

The Effect of Section 7 the Endangered Species Act on Energy Law Policies; Any Meeting Point and Opportunity for Development

Somtochukwu Attamah*

Department of Fishery Science and Research, Pennsylvania State University, University Park, United States

ABSTRACT

Section 7 of the Endangered Species Act (ESA) has progressed much in protecting endangered and threatened species and their critical habitat. This is essential because it preserves the endangered species from going into extinction and also, preserves their critical habitat from being destroyed. Section 7 of the ESA empowers the Fish and Wildlife Services (FWS) to make decisions as it affects endangered species. For any project which may affect endangered species or their critical habitat, any agency in charge of such project has to be in consultation with the FWS. Nevertheless, as it is crucial for the preservation of wildlife, there is also the need to respond to the recent challenges of climate change by adapting to a change from non-renewable to renewable energy like solar and hydropower. These are but a few of many examples of combating climate change. In a situation where there is a need for development, for example, the construction of a dam for hydropower and there are endangered species in the river, this creates a situation of which should take precedence over the other: Hydropower or endangered species? As much as the courts in many ways have tried resolving issues of this kind, FWS issuing incidental take permits or the god squad deciding when an agency is dissatisfied with the decision of FWS, it appears that most of the decisions are politically affected by the administration in power when such issues arise. Therefore, there is a need for.

Congress to address the approach and factors to adopt in reaching a middle ground on conflicting issues of endangered species and climate change.

Keywords: Endangered species; Renewable energy; Energy law policies; FWS; ESA

INTRODUCTION

The fight for clean energy has been the order of the day. This is because of the environmental issues associated with it (i.e., global warming and climate change). The U.S currently is one of the countries partaking in the Paris agreement for the fight against greenhouse gas emission. However, in as much as greenhouse gas emission is aimed to be reduced in the United States, much consideration is also given to endangered species with respect to their habitat and a proposed site for energy project. The questions which come to mind are which should take priority, endangered species, or the proposed energy project to keep clean environment. An overview of Section 7 of the endanger species act will be of importance to address the issue of priority and recommendations for a meeting point in developing clean energy and preserving the endangered species [1].

Congress enacted the Endangered Species Act (ESA) primarily for the protection of critically jeopardized species facing extinction. ESA was first enacted in 1973 to provide means for conserving “ecosystems that endangered or threatened species depended upon and to provide a program of conservation for the endangered and threatened species.” The ESA seeks that all federal agencies also take part in conserving the endangered and threatened species. For the purpose of the ESA, species includes “all species of plants and animals, except pest insects.”

The administration of the ESA is most carried out by the fish and wildlife services. By this, the legislative intent behind the act is to prevent and recover species from extinction. The ESA focuses on species listed as threatened or endangered [2].

Correspondence to: Somtochukwu Attamah, Department of Fishery Science and Research, Pennsylvania State University, University Park, United States; E-mail: vallyarthur@gmail.com

Received: 19-Sep-2024, Manuscript No. PFW-24-34129; **Editor assigned:** 24-Sep-2024, PreQC No. PFW-24-34129 (PQ); **Reviewed:** 08-Oct-2024, QC No. PFW-24-34129; **Revised:** 05-Feb-2025, Manuscript No. PFW-24-34129 (R); **Published:** 12-Feb-2025, DOI: 10.35248/2375-446X.24.13.301

Citation: Attamah S (2025) The Effect of Section 7 the Endangered Species Act on Energy Law Policies; Any Meeting Point and Opportunity for Development. *Poult Fish Wildl Sci.* 13:301.

Copyright: © 2025 Attamah S. This is an open-access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution and reproduction in any medium, provided the original author and source are credited.

For proper implementation of the law, Section 4 requires the agency to oversee the act and designate species as endangered or threatened. Section 7 requires federal agencies to conserve species already listed. Then Section 9, tends to prohibit any form of an unlawful take of these species. The U.S. supreme court has interpreted these sections of the act to give it, its plain and ordinary meaning; that is to say that, by the court's interpretation of the congressional intent, the purpose of the act is to prevent and preserve listed species from extinction at whatever cost.

LITERATURE REVIEW

Section 7 federal agency actions and consultations

The ESA has empowered the Fish and Wildlife Services (FWS) to take decisions on projects which may affect endangered species. Section 7 demand all federal agencies to consult with the FWS. This is to insure that any action taken by the agency is not likely to jeopardize the continued existence of any endangered or threatened species, result in the destruction or adverse modification of the critical habitat of the species [3].

By the words of the act, "all other federal agencies shall, in consultation with and with the assistance of the secretary..." Congress has placed the endangered species act superior to all other acts with respect to any activity that would be conducted by any federal agency that may affect any species listed as endangered or threatened. Therefore, for any potential energy project to succeed, it must first pass the test of Section 7 ESA [4].

The interpretation of the court to the provisions of the act is to the effect that all other acts must take into consideration the endangered species act to verify if the listed species may be affected.

DISCUSSION

Analysis of court positions on Section 7

The courts, on the enactment of the endangered species act in 1973, have been of the position of conserving the listed species no matter the cost. Unfortunately, the first major ESA Section 7 implementation was on an energy project. The project deals with construction of hydroelectricity on the Tellico dam. The project led to the court case and decision in Tennessee valley authority v. hill. The decision by the court in Tennessee valley authority v. hill 14 has shown how protective the courts are in the preservation of endangered species irrespective of its benefits in terms of hydroelectricity and tourism. Most courts as such draw their decision from this landmark case for the implementation of the provisions of the endangered species act. In TVA v. hill, the Tennessee Valley Authority (TVA) was constructing a dam before the passage of the NEPA. Upon NEPA coming into force, TVA was required to submit an Environmental Impact Statement (EIS). TVA prepared an EIS and that same year, "an endangered perch, known as snail darter," was discovered in the river. About two years after the discovery of the species, it was listed as an endangered species.

The listing of the species was for it being "genetically distinct and reproductively isolated from other fishes." This caused the river to be designated as critical habitat [5]. The construction of the dam should have been completed if not for the interference of a University of Tennessee law student Hiram Hill who challenged the dam completion on the ground that the construction of the dam would cause a "total destruction of the snail darter's critical habitat and constituted a clear violation of section." However, this fact was not challenged by TVA, rather, "TVA proposed moving the fish to another river" and also argued that "continued congressional funding clearly authorized an exception to ESA." In rejecting the argument, the court stated that "one might dispute this case by saying that the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. But neither the endangered species act nor article III of the constitution provides federal courts with the authority to make such fine utilitarian calculations."

In contrast to the view of the court in TVA, the supreme court upheld a different view in the national association of home builders v. defenders of wildlife. The case illustrates the line between the ESA and other federal laws which has mandatory language. The case gave room for an improvement and protection from the teeth of ESA section. In the case, the court was confronted with resolving the conflicting languages between two mandatory provisions of the clean water act and endangered species act. The conflicting sections presented before the court to decide on was section of the Endangered Species Act (ESA) and Section 402(b) of the Clean Water Act (CWA). "Section 402(b) of the CWA allows the Environmental Protection Agency (EPA) to transfer water pollutant discharge permit regulating authority as established in the National Pollution Discharge Elimination System (NPDES) to states." The section further provides that the EPA "shall" permit the transfer once the criteria in CWA are met. However, the ESA Section 7 ensures that an agency action does not jeopardize with the continued existence of threatened or endangered species. The ESA in doing this provides that the federal agency taking the action "shall" consult with the fish and wildlife services." The contention before the court was whether EPA's approval transferring clean water permitting authority to the state of Arizona was subject to review in accordance with Section 7 of the ESA. EPA argued that by the mandatory provision of the clean water act, the review is not required. The court in deciding in favor of EPA's argument held thus: "Applying Chevron, we defer to the agency's reasonable interpretation of ESA S 7(a)(2) as applying only to 'actions in which there is discretionary federal involvement or control' (an interpretation of 50 C.F.R. S 402.03, stating that 'Section 7 and the requirements of this part apply to all actions in which there is discretionary federal involvement or control.) Since the transfer of NPDES permitting authority is not discretionary but is mandated once a State has met the criteria in S 402(b) of the CWA, it follows that a transfer of CWA permitting authority does not trigger S 7(a)(2)'s consultation and no-jeopardy requirements [6].

The court's decision is beneficial because it offers protection to energy projects guided by other acts which have mandatory and non-discretionary language. The ESA has also provided some

mitigating factors to the consultation process of Section 7. It requires an agency to first prepare a biological assessment known as informal consultation to determine if the proposed project may adversely affect listed species. If it would, a Biological Opinion (BO) known as formal consultation would be prepared. The BO determines if the project would jeopardize the listed species, result in adverse modification of the listed species or destroy its critical habitat. If the listed species would be adversely modified, jeopardized or its designated critical habitat adversely modified, then the secretary would have to suggest a reasonable and prudent alternative. Also, when the action would not jeopardize with the listed species but can however, lead to 'taking,' the secretary could issue incidental take statement. For these reasons, it shows that in most situation, application of Section 7 does not really affect most projects. This is commendable as it promotes the sustainability of endangered species and does not necessarily hinder the action of agencies because even if there are listed species, the secretary will suggest reasonable and prudent measures (under the minor change rule) for non-jeopardy and when it will lead to "taking," incidental take statement may be issued or reasonable and prudent alternatives when a jeopardy is determined. However, as these above-mentioned options ameliorate the harshness of Section 7, it has its challenges. First, it all lies at the discretion of the agency to determine whether to grant incidental take statement. Second, whether the reasonable and prudent alternatives if at all available, would serve the purpose it was determined to serve in sustaining a proposed project required for clean energy. A potential threat of ESA on energy case relates to the concern about the sage grouse listing [7].

The effect of Section 7's teeth raised a concern on energy development on an attempt for the listing of sage-grouse." One of the major concerns associated with listing the sage-grouse, is the potential impact the decision will have on current and future energy projects located in sage-grouse habitat in the west and subsequently the impact on state and local economies. The 11 Western states that contain sage-grouse habitat account for 27 percent of the total energy produced in the United states." The sage-grouse was made a candidate species but did not get to the level of being listed. However, if the sage-grouse was listed, the energy producers in the area where the sage-grouse was found would have lost to the listing. This was a major concern because if the FWS listed the sage-grouse, the teeth of section 7 ESA on no jeopardy requirement and section 9's take would be invoked. In addition to the concern by the writer because of the possible listing of sage-grouse, energy development as it affects environment and human protection also should be an issue for concern and consideration [8].

The United States in adhering to the policy of mitigating greenhouse emission is gradually moving from non-renewable to renewable energy. Following the implications of non-renewable energy and the need to transform to renewable energy, actions are to be taken to put in place innovations for the sustainability of cleaner energy. For this to be put in place, in most cases, consultation as required by section 7 is a basic requirement.

Middle ground for Section 7 ESA and energy development

Mostly, Section 7 consultation under the ESA does not impede the progress of projects or energy development because of the procedure involved. When an agency or company has a proposed project, the Fish and Wildlife Services (FWS) surveys the project to determine if there are species in the proposed area for the project. If there are endangered species, the FWS would consider the extent of the harm that would affect the species because of the project. To this extent, the FWS would consider issuing a permit to the agency which may affect the endangered species. This is done only when the damage or harm to the species is unavoidable. In this circumstance, the incidental take statement would allow the killing or injuring of some of the endangered species. However, there is restriction and unavoidable line which is not crossed in issuing a permit: Jeopardy. This is a situation whereby the harm on the species based on the proposed project would make the species unrecoverable. Therefore, when the endangered species have not crossed their jeopardy limit, a permit can be issued to harm some of the species but not to eliminate them [9].

Nevertheless, as much as a jeopardy call by the FWS could halt a proposed project, there are still options available for the agency proposing the project. This was encountered in the TVA case. First is for FWS to propose a reasonable and prudent alternative. Second is for the agency proposing the project if not satisfied with the FWS' decision, to present the issue before "the god squad," or a lawsuit. In considering the effect of a proposed project, the FWS tends to follow the requirements of the law by using the best available science. Whenever there is doubt on the outcome of a proposed project on the endangered species, deference is given to the species. Yet, in considering the law, the FWS, take cognizance of the regulation and policies in place at the time of consideration. These policies and regulations affect most part of the decisions made.

These policies and regulation can change based on the administration and congress in office. Example, the last administration made a policy and legal determination that the Migratory Bird Treaty Act (MBTA) does not prohibit incidental take of migratory birds, only intention take. In essence, it is either a prohibited incidental takes or no take if it was not intended, as stipulated by the MBTA. However, the current administration has overruled the policy and reinstated the policy of prohibiting incidental take of migratory birds. The migratory bird policy does not reflect the effect of administrative policy on proposed energy project. However, the example portrays challenges a proposed energy project may face based on administrative policy. In other words, the factors considered in reaching a decision about a proposed project and its effect on protected species can depend on the policy made by the siting administration. These policies are made to supplement the law enacted by the congress if the law is silent or vague on the factors under consideration.

On issues of climate change, the ESA is silent on the factor to be considered by FWS in making decision about a proposed project. The polar bear memo was the first consideration of

climate change during the bush administration for the listing of species. This consideration, nonetheless, is for the benefit of the species.

Challenges

As much as FWS tries not to halt a proposed project, there are certain issues which a proposed project or endangered species may face. The basic challenge faced in energy development with respect to Section 7 of the ESA is the issue of policies and regulations that is at the discretion of any sitting administration to make. Each administration defines its interest and makes it its priority. An administration with little or no interest in the fight for a clean energy would put no interest in making regulations or policies which would consider clean energy, environmental protection when it comes to the issues of a proposed project and endangered species. Even when the administration has an interest on energy development, it may still be susceptible to change by the next or any given administration.

Also, politics has its role to play. The FWS are bound to follow the policies or regulations made by an administration when making decision on any proposed project when it affects endangered species. Sometimes these policies are motivated by political interest and the policies are there to serve the political interest for which it was made than to serve a beneficial purpose for the environment. which often is promoting the intended interest for making the policies.

CONCLUSION

In most situations, the FWS tries to provide a middle ground to accommodate proposed project when avoidance could not be achieved, either by providing a reasonable and prudent measures, reasonable and prudent alternatives, authorizing incidental take or mitigation project effects. However, in any of these situations, jeopardized species by federal actions is prohibited unless the endangered species act committee (god squad) exempts the project from the jeopardy standard. These decision lies solely either on the god squad to take or when before the FWS, the FWS has major policies or regulations to

guide their decision. The ESA, however, did not set out many factors to be considered by FWS in making their decision or what should guide the god squad on reaching a reasonable decision, congress should expand the horizon of the ESA to include factors for consideration in reaching decisions especially in line with current contemporary issue like global warming.

As much as endangered species are jeopardized and need to be protected, the fight for a clean energy environment should also be in consideration before a decision is made by the FWS or the god squad over a given project. The law (ESA) should make adequate provisions which serves a scale and guideline for evaluation and grounds for reasonable conclusions by FWS and god squad. It should not be within the decision of an administration to make the guiding policies or regulation as it could be susceptible to be changed by the next administration or politicized.

REFERENCES

1. Wood MC. Protecting the wildlife trust: A reinterpretation of section 7 of the endangered species act. *Envtl L.* 2004;34:605.
2. Beiers JC. The international applicability of section 7 of the endangered species act of 1973. *Santa Clara L Rev.* 1989;29:171.
3. Salzman J. Evolution and application of critical habitat under the endangered species act. *Harv Env L Rev.* 1990;14:311.
4. Evansen M, Harl H, Carter A, Malcom J. Status of the recovery mandate under section 7 (a)(1) of the US endangered species act. *Fron Conserv Sci.* 2021;2:768628.
5. Davison SG. Federal agency action subject to section 7 (A)(2) of the endangered species act. *Mo Env L Poly Rev.* 2006;14:29.
6. Rohlf DJ. The endangered species act at forty: The good, the bad and the ugly. *Animal L.* 2013;20:251.
7. Ruhl JB. Section 7 (a)(1) of the new endangered species act: Rediscovering and redefining the untapped power of federal agencies' duty to conserve species. *Env L.* 1995;25:1107.
8. McDougall MA. Extraterritoriality and the endangered species act of 1973. *Geo LJ.* 1991;80:435.
9. Wood LD. Section 7 of the endangered species act of 1973: A significant restriction for all federal activities. *Env L Rep.* 1975;5:50189.