Endangered Species Act Differs From Other Environmental Laws (Newsletter)*

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The influence of the Endangered Species Act (ESA) on the regulated public is much different from other environmental statutes such as the National Environmental Policy Act (NEPA) and Clean Water Act (CWA). These fundamental differences are responsible for the frustration expressed by industry and need to be considered when evaluating options for the improvement of the ESA.

There are two aspects of all these laws: technical and implementation. On our web site is a white paper on the technical aspects, but implementation impacts have not been presented before now.

Most federal environmental statutes are implemented by administrative regulations promulgated by each federal regulatory agency. The public is engaged in both the development of the regulations and by the permitting process that triggers application of the statutes. Agencies involved include the Army Corps of Engineers, Bureau of Land Management, Forest Service, Federal Energy Regulatory Commission, Federal Highway Authority, and the Environmental Protection Agency.

The ESA is implemented by only two federal agencies: the National Marine Fisheries Service (NMFS) and the Fish and Wildlife Service (FWS). These are not regulatory agencies, they are resource agencies. They are not directly responsible for permitting decisions so there is no requirement for public participation in either how the ESA is administered nor how decisions are reached.

When the project might adversely effect ESA-listed species regulatory agencies must consult with the NMFS or FWS before issuing a decision. Too frequently, the regulatory agency staff tells the applicant that they are not the subject experts, so they depend on the resource agency for the decision. It is the resource agency staff making the regulatory decision, not the regulatory agency staff. The applicant usually is not allowed to participate in the process, as they do with regulatory agencies.

The resource agencies are not held to the same rigorous technical standards as are applicants. NMFS and the FWS can tell the regulatory agency, "we believe ...," "we think ...," or "we feel ..." and are given greater credibility

by the regulator than is the applicant's consultants who submit objective, documented information. Similarly, the resource agencies can ignore what the applicant has submitted to them in support of the project, and the regulatory agency staff do not need to consider this discrepancy when justifying their action.

As much as any technical improvements to the ESA, the playing field should be leveled. The regulated public should have equal weight to NMFS or FWS in the decision of the regulator. We cannot be held to a high standard while the resource agencies are held to none. This disparity is the major complaint of the ESA by the regulated public. Both NMFS and FWS should be given Congressional direction that the purpose of their ESA review of a regulated activity is to find acceptable ways for the activity to proceed, not to deny it by declaring–often arbitrarily and capriciously–that the proposed activity is thought to have adverse impact so should not be permitted to occur.