of the United States, and 3% of the overall non-federal land area.¹⁵⁶

Until recently, the FWS has made clear in implementing the ITP-HCP program under section 10(a)(1)(B) of the ESA, the ITP process is the *only* mechanism available for private landowners and developers to take a listed species.¹⁵⁷ In so doing, the FWS avoided any blurring of lines between ITPs and section 10(a)(1)(A) recovery permits issued for scientific research efforts.¹⁵⁸ For example, the HCP Handbook contrasts the two types of permits, explaining that,

A section 10(a)(1)(B) [incidental take] permit only authorizes take that is incidental to otherwise lawful activities[. . .] [which] means *economic development or land or water use activities* that, while they may result in take of federally listed species, are consistent with

¹⁵¹ *Id.* at 6–18 (noting that large-scale or regional HCPs are “often complex and address a variety of activities”).

¹⁵² U.S. FISH & WILDLIFE SERV. & NAT’L OCEANIC & ATMOSPHERIC ADMIN., ADDENDUM TO THE HCP HANDBOOK (2000), available at http://www.fws.gov/endangered/esa-library/pdf/Final_Addendum_QandA.pdf, archived at <http://perma.cc/YK76-WALE>.

¹⁵³ Wheeler, *supra* note 37, at 224.

¹⁵⁴ *Id.* at 224–25.

¹⁵⁵ *Id.* at 225.

¹⁵⁶ *Id.*

¹⁵⁷ See U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., *supra* note 90, at 1-1 to -2.

¹⁵⁸ See *id.* at 1-5.

other [f]ederal, state, and local laws. [In contrast,] [t]ake that occurs during other types of activities—i.e., *take for scientific purposes*, to enhance the propagation or survival of a listed species, or for purposes of establishment and maintenance of experimental populations—must be authorized by a permit under section 10(a)(1)(A) of the ESA (e.g., “Safe Harbor” or “recovery” permits).¹⁵⁹

The HCP Handbook further elucidates this distinction:

Other types of activities cannot be authorized by an [ITP] because they include actions that are not generally needed to implement an HCP or include long-term components that are not ‘incidental’ to the activity described in the HCP. Examples of these types of activities include holding endangered or threatened animals in captivity for propagation purposes or scientific research; euthanizing them for research purposes; and taking tissue samples for laboratory testing. However, such activities qualify as take for “scientific purposes” or purposes of “enhancement of propagation or survival” and can be authorized under section 10(a)(1)(A) of the ESA. If an HCP calls for activities of this type, the applicant should specify that the project will result in incidental take and take for scientific purposes or for purposes of enhancement of propagation or survival. Application requirements for scientific permits must then be addressed Generally, if proposed activities are well-described in the HCP, including those requiring a scientific permit, and if all incidental take permit application requirements have been met, [t]he permit issued can be a joint section 10(a)(1)(A) section 10(a)(1)(B) permit—i.e., only one permit need be issued.¹⁶⁰

Accordingly, as the FWS’s own handbook makes clear, the ESA has two separate processes for two very different types of permits, which require that an applicant secure *both* permits—and comply with the distinct requirements of each program—if there is any argument that a development or similar project also gives rise to scientific research efforts implicating section 10(a)(1)(A) of the Act.¹⁶¹

¹⁵⁹ *Id.* (emphases added). The HCP Handbook explains that, “[i]n some cases, however, take in the form of capture or harassment can be authorized under an incidental take permit, if the purpose of such actions is to minimize more serious forms of take (e.g., death or injury) or to conduct monitoring programs during activities authorized by the permit.” *Id.*

¹⁶⁰ *Id.* at 7-3.

¹⁶¹ *See id.*

This distinction is crucial because the permit issuance criteria are very different for the two types of permits.¹⁶² First, for example, the public comment period for a section 10(a)(1)(A) recovery permit is only thirty days (and even that can be waived by the FWS), whereas the minimum public comment period on most section 10(a)(1)(B) ITPs is sixty days (and even longer for certain ITP-HCPs).¹⁶³ Second, whereas the FWS must engage in NEPA review and prepare an environmental impact statement (“EIS”) or EA for nearly all ITP-HCPs (except for a relative few determined to be “low-effect” HCPs), scientific recovery permits are practically always categorically excluded from NEPA review because such permits seek not to undertake activities that will impact the environment but rather efforts to help recover species from the brink of extinction.¹⁶⁴

A third distinction is that each and every ITP-HCP must undergo internal FWS or NMFS consultation, which yields a biological opinion.¹⁶⁵ The biological opinion “represents a last internal ‘check’ that the fundamental standard of avoiding jeopardy has been satisfied,” and serves as the means by which the issuing agency “develop[s] reasonable and prudent measures and terms and conditions to minimize anticipated incidental take, or, if necessary, reasonable and prudent alternatives to eliminate the risk of jeopardy.”¹⁶⁶ Recovery permits, however, are often subject to a programmatic section 7 consultation and biological opinion that exists for a long duration and covers all related scientific recovery activities—even though they have not been analyzed in a site-specific manner—so long as they do not individually cause jeopardy.¹⁶⁷

¹⁶² See 50 C.F.R. § 17.22 (2015); U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., *supra* note 90, at 5-2 to -5, 6-3.

¹⁶³ Compare 50 C.F.R. § 17.22 (stating that the FWS “shall publish notice in the *Federal Register* of each application for a [recovery] permit,” which “shall invite the submission from interested parties, within [thirty] days after the date of the notice, of written data, views, or arguments with respect to the application” although “[t]he [thirty]-day period may be waived by the Director in an emergency situation where the life or health of an endangered animal is threatened”), with U.S. FISH & WILDLIFE SERV. & NAT’L OCEANIC & ATMOSPHERIC ADMIN., *supra* note 152 (“Because of the concern that [thirty days] does not provide enough time for members of the public to review and provide meaningful comments, the Services extended the minimum comment period for most HCPs to [sixty] days.”).

¹⁶⁴ Compare U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., *supra* note 90, at 5-2 (explaining that a FWS “order categorically excludes permits for scientific research and public display under the ESA and Marine Mammal Protection Act, and other categories of actions which would not have significant environmental impacts including routine operations, routine maintenance, actions with short-term effects, or actions of limited size or magnitude), with *id.* at 5-1 to -6 (describing application of EIS and EA requirements to most ITP-HCPs).

¹⁶⁵ *Id.* at 6-12 to -13.

¹⁶⁶ *Id.* at 6-13.

¹⁶⁷ See, e.g., Memorandum from Kris Olsen, Reg’l Office Recovery Permits Coordinator, U.S. Fish & Wildlife Serv., to Chief of Endangered Species, U.S. Fish & Wildlife Serv., at 4 (July 10, 2012) (on file with author) (referring to the January 31, 2012, biological opinion on recovery actions, initiated by Region 6 of the FWS, exemplifying the need for such a biological opinion to describe and

Finally, the issuance criteria are very different, as ITPs may only issue if “[t]he applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such takings,” and “[t]he taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild” (i.e., the taking will not cause jeopardy to a listed species).¹⁶⁸ In contrast, the much less stringent issuance criteria for scientific recovery permits merely requires that it is “likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit,” and “the purpose for which the permit is required is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit.”¹⁶⁹

During the Obama administration, these important permitting distinctions are starting to blur for the first time in the history of the Act’s implementation. Because the distinctions themselves lead to very different legal and practical consequences for permit applicants and the public, allowing these lines to blur can result in discord and confusion that undermines the purpose behind Congress’ creation of the ITP process in the first instance and Secretary Babbitt’s innovative reforms designed to strengthen it. Although consistency may be “the last refuge for the unimaginative,”¹⁷⁰ consistency is nevertheless vital to effectively implementing and enforcing federal laws.¹⁷¹

III. BLURRED LINES: CONFLATING ITPS AND SCIENTIFIC RECOVERY PERMITS

Although the incidental take permit (“ITP”) and habitat conservation plan (“HCP”) program is viewed by many as a resounding Endangered Species Act (“ESA”) success story, chinks in the program’s armor have started to show as a result of U.S. Fish and Wildlife Service’s (“FWS”) recent shift towards a more haphazard implementation of the ESA section 10 permitting programs for scientific recovery permits and ITPs.¹⁷² Specifically, although the FWS’s section 10 website still maintains the clear delineation between the two permitting

analyze the activities covered by the permit and to determine that the action would not jeopardize the continued existence of the species).

¹⁶⁸ 50 C.F.R. §§ 17.22(b)(2)(i), 17.32(b)(2)(i) (2015).

¹⁶⁹ *Id.* §§ 17.22(a)(2), 17.32(a)(2)(i).

¹⁷⁰ Oscar Wilde, *The Relation of Dress to Art*, PALL MALL GAZETTE (London), Feb. 28, 1885, at 4, reprinted in OSCAR WILDE, ARISTOTLE AT AFTERNOON TEA: THE RARE OSCAR WILDE 52 (John W. Jackson ed., 1991); see also RALPH WALDO EMERSON, *Self-Reliance*, in ESSAYS: FIRST SERIES (1841) (“A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.”).

¹⁷¹ Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1000 (2005).

¹⁷² See *infra* notes 175–253 and accompanying text.

programs,¹⁷³ and although the Obama administration continues to issue new ITPs and HCPs with regularity,¹⁷⁴ the boundaries demarcating the two permitting programs have started to blur for several controversial, yet politically expedient, projects that have flown under the radar despite producing insidious impacts on the efficacy of the section 10 process.

A. Wind Energy Projects

The primary area where the FWS has recently straddled the border between the two types of section 10 permits is in the development of renewable energy. It is not surprising that the Obama administration is conflicted when presented with questions surrounding renewable energy development when such projects will negatively affect listed wildlife species. Indeed, this administration has made it a top priority to permit as much renewable development as possible to achieve its stated climate goals.¹⁷⁵ Hence, although the reason the administration would be looking for shortcuts to getting more renewable projects online is understandable, the ESA makes no exceptions for projects self-labeled as “green” projects.¹⁷⁶ This means that a developer must comply with the proper section 10 mechanisms before proceeding with project construction and-or operation that is likely to incidentally take a listed species.¹⁷⁷

¹⁷³ *Permits*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/ENDANGERED/permits/index.html> (last updated July. 15, 2013), archived at <http://perma.cc/Z72T-FXH8> (explaining that, “[i]ncidental take permits are required when non-[f]ederal activities will result in take of threatened or endangered species,” as compared to “[r]ecover and interstate commerce permits[, which] are issued to allow for take as part of activities intended to foster the recovery of listed species . . . [such as] to allow for scientific research on a listed species in order to understand better the species’ long-term survival needs”).

¹⁷⁴ See *Conservation Plans and Agreements Database*, U.S. FISH & WILDLIFE SERV., http://ecos.fws.gov/conserv_plans/public.jsp (last updated Mar. 31, 2015), archived at <http://perma.cc/445T-EQYW> (showing that as of April 1, 2015, the FWS has issued a total of 822 ITPs and approved 696 HCPs since 1982) (note this this source updates daily and thus the numbers stated can be found in the archived link only).

¹⁷⁵ EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT’S CLIMATE ACTION PLAN 6–7 (2013), available at <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>, archived at <http://perma.cc/ZU6N-MCA9> (explaining that, “[d]uring the President’s first term, the United States more than doubled generation of electricity from wind, solar, and geothermal sources,” and advocating that, “[t]o ensure America’s continued leadership position in clean energy, President Obama has set a goal to double renewable electricity generation once again by 2020”).

¹⁷⁶ See John C. Nagle, *Green Harms of Green Projects*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 59, 96 (2013).

¹⁷⁷ See, e.g., *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 581–83 (D. Md. 2009) (finding a wind energy developer in violation of ESA section 9). The court in *Animal Welfare Institute v. Beech Ridge Energy LLC* concluded “that the only avenue available to Defendants to resolve the self-imposed plight in which they now find themselves is to do belatedly that which they should have done long ago: apply for an ITP.” *Id.* The court further explained that, “[t]he development of wind energy can and should be encouraged, but wind turbines must be good neighbors.” *Id.* See

1. The Fowler Ridge Wind Energy Facility

A thorough review of the Federal Register shows that 2010 marked the first time that a developer applied for—and received—a section 10(a)(1)(A) scientific recovery permit for activities associated with profit-generating private development, rather than for activities executed for the sole purpose of scientific research for species recovery.¹⁷⁸ To be clear, before 2010, and since, the FWS issued many scientific recovery permits to developers or their contractors—including in the renewable energy context—for the purpose of *surveying* a potential project site for presence or absence of listed species and to help determine whether an ITP is necessary *prior* to project construction and operation, or similarly, to determine whether new circumstances or information require an ITP before further operation that threatens a listed species.¹⁷⁹ What appeared in the Federal Register in 2010, however, is a far cry from survey activities during a time when a project is *not* in active operation.¹⁸⁰

On June 8, 2010, Fowler Ridge Wind Farm, LLC applied for a section 10(a)(1)(A) scientific recovery permit from the FWS for the purported purpose of implementing a scientific study “to test raising cut-in speeds of turbines as a method for reducing Indiana bat fatality rates at the Fowler Ridge Wind-energy facility.”¹⁸¹ The company only applied for this scientific recovery permit *after*

generally Nagle, *supra* note 176 (discussing the holding of *Animal Welfare Institute* and analyzing “environmental law’s contrasting approaches to the green harms of green projects”).

¹⁷⁸ See Endangered and Threatened Wildlife and Plants, 75 Fed. Reg. 35,503, 35,504 (Dep’t of Interior June 22, 2010) (notice and request for comments) (noting permit application number TE15075A requested by Fowler Ridge Wind Farm, LLC).

¹⁷⁹ See, e.g., Endangered and Threatened Wildlife and Plants, 74 Fed. Reg. 47,814, 47,815 (Fish & Wildlife Serv. Sept. 17, 2009) (notice and request for comments) (soliciting public comment on applications for section 10(a)(1)(A) permits, including an application by “ABR, Inc., Environmental Research & Services” for the purposes of “surveys to document species’ presence or absence in areas proposed for wind-energy development, studies to document habitat use, collection of echolocation data and hair/tissue sampling for scientific research,” which “are aimed at enhancement of the survival of the species in the wild”).

¹⁸⁰ Compare *id.* (providing the proposed activities that included “surveys to document species’ presence or absence in areas proposed for wind energy development, studies to document habitat use, collection of echolocation data and hair/tissue sampling for scientific research”), with Endangered and Threatened Wildlife and Plants, 75 Fed. Reg. at 35,504 (noting that the study is intended to aid the applicant in avoiding a take and the level of impact of certain operating procedures when a take does occur).

¹⁸¹ Endangered and Threatened Wildlife and Plants, 75 Fed. Reg. at 35,504; LARRY FOLKS, FOWLER RIDGE WIND FARM LLC, TE15075A, U.S. FISH AND WILDLIFE SERVICE: FEDERAL FISH AND WILDLIFE PERMIT APPLICATION FORM (2010) (on file with author). Fowler Ridge’s contractor stated:

We are seeking authorization for *incidental take of Indiana bats*, as part of a study designed to test the effectiveness of raising cut-in speeds to reduce overall bat fatality rates during the fall migration period, the results of which can then be used to evaluate the effectiveness of these operational alternations in reducing turbine-related Indiana

discovering the “fatality of an [endangered] Indiana bat . . . at the Fowler Ridge project during the [2009] fall migration period,” which “was likely a result of a collision with a wind turbine”—meaning the company had *already* killed an Indiana bat without an ITP in place, in violation of section 9 of the ESA.¹⁸² Thus, rather than immediately halting operation of the energy facility until an ITP could be obtained, as is ordinarily required if take occurs without lawful authorization in place, Fowler Ridge sought FWS authorization to *continue* operating its profit-generating project in the absence of an ITP—including by obtaining authorization to kill six more Indiana bats without penalty—under the guise of conducting scientific research.¹⁸³ Importantly, however, that scientific research was *not* scientific research aimed at recovering the Indiana bat.¹⁸⁴ Instead, it was scientific research that, at best, would be used by the company to support its own subsequent ITP application to the FWS.¹⁸⁵

On June 22, 2010, the FWS issued a generic notice in the Federal Register “invit[ing] public comment on [several] permit applications for certain activities with endangered species authorized by section 10(a)(1)(A) of the Act” (i.e., scientific recovery permit applications).¹⁸⁶ For these permit applications, the FWS only provided a thirty-day comment period and determined that, “the proposed activities in these permits are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.”¹⁸⁷ The notice identified five scientific recovery permit applications.¹⁸⁸ The first four applications concerned traditional activities for which scientific recovery permits are routinely granted.¹⁸⁹ The fifth application stated that it was from Fowler Ridge Wind Farm, LLC, that, “[t]he applicant requests a permit to take (migrating) Indiana bats within Benton County, Indiana, at the Fowler Ridge wind facility,” and that, “[t]he salvage study is designed to in-

bat casualties . . . to better understand the risk to Indiana bats during the migratory period and to more accurately estimate fatality rates.

RHETT E. GOOD ET AL., WEST INC., BAT MONITORING PROTOCOL: FOWLER RIDGE WIND-ENERGY FACILITY PHASES I, II AND III, BENTON COUNTY INDIANA 18 (2010) (emphasis added) (on file with author) (submitted as part of Fowler Ridge Wind Farm LLC’s permit application).

¹⁸² FOLKS, *supra* note 181, at (C)(1)(b), (e)(v).

¹⁸³ *See id.*

¹⁸⁴ GOOD ET AL., *supra* note 181, at 1.

¹⁸⁵ *Id.* (noting that, “the owners of the Fowler Ridge Wind Farm requested that WEST conduct further research of Indiana bat use and potential casualty rates at [Fowler Ridge] for use in completing a HCP and obtaining an Incidental Take Permit (ITP) from Region 3 of the USFWS”).

¹⁸⁶ Endangered and Threatened Wildlife and Plants, 75 Fed. Reg. 35,503, 35,503 (Fish & Wildlife Serv. June 22, 2010) (notice and request for comments).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 35,503–04 (listing permit application requests).

¹⁸⁹ These were capture and release activities, radio-tagging activities, and surveying activities to determine presence or absence of species. *Id.*

form the applicant as to the operating parameters that avoid take of bats and, where impacts occur, the level of impacts at various wind speeds and operating parameters.”¹⁹⁰ The Federal Register notice failed to point out that the Fowler Ridge application concerned an operating project that had already resulted in the unauthorized lethal incidental take of an Indiana bat, or that the applicant sought FWS authorization for additional lethal incidental take while continuing to operate its project in a high-risk location for Indiana bats without an ITP in hand.¹⁹¹

Although the FWS issued a cryptic Federal Register notice that likely made it difficult for members of the public to grasp the legal and practical consequences of the Fowler Ridge scientific recovery permit application, the unprecedented application caught the eye of two conservation organizations: Defenders of Wildlife and the Animal Welfare Institute. The organizations jointly submitted comments condemning the application and urging the FWS to deny it.¹⁹² The commenters raised myriad concerns with the application, including, *inter alia*:

- Fowler Ridge’s application conflates the two distinct section 10 permit schemes created by Congress;¹⁹³
- Fowler Ridge’s application cannot logically be processed under section 10(a)(1)(A) because it seeks merely to collect data to support the company’s own subsequent ITP;¹⁹⁴

¹⁹⁰ *Id.* at 35,504 (listing permit application number TE15075A by Fowler Ridge Wind Farm, LLC).

¹⁹¹ *See id.*

¹⁹² Letter from William S. Eubanks II & Eric R. Glitzenstein, Counsel to the Animal Welfare Inst. & Defenders of Wildlife, to Peter Fasbender, Reg’l Dir., U.S. Fish & Wildlife Serv. (July 21, 2010) (on file with author) (the subject line of the letter reads, “Public Comments on Permit Application Number TE15075A (Fowler Ridge Wind Farm, LLC)”).

¹⁹³ *Id.* at 3. In explaining the distinguishing features of each permit, the commenters explain that,

Because of the very different nature of the activities permitted by each mechanism (pure scientific research vs. private landowner development resulting in incidental take), Congress created many safeguards with respect to ITPs that are not required for [scientific recovery] permits . . . [T]he proper permit mechanism for a particular activity depends on the nature of the activity. Where the activity is intended solely to advance the existing body of science and to benefit a listed species by enhancing its survival and recovery efforts, an enhancement permit is sensible and a quicker federal review is appropriate. However, in circumstances involving private landowners and activities that are likely to result in incidental takes of listed species, the only legally permissible mechanism is an ITP—and only if each of the defined criteria are satisfied . . .

Id.

¹⁹⁴ *Id.* at 4 & n.3 The commenters further explain that,

[T]esting cut-in speeds mostly to support its own ITP application cannot, by itself, support an “enhancement” permit . . . [because] it would be a legal and logical oxymoron

- Fowler Ridge’s application is problematic because it eliminates the more stringent ITP issuance standards and excludes this activity from NEPA review;¹⁹⁵
- Fowler Ridge’s application fails to recognize that many similarly situated wind energy facilities had appropriately sought an ITP, rather than a scientific recovery permit for identical activities;¹⁹⁶ and
- Fowler Ridge’s application failed to demonstrate that there was a credible need for the stated research activities to contribute to the existing body of science, nor were there sufficient peer review safeguards in place to ensure that such research would be methodologically defensible.¹⁹⁷

Although the commenters urged that the FWS deny the permit application for these various reasons, they nevertheless offered suggestions—based on cutting-edge scientific research—of how the developer could lawfully proceed with at least some energy generation (and thus obtain some profits) without resulting in any unauthorized take of Indiana bats while waiting for an ITP.¹⁹⁸ Further, the commenters encouraged the developer to incorporate the scientific research underlying the recovery permit application into the HCP that would accompany the developer’s ITP application at the appropriate juncture, because doing so would allow the FWS and the public to consider the wisdom of that particular scientific methodology in the proper context of an ITP aimed at minimizing and mitigating take of Indiana bats at this particular project site.¹⁹⁹

Despite the critical comments received on Fowler Ridge’s permit application, the FWS made its required ESA findings on July 30, 2010 concerning permit issuance, which recommended on the basis of those findings that the FWS issue the scientific recovery permit to the company.²⁰⁰ Anomalously, the

for a private company seeking to take a listed species to say that it is “enhancing” the survival and recovery of the species merely by obtaining the data necessary to support its own ITP. . . . Indeed, if such a rationale was acceptable here, then any private activity impacting a species—be it a logging operation, mining project, or subdivision—could be justified on “enhancement” grounds, i.e., that the project proponent’s partial implementation of the project is necessary to obtain data that will support an ITP.

Id.

¹⁹⁵ *Id.* at 6 n.5 (reasoning that an enhancement permit should not be granted because it circumvents the requirements of NEPA and avoids “other federal and public review processes”), 8 (explaining that an enhancement permit here avoids the notice and comment requirements of ITPs as well as federal review under section 10 of the ESA).

¹⁹⁶ *Id.* at 6–7.

¹⁹⁷ *Id.* at 7.

¹⁹⁸ *Id.* at 9–10.

¹⁹⁹ *Id.*

²⁰⁰ Memorandum from Peter Fasbender, Endangered Species Permits Biologist, U.S. Fish & Wildlife Serv., to Chief of Endangered Species, U.S. Fish & Wildlife Serv. (July 30, 2010) (on file with author).

FWS based its findings on the fact that, in the FWS's view, "[t]he research at Fowler Ridge will provide information that can be applied to wind farms throughout the range of the Indiana bat" and that, "[w]ithout this permit, the research will not be conducted."²⁰¹ This was misleading, however, because not only had the commenters explained to the FWS that similar scientific research was already ongoing in various places throughout the Indiana bat's range, but they had also made clear that this same research can—and should—be a centerpiece of the company's ITP and HCP.²⁰² As such, the research would, in fact, be conducted irrespective of whether the FWS issued the scientific recovery permit.²⁰³ Two days later, the FWS issued a section 10(a)(1)(A) scientific recovery permit to Fowler Ridge Wind Farm, LLC authorizing lethal take of up to six Indiana bats resulting from turbine collision during the period of time that the company's contractor would be conducting some scientific research to support the developer's ITP application.²⁰⁴

During the research period authorized under the scientific recovery permit, Fowler Ridge's contractor discovered yet another Indiana bat that had been killed by the facility's wind turbines—i.e., a predictable result of continued operation of a high-risk project without an ITP in place delineating specific terms and conditions aimed at minimizing and mitigating incidental takes of Indiana bats.²⁰⁵ Had the FWS denied Fowler Ridge's recovery permit application and instead required the company to cease further operation until an ITP could be obtained (or at least agree to operational constraints that would eliminate any risk of Indiana bat fatalities)—as this author argues is the only outcome consistent with section 10 of the ESA—this new endangered bat fatality in the absence of an ITP could not have occurred. Instead, rather than penalizing Fowler Ridge for killing multiple Indiana bats without an operative ITP in place as required by section 10, the FWS specifically allowed the "research" to continue by renewing the permit multiple times, thereby extending its duration to far longer than originally disclosed to the public in the initial permit application.²⁰⁶ As expected, at the end of the research period, the developer sought a

²⁰¹ *Id.* at 2.

²⁰² Letter from William S. Eubanks II & Eric R. Glitzenstein, Counsel to the Animal Welfare Inst. & Defenders of Wildlife, *supra* note 192, at 7–9.

²⁰³ *Id.* at 7–10.

²⁰⁴ U.S. FISH & WILDLIFE SERV., NO. TE15075A-0, FEDERAL FISH AND WILDLIFE PERMIT, PERMITTEE: FOWLER RIDGE WIND FARM (2010) (on file with author).

²⁰⁵ See Amanda Solliday, *Wind Farm Offers Plan to Protect Endangered Indiana Bat*, IND. PUB. MEDIA (May 16, 2013), <http://indianapublicmedia.org/news/wind-farm-offers-plan-protect-endangered-bat-49373/>, archived at <http://perma.cc/2PJF-SG9U>.

²⁰⁶ See Endangered and Threatened Wildlife and Plants, 78 Fed. Reg. 76,173, 76,174 (Dec. 16, 2013) (notice of availability of permit applications; request for comments) (noting permit application number TE73598A requested by Fowler Ridge Wind Farm, LLC); Endangered and Threatened Species, 78 Fed. Reg. 9415, 9416 (Feb. 8, 2013) (notice of issuance of permits); Endangered and Threat-

section 10(a)(1)(B) ITP to cover incidental take for the remainder of the project's lifespan.²⁰⁷ Because the FWS was, at last, reviewing an ITP application, there was a much more transparent process—including two public comment opportunities totaling ninety days—as well as a full-blown environmental impact statement (“EIS”) analyzing the entire array of environmental impacts resulting from issuance of an ITP.²⁰⁸

Although it is commendable that the developer finally sought and obtained an ITP for what is plainly a high-risk project in light of the two confirmed Indiana bat mortalities, the plain language of the ESA does not support the spurious use of a scientific recovery permit to allow the private developer to operate this project for over four years without crucial HCP-backed mortality minimization measures.²⁰⁹ It is particularly troubling that the FWS approved this unprecedented course of action for a developer in an industry that is highly prioritized by the current administration.²¹⁰ As the commenters to the Fowler Ridge recovery permit application explained, this legally tenuous approach could lead to absurd results because, “if such a rationale was acceptable here, then any private activity impacting a species—be it a logging operation, mining project, or subdivision—could be justified on ‘enhancement’ grounds, i.e., that the project proponent’s partial implementation of the project is necessary to obtain data that will support an ITP.”²¹¹ Such an outcome would turn ESA section 10 on its head, and ignore the legislative history of the Act, which emphasizes the critical distinctions between the two permitting mechanisms.²¹²

2. The Bishop Hill Wind Energy Facility and the California Ridge Wind Energy Facility

After setting the precedent by issuing the Fowler Ridge scientific permit, which approved wind energy generation in high-risk Indiana bat habitat so long as there is some purported scientific research that can be conducted dur-

ened Wildlife and Plants, 77 Fed. Reg. 29,357, 29,358 (May 17, 2012) (notice of permit applications; request for comments) (noting permit application number TE73598A requested by Fowler Ridge Wind Farm, LLC); Endangered and Threatened Species, 76 Fed. Reg. 74,070, 74,740 (Nov. 30, 2011) (notice of issuance of permits).

²⁰⁷ Notice of Intent to Prepare a Draft Environmental Impact Statement for a Proposed Habitat Conservation Plan and Incidental Take Permit, 76 Fed. Reg. 30,384 (May 25, 2011).

²⁰⁸ See Final Environmental Impact Statement, Fowler Ridge Wind Farm, Benton County, Indiana, 79 Fed. Reg. 3224 (Jan 17, 2014); Draft Environmental Impact Statement, Fowler Ridge Wind Farm, Benton County, Indiana, 78 Fed. Reg. 20,690 (Apr. 5, 2013).

²⁰⁹ See 16 U.S.C. §§ 1538(a)(1)(B), 1539(a)(1)(A)–(B) (2012).

²¹⁰ See U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., *supra* note 90, at 1-5.

²¹¹ Letter from William S. Eubanks II & Eric R. Glitzenstein, Counsel to the Animal Welfare Inst. & Defenders of Wildlife, *supra* note 192, at 4 n.3.

²¹² See 16 U.S.C. §§ 1538(a)(1)(B), 1539(a)(1)(A)–(B).

ing the course of project operation,²¹³ other wind companies came knocking on the FWS's door seeking similar treatment.²¹⁴

First, the FWS announced in April 2012 that Bishop Hill Energy LLC was seeking lethal take authorization for up to two Indiana bats as a result of its normal project operations, during which time the developer would implement a "research proposal . . . [that] would evaluate bat mortality and take avoidance at the facility to benefit listed and unlisted bat species," and which sought to "devise biologically based operational protocols for turbines at the Henry County facility to successfully avoid take of listed bat species" (i.e., the activities ordinarily devised in, and researched under, an ITP-HCP).²¹⁵ In contrast to the Fowler Ridge situation, the FWS at least purported to conduct NEPA review related to permit issuance, although the self-interested developer drafted the cursory twenty-six-page EA, rather than the FWS.²¹⁶ As was the case with Fowler Ridge, the FWS only provided a thirty-day public comment period.²¹⁷ In line with the precedent set at Fowler Ridge, the FWS ultimately issued a scientific recovery permit to Bishop Hill.²¹⁸

Next, in April 2013, the FWS notified the public that California Ridge Wind Energy LLC was seeking a scientific recovery permit for "a two year scientific research study of acoustic deterrents, wind turbine operational experiments, and fatality surveys at the California Ridge Wind Energy Project," programs purportedly "aimed at conservation of the species through reduction of impacts at wind energy facilities"—activities that, once again, ordinarily require *incidental* take authorization pursuant to an ITP *before* any additional activities may proceed that are likely to take listed species.²¹⁹ Yet again, the FWS only provided a thirty-day public comment period for this application, and again deferred to the developer by letting the company prepare the cursory EA that was only available for public review upon request.²²⁰ Commenters

²¹³ See *supra* notes 178–212 and accompanying text.

²¹⁴ See, e.g., Endangered and Threatened Wildlife and Plants, 78 Fed. Reg. 24,768, 24,769 (Apr. 26, 2013) (noting permit application number TE03502B requested by California Ridge Wind Energy, LLC); Endangered and Threatened Wildlife and Plants, 77 Fed. Reg. 23,273, 23,273–74 (Apr. 18, 2012) (noting permit application number TE71464A requested by Bishop Hill Energy, LLC).

²¹⁵ See Endangered and Threatened Wildlife and Plants, 77 Fed. Reg. at 23,273–74.

²¹⁶ *Id.* at 23,274; see also BISHOP HILL ENERGY LLC, DRAFT ENVIRONMENTAL ASSESSMENT: SECTION 10(A)(1)(A) RECOVERY PERMIT APPLICATION, BISHOP HILL WIND ENERGY PROJECT, HENRY COUNTY, ILLINOIS (2012) (on file with author) (indicating that the EA was prepared by Bishop Hill Energy LLC, the developer for this project).

²¹⁷ Endangered and Threatened Wildlife and Plants, 77 Fed. Reg. at 23,273.

²¹⁸ Endangered and Threatened Species, 78 Fed. Reg. 9415, 9416 (Feb. 8, 2013) (notice of issuance of permits) (granting permit to Fowler Ridge Wind Farm); Endangered and Threatened Species, 79 Fed. Reg. 8473, 8474 (Feb. 12, 2014) (notice of issuance of permits).

²¹⁹ Endangered and Threatened Wildlife and Plants, 78 Fed. Reg. at 24,769.

²²⁰ Endangered and Threatened Wildlife and Plants, 78 Fed. Reg. 24,768, 24,768 (Apr. 26, 2013); see also CAL. RIDGE WIND ENERGY LLC, DRAFT ENVIRONMENTAL ASSESSMENT: SECTION

raised serious concerns with the FWS's continued illegal conflation of the purposes underlying ITPs and scientific recovery permits, as well as the lack of compliance with section 10 of the ESA, NEPA, and general notice-and-comment procedures.²²¹ Notwithstanding those concerns, the FWS granted the developer a scientific recovery permit allowing it to operate its turbines in the absence of an ITP through the end of 2015.²²²

Considering that the FWS has now issued scientific recovery permits to three different wind energy facilities in less than four years, even though those developers all genuinely seek incidental take authorization through an ITP-HCP, it does not seem likely that the FWS will be reversing its trend anytime soon.²²³ This is particularly unlikely during an administration that, at least through its actions, appears to support renewable energy above imperiled species.²²⁴ If the FWS, however, were to simply return to implementing the section 10 permitting scheme as Congress intended, while refusing to grant convenient administrative shortcuts to wind energy developers, a lawful, yet environmentally protective equilibrium, could be restored between these two important national policies.²²⁵

In *Animal Welfare Institute v. Beech Ridge Energy LLC*, a federal judge summarized this need perfectly in finding that a wind energy project was in violation of the ESA and had to obtain an ITP:

[T]his is a case about bats, wind turbines, and two federal policies, one favoring the protection of endangered species, and the other encouraging development of renewable energy resources. Congress, in enacting the ESA, has unequivocally stated that endangered species must be afforded the highest priority, and the FWS long ago designated the Indiana bat as an endangered species. By the same token, Congress has strongly encouraged the development of clean, renew-

10(A)(1)(A) INDIANA BAT (*MYOTIS SODALIS*) ENHANCEMENT OF SURVIVAL PERMIT APPLICATION, CALIFORNIA RIDGE I WIND ENERGY PROJECT, VERMILION AND CHAMPAIGN COUNTIES, ILLINOIS (2013) (on file with author) (indicating that the EA was prepared by California Ridge Wind Energy LLC, the developer for this project).

²²¹ See, e.g., Letter from William S. Eubanks II & Eric R. Glitzenstein, Counsel for Friends of Blackwater, to Lisa Mandell, Reg'l Dir., U.S. Fish & Wildlife Serv. Ecological Servs. (May 28, 2013) (on file with author) (stating in subject line, "Comments on Permit Application Number TE03502B (California Ridge Wind Energy LLC)").

²²² Endangered and Threatened Species, 79 Fed. Reg. at 8474 (renewing permit).

²²³ See Endangered and Threatened Wildlife and Plants, 78 Fed. Reg. 24,768, 24,769 (Apr. 26, 2013); Endangered and Threatened Wildlife and Plants, 77 Fed. Reg. 23,273, 23,273-74 (Apr. 18, 2012); Endangered and Threatened Wildlife and Plants, Permit Applications, 75 Fed. Reg. 35,503, 35,504 (Dep't of Interior June 22, 2010) (notices).

²²⁴ See EXEC. OFFICE OF THE PRESIDENT, *supra* note 175, at 6-7.

²²⁵ See *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 581 (D. Md. 2009).

able energy, including wind energy. It is uncontroverted that wind turbines kill or injure bats in large numbers, and the Court has concluded, in this case, that there is a virtual certainty that construction and operation of the Beech Ridge Project will take endangered Indiana bats in violation of Section 9 of the ESA. *The two vital federal policies at issue in this case are not necessarily in conflict. Indeed, the tragedy of this case is that Defendants . . . failed to take advantage of a specific mechanism, the ITP process, established by federal law to allow their project to proceed in harmony with the goal of avoidance of harm to endangered species.*²²⁶

For these reasons, wind energy developers seeking to operate profit-generating turbines on private land that are likely to kill or otherwise take federally protected species must obtain an ITP prior to project operation or immediately upon learning of the project's risk to imperiled species.²²⁷ They should not, instead, operate their turbines in a manner that will take endangered or threatened species until and unless the FWS issues an ITP and approves an HCP.²²⁸ In implementing that ITP-HCP, a wind energy developer would likely undertake various scientific monitoring and survey measures identified in the HCP, several of which may very well contribute to the body of existing science concerning the effects of wind energy on birds, bats, and other listed species.²²⁹ This is the precise purpose for which Congress designed the section 10 ITP-HCP process.²³⁰ Adhering to Congress' design is the logical way to restore harmony between the "two vital federal" policies that "are not necessarily in conflict": renewable energy generation and wildlife conservation.²³¹

B. Keystone XL Pipeline

The only other instance in which the FWS has erroneously issued a scientific permit for activities requiring an ITP provides a glimmer of hope that this practice will eventually disappear as a matter of agency policy. That instance involved a permit related to development of another energy project: the controversial Keystone XL Pipeline.²³² The FWS, faced with litigation in that

²²⁶ *Id.* (emphasis added) (noting, however, that Beech Ridge had ignored the "repeated advice" of FWS).

²²⁷ *See id.*

²²⁸ *See id.*

²²⁹ *See, e.g.,* Endangered and Threatened Wildlife and Plants, 78 Fed. Reg. 24,768, 24,769 (Apr. 26, 2013).

²³⁰ *See* U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., *supra* note 90, at 1-5.

²³¹ *See Animal Welfare Inst.*, 675 F. Supp. 2d at 581.

²³² *See* Complaint for Declaratory and Injunctive Relief at 1, *Ctr. for Biological Diversity v. U.S. Dep't of State*, 2011 WL 5909488 (D. Neb. 2011) (No. 8:11-cv-00345), 2011 WL 4580585; Receipt

case, backed off of its stance that a scientific recovery permit can lawfully cover incidental take (and substitute for an ITP).²³³

The U.S. Department of State announced in 2008 that TransCanada Keystone Pipeline, LP “ha[d] applied . . . for a Presidential Permit for the proposed construction, connection, operation, and maintenance of a pipeline and associated facilities at the United States border for importation of crude oil from Canada.”²³⁴ A potential hiccup for TransCanada, however, was the fact that pipeline would have to be built directly through the range of the endangered American burying beetle in Nebraska, meaning the beetles would almost certainly be taken incidental to TransCanada’s pipeline-related activities.²³⁵ Rather than itself seeking an ITP to move beetles out of harm’s way prior to pipeline construction or to harm beetles during construction and operation, TransCanada hired Dr. Wyatt Hoback—an entomologist at the University of Nebraska Kearney—to relocate the beetles under an existing recovery permit allowing Dr. Hoback to carry out certain scientific research activities with respect to beetles.²³⁶

Starting in 2001, the FWS issued Dr. Hoback a scientific recovery permit “in conjunction with recovery activities throughout the species’ range for the purpose of enhancing its survival and recovery.”²³⁷ After being retained by TransCanada—many years later—to capture American burying beetles in the

of Six Incidental Take Permit Applications for Participation in the Oil and Gas Industry Conservation Plan for the American Burying Beetle in Oklahoma, 79 Fed. Reg. 70,544 (Nov. 26, 2014).

²³³ See Complaint for Declaratory and Injunctive Relief, *supra* note 232, at 16, 17 (arguing that previous scientific permits were granted for impermissible purpose); Receipt of Six Incidental Take Permit Applications for Participation in the Oil and Gas Industry Conservation Plan for the American Burying Beetle in Oklahoma, 79 Fed. Reg. at 70,544 (publishing request by Keystone Pipeline developer for incidental take permit after scientific permit restrictions had been imposed); Memorandum from Kris Olson, Reg’l Office Recovery Permits Coordinator, U.S. Fish and Wildlife Serv., to Chief of Endangered Species, U.S. Fish and Wildlife Serv., (July 10, 2012) (on file with author) (recommending issuance of permit to Dr. Wyatt Hoback, pursuant to permit TE-045150, only for the genuine purpose of scientific research).

²³⁴ BUREAU OF OCEANS & INT’L ENVTL. & SCIENTIFIC AFFAIRS, U.S. DEP’T OF STATE, EXECUTIVE SUMMARY: FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEYSTONE XL PROJECT, at ES-1 (2014), available at <http://keystonepipeline-xl.state.gov/documents/organization/221135.pdf>, archived at <http://perma.cc/5RTP-V8ZE>.

²³⁵ See *id.* at ES-23 to -24.

²³⁶ See Tammy Bain, *UNK Professor Works to Ensure Safety of Endangered Burying Beetle*, DAILY NEBRASKAN (Apr. 15, 2013), http://www.dailynebraskan.com/endowment/article_e26d05e4-a541-11e2-a88c-001a4bcf6878.html, archived at <http://perma.cc/RXE6-JGHJ>; Sarah Laskow, *Keystone XL’s Beetlemania*, AM. PROSPECT (Aug. 8, 2012), <http://prospect.org/article/keystone-xl%E2%80%99s-beetlemania>, archived at <http://perma.cc/2D2C-BT8K>; see also *Biology: Dr. Wyatt Hoback*, UNIV. OF NEB. KEARNEY, http://www.unk.edu/academics/biology/faculty/wyatt_hoback.php (last visited Apr. 2, 2015), archived at http://www.unk.edu/academics/biology/faculty/wyatt_hoback.php (Dr. Wyatt Hoback’s faculty profile on the UNK website).

²³⁷ Endangered Species Permit Applications, 66 Fed. Reg. 32,636, 32,636 (June 15, 2001) (providing notice of receipt of application for permit number TE-040748).

construction path of the Keystone XL Pipeline in order to relocate them, Dr. Hoback sought to renew his permit from FWS. In notifying the public about Dr. Hoback's request to renew his recovery permit, the FWS issued a cryptic Federal Register notice in which the agency did little to inform the public about the full extent of the activities for which Dr. Hoback sought recovery permit renewal.²³⁸ The notice stated that, "[t]he applicant requests a renewed permit to take American burying beetle in conjunction with recovery activities throughout the species' range for the purpose of enhancing its survival and recovery."²³⁹ Perhaps not realizing the legal implications, local newspapers broke the story in late 2011 that TransCanada was spending hundreds of thousands of dollars on Dr. Hoback and his team of graduate students in order to survey, capture, and relocate beetles out of the pipeline's path under the authority of Dr. Hoback's scientific recovery permit.²⁴⁰ The purpose of these activities, however, was plainly not to conduct scientific research aimed at species recovery but rather to minimize incidental take associated with construction and operation of a privately developed pipeline (i.e., exactly the type of activity for which an ITP is required).²⁴¹

In *Center of Biological Diversity v. U.S. Department of State*, three conservation organizations filed suit against the FWS and other federal agencies in connection with the FWS's authorization of incidental take to Dr. Hoback through a scientific recovery permit, instead of an ITP.²⁴² The plaintiffs asserted that, "[t]he authorization of take incidental to the Keystone XL Pipeline is beyond the statutory authority conferred by and in direct violation of Section 10(a)(1)(A) of the ESA."²⁴³ In support of their claim, the plaintiffs explained that, "[b]y the plain language of [s]ection 10(a)(1)(A), a research permit can only permit take that occurs in connection with scientific research or enhancement, and cannot authorize take of endangered species when that take is incidental to an agency action such as the Keystone XL Pipeline."²⁴⁴ As such, the plaintiffs argued, "FWS's issuance of the research permit was arbitrary, capricious, an abuse of discretion, [and] not in accordance with the ESA"²⁴⁵

²³⁸ Endangered and Threatened Wildlife and Plants, 75 Fed. Reg. 5101, 5102 (Feb. 1, 2010) (providing notice of receipt of application for permits).

²³⁹ *Id.*

²⁴⁰ See, e.g., Paul Hammel, *UNK Prof, Students Helping Find, Move Protected Beetle from Along Proposed Pipeline Path*, KEARNEY HUB (Sept. 5, 2011, 3:30 PM), http://www.kearneyhub.com/news/local/unk-prof-students-helping-find-move-protected-beetle-from-along/article_0a9d7898-d7dd-11e0-bb4c-001cc4c002e0.html?TNNNoMobile, archived at <http://perma.cc/GU3L-P8FA>.

²⁴¹ See U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., *supra* note 90, at 1-5.

²⁴² Complaint for Declaratory and Injunctive Relief, *supra* note 232, at 1, 16-17.

²⁴³ First Amended Complaint for Declaratory and Injunctive Relief at 40, *Ctr. for Biological Diversity v. U.S. Dep't of State*, 2011 WL 5909488 (D. Neb. 2011) (No. 11-cv-345), 2011 WL 5077848.

²⁴⁴ *Id.* at 7.

²⁴⁵ *Id.* The FWS stated that,

Recognizing that the ESA's plain language would almost certainly prevail if the case reached the merits, the FWS abandoned its previous approval of incidental take via a scientific recovery permit when Dr. Hoback next requested renewal of his recovery permit in 2012.²⁴⁶ Specifically, the FWS renewed Dr. Hoback's scientific recovery permit insofar as the FWS expressly determined that such activities—"trapping and handling" of beetles "to assess their range, distribution, numbers, and habitat conditions"—were "*consistent with the recovery of the burying beetle.*"²⁴⁷ The FWS, however, denied the remainder of the permit, which sought coverage for incidental take associated with the Keystone XL Pipeline.²⁴⁸

Based on this finding, the FWS issued Dr. Hoback a scientific recovery permit for the limited purposes of surveying and scientific research efforts aimed at genuine species recovery.²⁴⁹ It reiterated in the terms and conditions of the permit itself that the permit "does not apply to capture and relocation of American burying beetles for removal from harm's way related to project-related impacts" because incidental take of that kind must "be covered through another mechanism, such as an incidental take statement in a biological opinion pursuant to section 7(a)(2) of the Endangered Species Act or an incidental take permit pursuant to section 10(a)(1)(B) of the Act."²⁵⁰ Indeed, as a result of the FWS's hard line on section 10 in this context, the developer is now seeking an ITP for an incidental take of American burying beetles in connection with construction and operation of the pipeline.²⁵¹

Dr. Hoback's revised permit does not allow trapping and removal of American burying beetles for the purpose of removing beetles from harm's way of development projects. That form of incidental take shall be covered under a Section 10(a)(1)(B) permit for activities without a [f]ederal nexus or exempted by an incidental take statement pursuant to consultation with [f]ederal agencies under [s]ection 7(a)(1) of the [ESA].

Id.

²⁴⁶ See *Endangered and Threatened Wildlife and Plants*, 77 Fed. Reg. 16,252, 16,252 (Mar. 20, 2012) (providing notice of permit application number TE-015150, requested by Wyatt Hoback).

²⁴⁷ Memorandum from Kris Olson, Recovery Permits Coordinator, Region 6, U.S. Fish & Wildlife Serv., to Assistant Reg'l Dir., Ecological Servs., Region 6, U.S. Fish & Wildlife Serv. 1 (June 12, 2012) (emphasis added), available at http://libcloud.s3.amazonaws.com/93/10/2/2310/045150_Hoback_Combpliance_Memo.pdf, archived at <http://perma.cc/8J3L-V4WJ>.

²⁴⁸ *Id.*

²⁴⁹ Memorandum from Kris Olson, *supra* note 233, at 5; see U.S. FISH & WILDLIFE SERV., AMERICAN BURYING BEETLE (NICROPHORUS AMERICANUS) SURVEY CONTACTS IN OKLAHOMA (n.d.), available at <http://www.fws.gov/southwest/es/Oklahoma/Documents/ABB/ABB%20Permit%20holders%20last%20updated%20August%202014,%202013.pdf>, archived at <http://perma.cc/DW4J-488Q> (listing American burying beetle Permit holders as of Aug. 14, 2013).

²⁵⁰ Memorandum from Kris Olson, *supra* note 233, at 5.

²⁵¹ Receipt of Six Incidental Take Permit Applications for Participation in the Oil and Gas Industry Conservation Plan for the American Burying Beetle in Oklahoma, 79 Fed. Reg. 70,544, 70,544

In this instance, it took litigation to bring about the FWS's clear statement of agency policy concerning the proper application of section 10 vis-à-vis activities resulting in incidental take associated with a private development project—irrespective of whether those activities contain a scientific component.²⁵² Nevertheless, the Keystone XL Pipeline case study supports the possibility that the FWS could permanently halt its arbitrary issuance of scientific recovery permits to inapt developers seeking shortcuts to avoid operational shutdowns, constraints, or delays due to the existing or newly discovered likelihood of incidental take.²⁵³

IV. FOSTERING POOR PUBLIC POLICY: WHY THE FWS MUST ABANDON ITS ARBITRARY APPLICATION OF SECTION 10 AND RETURN TO THE PLAIN LANGUAGE OF THE ENDANGERED SPECIES ACT

As seen in the examples described above, granting a scientific recovery permit to a preferentially treated industry is tantamount to providing that industry with what amounts to a regulatory subsidy.²⁵⁴ The U.S. Fish and Wildlife Service's ("FWS") actions helped developers implement a stopgap measure when listed species issues arose, to ensure continued operation—and thus continued profits—until an incidental take permit ("ITP") could be properly secured to address the threats the project posed to those species.²⁵⁵ Although this exercise in political expediency may not ruffle many feathers in the environmental community when it is applied to the renewable energy industry, a sector aimed in part at ameliorating the adverse effects of climate change, cementing this counter-textual precedent now will facilitate less palatable applications in the future. Such a precedent would give future administrations ammunition to confer similar regulatory subsidies, through scientific recovery permits, to the oil and gas industry, commercial and residential construction companies, and other private developers for whom the ITP was specifically designed.

By blurring the lines between the two distinct Endangered Species Act ("ESA") section 10 programs, the FWS's recent practice has removed the objectivity and fairness inherent in the carefully calibrated scheme Congress cre-

(Nov. 26, 2014) (publishing the request by the Keystone XL Pipeline developer for an ITP after scientific permit restrictions had been imposed).

²⁵² See *supra* notes 242–248 and accompanying text.

²⁵³ See Memorandum from Kris Olson, *supra* note 247; *supra* notes 242–248 and accompanying text (demonstrating that the Keystone XL developer abandoned use of the scientific permit and applied for an ITP).

²⁵⁴ See *supra* notes 175–253 and accompanying text.

²⁵⁵ See *supra* notes 175–253 and accompanying text.

ated.²⁵⁶ In the place of that objectivity and fairness, the FWS has made the applicability of section 10 permits subject to the whims, campaign contribution-fueled priorities, and other subjective factors, of the current administration.²⁵⁷ In essence, this result-oriented approach of issuing scientific recovery permits to certain industries, while refusing to issue similar permits to other industries in functionally identical factual circumstances, constitutes the height of arbitrary and capricious decision-making.²⁵⁸

In addition to these practical considerations, there are strong legal consequences that flow from the FWS's arbitrary conferral of scientific recovery permits for certain industries where incidental take is at issue. First, the FWS's Federal Register notices concerning scientific recovery permits are far less descriptive than the notices for ITPs, and thus the conflation of these two distinct permitting systems subverts the information disclosure that would otherwise occur if an entity sought an ITP.²⁵⁹ Second, the public comment period is ordinarily a minimum of sixty days for ITPs, as compared to only thirty days for scientific recovery permits, meaning the FWS's blurring of the lines results in a severely truncated opportunity for meaningful public review.²⁶⁰ Third, whereas an ITP will almost certainly lead to an environmental impact statement ("EIS") or at minimum a detailed Environmental Assessment ("EA"),²⁶¹ a scientific recovery permit allows the applicant to skirt National Environmental Policy Act ("NEPA") by finding safe harbor under a categorical exclusion, or, at most, by allowing the applicant itself to develop a cursory EA.²⁶²

Fourth, instead of triggering the FWS's own section 7 duty to self-consult over permit issuance and to prepare a site-specific biological opinion as is re-

²⁵⁶ See Endangered Species Act, 16 U.S.C. § 1539(a)(1)(A), (B) (2012) (providing two distinct permit programs as exceptions to the take prohibition); *supra* notes 157–161 and accompanying text.

²⁵⁷ See *supra* notes 175–253 and accompanying text.

²⁵⁸ See Dotan, *supra* note 171, at 1000–01 (“There is hardly any more suitable reason to label the administrative process as ‘arbitrary and capricious’ than in the case of a process that treats like cases differently.”).

²⁵⁹ See, e.g., Endangered and Threatened Wildlife and Plants, 78 Fed. Reg. 76,173, 76,174 (Dec. 16, 2013) (notice of availability of permit applications; request for comments) (providing a short paragraph for each scientific recovery permit notice); Endangered and Threatened Wildlife and Plants, 77 Fed. Reg. 29,357, 29,357–58 (May 17, 2012) (notice of permit applications and request for comments); Notice of Intent to Prepare a Draft Environmental Impact Statement for a Proposed Habitat Conservation Plan and Incidental Take Permit, 76 Fed. Reg. 30,384, 30,384–86 (May 25, 2011) (providing information regarding the background, operations, and alternatives to the proposed action in a public notice for a request for an ITP); Endangered and Threatened Wildlife and Plants, Permit Applications, 75 Fed. Reg. 35,503, 35,504 (June 22, 2010).

²⁶⁰ See *supra* note 163 and accompanying text.

²⁶¹ U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., *supra* note 90, at 5-1 to -6 (describing the application of EIS and EA requirements to most ITPs and HCPs).

²⁶² See *supra* note 164 and accompanying text.

quired for an ITP,²⁶³ electing to issue a scientific recovery permit instead ordinarily bypasses this step because such permits are generally covered by a programmatic biological opinion spanning many recovery permits, which does not take into account the site-specific impacts of any one permit.²⁶⁴ Fifth, because an ITP necessarily requires more stringent issuance criteria due to the fact that purely scientific research efforts aimed at species recovery are granted more leniency than incidental take associated with private development,²⁶⁵ the FWS's issuance of a recovery permit where an ITP is appropriate vitiates the importance of the statutorily required issuance criteria, and of the findings that must be made before an ITP can be issued, such as the jeopardy backstop.²⁶⁶

For all of the aforementioned reasons, and in order to fully effectuate each distinct provision of section 10 of the ESA—thereby ensuring that the scientific recovery permit provision does not, in any instance, render the ITP provision superfluous—the FWS should follow its own example from the Keystone XL Pipeline.²⁶⁷ Specifically, the FWS should formally determine, as a matter of agency-wide policy, that incidental take associated with private development activities requires an ITP, regardless of whether the developer is willing to commit to some scientific surveys or mitigation measures as part of its plan to construct and operate the project consistent with the ESA.²⁶⁸ Further, the agency should also ensure that in such instances, developers will refrain from incidental take unless and until an ITP is secured.²⁶⁹

CONCLUSION

Congress implemented an ambitious objective when, pursuant to the Endangered Species Act (“ESA”), it created the incidental take permit and habitat conservation plan (“ITP-HCP”) section 10 permitting process in 1982, to accommodate non-federal development projects that will result in incidental takes of listed species that would otherwise be prohibited by section 9 of the Act. In so doing, Congress created a means by which non-federal development could co-exist with wildlife and habitat protection, and which might even result in net benefits to at-risk species. In conjunction with that objective, Con-

²⁶³ See 16 U.S.C. § 1536(c) (2012) (providing the section 7 requirements for a biological assessment to determine any endangered or threatened species that may be affected by the agency action); Rohlf, *supra* note 45, at 125 (explaining that issuance of an ITP requires the FWS or National Marine Fisheries Service to self-consult and comply with the procedural and substantive requirements of section 7); *supra* notes 165–167 and accompanying text.

²⁶⁴ See *supra* notes 165–167 and accompanying text.

²⁶⁵ See *supra* notes 164–169 and accompanying text.

²⁶⁶ See *supra* notes 165–169 and accompanying text.

²⁶⁷ See *supra* notes 172–253 and accompanying text.

²⁶⁸ See Memorandum from Kris Olson, *supra* note 247.

²⁶⁹ *Id.*

gress was seeking collaborative partnerships with landowners and developers, and agency reforms in the 1990s helped that program realize its full potential. The Fish and Wildlife Service's ("FWS") recent penchant, however, for muddying the waters in delineating what activities qualify for scientific recovery permits, in contrast to those that qualify for ITPs, has set in motion a dangerous and potentially environmentally harmful precedent that will be difficult to stop if it continues to gain momentum.

Accordingly, this Article calls for the FWS to immediately halt its recent practice of granting scientific recovery permits for incidental takes associated with private development projects. It is particularly crucial that the FWS cease this practice where the purpose of the authorization is to allow a developer to operate, or to continue operating, a profit-generating project at the expense of listed species and in the absence of an ITP-HCP. The ITP-HCP permitting program has a foundation of species-protective terms and conditions that have been fully vetted by the FWS and the public through the process embodied in section 10(a)(1)(B) of the ESA. This process is vital to ensuring the integrity of the permitting process and to effectuating the overall purposes behind the ESA, and thus it is imperative that it be implemented as Congress saw fit. At minimum, if a developer can set forth genuine empirical research that will contribute to the existing body of science, this Article argues that the FWS should follow its own handbook, which instructs that in such instances, the developer would need to satisfy the issuance criteria for *both* an ITP and a scientific recovery permit, *before* undertaking any project-related activities that are likely to incidentally take listed species. By taking a hard stance and refusing to bootstrap any future incidental take authorizations through the scientific recovery permit process, the FWS would return to the impartial science-based approach that Congress established in the ESA—a statute explicitly “intended to ensure objective, value-neutral decision making by specially trained experts.”²⁷⁰

²⁷⁰ Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act*, 34 ENVTL. L. 397, 419 (2004).

