



**Congressional
Research Service**

Informing the legislative debate since 1914

Endangered Species Act (ESA): The Exemption Process

M. Lynne Corn

Specialist in Natural Resources Policy

Betsy A. Cody

Specialist in Natural Resources Policy

Alexandra M. Wyatt

Legislative Attorney

January 27, 2017

Congressional Research Service

7-5700

www.crs.gov

R40787

Summary

The Endangered Species Act (ESA) is designed to protect species from extinction, but it includes an exemption process for those unusual cases where the public benefit from an action is determined to outweigh the harm to the species. This process was created by a 1978 amendment to the ESA, but it is rarely used. This report will discuss the exemption process for an agency action, with examples from past controversies, and its potential for application to actions that may affect current controversies, such as water supply.

The ESA mandates listing and protecting species that are endangered or threatened with extinction. Listing a species limits activities that could affect that species and provides penalties for taking individuals of that species. The ESA also requires federal agencies to consult with the Fish and Wildlife Service or the National Marine Fisheries Service (together, the Services) to determine whether a federal action may jeopardize the continued existence of a species or harm its critical habitat. The consultation process may lead to an opinion by one of the Services that the action will jeopardize listed species or harm their critical habitats unless certain reasonable and prudent alternatives are included in the action.

Rarely, the federal action agency may hold that those alternatives are inconsistent with the agency action. In other extremely rare cases, the Services may find that no alternatives are available that would allow the project to proceed and still prevent jeopardy. In either case, the following are the categories of potential applicants that can apply for an exemption for a federal action despite its effects on listed species or their critical habitat:

- the federal action agency interested in proceeding with the action,
- an applicant for a federal license or permit whose application was denied primarily because of the prohibitions of ESA requiring that federal agency actions avoid jeopardy to threatened or endangered species or harm to their critical habitats, or
- the governor of the state where the action was to have occurred.

An exemption application is considered by a specially convened committee which may exempt the federal agency's action from the prohibitions of the ESA. The exemption process allows major economic factors to be judged to outweigh the ESA's mandate to recover a species when the federal action is found to be in the public interest and is nationally or regionally significant.

The exemption process has been invoked with a dam on the Tellico River (TN), a water project in the Platt River (WY and NE), and timber sales (OR). In three other instances, the process was begun but was aborted before a decision was reached. In addition, there has been interest over the years in invoking the process in light of controversies over management of federal and state water resource projects in California, although no application has ever been filed. When a project achieves such levels of controversy, Congress is sometimes asked to intervene in the outcome, as it did in the case of the Tellico Dam and an endangered fish in the late 1970s.

Contents

Introduction	1
Tellico Dam and the Creation of the Exemption Process	2
Membership of the Committee	5
Applicant Qualifications.....	5
Contents of Application.....	6
Secretarial Review and Report	7
Committee Determination	7
Mitigation: Actions and Funding.....	8
Duration and Effects of the Exemption	9
Actions by Secretaries of State or Defense	9
Presidential Exemption.....	10
Interaction with Other Laws	10
Why the Exemption Process Is Rarely Used	11
Conclusion.....	12

Figures

Figure 1. Steps in Obtaining an Exemption Under the Endangered Species Act	3
--	---

Tables

Table A-1. Events in Tellico Dam Exemption Application	13
Table B-1. Events in Grayrocks Dam Exemption	15
Table C-1. Events in BLM Timber Sales Exemption	17

Appendixes

Appendix A. Exemption Denied for Tellico Dam, Tennessee	13
Appendix B. Exemption for Grayrocks Dam, Wyoming and Nebraska.....	15
Appendix C. Exemption for BLM Timber Sales, Oregon	17
Appendix D. Three Attempts at an Exemption.....	19
Appendix E. California Central Valley Project and State Water Project (Delta Pumping)	21

Contacts

Author Contact Information	23
Acknowledgments	23

Introduction

The Endangered Species Act (ESA) provides for the listing and protection of species that are endangered or threatened with extinction.¹ Listing a species results in limitations on activities that could affect that species and in penalties for the *taking* (as defined in the ESA) of individuals of a listed species.² Federal agencies are also required to use their existing authorities to further the purposes of the act.³ Under certain circumstances, federal agency actions may be exempted from the act. The exemption process and its history are the subject of this report.⁴

Federal agencies are required to consult with either the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (together, the *Services*) to determine whether an agency project might jeopardize the continued existence of listed species or destroy or adversely modify a species' critical habitat.⁵ This process is known as *consultation*. The consultation concludes with the appropriate Service issuing a biological opinion (BiOp) as to the harm the project poses. If a project could jeopardize a species, a *jeopardy opinion* is released along with any reasonable and prudent alternatives (RPAs) to the agency action that would avoid jeopardy. To excuse any incidental taking of listed species, the Services issue an *incidental take statement* that includes *reasonable and prudent measures* (RPMs) to minimize the effects of the project.

When a federal action cannot be conducted without jeopardizing species, and the federal agency believes that the RPAs would thwart the project, the federal agency, the governor of the state where the project would occur, or the licensees or permittees involved in the project may seek an exemption. Very rarely, the Service(s) may find that jeopardy would occur and that there is no RPA that would avoid jeopardy. The exemption process is also available for this circumstance.

The exemption process offers the opportunity to consider extraordinary economic circumstances in the list of factors used in evaluating federal actions, and provides an opportunity for economic factors to override jeopardy to the species. However, an exemption is for a federal project, license, or action, rather than for a species—a key distinction. In more than four decades since the ESA was enacted, there have been only six instances in which an exemption was sought, and only two in which it was granted. **Appendix A**, **Appendix B**, **Appendix C**, and **Appendix D** provide discussions and histories of the six attempts to secure exemptions under the ESA. If there are future applications for exemptions, the historical prologue as seen through these past applications may prove useful, because this process is used so rarely. In addition, in the controversy over California water projects, there were proposals in the mid - and late-2000s to seek an exemption from the ESA.⁶ **Appendix E** provides a discussion and history of the California water conflict.

¹ Endangered Species Act (ESA) of December 28, 1973, P.L. 93-205; 87 Stat. 884, codified at 16 U.S.C. §1531 *et seq.* This report assumes a basic knowledge of the act. An overview of the ESA and its major provisions may be found in CRS Report RL31654, *The Endangered Species Act: A Primer*, by M. Lynne Corn and Alexandra M. Wyatt.

² For definitions of terms (*critical habitat*, *taking*, *species*, etc.), see 16 U.S.C. §1532.

³ 16 U.S.C. §1536(a)(1).

⁴ The exemption process applies only to federal actions. Specified non-federal parties may also apply for an exemption. See “Applicant Qualifications” for discussion.

⁵ 16 U.S.C. §1536(a)(2). In general, FWS is responsible for terrestrial and freshwater species, while NMFS is responsible for marine species.

⁶ For more information, see out-of-print CRS Report R41876, *Biological Opinions for the Sacramento-San Joaquin Delta: A Case Law Summary*, available upon request from the author.

Tellico Dam and the Creation of the Exemption Process

The controversy over Tellico Dam in Tennessee in the 1970s set the stage for Congress's creation of the exemption process. As originally enacted in 1973, the ESA prohibited all activities detrimental to listed species with very few exceptions. In the 1970s, when the prospective impoundment of water behind the nearly completed Tellico Dam in Tennessee threatened to eradicate the only known population of the snail darter (a small fish related to perch), the Supreme Court concluded that the "plain language" of the ESA mandated that the gates of the dam not be closed.⁷ In *Tennessee Valley Authority (TVA) v. Hill*, the Court stated:

One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the [ESA]. Its very words affirmatively command all federal agencies "to insure that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species...." This language admits of no exception....

Concededly, this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds. But examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.⁸

After this Supreme Court decision, Congress amended Section 7 of the ESA to include a process by which economic impacts could be weighed and government projects exempted from the restrictions that otherwise would apply.⁹ The process they created is shown in **Figure 1**.

The Tellico Dam controversy also illustrated a common theme in ESA controversies: the protection of threatened and endangered species is rarely the chief issue. A species' need for a particular dwindling habitat and its resources often parallels human desires for the same dwindling resources. The parties to the debate have often struggled for years over the basic allocation of those resources, from Tellico River, to the Edwards Aquifer in Texas, to prairie grasslands, to water allocation in San Francisco Bay. The debate over ESA and species protection typically signals an intensification of an underlying and usually much larger struggle.

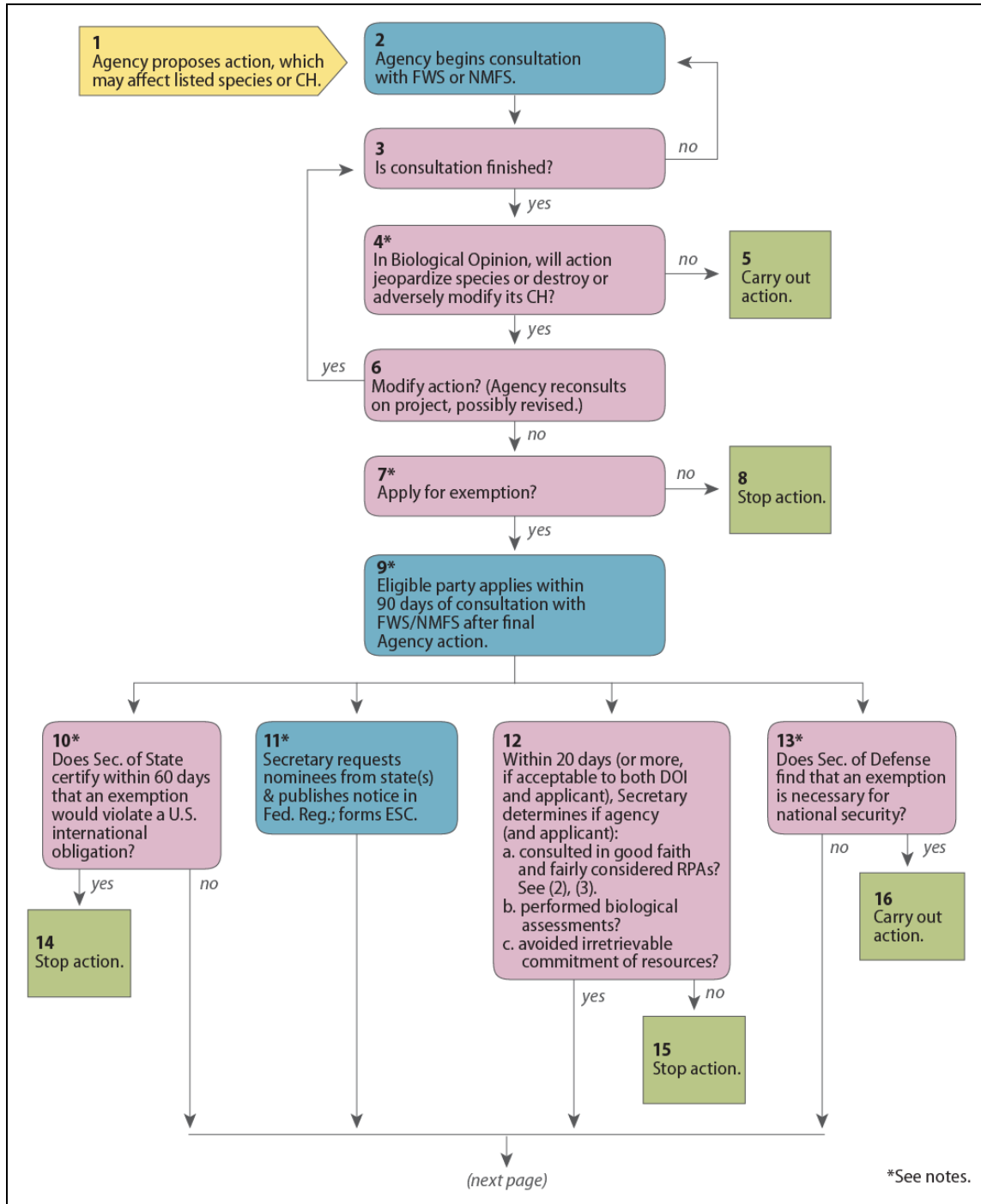
In broad outline, Congress created a committee of top government officials who could pass judgment on federal projects by balancing the national interest in protecting listed species against the national interest in proceeding with an important federal project. Congress limited the parties who could apply for exemptions, and required that successful parties would be required to pay the costs of mitigating the project's effects. Because projects are exempted, rather than species, the ESA still requires that species affected by the exempted project must be conserved in their remaining habitat. While there have been a few amendments to this process in later years, the basic structure formed after Tellico Dam remains the same, and is described below.

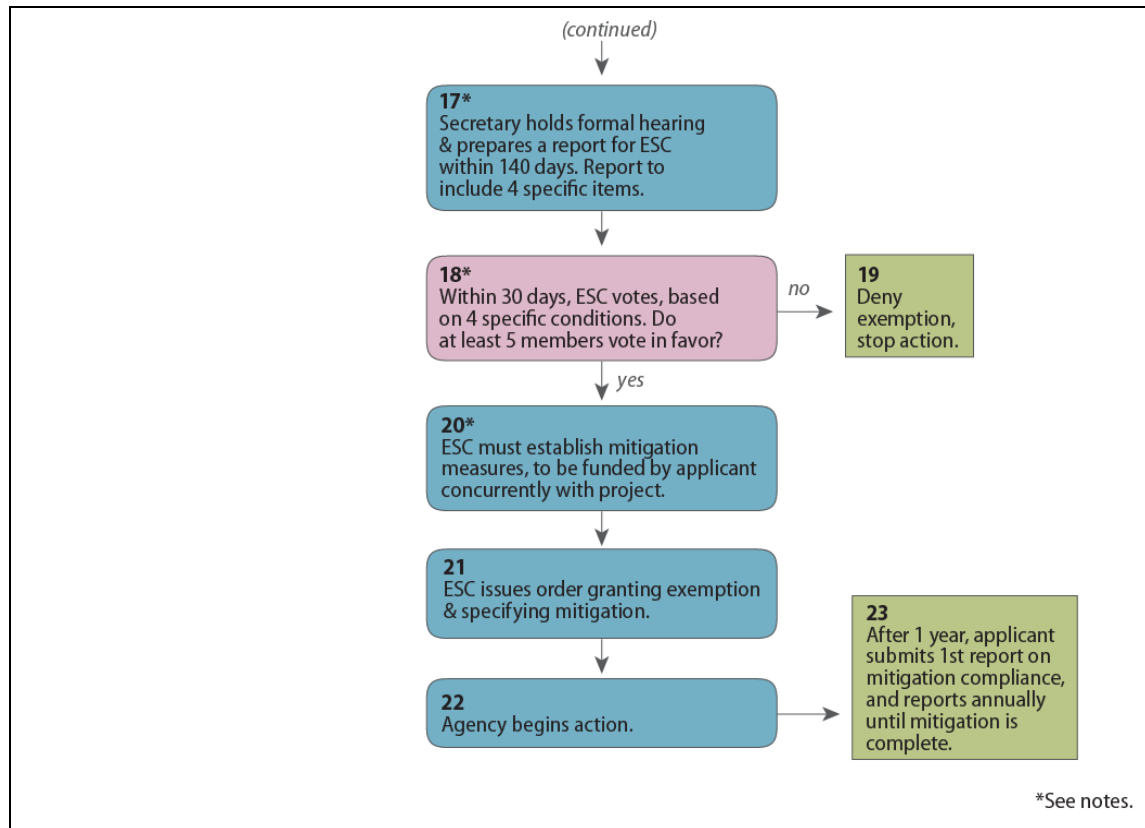
⁷ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

⁸ *Ibid.* (quoting 16 U.S.C. §1536 (1976 ed.) (emphasis added)). For a chronology of the Tellico Dam controversy, see **Appendix A**.

⁹ Endangered Species Act Amendments of 1978 (P.L. 95-632).

Figure I. Steps in Obtaining an Exemption Under the Endangered Species Act





Source: Congressional Research Service (CRS). See text for further discussion of steps.

Notes: CH = Critical Habitat; ESC = Endangered Species Committee; FWS = Fish and Wildlife Service; NMFS = National Marine Fisheries Service. Collectively, FWS and NMFS = the Services.

Step 4. During the course of consultation, the action agency and the Services may develop reasonable and prudent alternatives (RPAs) to the original action. These RPAs might include modifying the season, size, or extent of the project, or altering some other feature in a manner that will allow the project to proceed and avoid jeopardy or adverse modification of the critical habitat. If the agency is willing or able to make the modification(s)—and agencies usually are—the project proceeds as modified. Almost all projects subject to consultation end at Step 6 and proceed with the action, as modified by any RPAs, if necessary.

Step 7. Only six projects have ever resulted in an exemption application. (See **Appendixes A-D.**)

Step 9. If the applicant is attempting to obtain a permit or license, the applicant must await final agency action (denial of the permit or license) before applying for an exemption. The Pittston case raised the issue of whether a judicial appeal and an exemption could be pursued simultaneously, and Congress clarified the law on this process (16 U.S.C. §1536(g)(2)(A); see **Appendix D.**) There are three categories of eligible applicants: a federal agency, a governor, or a permit or license applicant.

Step 10. This issue could be important in some specific cases, such as certain kinds of harm to migratory birds, because nearly all migratory birds are protected under the Migratory Bird Treaty Act and the U.S.-Mexico and U.S.-Canada Migratory Bird Treaties. Note that in theory the Secretary of State may issue a determination after the DOI Secretary’s determination (Step 12), but before the secretarial report on the effects of the action (Step 17).

Step 11. A state nominates representatives, and the President selects one from the state’s list. According to regulations, if multiple states are involved, each state gets an appropriate fraction of a vote.

Step 13. This option has never been exercised in controversies affecting Defense Department activities. Technically, for the option to be exercised, the ESC would have to be convened and receive the report described below (Step 17). The ESC would have a formal vote, even though the outcome would not be discretionary: the ESC is directed to approve the exemption if the Defense Secretary makes the finding.

Step 17. The act specifies that the Secretary’s report must cover these four issues: (a) any alternatives to the project that would still protect the species and its habitat, and the benefits of these alternatives and the

proposed action; (b) evidence on the national or regional significance of the project and the public interest aspects of the agency's action; (c) any mitigation or enhancement measures for the ESC to consider; and (d) whether the agency and the applicant have avoided irretrievable commitment of resources that would foreclose on any of the alternatives to the project.

Step 18. The ESC is to make its determination based on these four issues: (a) Is there a reasonable and prudent alternative to the project that would be consistent with conserving the species? (b) Do the benefits of the agency action clearly outweigh the benefits of the alternatives, and is the proposal in the public interest? (c) Is the agency action regionally or nationally significant? (d) Have the agency and the applicant avoided irretrievable commitments of resources that would foreclose on alternatives consistent with conserving the species?

Step 20. These mitigation measures must be necessary and appropriate. The applicant must pay for these mitigation measures, but may contract with a federal agency to carry them out on its behalf. Because the law makes no distinction among types of applicants, this provision would apply whether the applicant was a federal agency, a governor, or a permit or license applicant.

Membership of the Committee

The Endangered Species Committee (ESC)¹⁰ reviews applications for exemptions, and is responsible for the ultimate decision. It may conduct additional fact-finding. The ESC is composed of the following members:

- the Secretary of the Interior (who serves as the chair),
- the Secretary of Agriculture,
- the Secretary of the Army,
- the Chairman of the Council of Economic Advisors,
- the Administrator of the Environmental Protection Agency,
- the Administrator of the National Oceanic and Atmospheric Administration, and
- one individual from each affected state.¹¹ (If multiple states are involved, each state has an appropriate fraction of a vote.¹²)

Applicant Qualifications

Application for an exemption is limited to three eligible entities: the federal agency proposing the action, the governor of the state in which the action is proposed, or the permit or license applicant (if any) related to that agency action.¹³ The term *permit or license applicant* is defined in the ESA as a person whose application to a federal agency for a permit or license has been denied primarily because of the application of the prohibitions in Section 7(a), which requires that federal agency actions avoid jeopardy or destruction or adverse modification of critical habitat.¹⁴ These restrictions of the exemption process clarify that the exemption process is used *after* a Section 7 consultation has been completed, and that the exemption process is not open to just any interested party. (See **Figure 1**, Steps 3 and 7.)

¹⁰ Many observers refer to the ESC as the “God Squad,” a reference to its authority to pass a judgment that may lead to a species’ extinction. For example, see Donald C. Baur and William Robert Irvin, *Endangered Species Act: Law, Policy, and Perspectives* (Chicago: American Bar Association Publishing, 2001), p. 6.

¹¹ 16 U.S.C. §1536(e).

¹² 50 C.F.R. §453.05(d).

¹³ 16 U.S.C. §1536(g)(1).

¹⁴ 16 U.S.C. §1532(12); 50 C.F.R. §450.01.

Contents of Application

An exemption application must describe the consultation process already carried out between the federal agency and the Secretary (of Commerce or the Interior, as appropriate) and must include a statement explaining why the action cannot be altered or modified to conform to the requirements of the statute.¹⁵ (See **Figure 1**, Step 9.) All applications must be submitted to the Secretary not later than 90 days after completing the consultation (i.e., issuance of a BiOp finding jeopardy to the species or destruction or adverse modification of its designated critical habitat) if the exemption applicant is the federal agency or state, or within 90 days of denial of the permit or license if the exemption applicant is a permit or license applicant. An application must set out the reasons the applicant considers an exemption warranted, include relevant documents such as a biological assessment (BA) and BiOp, and describe any alternatives to the project.¹⁶ Additional application requirements are contained in the relevant regulations.¹⁷ The Secretary may deny the application within 10 days if these initial requirements have not been completed. If the application is complete, the Secretary will publish a notice of receipt of the application in the *Federal Register* and notify the governor of each affected state (as determined by the Secretary), so that state members can be appointed to the ESC. The Secretary also must notify the State Department, so that its review for potential conflicts with international treaties or agreements can begin.

The Secretary determines whether the federal agency and/or the exemption applicant have met three criteria:

- consulted in good faith and reasonably and responsibly considered modifications or any RPAs;
- conducted any biological assessment required; and
- refrained from irreversibly or irretrievably committing resources that would foreclose on the implementation of any reasonable and prudent measures to avoid jeopardy to the species or adverse modification of its critical habitat.¹⁸

The Secretary has 20 days from receipt of the completed application to make a finding that the exemption applicant has met the criteria.¹⁹ A denial for failing to meet the criteria in this stage of the application is deemed a final agency action,²⁰ meaning that it has reached a stage eligible to be challenged in federal court.

The last criterion, whether there has been an irreversible or irretrievable commitment of resources, harkens back to the consultation process. The statute prohibits those initiating consultation from making such a commitment of resources if it would have “the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative

¹⁵ 16 U.S.C. §1536(f).

¹⁶ 50 C.F.R. §451.02(e).

¹⁷ 50 C.F.R. §451.02(e). These requirements include, for example, contact information for the applicant, copies of BAs, BiOps, descriptions of RPAs and any resources already committed by the action agency to the project, a description of the benefits of the proposed action and why the benefits outweigh the benefits of any RPAs, and more.

¹⁸ 16 U.S.C. §1536(g)(3)(A).

¹⁹ 16 U.S.C. §1536(g)(3). The time period may be extended upon consent of the parties. The provision regarding irretrievable commitment of resources arose in light of the Tellico Dam controversy. As debate over the dam continued, the Tennessee Valley Authority continued work around the clock to hasten the dam’s completion, even as the dam’s future was being debated.

²⁰ 16 U.S.C. §1536(g)(3)(B).

measures.”²¹ This serves to prevent waste of federal resources (such as time and money) on a project that may turn out to violate a federal statute. It also allows a project to be halted before any harm to listed species or their habitats occurs. Because the agency presumably is not carrying out the proposed project while the consultation occurs,²² it appears that the reference to commitments of resources in the exemption process refers to activities after consultation has concluded. Otherwise, after a jeopardy opinion, an agency that continued to work on a project might seek an exemption, but leave the ESC faced with a *fait accompli*—the loss of the species in violation of the act.

Secretarial Review and Report

Within 140 days of determining that the exemption applicant has met the requirements described above, the Secretary, in consultation with the other members of the ESC, must convene a formal hearing on the application and prepare a report. (See **Figure 1**, Step 17.) The hearing is to collect evidence regarding the exemption.²³ The formal hearing is conducted by an independent administrative law judge (ALJ), and can include witness testimony, offers of proof, and interveners. The purpose is to develop a full evidentiary record to provide a basis for the Secretary’s report. If deemed necessary, the ALJ may subpoena records and testimony for the hearing. Service employees who participated in the consultation may not participate in the hearing (e.g., as advisors), but may be witnesses.²⁴

By law, the Secretary’s report must discuss the following:

- the availability of reasonable and prudent alternatives;
- the nature and extent of the benefits of the agency action;
- the nature and extent of alternative actions consistent with conserving the species or the critical habitat;
- a summary of whether the action is in the public interest and is nationally or regionally significant;
- appropriate reasonable mitigation and enhancement measures that should be considered by the ESC; and
- whether the applicant has made any irreversible or irretrievable commitment of resources.²⁵

Committee Determination

The ESC is required to determine whether to grant an exemption within 30 days of receiving the Secretary’s report. (See **Figure 1**, Step 18.) If the ESC decides more information is required, it

²¹ 16 U.S.C. §1536(d).

²² In the California case, Reclamation did move forward with certain activities (including increased pumping from the Delta) under previous BiOps that did not find jeopardy from the OCAP, until a judge ordered a halt to their activities, pending a new FWS BiOp. See out-of-print R41876, *Biological Opinions for the Sacramento-San Joaquin Delta: A Case Law Summary*, available upon request from the author.

²³ H.Rept. 97-835, p. 28.

²⁴ 16 C.F.R. §452.07.

²⁵ 16 U.S.C. §1536(g)(5).

may conduct additional fact-finding, including hosting oral presentations.²⁶ The ESC has subpoena powers for obtaining information it deems necessary to reach its decision.²⁷

The ESC meetings, hearings, and records are open to the public, and a notice of the hearings and meetings is published in the *Federal Register*.²⁸

The ESC shall grant an exemption if, based on the evidence, it determines that

- (i) there are no reasonable and prudent alternatives to the agency action;
- (ii) 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;
- (iii) the action is of regional or national significance; and
- (iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited in subsection (d) of this section.²⁹ [See discussion above on commitments of resources.]

The second and third items give the ESC the opportunity to weigh economic impacts of an exemption and of any alternative courses of action on a national or regional scale. An exemption requires five affirmative votes (out of seven) on the committee.³⁰ If it approves the exemption, the ESC is required to specify mitigation and enhancement measures in its written decision.³¹

Mitigation: Actions and Funding

The mitigation and enhancement measures that are required to be established by the ESC must be reasonable and “necessary and appropriate to minimize the adverse effects” of the approved action on the species or its critical habitat.³² (See **Figure 1**, Step 20.) The measures can include live propagation, transplantation, and habitat acquisition and improvement.³³ The exemption applicant (whether federal agency, governor, or permit or license applicant) is responsible for carrying out and paying for the mitigation,³⁴ although the applicant may request that the Secretary carry out the mitigation or enhancement measures. If so, the applicant must fund the measures carried out by the Secretary.³⁵

The cost of mitigation and enhancement measures specified in an approved exemption must be included in the overall costs of continuing the proposed action, and the applicant must report annually to the Council on Environmental Quality on compliance with mitigation and enhancement measures.³⁶ Mitigation costs could be considerable and may deter applicants from seeking an exemption.

²⁶ 50 C.F.R. §453.04.

²⁷ 50 C.F.R. §453.06.

²⁸ 50 C.F.R. §§453.04-05.

²⁹ 16 U.S.C. §1536(h)(1)(A).

³⁰ 16 U.S.C. §1536(h)(1).

³¹ 16 U.S.C. §1536(h)(1)(B).

³² 16 U.S.C. §1536(h)(1)(B).

³³ 50 C.F.R. §453.03(a)(2).

³⁴ 16 U.S.C. §1536(l)(1).

³⁵ 16 U.S.C. §1536(l)(2).

³⁶ 16 U.S.C. §1536(l)(2).

Duration and Effects of the Exemption

An exemption from the ESC is permanent unless the Secretary later finds, based on the best scientific data available, that the exemption would result in the extinction of a species that was not the subject of consultation nor identified in a biological assessment *and* the ESC then determines within 60 days of the Secretary's finding that the exemption should not be permanent.³⁷ In cases where the Secretary does *not* find that extinction will result, the exemption is permanent even with respect to species not identified in a biological assessment (BA), provided that a BA was prepared during the consultation. The ESA expressly states that the penalties that would normally apply to the taking of an endangered or threatened species do not apply to takings resulting from actions that are exempted.³⁸

Exemptions apply to the specific federal agency action in the exemption application, not to the species. Consequently, even if an agency action is exempted, FWS or NMFS is still obligated to recover the species. So, for example, if the exempted action causes some portion of the range of a species to become uninhabitable (as happened with the Tellico Dam), any remaining range would become more important because there was less of it. In that remaining habitat, federal actions might receive more intense scrutiny due to the harm to the species caused by the exempted action, and the frequency of jeopardy opinions might increase. Alternatively, if the total habitat area would be unchanged, but quality of the species' habitat would be degraded under the exemption, then more scrutiny might be given to federal actions that affect the habitat (e.g., water temperature, timing, or quantity), as changes might add to the stress on the population and further slow the recovery of the species. Similarly, if the exempted action affects a critical food source, the Services might seek to enhance another food source, and so on.

Actions by Secretaries of State or Defense

There are limits on the ESC's authority. (See **Figure 1**, Steps 10 and 13.) The ESC cannot grant an exemption for an agency action if the Secretary of State, after a hearing and a review of the proposed agency action, certifies in writing that carrying out the action would violate a treaty or other international obligation of the United States.³⁹ For example, if the species in jeopardy is a migratory bird and the action is prohibited under the Migratory Bird Treaty, then the Secretary of State may find that the action would violate that treaty, and no exemption could be granted. The Secretary of State must make this determination within 60 days "of any application made under this section." (The determination could be difficult, however, because the Interior Secretary's report that would fully describe the agency action would not be due for an additional 80 days, well after the deadline for the Secretary of State.)

In contrast, the ESC *must* grant an exemption if the Secretary of Defense finds that the exemption is necessary for national security.⁴⁰ (See **Figure 1**, Step 13.) The language of this section does not make clear whether the ESC would still have to meet and vote, even though the result would

³⁷ 16 U.S.C. §1536(h)(2). In other words, once an exemption is granted, even the discovery of a newly listed species in the area will not affect the action that has been exempted, unless outright extinction, rather than jeopardy or adverse modification of critical habitat of the newly identified species, is at issue.

³⁸ 16 U.S.C. §1536(o).

³⁹ 16 U.S.C. §1536(i).

⁴⁰ 16 U.S.C. §1536(j). This provision was added in P.L. 95-632, the law that created the ESC process. Committee and conference reports do not clarify congressional intent on the need for the ESC to ratify the conclusion it is required by law to reach.

already have been determined. While there have been a number of controversies over the years in which conflicts between military readiness and the ESA have been alleged, there have been no instances in which the Defense Department (DOD) has availed itself of this provision, even though the ESC result would be a certainty. DOD has claimed that the exemption provision is too cumbersome and time-consuming for its use, given the geographic array of its actions and their frequency.⁴¹

Presidential Exemption

If there is a presidentially declared disaster, the ESA provides another option for an exemption under this process. ESA (16 U.S.C. §1536(p)) authorizes the President, after such a disaster, to make the determinations that would have been made by the Secretary and the ESC.⁴² The presidential exemption may be granted only to projects to replace or repair public facilities. To grant the exemption, the President must determine that the project is necessary to prevent the recurrence of a natural disaster and that the emergency situation does not allow ordinary procedures to be followed. The ESA provides that the ESC “shall accept the determinations of the President.”⁴³ It is unclear whether this provision means that the ESC must still be convened, even though acceptance of the determination is pre-ordained. This section of the law has not been invoked to date.

Interaction with Other Laws

If an agency action receives an exemption and avoids the penalties that otherwise would apply under the ESA, other underlying issues related to natural resources may still exist. Such conflicts often involve not only the listed species protected under the ESA but also species protected under other federal laws, state protections, and multiple levels of government, as well as a number of interest groups. As a result, the underlying conflict is rarely centered solely on threatened or endangered species.

For example, in a controversy regarding river and dam management in the San Joaquin River basin and the federal Central Valley Project (CVP) in California, multiple lawsuits have been filed over the years based on both federal and state laws. These lawsuits have addressed a host of issues, such as irrigation water supply, fish and wildlife management, recreation, and the environment.⁴⁴ The federal court decisions that formed the impetus for the San Joaquin River Restoration Settlement agreement were based not only on the ESA but also on a state law requiring dam owners to provide sufficient water for downstream fish habitat.⁴⁵ In this and other

⁴¹ For further discussion of military readiness and ESA, see CRS Report RL32183, *Defense Cleanup and Environmental Programs: Authorization and Appropriations for FY2004*, by David M. Bearden.

⁴² Declarations of disaster (e.g., drought) made by other officials, such as the Secretary of Agriculture, would not trigger this provision.

⁴³ 16 U.S.C. §1536(p). The conference and committee reports for P.L. 95-632, which created the exemption process, do not elaborate on whether the ESC must meet to ratify the President’s decision, nor on how the provision might affect the section’s requirements for public notice and comment, deadlines, etc.

⁴⁴ Among the other federal laws that have been at issue are the Clean Water Act, NEPA, and project-specific authorizations. Among the state laws that have been at issue are the California Endangered Species Act, California Environmental Quality Act, and Cal. Fish & Game Code §5937.

⁴⁵ Nat. Res. Defense Council (NRDC) v. Patterson, 333 F. Supp. 2d 906 (E.D. Cal. 2004) (finding that federal law required following Cal. Fish & Game Code §5937, which stated: “The owner of any dam shall allow sufficient water at all times to pass ... over, around or through the dam, to keep in good condition any fish that may be planted or exist (continued...)”).

CVP-related cases, water-flow restrictions due to ESA requirements are only one piece of the regulatory puzzle. State water quality flow requirements often limit management of pumps before ESA requirements are triggered, particularly during drought. Thus, at certain times of the year and under certain hydrological circumstances, an ESA exemption would not necessarily result in more water being pumped.⁴⁶

In general, with respect to the ESA's interaction with state laws, where ESA requirements are stricter than state requirements or otherwise incompatible with them, then the ESA requirements will preempt the state requirements.⁴⁷ However, in other instances, such as the aforementioned CVP-related cases, some state requirements are additional to and compatible with those of the ESA and both sets of requirements apply simultaneously.⁴⁸

Why the Exemption Process Is Rarely Used

As outlined above, the exemption process is a complex affair, and even without extensions, could take 280 days. Because the resulting decision risks causing the extinction of a species, some would argue a rigorous process is appropriate; others still may find it onerous. But even if the process were simple, any potential exemption applicant would face these challenges:

- The applicant must fund any required mitigation measures; the funding obligation lasts for the life of the action—potentially forever, depending on the nature of the action.
- Because the exemption applies to the action and not to the species, FWS or NMFS must continue to attempt to recover the species. Consequently, the burden of conservation and recovery may fall more heavily elsewhere. A governor, trying to balance the interests of an entire state, might find this a particularly difficult obstacle.
- If conservation of a listed species is only one of various statutory obligations under federal or state laws, then an exemption from ESA for the action may not advance the action, because those other statutory obligations may still be required.
- Many parties to a dispute may be reluctant to appear publicly to side with the extinction of a species, no matter how uncharismatic. Moreover, if the increased

(...continued)

below the dam.”); *NRDC v. Rodgers*, 381 F. Supp. 2d 1212 (E.D. Cal. 2005) (granting summary judgment to environmental plaintiffs on several ESA claims); *NRDC v. Rodgers*, No. S-88-1658 at 4-5 (E.D. Cal. Aug. 13, 2006) (stipulation of settlement).

⁴⁶ For more on this topic, see CRS Report R40979, *California Drought: Hydrological and Regulatory Water Supply Issues*, by Betsy A. Cody, Peter Folger, and Cynthia Brown.

⁴⁷ See, for example, *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 852 (9th Cir. 2002) (“[T]o the extent [a state law] prevents federal agencies from protecting ESA-listed species, it is preempted by the ESA.”); *Strahan v. Cox*, 127 F.3d 155, 167-70 (1st Cir. 1997) (affirming order that state’s fishing regulations be brought into compliance with ESA); *Man Hing Ivory & Imports, Inc. v. Deukmejian*, 702 F.2d 760, 765 (9th Cir. 1983) (holding that “section 6(f) of the Endangered Species Act ... preempts California’s statutory prohibition on trade in African elephant products by a trader who has secured all necessary federal permits [pursuant to the ESA and its regulations].”).

⁴⁸ 16 U.S.C. §1535(f) provides, in part, that “[a]ny State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.” Also see, for example, *Florida Panthers v. Collier Cnty.*, 2016 U.S. Dist. LEXIS 47782 (M.D. Fla. Apr. 8, 2016) (finding that a state policy “is not less restrictive than the ESA, and is therefore not pre-empted”).

risk of extinction provides only modest advancement for the action, the rewards of a successful exemption application may not seem worth the effort.

As a practical matter, the consultation process itself offers federal agencies many opportunities to modify their actions to avoid jeopardizing species or adversely modifying their designated critical habitats, yet still proceed with their actions. The well-known implications of an ESA conflict generally prompt agencies to consider ESA consequences at a very early stage in their actions to avoid conflict later, and specifically to avoid the need for an exemption. Prospective applicants, whether a federal agency, a governor, or a license applicant, must balance the costs of the process described above with benefits (and costs) of winning an exemption.⁴⁹ Even so, in many cases, some land and water resource users believe ESA protections for species to be onerous.

Conclusion

The protection of threatened and endangered species is often only one of many complex issues surrounding debates over land use, water allocation, energy extraction, energy corridors, and the like. Parties to such debates have commonly struggled for years or even decades over the basic allocation of these resources, as illustrated by the conflicts over water resource management in California; water use in the Apalachicola-Chattahoochee basin in Alabama, Florida, and Georgia; river basin flooding in Tennessee's Tellico River; and timber harvest in the Pacific Northwest, to name only a few. But because the ESA has strong legal protections for listed species, it tends to force decisions on issues that have long been in conflict.

When an exemption is considered, potential applicants may be unaware of the stringency of the process, the fact that the exemptions apply to the action rather than the species, the need for the applicant to fund potentially costly permanent mitigation, and the fact that after an exemption is granted, the burden of conservation may fall more heavily on any other areas that the species inhabits or on other resources that the species requires. These considerations likely have played a strong role in limiting interest in the exemption process. (See **Appendix A**, **Appendix B**, **Appendix C**, and **Appendix D**.) In addition, perhaps the consultation and negotiation stages provided for in the ESA accomplish the purpose of modifying proposed actions early in the planning and development stages and so avoid harm to listed species. These cautions may help explain why the exemption process has rarely been invoked in any recent case.

If those involved in a project decide to proceed with an exemption application, the first step is to decide who can and should apply, and for what action. Then the exemption process described above may begin. The Secretary and then the ESC would have to make all of the required findings on which an exemption rests. Even if all of the required findings were made in favor of the applicant, mitigation determined (and the applicant, whether the action agency, the governor, or any permit applicant has the means to pay for it), and an exemption granted, controversy and legal challenges may continue. Other laws may still be in play and, as a result, conflicts may remain.

⁴⁹ A federal agency could be directed, administratively, to apply for an exemption without regard to later costs of mitigation. In addition, Congress could pass legislation to override the statutory obligation to mitigate effects of an exemption. A governor or license applicant also might apply without regard to the cost of preparing the application or of subsequent mitigation. Either party might seek federal legislation to override their statutory responsibility for mitigation.

Appendix A. Exemption Denied for Tellico Dam, Tennessee

A dam on the Little Tennessee River was proposed by the Tennessee Valley Authority (TVA), based on arguments that it would aid navigation, power generation, and economic development. Opposition to the project arose early in the planning for the dam, because of concern over fishing, recreation, Native American religious sites, and loss of agricultural land. After discovery of the snail darter, project opponents had to decide whether to abandon their old arguments and pin their hopes on a small fish. According to one observer, “opponents would have preferred a weapon like a bald eagle or a bear or a buffalo. But what they had was [a] fish.”⁵⁰

Table A-1. Events in Tellico Dam Exemption Application

Date	Event
1936	A dam on the Little Tennessee River, to improve navigation and generate electricity, is proposed by TVA.
1963	Now named the Tellico Project, TVA again proposes the dam. Acquisition of additional lands is included to provide for industrial, commercial, and residential development. The cost of the revised project is estimated at \$41 million.
1966	Congress authorizes the construction of the Tellico Project.
1967	First annual appropriation for the project’s construction is passed. (Money is appropriated for each year thereafter.) Preliminary construction and site preparation begin the following year.
1971	Lawsuit filed, contending that Tellico’s Environmental Impact Statement (EIS) was inadequate and violated NEPA. (The 1973 ESA had not yet become federal law.)
8/12/1973	Dr. David Etnier of the University of Tennessee discovers snail darters in the stretch of the Little Tennessee that would be impounded by Tellico; he realizes that the fish is a species new to science.
10/9/1975	Snail darter is listed as endangered under ESA. Dam construction continues.
2/18/1976	Hill v. TVA filed; plaintiffs argue that Tellico violates ESA. ^a
10/12/1976	FWS issues a BiOp that Tellico, as proposed, would jeopardize the continued existence of the snail darter.
4/1976	District court dismisses the case on the merits; ^a plaintiffs appeal, and the 6 th Circuit issues an injunction preventing closure of the dam but allowing construction to continue. ^b
1/31/1977	Appellate Court holds that ESA does apply to Tellico. It grants an injunction that stops the remaining 10% of construction except for structures that would be required even if the project were never completed. TVA appeals to the Supreme Court. ^b
6/15/1978	Supreme Court affirms decision of Appellate Court. ^c
7/19/1978	Senate passes ESA reauthorization; bill contains an exemption process, which creates an Endangered Species Committee (ESC), but no specific exemption for Tellico Dam (or Grayrocks Dam).
9/30/1978	Scheduled expiration of ESA authorization.
10/14/1978	House passes ESA reauthorization; bill contains an exemption process and specific language affecting Tellico (and Grayrocks).

⁵⁰ William B. Wheeler and Michael J. McDonald, *TVA and the Tellico Dam* (Knoxville, TN, University of Tennessee Press, 1986), p. 189.

Date	Event
10/14/1978	House and Senate pass ESA conference report (for S. 2899 of the 95 th Congress). Provisions on Tellico and Grayrocks require that (1) the ESC meet within 30 days of enactment; (2) exemptions must be granted if stated provisions are satisfied; and (3) decision must be made within 90 days of enactment or both projects automatically exempted.
11/10/1978	President Carter, despite encouragement from DOI for a veto, signs ESA reauthorization (P.L. 95-632).
12/8/1978	ESC meets to consider exemption.
1/8/1979	Hearings held in Knoxville and Washington, DC, on exemption proposal.
1/10/1979	Deadline for comments on the record for ESC deliberations.
1/19/1979	Staff report to ESC is issued for use as background in determining whether to grant an exemption.
1/23/1979	ESC unanimously rejects exemption for Tellico. Chair of ESC, Interior Secretary Cecil Andrus states: "Frankly, I hate to see the snail darter get the credit for stopping a project that was ill-conceived and uneconomical in the first place."
2/7/1979	As Chair of the ESC, Andrus signs the decision denying the exemption for Tellico.
2/8/1979	If no decision by ESC had been made before this date, under P.L. 95-632 the Tellico project would have been automatically exempted.
6/18/1979	Rep. John Duncan (TN) offers amendment to H.R. 4388 (Energy and Water Appropriations for FY1980), exempting Tellico from ESA and other laws; the House accepts the language on voice vote, with little discussion.
7/17/1979	Senate passes an amendment (53 yeas to 45 nays; Roll Call #180) to strike the House language exempting Tellico from the requirements of ESA and other laws. (A vote of "yea" was a vote for those opposing the dam (primarily farmers, fishing interests, and Indians); a vote of "nay" favored the TVA position of finishing the dam, exempting it from ESA and proceeding with development. This position was supported by construction interests and much of the state's congressional delegation.)
9/10/1979	The Senate recedes from its earlier amendment of 7/17, and agrees to the conference language exempting Tellico from ESA and other laws (48 yeas, 44 nays; Roll Call #269). A vote of "yea" favored finishing the dam, exempting it from ESA, and proceeding with development; "nay" favored those opposing the dam.
9/25/1979	President Carter signs the Energy and Water Development Appropriation (H.R. 4388, P.L. 96-69), expressing regret about provision on Tellico Dam.
11/29/1979	Workers at Tellico close the gates on the dam, allowing filling of the reservoir to begin.
7/5/1984	FWS reclassifies the snail darter as threatened rather than endangered based largely on new data on distribution of the species. The notice also rescinds the designation of the Tellico Dam area as critical habitat because the species no longer exists in that area. At the time of the notice, the fish had been found in small populations at nine locations in the Tennessee River watershed.
a.	Hill v. Tennessee Valley Auth., 419 F. Supp. 753 (E.D. Tenn. 1976).
b.	Hill v. Tennessee Valley Auth., 549 F.2d 1064 (6 th Cir. 1977).
c.	Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

Appendix B. Exemption for Grayrocks Dam, Wyoming and Nebraska

The Platte River, in its lower reaches in Nebraska, is a major stopover site in the migration of endangered whooping cranes between southern Texas and north central Canada. FWS determined that the federal action agencies involved in permits for construction of the nonfederal Grayrocks Dam and Reservoir in Wyoming, along with existing projects in the Platte River basin, would have jeopardized the downstream habitat of cranes. Specifically, a reduction in instream flow as a consequence of the project as originally designed could have damaged the cranes' resting sites. (The reduction in total flow would also have threatened Nebraska irrigation interests, and caused the state to oppose Wyoming's plans.) The federal action agencies were the U.S. Army Corps of Engineers, because the dam's developers needed to obtain a Corps permit pursuant to the Clean Water Act, and the Rural Electrification Administration, which had guaranteed loans to the dam's developer.

Table B-I. Events in Grayrocks Dam Exemption

Date	Event
1976	Lawsuits are filed by the state of Nebraska, the National Audubon Society, and the National Wildlife Federation against the Corps of Engineers and against the Rural Electrification Administration (REA, now the Rural Utilities Service, in the U.S. Dept. of Agriculture). The suits (later consolidated as two cases, Nebraska v. REA and Nebraska v. Ray) allege a failure of the federal agencies to consult with the FWS under Section 7, and a possible violation of NEPA.
12/1976	REA grants a loan guarantee to the Basin Electric Power Cooperative for construction of Grayrocks Dam.
10/1977	Corps requests Section 7 consultation with FWS. FWS initially replies that a three-year study is necessary before it can offer a BiOp on the effects of the project.
3/1978	Corps issues a Section 404 dredge and fill permit under the Clean Water Act.
5/15/1978	FWS designates parts of Platte River as critical habitat for whooping cranes.
7/19/1978	Senate passes ESA reauthorization; bill contains an exemption process, which creates an Endangered Species Committee (ESC), but no specific exemption for Grayrocks (or Tellico Dam).
9/30/1978	Scheduled expiration of ESA authorization.
10/1978	Federal district court finds that Corps and REA violated Section 7 and issues an injunction to halt the project. ^a The case is appealed to the 8 th Circuit, which stays the lower court injunction.
10/14/1978	House passes ESA reauthorization; bill contains an exemption process and specific language affecting Grayrocks (and Tellico).
10/14/1978	House and Senate pass ESA conference report (for S. 2899 of the 95 th Congress). Provisions on Grayrocks and Tellico require that (1) the ESC meet within 30 days of enactment; (2) exemptions must be granted if stated provisions are satisfied; and (3) decision must be made within 90 days of enactment, or both projects automatically exempted. A separate provision, based on a possible settlement in the Grayrocks case, states that if FWS renders a BiOp that the project as then planned would jeopardize the cranes, then REA, DOI, and Corps must require modifications to insure that the Grayrocks project does not jeopardize the continued existence of endangered species (i.e., whooping cranes). As a result of these unique provisions, the Grayrocks controversy differs from the more generally applicable process created in the statute for future exemption applications.
11/10/1978	President Carter, despite encouragement from DOI Secretary for a veto, signs ESA reauthorization (P.L. 95-632).

Date	Event
11/1978	FWS concludes that Grayrocks would jeopardize the survival of whooping cranes. (Note: exact date of this BiOp is uncertain, but it is after November 10, 1978, when P.L. 95-632 was signed.)
12/4/1978	Parties to <i>Nebraska v. REA</i> reach a settlement that would place restraints on operation of the Grayrocks reservoir and establish a permanent irrevocable trust fund of \$7.5 million for maintenance of the cranes' critical habitat. But before the agreement is finalized, parties agree that three conditions must be met: (1) DOI must concur that the implemented agreement and completed project would satisfy the requirements of ESA; (2) either the project gets an exemption from ESA, or the ESC determines that no exemption is needed; and (3) the federal appeals court must dismiss the litigation with prejudice (i.e., the plaintiffs cannot file the same suit unless the agreement is violated). In effect, the provisions of P.L. 95-632 uniquely applying to Grayrocks ask ESC to validate an agreement that had been reached already and was deemed by FWS to meet the requirements of ESA.
12/8/1978	ESC meets to consider exemption. Also, FWS issues BiOp on the effects of the Grayrocks project.
1/8/1979	Simultaneous hearings in Cheyenne, WY, and Washington, DC, on exemption proposal.
1/10/1979	Deadline for comments for record for ESC deliberations.
1/19/1979	Staff report to ESC is issued for use as background in determining whether to grant an exemption.
1/23/1979	ESC grants exemption for Grayrocks Dam and Reservoir by unanimous vote, thus ratifying the settlement that had been reached on 12/4/1978. (See date above.) Decision requires specified mitigation measures: (1) limiting maximum annual water use to 23,250 acre-feet/year; (2) making certain releases of water at critical times of year; (3) replacing water withdrawn in an irrigation project in the Platte River watershed; (4) creating a permanent trust fund of \$7.5 million for maintenance and enhancement of critical habitat for the cranes on the Platte River; and (5) other specified measures. Exemption is granted on the condition that mitigation and enhancement features are funded concurrently with the rest of the project for its duration, paid for by power and water ratepayers, and carried out without regard to the final settlement and compromise signed by the litigants in <i>Nebraska v. REA</i> and <i>Nebraska v. Ray</i> . In this respect, while the prologue to the ESC decision was uniquely directed by Congress, the result (regarding analysis of biological impacts, economic impacts, mitigation, and funding by responsible parties) was generally consistent with the provisions of the statute creating the ESC.
2/8/1979	If no ESC decision had been made by ESC before this date, the Grayrocks project would have been automatically exempted.

Source: Compiled from *Federal Register* notices, legislative histories, and contemporary press accounts.

- a. *Nebraska v. REA*, 12 ERC 1156 (D. Neb. 1978).

Appendix C. Exemption for BLM Timber Sales, Oregon

Throughout the 1980s and 1990s, controversy abounded in the Pacific Northwest over timber harvests from federal lands. The various players included hikers, large and small timber companies, commercial fishermen and recreational anglers, Indian tribes, hunters, motorized recreation interests, water users, birders, and others. Key federal laws included the National Environmental Policy Act, the National Forest Management Act, and the Federal Land Policy and Management Act. And though the litigation history under these statutes regarding timber management in the Northwest is rich and complex, not until the listing of the northern spotted owl as threatened on June 26, 1990, was the ESA a major factor in the debate. The conflict arose because this species is heavily dependent in its entire life cycle on old growth forests of the type found in the Cascades in southern British Columbia, Washington, Oregon, and northern California. The same forest characteristics that make an area valuable to this species also make it valuable to the timber industry.⁵¹

The Bureau of Land Management (BLM) manages large tracts of old growth forest in Oregon, where conflicts over resource management had arisen many times; the presence of the threatened spotted owl was a new complication. BLM submitted its proposed FY1991 timber sale program to FWS for Section 7 consultation. The history below contains lawsuits and actions based on the ESA, but omits the many legal actions based on other statutes (e.g., the initial lawsuits against Forest Service timber sales under the National Forest Management Act).

Table C-I. Events in BLM Timber Sales Exemption

Date	Event
1/1987	First petition to list northern spotted owl (NSO) is filed. Petition asks endangered status.
12/1987	FWS finds that NSO listing is not warranted. Lawsuits follow regarding the decision. ^a
6/26/1990	NSO listed as threatened; no critical habitat is designated at the time of listing.
?/1990	BLM submits its FY1991 timber sales plan to FWS for consultation.
?/1990	FWS rejects 52 BLM sales (about 1/3 of planned sales) as jeopardizing the continued existence of NSO.
9/25/1991	Of the 52 sales, BLM submits 44 to ESC for an exemption.
10/22/1991	DOI Secretary Lujan determines that BLM application meets three statutory standards to qualify for exemption and accepts application.
?/1991	State Department certifies that United States is party to no international agreement that would protect NSO from effects of proposed sales.
1/15/1992	FWS designates critical habitat for NSO.
4/15/1992	ESC receives Secretary's report on proposed sales.

⁵¹ For background on the spotted owl controversy, see out-of-print CRS Issue Brief IB93015, *Owls, Murrelets, and Salmon: the Endangered Species Act and Northwest Forests*, by M. Lynne Corn, available from the author.

Date	Event
5/14/1992	ESC meets. Secretary Lujan proposes that 31 of the sales be rejected: 11 had reasonable and prudent alternatives, 12 were in critical habitat or designated conservation areas under recovery plan, and 8 were not regionally significant. The remaining 13 sales were then considered for exemption. NOAA Administrator offers amendment to strengthen mitigation measures; amendment is accepted.
5/14/1992	ESC approves exemption for remaining 13 sales (5 years, 2 days; EPA Administrator and Oregon representative voting in the negative). BLM required to carry out and fund mitigation measures concurrently with execution of sales.
5/1992	Environmental groups file suit against decision, arguing among other things that decision violates Administrative Procedure Act and is politically rather than scientifically based. ^b
6/3/1992	ESC publishes record of decision in <i>Federal Register</i> .
4/19/1993	BLM withdraws request for exemption, making lawsuit moot. Status of the 13 approved sales remains in doubt, due to lawsuits under other laws. ^c BLM subsequently withdraws the sales from its timber program.

- a. See *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. 1988).
- b. *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993).
- c. Letter from Michael Penfold, Acting Director, BLM, to Bruce Babbitt, Chair of ESC. (Letter is not extant, but is cited in multiple sources, including Victor M. Sher, "Travels with Strix: The Spotted Owl's Journey through the Federal Courts," *Public Land and Resources Law Review*, vol. 14 (1993), pp. 41-79.)

Appendix D. Three Attempts at an Exemption

In addition to the three completed applications, there were three other instances in which applications were filed, but the applications were withdrawn or abandoned.

Pittston Refinery, Eastport, Maine

The Pittston Company wished to build an oil refinery at Eastport, ME, in the mouth of the Bay of Fundy, an area with one of the world's greatest tidal fluctuations (over 20 feet). In its BiOp on an EPA permit, FWS held that the refinery would jeopardize bald eagles, and NMFS held that the project would endanger whales. Initially, EPA denied Pittston's application for a permit to discharge effluent. In 1979, the company responded with two actions. First it sought an administrative appeal of the denial. Second, it applied for an exemption under ESA for its discharge permit. The company felt it was forced to take the two actions simultaneously because the ESA required an application to be filed within 90 days of the denial of a permit. In January 1979, the various parties agreed to suspend the exemption process while a compromise was sought. The effort at compromise was not successful.

Environmental groups sued, asking an injunction to stop the exemption application. They argued that the case was brought prematurely, before the issue had finished with the administrative appeals process. In effect, they argued that the ESA itself was poorly written, in that it forced the applicant to carry out two procedures (appeal and exemption) simultaneously.⁵² The U.S. Justice Department agreed that the law was unclear and that the exemption process should not run concurrently with an appeal. The court eventually agreed that the exemption process could not begin until the appeals process was finished.⁵³

This confusion, and apparent conflict, was addressed by Congress in the 1982 amendments to ESA. These amendments clarified that the exemption process was to be invoked only after the issuance of a BiOp and after other means of compliance had failed. In the case of a permit or license, the exemption process must also wait until after an agency formally denies the permit or license.⁵⁴ The applicant may not simultaneously seek an administrative appeal and an exemption.

Docking Area, Mound City, Illinois

The Consolidated Grain and Barge Company (CGBC) sought to build a docking area for barges on the Ohio River at Mound City, IL. The area was habitat for the endangered orange-footed pearly mussel, *Plethobasus cooperianus*. CGBC had sought a permit from the Army Corps of Engineers (Corps) under the Rivers and Harbors Act of 1899 to construct the docking area.⁵⁵ FWS issued a jeopardy BiOp to the Corps which denied the permit on that basis. Initially, the owner of the property agreed to provide funds for the exemption application, although CGBC was

⁵² See *Pittston Company v. Endangered Species Committee*, 14 ERC 1257, 10 ELR 20248 (D.D.C. 1980). The court commented that “[t]he exemption process was designed to resolve endangered species conflicts after other administrative remedies have been exhausted. It makes no sense to initiate an exemption process before it has been determined that there is a need for an exemption in the first place. This provision insures exemption applications will be filed, in cases involving permit or license applicants, when the application is ripe for review.”

⁵³ After the court case, “the issue just disappeared, because Pittston gave up,” according to Jon H. Goldstein, a former DOI official, now retired. (Personal communication with Lynne Corn, April 1990.)

⁵⁴ 16 U.S.C. §1536(g)(2).

⁵⁵ Rivers and Harbors Act of 1899, 33 U.S.C. §404.

not willing to commit similar funds. On November 6, 1985, FWS published notice of the exemption application in the *Federal Register*.

On December 6, 1985, FWS published a *Federal Register* notice of a hearing to be held in St. Louis, MO, on January 28, 1986. The notice indicated that the DOI Secretary agreed that the threshold criteria for beginning the exemption process (see Box 12, **Figure 1**) had been met, and set the details for the next stage of the process, that is, the hearing. The notice also reminded interested parties that the applicant had the burden of proof in the proceedings.⁵⁶

At a pre-hearing conference with an administrative law judge on January 8, 1986, CGBC sent no one to represent its interests. A partner in a law firm of the lawyer hired by the landowner was present, but said he had limited information concerning the issue. He had no list of witnesses on which to call. The lawyer asked for a one-week extension of the hearing, but before it was held, the exemption application was withdrawn.

Dredging Alligator Pass in Suwanee Sound, Florida

On July 30, 1986, the consulting engineer of the Suwanee River Authority (SRA) applied for an exemption for a project to dredge Alligator Pass in Suwanee Sound, FL, an area that provided habitat for the endangered manatee. It is not clear that the consulting engineer had authority from the SRA to apply on its behalf. The project needed a permit from the Corps, which had denied it, primarily on the grounds of the presence of manatees.

On August 12, 1986, the board of the SRA refused to ratify the actions of the consulting engineer and asked that the exemption application be withdrawn. In a letter on his own stationery, the engineer asked that the application be continued. After a further exchange of contradictory letters, the withdrawal stood.

⁵⁶ 50 Fed.Reg. 49983-49985, December 6, 1985. The notice also included a list of 15 specific questions addressed to the CGBC that illustrated the types of specific information that would be sought for the record at the hearing. These questions could be very helpful for those seeking a detailed guide to issues raised in an exemption application.

Appendix E. California Central Valley Project and State Water Project (Delta Pumping)

Two existing federal BiOps affect coordinated operation of the federal Central Valley Project (CVP) and the California State Water Project (SWP), two of the largest water resource projects in the country. Of particular concern to many Members of Congress has been the effect of ESA pumping restrictions on water supplies available from these projects to water users in central and southern California. Many water users saw dramatically reduced supplies during a multiyear drought—in some years, receiving no water from the CVP.⁵⁷ Whereas some parties have advocated eliminating or otherwise relaxing these pumping restrictions, others have voiced concerns about such efforts on the multiple threatened and endangered species in question, such as the Delta smelt and various salmon and other species.⁵⁸ Although other factors, such as state water quality regulations and hydrologic limitations, play a role in how much water can be pumped and made available to water users, much attention has been paid to restrictions on project operations due to implementation of the ESA.

In 2009, some parties advocated for petitioning the governor and the President to begin the ESA exemption process in response to reasonable and prudent alternatives (RPAs) developed during the ESA consultation process on the coordinated operation of the CVP and SWP.⁵⁹ Since then, most action has been aimed at developing legislation to address the ESA restrictions. In the 114th Congress, legislative activity focused primarily on H.R. 2898 S. 1894, and S. 2533. While all three bills contained provisions pertaining to pumping levels and threatened and endangered fish species, none included provisions seeking or supporting exemptions under the ESA exemption process.⁶⁰ Provisions allowing increased pumping beyond the RPA limits under certain conditions were included in S. 612, the Water Infrastructure Improvements for the Nation (WIIN) Act, which was signed into law on December 16, 2016 (P.L. 114-322).⁶¹ New legislation in the 115th Congress also could address CVP and SWP operations and implementation of the ESA.

⁵⁷ For additional background on the CVP, see CRS Report R44456, *Central Valley Project Operations: Background and Legislation*, by Charles V. Stern, Pervaze A. Sheikh, and Betsy A. Cody.

⁵⁸ See, for example, debate on the Water Infrastructure Improvements for the Nation (WIIN) Act in the U.S. House of Representatives on December 8, 2016 (<https://www.congress.gov/crec/2016/12/08/CREC-2016-12-08-pt1-PgH7413.pdf#page=72>), and in the U.S. Senate on December 9, 2016 (<https://www.congress.gov/crec/2016/12/09/CREC-2016-12-09-pt1-PgS6932-4.pdf>).

⁵⁹ For example, see Pacific Legal Foundation, “Save Our Water” petition, <http://www.pacificlegal.org/page.aspx?pid=4027> (last accessed November 28, 2016). In 2004, CVP and SWP operators proposed increased pumping as part of an Operations Criteria and Plan (OCAP) for the long-term coordinated operation of the CVP and SWP. Jeopardy opinions including pumping and flow restrictions under RPAs were issued by both the FWS and NMFS in 2008 and 2009, respectively.

⁶⁰ See S. 2533, tit. II-IV, 114th Cong. (2016); S. 1894, §§101(c), 113, 121, 201-03, 114th Cong. (2015); H.R. 2898, §§103(f), 605, tit. II-V (2015).

⁶¹ For more information on the drought legislation, see CRS Report R44456, *Central Valley Project Operations: Background and Legislation*, by Charles V. Stern, Pervaze A. Sheikh, and Betsy A. Cody. For an overview of the WIIN Act, including Title III, Subtitle J (titled “California Water”), see CRS In Focus IF10536, *Water Infrastructure Improvements for the Nation Act (WIIN)*, by Nicole T. Carter et al.

Background

In 2004, both Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) issued biological opinions (BiOps) on the Bureau of Reclamation's Long-Term Operational Criteria and Plan (OCAP) for Reclamation's operation of the federal Central Valley Project (CVP) in coordination with the California State Water Project (SWP). The 2004 BiOps were challenged in court, including by environmental groups that alleged that the BiOps were not sufficiently protective. The BiOps were remanded to the Services, and consultations were renewed.⁶²

The latest FWS BiOp issued in December 2008, found that proposed operations under OCAP would jeopardize the continued existence of threatened Delta smelt and adversely modify its critical habitat.⁶³ The most recent NMFS BiOp, issued in June 2009 and updated in 2011, found that proposed operations under OCAP are likely to jeopardize the continued existence of federally listed Sacramento River winter-run Chinook salmon (endangered), Central Valley spring-run Chinook salmon (threatened), Central Valley steelhead (threatened), Southern Distinct Population Segment of North American green sturgeon (threatened), and Southern Resident killer whales (endangered).⁶⁴ NMFS also found that the proposed action is "likely ... to destroy or adversely modify" the critical habitats of both Chinook salmon species and the Central Valley steelhead and the proposed critical habitat for the green sturgeon, as well as adversely affect essential fish habitat (EFH, under the Magnuson-Stevens Fishery Conservation and Management Act) for Pacific Coast Salmon species within the action area.⁶⁵

The reasonable and prudent alternatives (RPAs) included in both Service opinions call for changes in the timing and quantity of water that can be pumped from the Delta, thereby at times limiting the amount of water that can be delivered to certain water users south of the Delta. The timing of these opinions was especially difficult for water users because the opinions came as California was experiencing its third straight year of drought conditions and some water users were already experiencing reduced water deliveries due to drought and other environmental restrictions.⁶⁶ Some areas in which water users received only 10% to 18% of their contracted CVP allocations had historically high unemployment and were also affected by turbulent financial markets and a significant downturn in the construction industry.⁶⁷ Consequently, some advocated overriding the BiOps via congressional mandate or by petitioning the governor and the President to begin the ESA exemption process.⁶⁸ Such issues persisted as drought conditions continued in California for more than five consecutive years (through water year 2016, which ended September 30th, 2016) and pumping restrictions remained in place. Some water users in recent years have received no water from the CVP due to federal and state regulatory restrictions and hydrological limitations during the drought.⁶⁹

If Reclamation or the California Department of Water Resources (DWR) had rejected either of the BiOps or found the RPAs unworkable, then either DWR could have recommended that the governor seek an exemption or Reclamation could have sought an exemption from ESA. Neither agency did so.

Both of the current BiOps, and their implementation, were challenged in federal court. The district court initially held

⁶² See *NRDC v. Norton*, 2006 U.S. Dist. LEXIS 94689, 64 ERC (BNA) 1718 (E.D. Cal. Dec. 29, 2006); *NRDC v. Rodgers*, 381 F. Supp. 2d 1212 (E.D. Cal. 2005).

⁶³ FWS, Formal Endangered Species Act Consultation on the Proposed Coordinated Operations of the Central Valley Project (CVP) and State Water Project (SWP) (2008), available at <https://www.fws.gov/sfbaydelta/cvp-swp/cvp-swp.cfm>.

⁶⁴ NMFS, Biological Opinion and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project (2009), and 2011 Amendments to the NMFS OCAP RPA (2011), available at http://www.westcoast.fisheries.noaa.gov/central_valley/water_operations/ocap.html.

⁶⁵ *Ibid.*

⁶⁶ See generally CRS Report R40979, *California Drought: Hydrological and Regulatory Water Supply Issues*, by Betsy A. Cody, Peter Folger, and Cynthia Brown.

⁶⁷ See, for example, findings of fact in *Consol. Delta Smelt Cases*, 717 F. Supp. 2d 1021, 1055-56 (E.D. Cal. 2010) (summary judgment granted in part at 760 F. Supp. 2d 855 (E.D. Cal. 2010); affirmed in part and reversed in part by *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014)).

⁶⁸ See, for example, Save Our Water Act, H.R. 1668, 114th Cong. (2015); Pacific Legal Foundation, "Save Our Water" petition, <http://www.pacificlegal.org/page.aspx?pid=4027> (last accessed November 28, 2016).

⁶⁹ Historical and current information on CVP allocations is available at Bureau of Reclamation, *Central Valley Project Water Supply*, at <https://www.usbr.gov/mp/cvp-water> (last visited November 28, 2016).

that the BiOps were unlawful, but the U.S. Court of Appeals for the Ninth Circuit reversed and upheld both BiOps in 2014.⁷⁰ Both courts, however, ordered Reclamation to complete an environmental review of its implementation of the RPAs included in the BiOps.⁷¹ The practical effect of the courts' rulings is ongoing coordination among the state and federal agencies and the Services in implementing the RPAs and, potentially, modification of the RPAs as conditions warrant.

In the meantime, Reclamation and DWR requested reinitiation of Section 7 consultation in August 2016, which might lead to a new BiOp for Delta smelt and further court intervention. Additionally, Reclamation and DWR have submitted a biological assessment for consideration of Section 7 permits for the California WaterFix. WaterFix is a proposed water conveyance structure that aims to divert a portion of water from the Sacramento River and send it via two underground tunnels to existing pumping plants south of the Bay-Delta. Water from this structure would be pumped to the CVP and SWP, largely replacing the existing operations. If new BiOps were to be issued for WaterFix, they likely would supersede existing BiOps for affected species under ESA. In the meantime, Reclamation and DWR operate the CVP and SWP within the regulatory structure outlined in the recently passed Water Infrastructure Improvements for the Nation Act (WIIN Act; P.L. 114-322) and within guidelines and procedures developed under various state and federal laws, including the ESA.

Author Contact Information

M. Lynne Corn
Specialist in Natural Resources Policy
lcorn@crs.loc.gov, 7-7267

Alexandra M. Wyatt
Legislative Attorney
awyatt@crs.loc.gov, 7-0816

Betsy A. Cody
Specialist in Natural Resources Policy
bcody@crs.loc.gov, 7-7229

Acknowledgments

Kristina Alexander, former CRS legislative attorney, contributed to a previous version of this report. Pamela Baldwin, former CRS legislative attorney, also contributed to a previous version of this report before her retirement.

⁷⁰ *San Luis & Delta-Mendota Water Auth. v. Jewell* (Delta Smelt), 747 F.3d 581 (9th Cir. 2014); *San Luis & Delta-Mendota Water Auth. v. Locke* (Salmonid), 776 F.3d 971 (9th Cir. 2014).

⁷¹ Delta Smelt and Salmonid cases, *supra* footnote 70.