Hastings Environmental Law Journal

Volume 13
Number 1 *Winter 2007*

Article 1

1-1-2007

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Introduction

Thirty-four years ago, the United States embarked on an audacious quest to reverse and to repair one of the tragic consequences of centuries of human development — the extinction of animal and plant species caused by conversion of land to agriculture, hunting and fishing, industrial activity, population growth, pollution, and the damming of rivers. It was impossible, of course, to restore species that had already been lost. The Passenger Pigeon, the Great Auk, the Grizzly Bear in the urban, suburban, and agricultural portions of its former range, and (perhaps) the Ivory-Billed Woodpecker, had long ago succumbed to predation and loss of their native habitat. But the United States Congress *did* set out to prevent such future extinctions from occurring; and it did so seemingly without regard to the cumulative effects of human development on the remnant populations and habitat of those species that were on the brink of catastrophe — the American Crocodile, Peregrine Falcon, Bald Eagle, Aleutian Canada Goose, Western Gray Wolf, and Pacific Coast salmon, to name but a few examples. The overarching philosophy of the Endangered Species Act was to protect and to repropagate endangered and threatened species no matter how dire their current existence and with only passing acknowledgement of the reliance interests of those whose past activities and future plans placed those species in peril.

Whether viewed from our perspective or considered in its own time, several aspects of the Endangered Species Act stand out as extraordinary. The first are the circumstances of its enactment. The legislation passed the House of Representatives by a vote of 355 to 4, and the Senate gave its unanimous support.[1] When President Richard M. Nixon signed the legislation into law on December 28, 1973, he famously declared:

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1. 119 Cong. Rec. 42, 535 (1973) (Senate voice vote); *id*. at 42, 915-16 (House vote).

> Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we all share as Americans.[2]

The near universal political acclaim for the law, however, should give us reason to question whether the members of Congress, the President, and the public understood either the Act or the forces that it would set into motion. As a commentator for the *Idaho Mountain Express* wrote on the 25th Anniversary of the legislation: "The [Act] was given scant attention by the general public when it was passed, and those who noticed viewed it as a warm, fuzzy law filled with admirable intention, sort of like a Smoky the Bear billboard with Smoky saying 'Help!'"[3]

A second salient feature of the Endangered Species Act is the breadth of its coverage. The legislation does not simply protect the "charismatic megafauna" that had been the focus of public and congressional attention. Rather, the Act commits the United States to prevent the extinction of *all* plant and animal species — from the California Condor and the Chinook Salmon to the Texas Blind Salamander, the Desert Pupfish, the North American Burrowing Beetle, the Fairy Shrimp, and several hundred conifers, flowering plants, ferns, and lichens.[4] Moreover, the legislation does not apply only to species found within the United States and its territorial waters; Congress sought to use American domestic and international policy to protect endangered species in foreign nations and those threatened by the over-fishing of international waters.[5]

2. Richard M. Nixon, *Statement on Signing the Endangered Species Act of* 1973, 10 Wkly. Comp. Pres. Docs. 1 (Dec. 28, 1973).

3. Dick Dorworth, *The Endangered Species Act: Nixon's Best Legacy*, IDAHO MOUNTAIN EXPRESS (Sun Valley, ID) (Dec. 30, 1998), *available at* www.mtexpress.com/1998/12-30-98/esa.htm.

4. For a listing of all animal and plant species designated for protection under the Endangered Species Act, *see* 50 C.F.R. §§ 17.11 (animals), 17.12 (plants) (2006).

5. The principal provisions of the Act that address the protection of species in foreign countries and in international waters are section 8 (international cooperation), section 8A (implementation of the Convention on International Trade in Endangered Species and Wild Fauna and Flora), and section 9 (prohibition of takings of protected species on the high seas and regulation of imports and exports). *See* 16 U.S.C. §§ 1537, 1537A, 1539. In 1978, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service promulgated a joint rule that applied the consultation requirements of section 7 of the Act to federal agency action taken in foreign countries. *See* 43 Fed. Reg. 874 (1978). However, in 1986, the Services published a revised rule that limited consultation to agency action taken in the United States or

A third significant feature of the Endangered Species Act is how different it was from its predecessors. The authors of the statute drew from myriad sources — including the common law of wildlife, the Lacey Act of 1900,[6] Migratory Bird Treaty Act of 1918,[7] the Black Bass Act of 1926,[8] and the Bald Eagle Protection Act of 1940,[9] as well as the ESA's immediate predecessors: the Endangered Species Preservation Act of 1966,[10] the Endangered Species Conservation Act of 1969,[11] and the Marine Mammal Protection Act of 1972.[12] Although the Endangered Species Act of 1973 carried forward many aspects of these earlier laws — most notably the inclusion of both vertebrates and invertebrates and federal authority to regulate the trade and possession of endangered animals and body parts — the new legislation greatly expanded the federal role in four respects:[13]

The Act imposed nondiscretionary obligations on the Fish and Wildlife Service (USFWS or 'the Service') and the National Marine Fisheries Service (NMFS) to list species that qualified under the statutory criteria for endangered and threatened status.[14]

Congress required all federal agencies to *ensure* that their actions would not jeopardize the continued existence of protected species, wherever those species may exist[15] — a significant change from the earlier endangered species acts, which required only that certain federal agencies "*seek* to protect species . . . threatened with extinction, and, insofar as practicable and consistent with the [agencies'] primary purposes . . . preserve the habitats of such threatened species on lands within their jurisdiction."[16]

The legislation prohibited the "taking" of endangered species — a power traditionally exercised only by state wildlife officials — and it adopted a broad definition of the take prohibition.[17] This change

in international waters. 51 Fed. Reg. 19926, 19329-30 (1986) (codified at 50 C.F.R. § 402.01). *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

6. 16 U.S.C. §§ 3371-3378 (2006).

7. 16 U.S.C. §§ 703-711 (2006).

8. Ch. 346, 44 Stat. 576 (codified at 16 U.S.C. §§ 851-856 (1976)) (repealed 1981).

9. 16 U.S.C. §§ 668-668d (2006).

10. Pub. L. No. 89-669, 80 Stat. 926 (repealed 1973).

11. Pub. L. No. 91-135, 83 Stat. 275 (repealed 1973).

12. 16 U.S.C. §§ 1361-1421h.

13. For an analysis of the significant changes between the earlier endangered species acts and the 1973 legislation, *see* MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 194-202 (3d ed. 1997).

14. Endangered Species Act of 1973, 16 U.S.C. §§ 1533(a) (listing), 1532(6) (definition of "endangered species"), 1532(20) (definition of "threatened species") (2006).

15. *Id.* § 1536(a)(2).

16. Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, § 1(b), 80 Stat. 926 (repealed 1973) (emphasis added).

17. 16 U.S.C. § 1539(a).

would have far-reaching implications as it extended the scope of federal regulatory power — which previously applied only to federal lands and resources and to the commercial trade in protected species — to a potentially broad array of private and state activities.

Although the Endangered Species Preservation Act of 1966 had recognized that protection of habitat is an important component of endangered species preservation,[18] the new law required the USFWS and NMFS to designate as "critical habitat" specific areas of the geographic area occupied by listed species that are "essential to the conservation of the species and which may require special management . . . or protection."[19]

A final notable feature of the Endangered Species Act is its placement in the sequence of statutes that comprise modern American environmental law. The Act was the fourth of the environmental statutes that began the environmental decade — the National Environmental Policy Act, which President Nixon signed into law on January 1, 1970;[20] the Clean Air Act, passed later that year;[21] the Clean Water Act, which Congress enacted two years later;[22] and the Endangered Species Act the following year.[23] The ESA has some characteristics in common with the preceding laws:

- They are all general statutes that regulate a variety of federal, state, and private activities.

- In enacting these laws, Congress recognized that economic development and population growth had occurred with little regard to externalities — loss of open-space, air and water pollution, risks to public health, loss of wetlands and biodiversity, and other social costs — and it sought to restore balance to historically degraded ecosystems.

- Each law was immensely popular when it was enacted. All four statutes enjoyed broad bipartisan support (although Congress was forced to override President Nixon's veto of the Clean Water Act).

18. § 1(c), 80 Stat. at 926.

19. 16 U.S.C. § 1533(a)(3) (designation of critical habitat). The definition of critical habitat quoted in the text was added to the statute in the 1978 amendments. Pub. L. No. 95-632, 92 Stat. 3751 (1978) (codified at 16 U.S.C. § 1532(5)).

20. 42 U.S.C. §§ 4321-4347 (2006).

21. 42 U.S.C. §§ 7401-7671 (2006).

22. 33 U.S.C. §§ 1251-1387 (2006).

23. 16 U.S.C. §§ 1531-1544 (2006).

- Congress acted to encourage public participation in the administration and enforcement of these laws by including citizen suit provisions in the Clean Air Act, the Clean Water Act, and the Endangered Species Act.

- Finally, in these three statutes, Congress established complex regulatory regimes that delegate many important policy decisions to federal administrative agencies: Which pollutants to regulate? What species qualify for protection? How best to protect public health? With what margin of safety? And how to proceed in the face of scientific uncertainties and disagreement over policy choices? These are all questions left to the expertise of agencies such as the Environmental Protection Agency (EPA), the Fish and Wildlife Service, and NMFS.

Yet, in other respects, the Endangered Species Act stands in dramatic contrast to its predecessors, and the similarities among the statutes potentially mask one essential difference: Unlike the other major federal environmental laws, the Endangered Species Act is not an accomodationist statute. It does not call for a balancing of the competing interests. It generally does not allow for consideration of the economic costs of regulation to protect endangered and threatened species. And, most importantly, the Act makes *all* of its regulatory actions — from species listing and designation of critical habitat to consultation and the formulation and implementation of recovery plans, reasonable and prudent alternatives, and habitat conservation plans — subordinate to Congress's paramount directive to ensure the continued survival of every plant and animal species (wherever in the world they may be located) that are currently in jeopardy of extinction.

Four Lessons From History

The circumstances surrounding the enactment of the Endangered Species Act largely explain the contemporary controversy over the statute, and it did not take long for the radical changes in federal policy mandated by the Act to become the focus of intense political and popular attention. Four examples (one from each of the last four decades) are illustrative:

1. The "Two Inch Terror"

This was former Senator Howard Baker's name for his political nemesis, the Tennessee Snail Darter.[24] The controversy over this tiny

24. 124 Cong. Rec. 23, 867, 96th Cong., 1st Sess. (Sep. 10, 1979).

and obscure fish — especially the Supreme Court's 1978 decision in *Tennessee Valley Authority v. Hill*,[25] which held that the preservation of the species takes precedence over completion a dam separately authorized by Congress and months short of completion — revealed several features of the Endangered Species Act that were shrouded by the ease and swiftness of its enactment.

First, the Court confirmed that Congress meant what it said in section 7: all federal agencies shall ensure the protection and preservation of endangered species and their critical habitat, regardless of cost or conflict with other important federal programs. In the words of Chief Justice Warren Burger:

> 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.[26]

The administrative philosophy embodied in this holding (which is correct as a matter of statutory interpretation) is a far cry from both the technology-based, cost conscious way in which we seek to protect air and water quality[27] and the multiple use-sustained yield management policies we employ in our national forests and other public lands.[28]

Second, TVA *v. Hill* demonstrated the consequences of the nondiscretionary directives of the Endangered Species Act and the power of its citizen suit authorization. Once the snail darter was discovered in the Little Tennessee River in the vicinity of Tellico Dam, and the USFWS concluded (at least at the time) that it was the only known population of the species, all other significant decisions followed as a matter of law — listing, designation and protection of critical habitat, consultation, and protection through whatever means would be necessary to preserve the species. And these results could be achieved by judicial order at the behest of any citizen (at least any

25. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) ("TVA *v. Hill*").

26. *Id.* at 174 (footnote omitted).

27. *See, e.g.*, 42 U.S.C. § 7411 (air pollution emissions standards for new sources); 33 U.S.C. § 1314(b) (effluent standards for existing point sources of water pollution).

28. *See, e.g.*, Multiple Use, Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (2006); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1712(c) (2006).

citizen with a personal interest and stake in the controversy), despite the contrary judgment of the United States Government.[29]

Third, although the congressional debates were dappled with references to the Bald Eagle, the Whooping Crane, the American Crocodile, and other great creatures that captured the public's imagination and sense of stewardship, the Act equally protects the lesser and less known species as well.[30] As Justice John Paul Stevens asked at oral argument, in response to Attorney General Griffin Bell's disparagement of the claim that a two-inch long fish should imperil a multi-million dollar flood control and rural electrification project, "Does the Government take the position that some endangered species are entitled to more protection than others?"[31] The Supreme Court's answer (again, correctly interpreting the will of Congress) was a categorical "no."

Fourth, the litigation was the first use of the statute for the ulterior and principal purpose of blocking development that opponents were unable to defeat through the political process. A University of Tennessee ichthyologist discovered the snail darter in the section of the Little Tennessee River that would be flooded by Tellico Dam; a UT law student recognized the legal significance of this discovery; and the student and his environmental law professor were able both to force the listing of the species and to use the consequent consultation requirements of the statute to stymie a project that they viewed as an environmentally destructive boondoggle for residential and commercial developers.[32] This disingenuous approach to endangered species protection probably reached its apex when Andy Stahl of the Sierra Club Legal Defense Fund told a group of environmental activists in 1988:

> [T]he northern spotted owl is the wildlife species of choice to act as a surrogate for old-growth protection . . . and I've often thought that thank goodness the spotted owl evolved in the Northwest, for if it hadn't, we'd have to genetically engineer it. . . . [I]t uses a lot of old growth. That's convenient, because we can use it to protect a lot of old growth.[33]

29. For a engaging description of the Snail Darter controversy, see CHARLES C. MANN & MARK L. PLUMMER, NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES 147-75 (1995).

30. The Act defines "species" as including "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16).

31. *See* MANN & PLUMMER, *supra* note 29, at 147.

32. *See* MANN & PLUMMER, *supra* note 29 at 164-69.

33. *See* WILLIAM DIETRICH, THE FINAL FOREST: THE BATTLE FOR THE LAST GREAT TREES OF THE PACIFIC NORTHWEST 85 (1992).

Finally, TVA *v*. H*ill* showed what everyone involved in species conservation should have recognized from the beginning — the decision whether to protect or to sacrifice an endangered species is fundamentally a policy (that is to say "political") choice, rather than a scientific or legal judgment. For Congress had the final word — two words, actually — on the Snail Darter controversy. In an effort to resolve the controversy and to avoid similar debacles in the future, Congress amended the statute to create an exemption to the strict prohibitions of section 7. An Endangered Species Committee (or "God Squad") now has the power to allow federal projects or federally authorized activities to go forward despite the judgment of the USFWS and NMFS that the action is likely to cause the extinction of a protected species.[34] And when the God Squad refused to grant such an exemption for Tellico Dam, Congress approved an appropriations bill that contained a rider that ordered the dam to be completed "notwithstanding any other law."[35]

Congress has exercised this supervenient power on occasion throughout the history of the Act. The most prominent examples are the series of "Salvage Timber Riders" that have authorized timber harvesting in Northern Spotted Owl and Marbled Murrelet habitat[36] and Congress's 2003 decision to mandate continuance of full water deliveries, despite threats to the Rio Grande Silvery Minnow, by prohibiting the Secretary of the Interior from using any funds appropriated for the fiscal year to "restrict, reduce or reallocate any water stored in Heron Reservoir or delivered pursuant to San Juan-Chama Project contracts . . . to meet the requirements of the Endangered Species Act."[37]

Of more importance, though, was Congress's reappraisal of the philosophy of the Endangered Species Act itself. As Senator Jake Garn observed during the debates on the 1978 amendments:

34. 16 U.S.C. § 1536(e)-(o).

35. 96 Pub. L. No. 69, 93 Stat. 437, 449-50 (1979). The story of the Snail Darter has a happy ending, however. The year after the floodgates at Tellico Dam were closed, David Etiner (the biologist who had first identified the Snail Darter in the Little Tennessee River) discovered multiple populations of the species in other tributaries to the Tennessee River. The Fish and Wildlife Service subsequently delisted the Snail Darter. *See* MANN & PLUMMER, *supra* note 29, at 173.

36. *See Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). For a review and spirited defense of Congress' practice of changing natural resources policy through the rider process, *see* Jason M. Patlis, *The Endangered Species Act: Thirty Years of Politics, Money, and Science: Riders on the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts*, 16 TUL. ENVTL. L.J. 257 (2003).

37. Energy and Water Development Appropriations Act of 2004, Pub. L. No 108-137 § 208(a), 117 Stat. 1827 (2003); *see also Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (2003).

> As a society, and as a Congress, we have competing responsibilities. Beyond the need to protect the environment, we are also responsible for the provision and preservation of aspects of our society which are judged desirable by the American people. These include food and water, electricity and other forms of power, and the materials we use to make everything from hospital beds to golden spittoons for Las Vegas casinos. Some of the uses to which we put our physical wealth are honorable and noble; others are certainly not that useful. But, as a society, we must negotiate among them, rather than have the Government follow only one value, no matter how important.[38]

Thus, in the aftermath of TVA *v*. H*ill*, Congress finally took a close look at the statute it had so blithely enacted five years before.

2. Mission Blues and "Hapless Toads": A Tale of Two Species

In 1975, the Fish and Wildlife Service promulgated a rule that interpreted the prohibition against the "taking" of endangered species set forth in section 9 of the Act[39] to include types of destruction or alteration of critical habitat. The rule specifically defines the word "harm" as it appears in the definition of "take" to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[40]

Although the Endangered Species Act (like its immediate predecessors) expressly recognizes that habitat protection is essential to the task of species conservation, this interpretation significantly expanded the USFWS's jurisdiction because it extended some of the statutory protections afforded "critical habitat" in the section 7 consultation to the Service's regulation of "takings" of endangered species under section 9.[41] The effect of the rule is to apply the take

38. 123 Cong. Rec. 21, 572-73, 95th Cong., 2d Sess. (July 19, 1978).

39. Section 9(a)(1) prohibits, *inter alia*, the taking of any endangered species without a permit issued under section 10 of the Act. 16 U.S.C. § 1538(a)(1) (2006). The statute defines "take" as meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." I*d*. § 1532(19).

40. 50 C.F.R. § 17.3 (1994).

41. Section 7(a)(2) requires each federal agency to consult with the USFWS or NMFS to ensure that "any action authorized, funded, or carried out by such agency . . .

prohibition to the use and alteration of habitat (on state and private lands) that is essential to the survival of listed species and to other activities, such as the exercise of state-created water rights that are not covered by the section 7 consultation requirements.

The Supreme Court upheld the "harm" regulation in 1995 in its second famous ESA decision, *Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt*.[42] The case was brought by landowners, loggers, and other individuals in rural communities in the Pacific Northwest and the Southwest who were concerned that the protection of Northern Spotted Owl and Red Cockaded Woodpecker habitat would limit their ability to cut timber on private and state lands. As Justice Stevens explained in his opinion for the Court:

> [T]he broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. Whereas predecessor statutes enacted in 1966 and 1969 had not contained any sweeping prohibition against the taking of endangered species except on federal lands, the 1973 Act applied to all land in the United States and to the Nation's territorial seas. As stated in § 2 of the Act, among its central purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ."[43]

The extension of the take prohibition to habitat located on private lands and to the use of resources traditionally left to state regulation has produced two types of responses over the past thirty years. The first is creative and constructive, as exemplified by the "habitat conservation plan" ("HCP") forged in 1982 to protect the habitat of

is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2). In contrast, the section 9 rule prohibits *significant* habitat modification or degradation that *actually* kills or injures wildlife. 50 C.F.R. § 17.3 (1994). In addition, section 7 applies both to endangered species and threatened species; while section 9 by its own terms prohibits only the taking of endangered species. By regulation pursuant to section 4(d) of the Act, however, the USFWS has generally extended the take protections of section 9 to all threatened species of wildlife. 50 C.F.R. § 17.31(a); *cf. id*. §§ 17.40-17.48 (special rules for the taking of selected individual species of wildlife). The U.S. Court of Appeals for the D.C. Circuit upheld the USFWS's decision generally to prohibit the taking of threatened species in *Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt*, 1 F.3d 1, 5-8 (D.C. Cir. 1993), *rev'd on other grounds on rehearing*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd on other grounds*, 515 U.S. 687 (1995).

42. *Sweet Home*, 515 U.S. 687 (1995).

43. *Id*. at 698 (citation omitted).

the Mission Blue and Callippe Silverspot Butterfly on San Bruno Mountain while accommodating the landowner's desire to develop its property for residential purposes. This HCP, the first of its kind, set aside and protected a core area of the lupine, thistle, and coastal buckwheat that are the butterflies' source of food and critical habitat. While it authorized construction of homes and streets on a portion of the mountain adjacent to the protected area (including 14 percent of the butterflies' existing habitat), it also limited the size and location of the development, restricted the use of certain pesticides and herbicides within the subdivision, prohibited the planting of potentially invasive exotic species, and established a number of other conditions on construction and use of the homes to protect the butterflies' "crucial habitat" from erosion, pollution, and other encroachment by residents and visitors.[44]

The Mission Blue HCP was a profoundly influential event in the history of the Endangered Species Act in two respects. It moved Congress to amend the Act in 1982 to allow the USFWS and NMFS to grant "incidental take permits" — permits that authorize the taking of individual members of a protected species as unavoidable incidents to "otherwise lawful activities" subject to regulation under the statute, such as development in areas of critical habitat. The 1982 amendments also codified the accommodation strategy created in the San Bruno Mountain case, by making incidental take permits subject to compliance with a "habitat conservation plan" approved by USFWS or NMFS.[45] As Michael Bean and Melanie Rowland have observed,

> [The incidental take permit authority] seems to ease the Act's restrictions because it permits what previously was prohibited. In fact, however, this provision likely increased the Secretary's leverage over activities that incidentally take endangered species because it substituted a flexible regulatory authority for a threat of prosecution [for the taking of members of a protected species population] that few found credible.[46]

Indeed, the second great contribution of the Mission Blue HCP was its service as a model for exactly this type of flexible and constructive regulation of private activities that threaten to encroach on

44. SAN BRUNO MOUNTAIN HABITAT CONSERVATION PLAN STEERING COMM., SAN BRUNO MOUNTAIN AREA HABITAT CONSERVATION PLAN (1982).

45. The incidental take permitting authority and habitat conservation plan requirements are codified in section 10(a) of the Act. 16 U.S.C. § 1539(a).

46. BEAN & ROWLAND, *supra* note 13, at 234.

critical habitat or otherwise interfere with federal efforts to protect and to recover endangered species. Based on the new authority created by the 1982 amendments, the Fish and Wildlife Service has negotiated a variety of HCPs, multi-species conservation programs, and other agreements that allow for the accommodation of economic development and resource use while also protecting listed species and their critical habitat. The most creative and successful of these endeavors have included the additional elements of integrated and adaptive resource management, coordinated implementation of the array of federal, state, and local laws that govern the land or resource in question, and protection of private property rights through "no surprises" guarantees or compensation agreements.[47]

There is a darker path that also followed, however, from the inclusion of habitat modification in the section 9 regulatory process. That path led to contentious litigation and political debates over the legality and fairness of extending the reach of the Endangered Species Act to private lands and to activities that traditionally have been governed by state and local laws, rather than by the federal government. The past 30 years have been marked by a series of lawsuits brought by farmers, ranchers, developers, water users, and other individuals whose property rights suddenly were limited by section 9 and the interpretative rule. Prominent examples include the P*alila* litigation involving wild sheep grazing on the Island of Hawaii;[48] S*weet* H*ome* and related Spotted Owl and Marbled Murrelet cases in the Pacific Northwest;[49] and lawsuits brought by developers contesting restrictions on construction to protect the California Gnatcatcher.[50] The USFWS's announcement earlier this year that it has designated 450,000 acres in the Sierra Nevada and along the California Coast as critical habitat for the Red-Legged Frog is likely to prompt similar litigation.[51]

Indeed, several of these cases not only claimed that the federal government overstepped its jurisdiction to regulate critical habitat on private lands; they also serve as poster children for the broader argument that the administration of the Endangered Species Act itself has gone seriously awry:

47. *See* U.S. FISH & WILDLIFE SERVICE, HABITAT CONSERVATION PLANS: THE QUIET REVOLUTION (1998) *available at* http://www.fws.gov/Endangered/hcp/Quiet/quietrev.html (last visited November 11, 2006); Eric Fisher, H*abitat Conservation Planning Under the* E*ndangered Species Act: No Surprises and the Quest for Certainty*, 67 U. COLO. L. REV. 371 (1996).

48. P*alila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988).

49. *See, e.g.*, M*arbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996).

50. E*ndangered Species Comm. of the Bldg. Indust. Ass'n of Southern California v. Babbitt*, 852 F. Supp. 2d 32 (D.D.C. 1994).

51. 71 Fed. Reg. 19244 (Apr. 13, 2006) (to be codified at 50 C.F.R. pt. 17).

- Construction of a county hospital and regional emergency medical center in San Bernardino County is halted to protect the habitat of the Deli Sands Flower-Loving Fly.[52]

- A commercial shopping center outside of Austin, Texas is blocked because the development site sits atop a limestone cave cluster that is home to six endangered species of beetles and arachnids.[53]

- A residential real estate development in San Diego County is stymied because it would encroach on the habitat of the Arroyo Toad.[54]

Although the federal courts in all three cases rejected constitutional challenges to the Endangered Species Act, applications of the Act to regulate land use activities that traditionally have been the province of state and local laws have fostered the political argument that the critical habitat provisions of the statute must be curtailed. The "hapless toad" — to use John Roberts' sobriquet — even played a cameo role in our new Chief Justice's confirmation hearings.[55]

What Goes Around, Comes Around

In December 1992, in the waning days of the first Bush Administration, the Interior Department settled a lawsuit filed by the Defenders of Wildlife and the Fund for Animals, which claimed that the USFWS had violated its nondiscretionary duty under section 4 of the Endangered Species Act to list species that qualified for protection under the statutory definition of "endangered" and "threatened." The settlement committed the Service to list 400 species (in addition to the 749 already on the endangered and threatened list) over the next four years and to study another 900 candidate species for protection.[56] The spokesman for the Department of the Interior, Steven Goldstein, acknowledged that the settlement left the incoming Clinton Administration with an enormous management challenge. "One thing is clear," he said, "[t]he Clinton Administration now will have to address the full force and effect of the Endangered Species Act. It

52. *National Home Builders Association v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

53. *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003).

54. *Rancho Viejo* LLC *v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003).

55. *See Rancho Viejo* LLC *v. Norton*, 334 F.3d 1158, 1160 (2003) (Roberts, J., dissenting from denial of rehearing *en banc*).

56. *See* Keith Schneider, *U.S. to Act Faster on Saving Species*, N.Y. TIMES, Dec. 16, 1992, at A1.

will be interesting to see if the environmentalists are still their best friends in four years."[57]

They weren't. But that is too long of a story to explore here. Just about everyone agrees, though, that the 1992 listing settlement imposed a Sisyphean task on the Fish and Wildlife Service. First, it would be impossible to conduct the biological and commercial studies required to support the decision to list an average of 100 species per year in accordance with the statutory criteria (not to mention fulfilling the obligation to evaluate an additional 900 candidate species) by September 30, 1993.[58] Second, section 4 of the Act requires the Service to proceed by rulemaking, which increases both the time and cost of agency decisionmaking.[59] Third, for every species listed, the Act imposes an additional nondiscretionary duty to designate critical habitat concurrently with the listing of the species.[60] Fourth, except in exceptional cases, the Service must develop a recovery plan for every listing.[61] Fifth, each new species listed expands both the consultation obligations the USFWS and other federal agencies,[62] and the listing of new species increases the number of incidental take permit/habitat conservation plan requests that the Service must evaluate and negotiate.[63]

The Clinton Administration's efforts to comply with the settlement were not aided by Congress's rescission of all funding for listing and designation of critical habitat during fiscal year 1995.[64] More generally, Secretary of the Interior Bruce Babbitt repeatedly expressed the view that the obligations imposed by the 1992 listing settlement and by the concomitant duty to designate critical habitat were "cannibalizing" the funds needed for the Clinton Administration's efforts to construct comprehensive species management plans and negotiated regional settlements of endangered species controversies.[65]

In one of history's ironies, shortly after taking office the current Bush Administration asked Congress to impose a moratorium on its obligation to list species for protection. According to Stephanie

57. *Id.*

58. *See* 16 U.S.C. § 1533(b)(1).

59. *Id.* § 1533(a)(1).

60. *Id.* § 1533(a)(3)(A).

61. *Id.* § 1533(f)(1).

62. *See id.* § 1536(a)(2).

63. *Id.* § 1539(a).

64. Pub. L. No. 104-06, 109 Stat. 73, 86 (1995). The U.S. Court of Appeals for the Ninth Circuit upheld the rescission of funds *in Environmental Defense Center v. Babbitt*, 73 F.3d 867 (9th Cir. 1995).

65. *See* Jennifer Lee, *Money Gone, U.S. Suspends Designations of Habitats*, N.Y. TIMES, May 29, 2003, at A6.

Hanna, spokeswoman for the Interior Department, "We want a chance to establish our own priorities, instead of just waiting for another court order to roll across the transom."[66] In any event, the experience of the past three presidential administrations suggests that there is bipartisan sentiment that the mandatory duties imposed by section 4 of the Act to list species and to designate critical habitat skew the administration of the endangered species conservation program away from the crisis spots and opportunities for creative solutions by continually adding new species that, with limited resources, must be evaluated and protected.

"Takings" and Takings

The Endangered Species Act also has been controversial because it frequently limits the exercise of private property rights and on occasion requires a fundamental change in long-standing land use or resource allocation practices. Farmers who cannot plow fields that are Fairy Shrimp or Elderberry Bark Beetle habitat, ranchers who must build fences to keep their livestock out of streams inhabited by the Lahontan Cutthroat Trout, and developers who must scale back their plans to exclude San Francisco Garter Snake habitat have all complained that they are unfairly asked to bear the costs of a statute that was enacted to protect the national interest in the preservation of endangered and threatened species.

Although there have been surprisingly few cases to date challenging the application of the Act as an unconstitutional taking of private property, three western water cases have focused national attention on the conflict between species conservation and private property rights. Water users in California's San Joaquin Valley have sued the United States, claiming that the biological opinions for the coordinated operation of the Central Valley Project ("CVP") and the State Water Project ("SWP") breached their contract rights by reallocating water from consumptive uses to the protection of the Sacramento River Winter Run Chinook Salmon and the Delta Smelt.[67] These hybrid water shortages — the result of drought and ESA mandates — caused partial reductions in water service. Ironically, the SWP users, who lost only about 10 percent of their normal water service for two years, won their case and received $28 million in dam-

66. *See* Douglas Jehl, *Moratorium Asked on Suits that Seek to Protect Species*, N.Y. TIMES, Apr. 12, 2001, at A1.

67. *See, e.g.*, *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995); *Stockton East Water Dist. v. United States*, 70 Fed. Cl. 515 (2006); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001).

ages and interest for the taking of their property rights.[68] In contrast, the CVP users, who incurred a 50 percent shortfall in 1993 and have suffered lesser shortages in most years since, thus far have been denied compensation based on the federal courts' interpretation of their water service contracts with the United States.[69]

The focal point of the property rights movement's attack on the Endangered Species Act, however, has been in the Klamath Basin. In 2001, most farmers in the basin received *no* water from the Klamath Irrigation Project, because the biological opinion governing project operations required the Bureau of Reclamation to leave water in project reservoirs for the benefit of the Short-Nosed and Lost River Suckers. The following year, the Bureau provided full water deliveries, but 40,000 to 70,000 Chinook Salmon washed up dead on the banks of the Klamath River because of low flows and high water temperatures in the river.[70] A federal court has so far rejected the farmers' $1 billion takings and breach of contract claims.[71] Since 2001, however, the Klamath tragedy has stood as a symbol of the tensions the Act creates between endangered species conservation and private property rights.

Contemporary Criticisms

On basis of this history, contemporary critics of the Endangered Species Act argue that the statute is flawed and must be overhauled. The strongest manifestation of these criticisms was H.R. 3824,[72] the "Threatened and Endangered Species Recovery Act of 2005," which passed the House of Representatives in September 2005 by a vote of 229 to 193.[73] Although the principal author of the legislation, Richard Pombo, lost his seat in Congress in the 2006 general election, the criticisms of the Endangered Species Act that motivated the legislation are likely to remain an important part of our political debate.

68. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001), *damages awarded*, 59 Fed. Cl. 246 (2003), *interest calculated*, 61 Fed. Cl. 624 (2004).

69. *See O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995). The Court of Federal Claims will analyze the contract claims of the plaintiffs in the *Stockton East* case at trial. *See Stockton East Water District v. United States*, 70 Fed. Cl. 515 (2006) (denying the United States' motion for summary judgment).

70. *See* Deborah Schoch, *Dreams Dry Up in Klamath Basin*, L.A. TIMES, July 23, 2001, at A1; Timothy Egan, *As Thousands of Salmon Die, Fight for River Erupts Again*, N.Y. TIMES, Sept. 28, 2002, at A1; Eric Bailey, U.S. *Report Cites Low Levels in Klamath River for Fish Die-Off*, L.A. TIMES, Nov. 19, 2003, at B6.

71. *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005).

72. Threatened and Endangered Species Recovery Act of 2005, H.R. 3824, 109th Cong. (1st Sess. 2005).

73. 151 Cong. Rec. H8546 (Sept. 29, 2005).

1. The Act Has Failed to Achieve Its Fundamental Purpose of Recovery and Delisting.

According to former-Representative Richard W. Pombo, the "Endangered Species Act has become a program that checks species in for protection, conservation, and recovery, but never checks them out."[74] Of the 1,304 domestic species that have been listed for protection under the statute, only 12 have been recovered and delisted. Moreover, according to the USFWS, only 30 percent of the 1,265 currently listed species are "stable" and only 9 percent are "improving."[75] In Representative Pombo's opinion, these data show that the Act has failed to achieve its fundamental purpose of recovery and delisting, and the Act itself "is becoming more and more of an unsustainable program."[76]

2. The Current Statute Forces the Fish and Wildlife Service to Designate Critical Habitat Prematurely and in Some Cases Unnecessarily.

Representative Pombo and other critics believe that the Endangered Species Act compels the Fish and Wildlife Service to spend too much of its administrative time and budget on the designation of critical habitat simultaneously with the listing of new species. He notes that in fiscal year 2003, the Service ran out of funds for this work and had to suspend its evaluation of critical habitat for five months. Quoting Bruce Babbitt, Mr. Pombo urges that the "best alternative is to amend the Endangered Species Act, giving biologists the unequivocal discretion to prepare maps when the scientific surveys are complete. Only then can we make meaningful judgments about what habitat should receive protection."[77]

74. Richard W. Pombo, *The* ESA *at* 30: T*ime for Congress to* U*pdate and* S*trengthen the* L*aw*, CTR. FOR THE DEFENSE OF FREE ENTERPRISE, 2005, *available at* http://www.cdfe.org/esa_reform1.htm. A more comprehensive critique of endangered species policy is set forth in the *Majority Staff Report to the House Committee on Resources: Implementation of the Endangered Species Act of* 1973. 109th Cong., 1st Sess. (May 2005) (report not officially adopted by the Committee on Resources), *available at* http://resourcescommittee.house.gov/issues/more/esa/implementationreport.htm. For a defense of the current Endangered Species Act, *see* Earthjustice, *Citizen's Guide to the Endangered Species Act*, 2003, *available at* http://www.earthjustice.org/library/reports/Citizens_Guide_ESA.pdf.

75. Pombo, *supra* note 74, § II.

76. I*d*.

77. I*d*. at § III.

3. Citizen Suits Have Perverted the Administration of the Law.

As Mr. Pombo has explained, the "law of unintended consequences has been especially unkind to the Endangered Species Act. . . . By filing inordinate numbers of lawsuits under the ESA, environmental organizations have handcuffed the USFWS to courtroom defense tables, draining the time, money, and manpower Congress intended the service to spend on species recovery in the field."[78] He then goes on to quote an analysis of federal endangered species policy by Jason Patlis, former Majority Counsel for the Senate Committee on Environment and Public Works:

> This is where the [USFWS] is today: the decisions relating to ESA listings and designations, arguably the most important decisions under the law because they trigger all other protections, are driven solely by litigation. The [USFWS] has lost all flexibility in making its own determinations as to which species is most endangered and should be listed first, and which habitat is most vulnerable and should be designated as critical. Litigation-driven actions prioritize only those species that have a plaintiff behind them (and often a larger political objective), rather than those species that are most endangered.[79]

4. The Act Has Been Implemented on the Basis of Unreliable Science.

Critics of the current Endangered Species Act also argue that the term "best scientific and commercial data available" — which serves as the basis for listing decisions, designation of critical habitat, and consultation — is both vague and poorly understood. In Representative Pombo's opinion, the "absence of clear, objective standards has resulted in a litany of data errors and poor decisions on species protection and critical habitat designations. These errors waste valuable agency resources that could be spent on species in proven need of recovery efforts." He cites the National Research Council's tentative conclusion that the 2001 forced allocation of water from Klamath Ba-

78. Id.

79. Id. (quoting Patlis, *supra* note 36, at 260).

sin farmers to the two endangered suckerfish had "no sound scientific basis."[80]

5. The Act Improperly Interferes with Private Property Rights.

Representative Pombo identified two aspects of ESA management as problematic for property owners. The first is the incentive to rid one's land of endangered or threatened species, or to destroy their habitat, before the full force of the law is applied to the private property. Pombo and many others call this the "shoot, shovel, and shut up" syndrome.[81] The second problem is that the Act has blocked development, prevented land from being farmed, interfered with timber-harvesting rights, and directed water resources away from agricultural users for the benefit of fish and other protected aquatic species. Again citing the Klamath controversy, Representative Pombo asserts that it and "hundreds of other horror stories and cases of government abuse under the ESA have fostered an adversarial relationship between government regulators and private property owners. This is incredibly deleterious to the goal of saving species because over 90% have habitat on private lands."[82]

The Threatened and Endangered Species Recovery Act

In one form or another, all of these criticisms of the Endangered Species Act found their way into H.R. 3824, which would have amended the existing statute in eight important ways:

1. "Best Available Scientific Data"

The legislation would have redefined the term "best scientific and commercial data available" — which is the basis for many important decisions, including listing, designation of critical habitat, consultation, and the formulation of reasonable and prudent alternatives — to "best available scientific data."[83] These data must be empirical or "found in sources that have been subject to peer review by qualified individuals recommended by the National Academy of Sciences

80. *Id.* (citing National Research Council, *Interim Report from the Committee on Endangered and Threatened Fishes in the Klamath River Basin: Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin* (2002) (prepublication copy).

81. *Id.* § IV-V.

82. *Id.* at § V.

83. Threatened and Endangered Species Recovery Act of 2005, H.R. 3824, 109th Cong. § 3(a)(2)(A) (2005).

to serve as independent reviewers for a covered action in a generally acceptable manner."[84]

2. Listing

H.R. 3824 would have amended the listing requirements of the statute to direct the USFWS "to determine any distinct population of any species of vertebrate fish or wildlife to be an endangered species or a threatened species *only sparingly*."[85] It also would have compelled the Service, concurrently with listing, to prepare an analysis of the economic impact and effects on national security of listing, but would not substantively alter the listing decision in any way.[86]

3. Critical Habitat

The legislation would have repealed all references to critical habitat in § 3 (definitions); § 4 (designation of critical habitat concurrently with listing); § 7 (consultation); and § 10(j) (experimental populations).[87] Although Representative Pombo previously suggested that the designation of critical habitat should be made as part of the formulation of recovery plans for individual or multiple species, his bill instead would have simply eliminated the designation of critical habitat altogether.

4. Recovery Plans and Land Acquisitions

The bill would have moved the statutory duty to develop and implement recovery plans, and to monitor the status of species listed for protection, from section 4 (listing) and merge it with the land acquisition authority set forth in section 5.[88] This connotes a policy preference for recovery of species that inhabit private lands princi-

84. I*d*. § 3(a)(2)(C)(ii) - (iii).

85. I*d*. § 4(a)(2).

86. I*d*. § 4(d). The bill would have added a new subsection 4 to section 4(a) of the statute, 16 U.S.C. § 1533(a), directing the Secretary, concurrently with the decision to list a species as endangered or threatened, to prepare an analysis of:

(i) the economic impact and benefit of that determination;

(ii) the impact and benefit on national security of that determination; and

(iii) any other relevant impact and benefit of that determination.

H.R. 3824 § 4(d)(1). It went on to say, however, that "[n]othing in this paragraph shall delay the Secretary's decision or change the criteria used in making [the listing] determinations. I*d*. § 4(d)(2).

87. H.R. 3824 § 5.

88. I*d*. § 9(a).

pally through voluntary land management agreements, rather than by regulation and HCPs imposed on the landowner or resource user through the incidental take permit process. Indeed, the legislation would have established a "Threatened and Endangered Species Incentives Program" through which the Fish and Wildlife Service may enter into "Species Recovery Agreements" and "Species Conservation Contract Agreements" with property owners and resource users.[89]

This program was modeled on the law of conservation easements and on the Clinton Administration's HCP implementation policy, which in many cases included "no surprises" agreements with a commitment to compensate the landowner if new listings, new scientific information, or other unforeseen circumstances required the United States to restrict the use of land or resources in ways not covered by the HCP.[90] A landowner who enters into one of these agreements must commit to manage its land in ways that contribute to the conservation of listed species on the property, protect and restore habitat, and are consistent with the recovery plan for the species.[91]

The legislation also would have authorized the United States to compensate the property owner for the costs of implementing the agreement. In the case of "Species Conservation Contract Agreements," compensation would be mandatory with the amount based on the length of time the land is managed for species or habitat conservation purposes:[92]

10 years 60% compensation
20 years 80% compensation
30 years 100% compensation

In addition, the bill stipulated that a landowner or resource user who is in compliance with these agreements shall be deemed to have a permit for enhancement or survival of species under section 10(a)(1)(A) of the Act and shall therefore be deemed in compliance with the take limitations of the statute.[93]

5. Consultation

Along with eliminating the directive to consider the adverse modification of critical habitat during the interagency consultation

89. *Id.* § 9(c).
90. *See* U.S. FISH AND WILDLIFE SERVICE, *supra* note 47.
91. H.R. 3824 § 9(c).
92. *Id.*
93. *Id.*

process, H.R. 3824 would have made several other significant amendments to section 7 of the Act.

By rulemaking, the USFWS could decide that certain types of federal agency action categorically comply with the substantive requirements of section 7 — that, in other words, they would not jeopardize the continued existence of an endangered or threatened species.[94] In those cases where consultation is required, the consultation could focus only on the possible effects on the species that would be caused by the proposed federal action, and the USFWS could not consider cumulative or synergistic effects that might result from the combined effects of the proposed action and other activities that might jeopardize the species.[95] In addition, the legislation would have exempted agency action from consultation if the species is already protected by an HCP or by a species recovery or conservation agreement and the federal agency's action is consistent with those existing protections.[96]

Reasonable and prudent alternatives ("RPAs") included in a biological opinion would have been limited in three respects: First, RPAs must be "capable of successful implementation." Second, they "shall be roughly proportional to the impact of the incidental taking." Third, the conditions must be consistent with the objectives of the federal agency (and the permit or license applicant) "to the greatest extent possible."[97]

Finally, the legislation would have eliminated the Endangered Species Committee and the exemption process.[98]

6. Incidental Take Permits and Habitat Conservation Plans

The legislation also would have made several important changes to sections 9 and 10 of the Act. Habitat conservation plans must contain "objective, measurable biological goals to be achieved for species covered by the plan and specific measures for achieving such goals."[99] They also must include "adaptive management provisions necessary to respond to all reasonably foreseeable changes in circumstances that could appreciably reduce the likelihood of the survival and recovery of any species covered by the plan."[100]

94. Id. § 11(a).
95. Id.
96. Id.
97. Id. § 11(b).
98. Id. § 11(d).
99. Id. § 12(a).
100. Id.

If changed circumstances contemplated by the HCP occur, the USFWS may "require only such additional minimization, mitigation, or other measures as are already provided in the permit or incorporated document for such changed circumstance."[101] For any changed circumstance not identified in the HCP, the Service may "require only such additional minimization, mitigation, or other measures to address such changed circumstance that do not involve the commitment of any additional land, water, or financial compensation not otherwise committed, or the imposition of additional restrictions on the use of any land, water or other natural resources otherwise available for development or use, under the original terms and conditions of the permit or incorporated document."[102]

The USFWS would have the burden of proof in demonstrating and documenting, with the best available scientific data, the occurrence of any changed circumstances.[103] Finally, consistent with the proposed amendment to section 7, the bill would have required that all the terms and conditions of all HCPs "be roughly proportional in extent to the impact of the incidental taking specified in the conservation plan."[104]

7. Private Property Conservation

H.R. 3824 also included a section titled "Private Property Conservation." This section would have authorized the USFWS to provide "conservation grants" to land owners and resources users to promote the voluntary conservation of endangered species and threatened species.[105] This authority would have complemented the recovery plan/land acquisition program described above. But the "Private Property Conservation" provisions of the bill also would have done something much more controversial: *compel* the United States to compensate private property owners whose rights are burdened or diminished by conservation measures imposed on them under the Act.

If a proposed use of private land would violate section 9(a) by taking a member of a protected species, and the landowner and the Service did not agree to an HCP, a "Species Recovery Agreement," or "Species Conservation Contract," the property owner would be entitled to what the bill called "financial aid" in the amount of the "fair

101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* § 13(a).

market value" of the prohibited use.[106] To qualify for this financial aid, the property owner must establish that he or she decided not to engage in the land or resource use that would violate section 9(a), that the "foregone use would be lawful under State and local law," and that the property owner has the means to undertake the proposed use."[107] This section was modeled on, but would have significantly expanded, the just compensation requirements of the Fifth Amendment to the United States Constitution.

8. Consolidation of Agency Authority

Finally, H.R. 3824 would have consolidated all authority to administer the Endangered Species Act in the Secretary of the Interior. Specifically, it would have transferred all authority currently exercised by the Secretary of Commerce (acting through NMFS) over ocean fisheries, marine mammals, and anadromous fish to the Interior Department.[108] In addition, the legislation would have declared — for a period of five years — all actions taken in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") to be automatically in compliance with the Endangered Species Act.[109] A principal purpose of this amendment is to allow EPA registration of herbicides and pesticides to preclude review of specific uses of such registered chemicals by the Fish and Wildlife Service under section 7 or section 9 of ESA.

Evaluation

Despite its author's reputation, the Threatened and Endangered Species Recovery Act was a mixed bag. Some of the proposed amendments were constructive — perhaps even salutary — although their benefits would have been equivocal. More regularized peer review of scientific studies and judgments that form the basis of listing, habitat protection, and consultation decisions under the Act, for example, would likely enhance the decisionmaking process and lead to greater public acceptance of the Fish and Wildlife Service's resources management decisions. The accompanying elimination of "commercial data" from the scientific information the USFWS must consider in

106. *Id.* § 13(a), (d). The bill would award financial aid in the amount of "the fair market value of the foregone use of the affected portion of the private property, including business losses, is what a willing buyer would pay to a willing seller in an open market. Fair market value shall take into account the likelihood that the foregone use would be approved under State and local law." *Id.* § 13(d).

107. *Id.*

108. *Id.* § 21.

109. *Id.* § 20.

making its listing, recovery, and consultation decisions, however, could have significantly impaired the Service's ability to protect certain species. For example, the USFWS's decision to list the Delta Smelt as a threatened species was based on commercial trawling data, which indicated a dramatic and precipitous decline in the population of the species.[110]

Similarly, clarification of the Fish and Wildlife Service's authority to negotiate conservation and habitat protection agreements and codification of the principles that underlie the "no surprises" policy would be likely to encourage more property right holders to attempt to achieve an accommodation of their land development and resource use goals with the species protection mandates of the Act. Yet, the bill's requirement that the United States pay fair market value compensation to property owners whose rights are restricted through the section 9 regulatory process would have created a perverse incentive for these individuals *not* to sign a species recovery or species conservation agreement, because their rights to compensation may be greater under the mandatory compensation provisions of the legislation than under the negotiated agreement sections.

Other proposed changes may have been benign in practice, although one may distrust the motives of the legislation's sponsors. For example, the proposed amendment to the listing provisions of section 4 to include analysis of the economic effects of listing new species — without the concomitant directive to weigh these economic costs against the benefits of species protection — would be unlikely to change the existing administration of the statute. In fact, in the right hands, these economic analyses could inform the Service's subsequent evaluation of habitat protection, land acquisition, conservation agreements, and other factors that it will need to analyze in formulating recovery plans for the species.

Some aspects of H.R. 3824, however, would have seriously impaired our nation's species conservation efforts. The existing statutory requirement that the USFWS must designate critical habitat concurrently with its listing of new species, especially when enforced through a long backlog of judicial orders in citizen lawsuits, has diverted the Service from more pressing priorities and has produced critical habitat maps that are often unnecessarily controversial and vulnerable in court. But the bill's meat cleaver response to this problem — elimination of the whole concept of "critical habitat" in con-

110. Determination of Threatened Status for the Delta Smelt, 58 Fed. Reg. 12854 (Mar. 5, 1993). Identification of the recent (and to date unexplained) decline in Delta Smelt populations in California's Bay-Delta Estuary also was made on the basis of commercial trawling surveys complied by California Department of Water Resources. *See* U.S. FISH & WILDLIFE SERVICE, DELTA SMELT 5-YEAR REVIEW (Mar. 31, 2004), *available at* http://www.fws.gov/cno/es/5yr.html (last visited November 11, 2006).

sultation, recovery, and evaluation whether private activities may violate the "take" prohibition — would undermine the fundamental purpose of the Act.

Protection of habitat is essential to the preservation and propagation of most endangered and threatened species. Under H.R. 3824, although the Fish and Wildlife Service could consider the effects of proposed uses of land and natural resources on listed species and their habitat, it would have to do so on an *ad hoc* basis without the guidance of a general critical habitat designation that would alert the Service, the agencies with which it consults under section 7, and private landowners and resources users who are potential subjects of regulation under section 9 that they may be encroaching on habitat that is essential to the survival of the protected species. Moreover, because the proposed amendments to section 7 would have eliminated all references to critical habitat in the consultation process, the Service could find that a proposed federal action would violate the "no jeopardy" directive only if it concludes that the action would be likely directly to place the survival of the species in peril or would indirectly do so by altering habitat. The precautionary aspects of the existing law — which categorically protects against destruction or adverse modification of critical habitat whether or not the species itself would be put at risk of extinction — thus would be lost.[111]

Another deleterious aspect of H.R. 3824 was the five-year plan to allow EPA, rather than the USFWS, to have the sole power to regulate the use of pesticides and herbicides that might harm listed species or threaten their breeding and habitat. This proposal was based on the doctrine of "functional equivalence" that EPA's evaluation of chemicals within its jurisdiction is an adequate substitute for additional, and perhaps duplicative, analysis by the Fish and Wildlife Service. This rationale, however, is disingenuous in two respects. First, the legal standard that governs registration of herbicides and pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act is that the chemical will provide the benefits claimed by its proponents, and "when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment."[112] The concept of "reasonable" harm is antithetical

111. Indeed, elimination of all references to critical habitat in section 7(a)(2) would bring the consultation standard close to the definition of the take prohibition of section 9 affirmed by the Supreme Court in the *Sweet Home* case: Federal agency action would violate section 7(a)(2) only if it would be likely to jeopardize the continued existence of listed species by killing or otherwise directly harming the species or by altering the species' habitat in a way that "actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (1994).

112. Federal Insecticide, Fungicide, and Rodenticide Act § 3(c)(5), 7 U.S.C. § 136a(c)(5) (2006).

to the unconditional standard that currently applies during consultation between EPA and the USFWS — *viz.* that use of the registered chemical would not be likely to jeopardize the continued existence of and endangered or threatened species or adversely modify its critical habitat.[113] Although FIFRA authorizes the suspension and cancellation of registered herbicides and pesticides that present an "unreasonable hazard to the survival of a species" listed for protection under the Endangered Species Act,[114] this *post hoc* evaluation of risk is also based on a significantly less precautionary standard than applies now during consultation. Second, EPA registration evaluates the effects of chemicals regulated under FIFRA only on a sampling of indicator species.[115] This testing protocol is not an adequate substitute for on-site analysis of the potential effects of the application of the pesticide or herbicide on a specific species under local ground, atmospheric, and hydrologic conditions.

Finally, the private property compensation provisions of the bill were perhaps well-intentioned, but lacked appropriate subtlety. H.R. 3824 would have required the United States to pay property owners whose full land and resource use rights are limited by section 9 of the Act, unless the property owner and the FWS agree to an HCP or species conservation agreement. There are several problems with this compensation requirement.

As described above, by providing compensation (or, to use the language of the bill, "financial aid") to landowners whose property rights are restricted by section 9, the legislation would have created an incentive not to enter into the "Species Recovery Agreements" and "Species Conservation Contracts' that were the focus of the Private Property Conservation reforms. Moreover, the legislation would have provided compensation both for temporary and permanent restrictions on the use of the private property. While this is a legitimate policy choice for Congress to make, I believe that the existing Supreme Court takings decisions draw an appropriate distinction between, say, a reduction on water service to ensure the migration and spawning of a protected species of salmon that may occur only during times of drought and a permanent shortage caused by the long-

113. Endangered Species Act of 1973 § 7(a)(2), 16 U.S.C. § 1536(a)(2).

114. FIFRA § 6(b)-(c), 7 U.S.C. § 136(b)-(c); *see* FIFRA § 2(*l*), 7 U.S.C. § 136(*l*): "The term 'imminent hazard' means a situation which exists when the continued use of a pesticide during the time required for cancellation proceeding would be likely to result in unreasonable adverse effects on the environment or will involve unreasonable hazard to the survival of [an endangered or threatened species]."

115. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA'S PROGRAM TO PROTECT ENDANGERED SPECIES FROM PESTICIDES (Aug. 1999), *available at* http://www.epa.gov/espp/endspec.htm (last visited Nov. 11, 2006).

term reallocation of water from consumptive users to endangered species purposes.[116]

Moreover, the compensation provisions of the legislation stated that the "foregone use" must be lawful under state and local law. This qualification failed to account, however, for other *federal law* restrictions on the exercise of property rights that should limit the right to compensation because the use would be prohibited by some other federal statute (such as section 404 of the Clean Water Act)[117] or because the rights the property owner is asserting did not exist in the first place — for example, because the user's water service contract or timber sales contract expressly exempts the United States from liability under these circumstances.[118]

Finally, H.R. 3824 would have authorized the appropriation of funds to the Fish and Wildlife Service both for negotiated compensation agreements such as the species conservation contracts *and* to pay the "financial aid" that is mandatory under the legislation.[119] This means that all just compensation awards would come out of the Interior Department's budget, which may have the effect of deterring the FWS from exercising its authority to impose land use restrictions on recalcitrant landowners, even in situations where protection of habitat on the private property is essential to the species' conservation and recovery. If Congress chose not to appropriate sufficient funds for payment of compensation as required by the legislation, the Fish and Wildlife Service might find itself incapable of fulfilling its statutory obligations to protect listed species.

Conclusion

Although H.R. 3824 is now a dead letter, the House of Representatives' approval of the bill served the purpose of bringing our na-

116. *See Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (temporary moratorium on development of real property pending completion of a comprehensive land use plan is not a taking *per se*); *cf. Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001) (reduction in water supply for one water year caused by a combination of drought and the mandates of the Endangered Species Act is a taking *per se*).

Representative Jay Inslee offered an amendment in committee to require landowners seeking compensation to demonstrate that the application of section 9 to restrict the use of private property for the benefit of listed species would constitute a taking of property as defined by the Fifth Amendment. The amendment failed on a roll call vote of 10 to 27. H.R. Rep. No. 109-237 (2005).

117. 33 U.S.C. § 1344.

118. *See, e.g.*, *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995) (shortage provision in federal reclamation contract exempts United States from liability for reduction in water service caused by drought and Endangered Species Act requirements).

119. H.R. 3824 § 18.

tional endangered species policy back to the public's attention. The decision whether to protect particular endangered species — or to continue the monumental task of trying to preserve *all* endangered and threatened species against the threats posed by modern economics and growing populations — is fundamentally a policy choice; and that policy (i.e., political choice) should be made anew by each generation.

It has been more than a generation since the Endangered Species Act was enacted, and our national circumstances and values have changed dramatically over the intervening three decades. We did not have an adequate political debate in 1973 on the essential questions posed by the statute:

- Why do we care about species protection?
- Do we literally want to preserves *all* endangered species of vertebrates, invertebrates, and plants?
- Do we want to do so regardless of cost and inconvenience?
- And who should bear the burden of those unavoidable costs? The taxpayers generally? Or only those who are privileged to own land, timber, water rights, and other valuable natural resources, but who are unlucky that their lands and resources also happen to be the last remaining habitat for these species of concern?

The House of Representative conducted only a cursory analysis of these difficult and important policy questions — devoting only one day to committee hearings[120] and less than one and one-half hours to the floor debate[121] — and the Senate took no action on the legislation during the fifteen months H.R. 3824 resided with the Committee on Environment and Public Works.[122] The criticisms of the current Endangered Species Act are unlikely to be diminished or muted by the passage of time, however, and we may expect the 110th Congress to consider the challenges and controversies of endangered species regulation.

True reform legislation must preserve those features of existing law that are essential to the survival of threatened and endangered species. These include the listing of species based on population

120. 151 Cong. Rec. D945 (Sept. 21, 2005).

121. 151 Cong. Rec. H8535-84 (Sept. 29, 2005).

122. *See* 151 Cong. Rec. S10796 (Sept. 30, 2005) (H.R. 3824 referred to Senate after passage by the House of Representatives).

data, habitat loss, and science, rather than a more free-ranging calculus that would embrace economic costs, private property interests, and other factors that would allow the two Services to balance the survival of species with human convenience or expediency. A revised Endangered Species Act also must preserve the concept of critical habitat, while integrating both the definition and administration of that habitat more fully into recovery, consultation, and habitat conservation planning. Most importantly, a viable and constructive Endangered Species Reform Act must reiterate the overarching directive of the current law that *all* actions taken under the Act must be consistent with the preservation and recovery of the protected species.

The past 34 years have demonstrated that the existing statute is not perfect, however, and the new Congress would be well-advised to address the more controversial aspects of endangered species management. Peer review of listing decisions, critical habitat designation, recovery plans, biological opinions, and HCPs would help to enhance both the policy determinations and the public's confidence in those decisions. The exigencies of species protection often may require that this peer review occur *post hoc*, however, and later be incorporated into the implementation and revision of the initial decisions. The experience of the Clinton Administration and both Bush Administrations also indicates that greater flexibility in the designation of critical habitat is desirable. Congress might choose to amend the statute, for example, to allow the Services to designate critical habitat after listing based on a finding that delayed designation would improve the Service's overall administration of the Act and would not jeopardize the continued existence of the species in question or result in the loss or adverse modification of habitat that the Service believes may be critical for the survival and recovery of the species.

Indeed, the intersection between the species preservation directives of the statute and private property designated as critical habitat for the species is the fulcrum of the contemporary controversies over the Endangered Species Act. Reform legislation therefore also must direct the Services, in implementing both the consultation requirements of section 7 and the take prohibitions of section 9, to analyze the effects of their proposed species protection decisions on private property (including the use of land, water, and other resources over which the United States has jurisdiction) and where appropriate to enter into agreements with the affected property owners that minimize or mitigate the necessary limitations on the private property rights. The Clinton Administration's HCP and "no surprises" policies should serve as a model for this component of the legislation, rather than the overly broad compensation directives of H.R. 3824, with their counterproductive incentives for property owners to claim "fi-

nancial aid" rather than attempt in good faith to negotiate a habitat conservation plan.

Finally, consolidation of endangered species jurisdiction in the U.S. Fish and Wildlife Service is probably a good idea. As long as the experience and expertise of the National Marine Fisheries Service with ocean and anadromous fish is preserved by transferring key personnel from NMFS to USFWS, the advantages of unified and integrated endangered species regulation in a single entity would far outweigh the transitional costs. The coordinated management of the Central Valley Project and the State Water Project under the umbrella of joint consultation with NMFS and USFWS to protect the salmonid and freshwater fisheries of the Bay-Delta Ecosystem is an excellent example of integrated, interagency species protection.

If the Democratic leaders of the 110th Congress decide to place endangered species reform on their legislative agenda, perhaps the Endangered Species Act of 1973 and the Threatened and Endangered Species Recovery Act of 2005 will serve as bookends to the public debate over our future endangered species policy.

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