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## Foreword

*Donald J. Barry and Robert Wallace*

Zygmunt Plater, the environmental law professor who brought the famous snail darter Supreme Court case, *Tennessee Valley Authority v. Hill*, once said that when Congress passes legislation, it launches an unguided missile. Zyg was right. While Congress drafts the skeletal outlines of a statute and has a general idea of where it intends the new law to land, ultimately it remains up to the implementing agencies to add interpretive meat to those skeletal bones, and then to federal judges to decide whether the adjusted missile's trajectory seems rational and is legally sound. The implementation of the Endangered Species Act (ESA) over the past 46 years has been a classic case in point.

It would be neither inaccurate nor unkind to say that when Congress passed the ESA in 1973, it had only a vague sense (if it had one at all) of the likely legal consequences of the language it placed in the new law. For example, the procedural requirements and substantive prohibitions for section 7 consultations were buried in a section of the act with the innocuous title of "Interagency Cooperation" (sounds positive and constructive . . . who could be opposed to that?). Five years later, the tiny snail darter would provide the shocking answer to that question.

As for the other game-changing provision under the 1973 Act—the statutory prohibition against the "take" of endangered species—that prohibition would be expanded a few years later by regulation to include significant habitat modification that severely affects a listed species. Moreover, this definition was extended by regulation to cover all future listed threatened species unless the Fish and Wildlife Service could demonstrate why that level of protection was not necessary and advisable. Thus, neither of the two most significant and sweeping provisions of the ESA—section 7's prohibition against jeopardizing a species' continued existence or adversely modifying or destroying its critical habitat and section 9's prohibition against "take" were blinking red lights when the law passed overwhelmingly in Congress. This meant that the future direction and ultimate landing of the ESA missile would be heavily influenced by creative bureaucrats, energetic litigants, and the courts.

The "quiet phase" of the ESA did not last long, as implementing regulations for the new law were finalized in the mid-1970s and the pace of litigation challenging the application of the law and those regulations accelerated dramatically. New issues and challenges rose constantly, and creative implementation strategies were developed and applied. Some of these concepts, like Habitat Conservation Planning, were subsequently adopted by Congress, whereas others were rejected in the courts and died. Thus, the ESA has become one of the most dynamic and evolving environmental laws of the 20th century, as competing advocates for science versus economic development continue to battle it out for the soul of the law.

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It is hard to overstate the immense array of talent and expertise in the ESA that the various authors of the chapters of this book bring to this project. Most have been students and practitioners of the ESA for decades and have had a fundamental impact upon the trajectory and effect of this law. Many have been friends and colleagues, while others have been worthy adversaries testing the appropriate boundaries of the ESA. All have important analytical stories to tell and the personal experiences and skills to tell it. This book will be invaluable to the natural resource legal and policy communities.

Both of us have had the honor of serving as the Assistant Secretary for Fish and Wildlife and Parks at the Department of the Interior, overseeing the Fish and Wildlife Service's implementation of the ESA. Our combined involvement in the implementation of the ESA spans the entire arc of the ESA's history, ranging from its earliest days to the present. Thus, the two of us are living book ends to the legacy of this evolving law, a legacy that this book so effectively captures.

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Donald J. Barry served as the Assistant Secretary from February 1997 to July 2000. Robert Wallace served as the Assistant Secretary from June 2019 to January 2021.