Penn State Environmental Law Review

Volume 3 | Number 2 Article 1

5-1-1994

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Nancy K. Kubasek & M. N. Browne, *The Endangered Species Act: An Evaluation of Alternative Approaches*, 3 *Penn St. Envtl. L. Rev.* (1994).

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THE ENDANGERED SPECIES ACT: AN EVALUATION OF ALTERNATIVE APPROACHES

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Every single day, at least one species disappears from the earth.[1] By the end of the century, that rate of extinction is expected to increase to 100 species per day.[2] When the Endangered Species Act of 1973 (ESA) was passed, the Act was supposed to help prevent such a devastating situation from developing.[3] The Endangered Species Act, allegedly the "strongest legislation ever devised for the protection of nonhuman species,"[4] was supposed to ensure that political and economic factors would not stand in the way of saving species.[5] According to the United States Supreme Court, the Act reflected "a conscious decision by Congress to give endangered species priority over 'primary missions' of federal agencies" and prevent the destruction of such species "whatever the cost".[6]

Yet, despite the best efforts of a bipartisan Congress to draft legislation to preserve our diversity of species, as the foregoing figures reveal, we are losing species at a more rapid rate than ever. And even as loss of diversity is becoming a greater problem, support for preserving endangered species may be waning. As Congress is preparing to reauthorize this Act in 1994, we need to examine why the ESA failed to live up to the hopes of its most ardent supporters, and how the Act has been evaluated by both its supporters and detractors. We can then examine the proposals for reauthorization in an attempt to ascertain what impact passage of the various proposed amendments might have.

The article will begin with a brief overview of the ESA. Section II will then examine some of the problems that have arisen under the Act. Section III explores some of the bills most likely to become the basis for the reauthorization of the ESA, focusing on how different bills attempt to respond to different perceptions of the primary flaws of the Act. Finally, Section IV attempts to provide some insight into what we can expect from the upcoming reauthorization debate.

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1. James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVT. L. REV. 311 (1990).

2. Norman Myers, THE SINKING ARK: A NEW LOOK AT THE PROBLEM OF DISAPPEARING SPECIES, 5 (1979).

3. In its Reducing Risk Study, the Environmental Protection Agency Science Advisory Board identified species extinction and habitat destruction, along with ozone depletion and global climate change, as the gravest problems facing the United States. Many scientists feel that loss of diversity will deprive humans of medicine, food, a comfortable climate, and aesthetic benefits. For current Developments see *General Policy: Scientist Urges Biodiversity Protection; Administration Opposes New Impact Analysis*, 22 ENV'T. L. REP. 844 (1991).

4. Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY. L. Q. 265 (1991).

5. *Id.*

6. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184-85 (1978).

I. Overview of the Endangered Species Act

The basic approach of the Endangered Species Act is to identify those species that are endangered[7] or threatened,[8] and once identified, to protect them and their habitat until they are no longer in danger of extinction. Special attention therefore needs to be given to those provisions of the Act that establish procedures for identifying a species as threatened or endangered as well as those sections delineating the protection to which such species are entitled.

A. *Listing of Endangered and Threatened Species and Designation of Critical Habitat*

Primary responsibility for the listing of endangered and threatened terrestrial species was given under the ESA to the Secretary of the Interior,[9] who delegated this responsibility to the Fish and Wildlife Service (FWS). Similar authority for the listing of marine species was given to the Secretary of Commerce,[10] who delegated that authority to the National Marine Fisheries Service (NMSF).[11]

Listing of a species[12] may be initiated by the agency responsible for listing or by a private party. A private party initiates a listing by filing a petition with the appropriate agency.[13] The agency then has ninety days to determine whether the petition "presents substantial scientific or commercial information" indicating that the petitioned action *may* be warranted.[14] Within twelve months of such a finding, the agency then has one year to determine whether (1) the petitioned action is not warranted;[15] (2) the petitioned action is warranted;[16] or (3) the petitioned action is warranted but is precluded by higher priority listings.[17] This determination will be published in the *Federal Register*. If there is a determination that listing is warranted, the

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7. A species is endangered when there is a finding that it is "in danger of extinction throughout all or a significant part of its range." 16 U.S.C. § 1532 (6) (1988).

8. A species is threatened when it is likely to become endangered in the foreseeable future. *Id.* at § 1532 (20).

9. 16 U.S.C. § 1532(15) (1988).

10. *Id.*

11. Because of the delegation of authority to the FWS and NMFS, the text of this article will interchangeably refer to duties of the Secretary and the FWS and NMFS.

12. The term "species" also includes subspecies, and, in the case of vertebrates, "distinct populations". 16 U.S.C. § 1532(16)(1988). Foreign species may also be listed.

13. *Id.* at § 1533.

14. *Id.* at § 1533(b)(3)(A).

15. *Id.* at § 1533(b)(3)(B)(i).

16. *Id.* at § 1533(b)(3)(B)(ii)(1988)

17. 16 U.S.C. at § 1533(b)(3)(B)(iii).

agency will "promptly"[18] publish notice[19] in the *Federal Register* and promulgate a rule listing the species as either endangered or threatened, following modified informal rule-making procedures.[20]

Final action must be taken within a year from publication of the proposed rule.[21] Final action consists of one of the following: publication of the final rule;[22] a one-time only request for a six-month extension,[23] or a notice that the proposed rule is being withdrawn.[24] When a final rule is published, it must be accompanied by a discussion of the data on which the rule is based and the relationship of the data to the rule.[25]

The agency's decision as to whether to promulgate a final rule listing a species as endangered or threatened must be based on a finding that at least one of the following statutory criteria has been met. The species in question has become endangered or threatened because of (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence.[26]

Simultaneously with promulgating the final rule listing a species, unless it is impossible or imprudent to do so, the agency must also list a critical habitat for the species.[27] The purpose of the habitat listing is to protect the ecosystems on which the endangered and threatened species depend.[28] Designation of land as critical habitat is to be based upon the "best scientific data available,"[29] but must also take into account consideration of economic and other relevant factors.[30] However, if designation of a specific area as critical habitat is necessary to prevent

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18. *Id.* at § 1533(b)(3)(B)(ii).

19. The notice must include the full text of the proposed regulation. *Id.*

20. Following publication there will be a 60 day waiting period for public comment, which may be extended "for good cause." 50 C.F.R. § 424.16(c)(2) (1990). A public hearing on the matter must be held if one is requested within 45 days of the publication of the proposed rule. 50 C.F.R. § 424.17.

21. 16 U.S.C. § 1533(b)(6)(A) (1988).

22. *Id.* at § 1533(b)(6)(A)(i)(I).

23. *Id.* at § 1533(b)(6)(A)(i)(III).

24. *Id.* at § 1533(b)(6)(A)(i)(IV)(1988).

25. *Id.* at § (b)(8).

26. 16 U.S.C. § 1533(a)(1).

27. *Id.* at § 1533(b)(6)(C).

28. In determining whether an area constitutes critical habitat, the agency would examine the area for uses critical to the species' survival. Therefore, areas that provide food, water, shelter, and breeding grounds would be considered critical habitat. 50 C.F.R. § 424.12(e) (1990). Such habitat must be located within the United States. 50 C.F.R. § 424.12(h).

29. 16 U.S.C. § 1533(b)(2) (1988).

30. *Id.*

extinction of the species, then the designation will be made despite the existence of factors that would otherwise preclude the designation.[31]

B. Development of Recovery Plans

The ESA would be deemed a success if most animals listed as endangered or threatened were ultimately removed from the list because their numbers had multiplied to the point where they no longer needed protection. Such a recovery, under the Act, is to be accomplished by the development and implementation of a recovery plan for the conservation and survival of each listed species currently existing in the United States.[32] These plans are technical, scientific documents, prepared by biologists from both public agencies and the private sector, that specify the precise steps necessary for recovery of the species.[33] A "recovery team," again comprised of individuals from the state and local governments as well as the private sector, would be responsible for implementing the plan.[34] The Secretary of the Interior is directed under the Act to give priority to the development of plans for those species that could benefit the most from such plans.[35] As of 1992, there were 276 approved recovery plans in place, covering 363 species.[36]

C. Imposition of the Consultation Requirement

One of the most powerful sections of the ESA is Section 7,[37] which requires federal agencies to "conserve" listed species[38] and consult with the appropriate agency to avoid taking any action that would be likely to "jeopardize" any endangered species or adversely modify the habitat of any endangered species.[39] The term action is broadly defined to include almost any undertaking, including entering into contracts; easements, licenses, rights-of-way, permits or grants-in-aid; and the promulgating of regulations.[40]

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31. *Id.*

32. *Id.* at § 1533(f)(1).

33. Such a plan would include: a description of site specific management actions; objective measurable criteria which, when met, would mean that the species could be removed from the list; and estimates of the time and cost necessary to attain the goals of the plan. *Id.* at § 1533(f)(2).

34. 16 U.S.C. § 1533(f)(2) (1988).

35. *Id.* at § 1533(f)(1).

36. Telephone interview with Dave Harrelson, Division of Endangered Species, Fish and Wildlife Division, Arlington, Virginia (Feb. 20, 1994).

37. 16 U.S.C. § 1536 (1988).

38. *Id.* at § 1536(a)(1).

39. *Id.* at § 1536(a)(2).

40. 50 C.F.R. § 402.2 (1990).

1. The Consultation Process

The consultation process begins with an agency's determination of the area that will be affected by the action it is about to undertake.[41] To determine what species will be affected and whether or not the effects are likely to "jeopardize" the species or adversely affect its habitat, three mechanisms are used:[42] a biological assessment; informal consultation; and formal consultation.

If an agency action involves a "major construction activity"[43] or if listed species or critical habitat are present in the affected area, a biological assessment must be prepared.[44] A biological assessment contains a list of species in the action area, a review of biological or botanical materials related to the affected species, the results of a field inspection, and statements of experts in the field.[45]

If it appears from the biological assessment that no endangered or threatened species will be adversely affected, then the consulting process is completed at this stage.[46] Likewise, if no biological assessment were required, there would simply be an informal consultation with the appropriate agency, and, after a determination that no listed species or critical habitat would be affected, the consultation obligation would be fulfilled.[47]

However, if the biological assessment reveals that a listed species or critical habitat may be adversely affected, formal consultation with the appropriate agency, NMFS or the FWS, is required.[48] The purpose of the formal consultation is the preparation of the biological opinion, a final assessment of whether the proposed action is "likely to jeopardize"[49] the

41. The acting agency initially makes the determination of the affected area. Upon subsequent consultation with the appropriate agency acting on behalf of the Secretary, either the FWS or the NMFS, the affected area may be revised.

42. A voluntary early consultation may precede these steps if a private party makes such a request prior to filing for an agency permit or license, providing that they give the agency sufficient data to perform the early consultation. 50 C.F.R. §§ 402.11(e),(f). The result of an early consultation is the preparation of a preliminary biological opinion on that potentially affected species, the impact of the proposed action on the species, and how any jeopardy to such species might be avoided by changes in the proposed action.

43. A "major construction activity" is defined as a construction project (or other physical undertaking having similar physical impacts) which is a major Federal activity significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act, 42 U.S.C. 4332 (2)(c)(1985). 50 C.F.R. § 402.02 (1990).

44. 16 U.S.C. § 1536 (c)(1) (1988).

45. 50 C.F.R. § 402.12 (1990).

46. *Id.* at § 402.13.

47. *Id.* at § 402.12 (d)(1).

48. *Id.* at § 402.14 (c).

49. This term is defined to mean engaging in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. *Id.* at § 402.02.

continued existence of species that are listed or proposed for listing or to result in "destruction or adverse modification of"[50] designated or proposed critical habitat.

The final biological opinion is prepared by the consulting agency only after discussing the potential effects with the acting agency and any private parties involved in initiating the agency action.[51] The consulting agency must draw one of three possible conclusions in its final biological opinion. It may find that there will be no adverse consequences for either the species or the critical habitat and will therefore issue a "no jeopardy" opinion.[52] The remaining two options arise when the agency finds that the action as proposed will jeopardize listed species or adversely affect critical habitat. At that point, the consulting agency must determine whether there are any "reasonable and prudent alternatives[53] to the proposed action, which must then be discussed with the acting agency and private party.[54] If such alternatives exist, the consulting agency will issue a "jeopardy opinion with reasonable and prudent alternatives."[55] If none exist, the agency issues a "jeopardy opinion without reasonable and prudent alternatives."[56]

While the biological opinion is finally delivered by the consulting agency, it is the action agency that must decide whether their proposed action is going to jeopardize a species.[57] The action agency may still act, but its decision to act must be based on credible scientific evidence, and if it chooses to not follow the suggestions of the biological opinion, it must be sure to take "alternative, reasonably adequate steps to ensure that continued existence" of listed species.[58]

2. *The Exemption Procedure*

If an action agency finds, after consultation, that its proposed action would jeopardize an endangered species, the agency will not undertake the action. If there are no reasonable and prudent alternatives, a permit or license applicant, the agency prohibited from acting, or the governor of the state in which the prohibited action would have taken place, may seek an exemption.[59]

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50. This term is defined as "a direct or indirect alteration that appreciably diminishes the value of the critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be crucial. 50 C.F.R. § 402.02 (1990).

51. *Id.* at § 402.14 (g)(5).

52. *Id.*

53. An alternative is reasonable and prudent when it is "consistent with the intended purpose of the action, within the scope of the action agency's legal authority, and jurisdiction, and economically and technologically feasible." *Id.* at § 402.02.

54. *Id.* at § 402.14 (g)(5).

55. 50 C.F.R. § 402.02 (1990).

56. *Id.*

57. 50 C.F.R. §§ 402.01 (b), 402.12 (1990).

58. Tribal Village Akutan V. Hodel, 859 F.2d 651, 660 (9th Cir. 1988).

59. 16 U.S.C. § 1536 (g)(1) (1988).

Seeking an exemption entails a public hearing before an administrative law judge who will certify the transcript and records to the Secretary of the Interior. The Secretary will then submit a report and the records to the Endangered Species Committee, which is composed of the Secretaries of Agriculture, Interior, and the Army; the Chair of the Council of Economic Advisors; the Administrators of the EPA and the National Oceanic and Atmospheric Administration; and a seventh member who is a resident of the affected state and is chosen by the President.[60]

The Committee must make a decision within thirty days of receipt of the Secretary's report. To grant the exemption, at least five of the seven members must find:

> (1) no reasonable and prudent alternatives exist; (2) the agencies benefits clearly outweigh the benefits of any alternatives which will conserve the species, and the action is in the public interest; (3) the action is of regional or national significance; and (4) no irreversible commitment of resources has been made.[61]

The order granting the exemption must establish reasonable mitigation and enhancement measures necessary to minimize risks of extinction.[62] Upon receipt of the order, the agency has an exemption from the Act, and the action may take place.[63]

D. The Taking Prohibition

A final key provision of the ESA is as the Section 9 prohibition against the "taking" of an endangered species.[64] To take is defined by the Act as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect."[65] To harass is further defined to include "an intentional or negligent act or omission that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns."[66] Harm includes "significant habitat modification where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering."[67]

A civil injunction is the primary remedy used when there is a taking or attempted taking.[68]

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60. *Id.* at § 1536 (e)(3).

61. *Id.* at § 1536 (h)(1)(A).

62. 50 C.F.R. § 453.03 (a)(2).

63. The exemption is permanent unless the Secretary discovers, based on the best scientific and commercial evidence available, that such exemption would result in the extinction of another species that was not the subject of a consultation or identified in the biological assessment. 16 U.S.C. § 1536(h)(2)(B)(i) (1988).

64. *Id.* at § 1536.

65. *Id.* at § 1532 (19).

66. 50 C.F.R. § 17.3.

67. *Id.*

68. 16 U.S.C. § 1540 (g)(1)(A) (1988).

Civil[69] and criminal penalties may also be imposed.[70] Actions to enjoin a taking under Section 9 may be brought against an individual, a corporation, or a public official.[71] Private actions to enforce this provision may be brought by a citizen after giving a sixty day notice to the Secretary and the violator.[72]

II. Criticisms of the Endangered Species Act

The ESA has been subject to a significant amount of criticism. Depending on which criticisms one sees as most significant, one's approach to reauthorization of the Act will differ because different bills attack different perceived problems of the Act. The various criticisms of the Act, may be categorized into three broad groups: (1) criticisms of the overall design of the Act; (2) criticisms of the Act's impact on private property rights, and (3) criticisms of the enforcement of the Act.

A. Criticisms of the Overall Approach of the ESA

If we go back and examine the purpose of the ESA, Congress declared an intent "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, to provide a program for the conservation of such endangered and threatened species, and to take such steps as may be appropriate to achieve the purposes of [international] treaties and conventions [to which the United States has pledged itself as a sovereign state.]."[73] Thus it appears that Congress intended to protect *ecosystems*, as a means for protecting threatened and endangered species. The provisions for habitat protection[74] further reinforce this interpretation of congressional intent. Many believe that it therefore was, and should have been, Congress' intent to preserve, maintain, and promulgate all species, regardless of the cost.[75] From many peoples' perspective, while the language of the Act focused on protecting individual species, the overall objective was really preservation of biodiversity.

One of the keys to preserving biological diversity under the Act should be the recovery plans. However, by February 20, 1994, recovery plans had been approved for only sixty-nine percent of the listed species for which the Fish and Wildlife Division is responsible.[76] Almost

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69. *Id.* at § 1540 (a) (1988).

70. *Id.* at § 1540 (b) (1988).

71. *Id.* at § 1540.

72. *Id.* at § 1540 (g)(1).

73. 16 U.S.C. § 1531 (b).

74. *Id.* at § 1533 (b)6(C).

75. Personal Interview with Dr. William Bretz, Director of the San Joaquin Freshwater Marsh, University of California, Irvine, in Irvine, California (April 17, 1991), cited in Christopher Cole, *Species Conservation in The United States: The Ultimate Failure of the Endangered Species Act and Other Land Use Laws*, 72 B.U.L. REV. 343 (1992).

76. Harrelson, *supra* note 36. Of the 834 specied for which FWS is responsible, plans have not be drafted for 260 species.

thirty percent of the species had been listed for over three years without an approved plan.[77] In 1988, the GAO reported that one Fish and Wildlife Region that had an annual budget of one million dollars stated that it needed ten million dollars over the next five years to implement its existing recovery plans.[78] Thus, it appears that the recovery plans are not being drafted in a timely manner, and even when drafted, there is often not sufficient funding for their implementation, and so these plans are not doing an adequate job in protecting biodiversity.

Many argue that preservation of biodiversity requires an overall plan to protect entire ecosystems,[79] and not a focus on individual species. When the focus is on individual species, too often it is the high profile birds and mammals that appeal to people who get protected,[80] and not the species that are most important from the perspective of the species' contribution to biodiversity.[81] From the perspective of those concerned with preserving biodiversity, the Act's habitat protection provisions do not protect sufficient areas to sustain recovered populations.[82]

The piecemeal and reactive nature of the Act makes it difficult to preserve entire ecosystems.[83] The Act only functions when a species is on the brink of disaster. Thus it intervenes only at a time when intervention is costly and success not highly likely,[84] requiring drastic, expensive measures, whereas preventative measures would have been less costly.[85]

To attempt to demonstrate how a different, planning oriented approach toward the protection of biodiversity should be adopted, one commentator[86] drew an analogy between the ESA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[87] Both are remedial responses to disasters.[88] Congress recognized that it would

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77. *Id.*

78. U.S. General Accounting Office, Endangered Species: Management Improvements Could Enhance Recovery Program 19 (1988) at 27.

79. J.M. Scott, et. al., *Species Richness: A Geographic Approach to Protecting Future Biological Diversity*, 37 Bioscience, Dec., 1987, at 782.

80. The majority of species currently protected under the Act are birds and mammals, more likely to elicit concern than plants, fish, amphibians and reptiles. *See, e.g.*, George C. Coggins and Anne F. Harris, *The Greening of American Law? Recent Evolution of Federal Law for Protecting Floral Diversity*, 27 NAT. RESOURCES J. 247 (1987)

81. For a thorough discussion of why the ESA fails to preserve biodiversity, *see* David J. Rohlf, *Six Biological Reasons Why The Endangered Species Act Doesn't Work and What to do About It*, CONSERVTION BIOLOGY, Sept. 1991, at 273.

82. *Id.* at 277-78.

83. *See* Julie B. Block, *Preserving Biological Diversity in the United States: The Case for Moving to an Ecosystems Approach*, 10 PACE ENVT. L. REV. 175 (1992).

84. *Id.*

85. *Id.*

86. The commentator was David E. Blockstein. See David E. Blockstein, *Toward a Federal Plan for Biological Diversity*, Issues in SCI. & TECH (Summer, 1984) at 63, 64, for further discussion of his analogy.

87. 42 U.S.C. § 1901-75 (1988).

88. Blockstein. *supra* note 83.

be cheaper to prevent the problems CERCLA was designed to correct, so they passed the Resource Conservation and Recovery Act[89] (RCRA) to control the production and disposal of hazardous waste. Likewise, we should learn from our experience with the ESA and pass legislation to protect species before they get to the brink of extinction.[90]

Most problematic to many of these critics, however, is that the ESA does nothing to protect species that are not yet endangered or threatened. It allows their number to diminish until imminent extinction causes them to be placed on the endangered species list.[91] The ESA, thus, fails to provide a cohesive net for species protection.[92] Currently, there are 600 species that the FWS and NMFS say deserve to be listed.[93] Over 3,000 petitions to list are pending.[94]

B. Criticisms of the ESA From a Property Right's Perspective

Developers are especially critical of Section 7 of the Act because of its potential to halt or significantly modify a project. They argue that the Act is abused as it is used as a "no growth" Act to stop developments.[95] Many argue that the Act puts species protection ahead of all other human, social, and economic concerns.[96] They point out that it is not only the large developers who sometimes get hurt, but also individuals who find out that they cannot develop their land the way they had planned.[97] Finally, they argue that its provisions are stringent and inflexible.[98]

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89. 42 U.S.C. § 6901-92(k).

90. Blockstein. *supra* note 83.

91. Christopher Cole, *Species Conservation in The United States: The Ultimate Failure of the Endangered Species Act and Other Land Use Laws*, 72 B.U.L.REV. 343 (1992).

92. *Id.*

93. United States General Accounting Office, Endangered Species Act, Types and Numbers of Implementing Action, GAO/RCtD-92-131BR 9, 2 (May 1992).

94. *Id.*

95. David Bond, *Groups at Loggerheads Over Forestry, Animals*, Coeur d'Alene Press, Nov. 11, 1992 at 1.

96. *See* Bruce Fein, *Theses for Endangered Species*, Legal Times, Dec. 9, 1991, at 24.

97. There have been reports of individual property owners killing endangered species habitats before officials discover their presence to keep from being restricted in their use of their land. Some farmers in California have stopped rotating the plantings in their fields to ensure that an endangered rodent does not take up residence in their fields.

A Florida developer who discovered that one of the types of birds that resided on his land was being considered for listing as an endangered species. After calculating what that listing would cost him, he organized a hunt to kill all such birds on his land prior to their listing. A number of Californians shaved their lands of coastal sage, the habitat for the California Gnatcatcher when they heard that the species might be listed. Maura Dolan, *Nature at Risk in a Quiet War*, L.A. Times, Dec. 20, 1992, at C4.

98. *See, e.g., Both Houses Rush to Move Spending Bills: Debate Centers on Salvage Sales, Grazing Hike, Mining Patent Ban*, Land Letter, Aug. 1, 1992, at 1 (statement of Rep. Don Young of Alaska, that "[i]f we do not change it [the ESA] to consider the human factor, we will have a revolution in this country").

C. Criticisms of the Act's Implementation

For many, the major problems arising from the Act stem not so much from any inherent flaws in the structure of the legislation, but rather they flow from problems of enforcement and funding.[99] Bruce Babbitt, himself, said that many government agencies, including his own Department of the Interior, have deliberately flouted the law.[100] The FWS receives less than $10 million annually to recover threatened and endangered species; an estimated $4.6 billion is needed to achieve that goal.[101] With such a hugh disparity, it is no wonder that the Act's goals have not been attained.

Between 1973 and 1993, an average of only twenty six species per year were listed.[102] In 1992, the GAO reported that 105 species had been on the "warranted but precluded" list for over two years.[103] These statistics indicate that there is a problem with implementation of the Act, a problem that could be attributed to a lack of funding and personnel.

III. Proposals for Reauthorization

Given the extensive and varied criticisms of the ESA, it is no wonder that by the end of 1993, several proposals for reauthorization had been introduced.[104] This article will examine some of the most recently introduced proposals as these are the most likely candidates to form the basis for the ultimate reauthorization of the Act.

A. The Smith Bill: H.R. 1992

From the perspective of those who criticized the ESA from a property rights perspective, the Smith Bill[105] was one of the best proposals of 1993.[106] The proposal primarily focuses on the listing process, attempting to ensure that listings are based on actual threats and, for the first time, and in direct contravention of the policy of the existing ESA, introducing economic and social factors into the listing process.

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99. David P. Berschauer, *Is The Endangered Species Act Endangered*?, 21 Sw.U.L.Rev. 991 (1992).

100. Current Developments, General Policy: Babbitt Calls ESA Biggest Priority, 23 E.R. 2686 (February 12, 1993). He stated that many government agencies "have deliberately flouted the law."

101. Oliver O. Houch, *The Endangered Species Act and its Implementation by the U.S. Depts. of Interior and Commerce*, 64 Col. L.Rev. 227 (1993).

102. *Id.*

103. *Id.*

104. Some of these proposals include: H.R. 1414, 103rd Cong., 1st Sess. (1993); H.R. 1490, 103rd Cong., 1st Sess. (1993); S. 921, 103rd Cong. (1993); H.R. 2043, 103rd Cong. (1993).

105. H.R. 1992, 103rd Cong., 2nd Sess. (1993).

106. Representative Smith was joined in introducing this bill by Mrs. Vucanovich, Mr. Young, Mr. Skeen, Mr. Doolittle, Mr. Herger, Mr. Roberts, Mr. Taylor, Mr. Packard, Mr. Boehner, and Mr. Hansen. Other proposals supportive of private property rights include H.R. 1414 and H.R. 1490.

H.R. 1992 would add the following section to the listing provisions:

> . . .
>
> (B) That the listing of the species is in the public interest after considering the following factors:
>
> (i) The technical practicability of recovering the species.
> (ii) The biological significance of the species.
> (iii) The quality of data available for each species.
> (iv) The direct and indirect costs to public and private sectors, including public service and employment, which may be imposed by the application of the protections of this Act to such species.
> (v) The impacts on the use and value of non-federal property which may result from application of the protections of this Act to such species.
> (vi) The impacts on the environment and other species which may result from the application of the protection of this Act to such species.
> (vii) The scientific and other benefits which may result from the application of the protection of this Act to such species.[107]

The amendment additionally adds a new step to the listing process: blind peer review.[108] Under this provision, prior to making a listing decision, the Secretary would submit all information and analyses of the species and habitat to a panel of experts who were not in receipt of any grants nor employed by the department of the Secretary, for the panelists' review.[109] The Secretary would consider their review in making his decision, and would include a response to such a review in the preamble to the final rule he promulgated.[110]

While advocates of the Smith Bill would argue that incorporating social and economic factors into the listing process merely bring a necessary "balance" to the Act, any such dramatic change that so drastically contravenes the intent of the original Act to *not* consider such factors is likely to raise strong opposition from environmentalists.

The proposal for blind review may be seen by many as merely exacerbating two pre-existing problems with the listing process — time and cost. This review may be seen as an expensive and time consuming additional step that really does not significantly improve the decision making process.

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107. *Supra* note 105, at § 2 (B)(i)-(viii).

108. *Id.* at § 3. Section 4(b) of the Endangered Species Act of 1973 (16 U.S.C. 153 3(b)) is amended by adding at the end thereof the following paragraph: (9) Prior to making any determination pursuant to subsection (a)(1), the secretary shall submit for peer review all information on and analyses of the species or habitat upon which such determination will be made to a panel of experts who are not employed by, under contract to, or recipients of grants from the department of the Secretary. The panel shall be selected by the Inspector General of the Department of the Secretary without the advise or consent of the Secretary or any official of any agency advising the Secretary on the determination. The Secretary shall consider the report of the panel prior to making a determination, shall make the report available to the public, and shall provide a response to the report on the preamble to the final rule setting forth the determination.

109. *Id.*

110. *Id.*

Another controversial provision of H.R. 1992 would change the emergency listing process of Section 4(b)(7),[111] changing the time when emergency listing could be sought for whenever there was "a significant risk to the well-being" of the species to "an immediate threat of extinction."[112] This provision would obviously lessen the number of emergency listings sought. The Pacific Pocket Mouse is an example of a recently listed species that clearly qualifies for emergency listing under a "significant risk" standard, but might not qualify under an "immediate threat" standard. The Pacific Pocket Mouse had not been observed for more than twenty years when it was rediscovered in 1993 on the Dana Point Headlands in Orange County, California. Because the population is threatened by development and predation by feral and domestic cats, an emergency listing was obtained for this species on February 3, 1994.

Sections 7 and 8 of the Smith Bill would again further the interests of those who want the most extensive freedom to use their private property. These sections would also be likely to reduce the amount of litigation under the ESA. Section 7[113] would restrict the definition of the "taking"[114] to include the terms "harass"[115] and "harm" only when the species in question was one subject to a recovery plan under Section 4(f). Given the slowness with which recovery plans have been developed, this provision could have a significant impact on the Act's enforcement.

Finally, the Smith proposal would grant new rights to property holders adversely affected by the listing of a species. A new section would be added to the act, providing compensation to any person whose private property has been diminished in value as a result of an action under

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111. 16 U.S.C. § 1533 (b)(7) provides that in the case of "an emergency posing a significant risk to the well-being of any species . . ." It further states:

> Such regulation shall, at the discretion of the Secretary, take effect immediately upon publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240 day period following the date of publication, unless, during such 240 day period, the rulemaking procedures which would apply to such regulations without regard to this paragraph are complied with . . .

112. *Supra*, note 105 at § 6.

113. *Id.*, at § 7, which provides, Sec. 9(a) of the Endangered Species Act of 1973 (16 U.S.C. 1538(a)) is amended by inserting at the end there of a new paragraph (3) as follows:

> (3) For purposes of paragraph (1)(B) of this subsection and any regulation applying such a paragraph to a threatened species pursuant to section 4(d) of this Act, the terms "harm" and "harass" in the definition of "take" in sections 3(19) of this Act shall apply only to such species which are subject to a recovery plan issued under section 4(f) of this Act.

114. *Id.*

115. *Id.*

the ESA.[116] Within sixty days of taking any action that diminishes the value of someone's property, the Secretary would be required to offer that party compensation. The party could reject the offer and sue in the Court of Claims for a determination of the value of the affected property. A successful litigant could receive the market value of the property affected as well as reasonable attorney fees.[117] The provision may gain high levels of support from developers and large landowners, many of whom may fear that at any moment their property may be taken from them. The provision may also have some support from environmentalists who feel that species must be protected, but it is the duty of all of us to pay for such protection, not just those who had the misfortune of purchasing land on which endangered species were found. The primary problem with this provision, however, may be that it will be perceived as being too broad. *Any* diminishment of value may be cause to seek compensation. To garner more support, a higher threshold of loss would seem to be necessary. One acceptable standard might be to say that compensation would be provided if, as a result of implementation of the Act, there were no longer any economically beneficial use to which the land could be put.

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116. *Supra* note 105, at § 9, which provides for a new Sec. 19, Compensation for Diminution Value of Private Property Rights that would read as follows:

(a) IN GENERAL — The head of any Federal agency who takes an action under this Act, or regulations issued pursuant to this Act, shall compensate the owner of private property for any diminution in value caused by the action. Action may cause the diminution in value of private property--
  (1) even though the action results in less than a complete deprivation of all use or valued or of all separate distinct interests in the same private property; and
  (2) even if the action is temporary in nature.

(b) DUTY OF FEDERAL AGENCY HEADS.—The head of each Federal agency shall, at the time of issuing regulations or undertaking any activity under this Act, determine whether such regulations or activity results in the diminution in value of private property such that such diminution is compensable under this section.

(c) COMPENSATION.—
  (1) Within 60 days after the date of issuance of any such regulation or the taking of any such action which results in a diminution in value of private property which is compensable under this section, the head of the Federal agency concerned shall make an offer of compensation to the owner of the private property affected. Any offer made under this paragraph shall be effective for one year.
  (2) Such owner may reject the offer and, within one year after such rejection, file a claim for compensation in the United States Claims Court for a determination of the value of the property affected. In addition to awarding fair market value for the property affected, the court may award reasonable attorney's fees and expenses of litigation.
  (3) In any case in which the property affected involves lands, such owner, in lieu of a claim under paragraph (2), may exchange in accordance with applicable Federal law lands affected by such law, regulation, or activity.
  (4) Such owner may also accept such compensation as may be available under other laws for tax benefits, mineral rights credits, and comparable offers for value by the United States.
  (5) Any cash settlement or judgment from the United States Claims Court pursuant to paragraph (2) shall be paid as a matter of right from the land and water conservation fund established by section 2 of the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601-5).

Id.

117. *Id.*

B. *The Studds Bill: H.R. 2043*

Those who tend to be basically content with the approach of the ESA as it exists today, but would like to see minor changes to make the Act more effective would be most likely to support the Studds Bill.[118] The bill makes a number of minor changes in the Act, including a mandate that the Secretary, by December 31, 1996, develop and implement a recovery plan for each species listed as of January 1, 1996, for which there had been no recovery plan developed, and for any species listed after that date, a plan would need to be developed within eighteen months.[119] This mandate would be supported by those who perceive that the Act simply has not been carried out efficiently.

This bill would also amend the Act to give priority to "integrated, multi-species recovery plans for the conservation of threatened species, endangered species, or species which the Secretary has identified as candidates for listing under Section 4 that are dependent on a common ecosystem."[120] This provision would appeal to those who see a need for a more integrative approach to saving species.

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118. H.R. 2043, 103rd Cong., 1st Sess. (1993). Mr. Studds was joined in introducing this bill by M. Saxton, Mr. Bonior, Mr. Conyers, Mr. Hughes, Mr. Manton, Mr. Pallone, Mr. Andrews, Ms. Furse, Ms. Eskoo, Mr. Ravenel, Mr. Beilenson, Mr. Schroeder, Mr. Vento, Mr. Frank of Massachusetts, Mr. Peterson, Mr. Stokes, Mr. Towns, Mr. Markey, Mr. Jefferson, Mr. Abercrombie, Miss Collins, Mr. Evans, Mr. McDermott, Mr. Levin, Mr. Sharp, Mr. Berman, Mrs. Morella, Mr. Walsh, Mrs. Mink, Mr. Coleman, Mr. Meehan, Mrs, Maloney, Mr. Torres, Mr. Moran, Mr. Olver, Mr. Nadler, Ms. Pelosi, Mr. Gilman, Mr. Porter, Ms. Woolsey, Mr. Payne, Mr. Black Sanders, Mr. Cardin, Mr. Sabo, Ms. Shepherd, Ms. Slaughter, Mr. Johnston, and Mr. Hinchey. A Companion bill, S921, was introduced in the Senate by Senator Baucus.

119. H.R. 2043, 103rd Cong., 1st Sess., § 4 (1993). Under this amendment, Sec. 5(a)(1)(C) of the Endangered Species Act shall read:

The Secretary shall develop and implement a recovery plan for a species— . . .

. . .

(ii) by no later than 18 months after the date on which the species is first included in a list published under Section 4(c), in the case of any species that is first included in such a list on or after January 1, 1996.

120. *Id.* at § (C)(2) (1993).

The most significant change proposed by Studds' bill is the creation of a Habitat Conservation Planning Fund.[121] This fund would provide grants or loans to help a state or political subdivision develop a species conservation plan. Criteria for receipt of the grant would include the number of species for which the plan is to be developed and a commitment to participate from a diversity of interests including local governmental businesses, and environmental interests.[122]

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121. *Id.* at § 8 (b)(1)8(b)(4)(c) (1993), which provides as follows:

...

(b) FEDERAL ASSISTANCE TO STATE AND LOCAL GOVERNMENTS FOR DEVELOPMENT OF PLANS.—

(1) ESTABLISHMENT OF HABITAT CONSERVATION PLANNING FUND.—The Secretary shall establish a Habitat Conservation Planning Fund (here-in-after referred to in this subsection as the 'Fund'), which shall—

(A) consist of all sums appropriated pursuant to section 15(d), and

(B) be administered by the Secretary as a revolving fund.

(2) AUTHORITY TO MAKE GRANTS OR ADVANCES FROM FUND.--The Secretary may make a grant or interest-free advance form the Fund to any State, county, municipality, or political subdivision of any State to assist in the development of a plan under this section or section 10(a)(2). A grant or advance under this paragraph for development of a plan may not exceed the total financial contribution of the other parties participating in development of the plan.

(3) CRITERIA FOR GRANTS AND ADVANCES FROM THE FUND.—In making grants and advances under paragraph (1) for a plan, the Secretary shall consider—

(A) the number of species for which the plan is to be developed;

(B) the commitment to participate in the planning process from a diversity of interests (including local governmental, business, environmental, and landowner interests);

(C) the likelihood of success of the planning effort; and

(D) other factors the Secretary considers appropriate.

(4) REPAYMENT OF ADVANCES FORM THE FUND.—

(A) Except as provided in subparagraph (B), sums advanced from the Fund shall be repaid within 10 years after the date of the advance.

(B) Sums advanced under this subsection for development of a plan shall be repaid within 4 years after the date of the advance if—

(i) no plan is developed within 3 years after the date of the advance; or

(ii) in the case of an advance for the development of a plan under section 10(a)(2), no permit is issued under section 10(a)(1)(B) based on the plan within 3 years after the date of the advance.

(C) Sums received by the United States as repayment of advances from the Fund shall be credited to the Fund and available for further advances in accordance with this subsection without further appropriation.

122. *Id.* at § 8 (b)(3) (1988).

C. The Human Protection Act: H.R. 1414

Clearly appealing to business interests, the "Human Protection Act of 1993," highlights what is certain to be one of the key issues of the debate over reauthorization: whether the determination of a specie's status as threatened or endangered is to continue to be determined solely on the basis of "the best scientific and commercial data available," or whether other factors are also to come into play. Changing this requirement would be a drastic step which would face stiff opposition from environmental interests.

Such a change, however, is the essential purpose of H.R. 1414. Its proposed Section 3[123] would require that the potential economic benefits of action under the ESA outweigh potential economic costs. Such a change would be so extreme and so widely opposed that passage of this bill is not likely. However, debate over the provision may pave the way for the erosion of the strict determination of threatened and endangered status "solely on the basis of the best scientific and commercial data available."

IV. Prospects for Reauthorization

Debate over the ESA reauthorization has been going on since 1992. Most expect legislation reauthorizing the Act to be passed in 1994 because the controversy over the Spotted Owl has galvanized many in both the environmental and business camps. New energy has consequently flowed into an old debate.

In this struggle, environmentalists appear to be attempting to keep the Act's structure basically the same,[124] whereas the primary proposals for radical revisions[125] appear to come from those concerned about business interests. Some of the more interesting proposals from 1991[126] and 1992 that focus more on biodiversity and habitat protection were not proposed in

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123. H.R. 1414, 103rd Cong., 1st Sess. Sec. 3, (1993), reads as follows:

Sec. 3 Requirement that Potential Economics Benefits of Action Under Endangered Species Act Outweigh Potential Economic Costs.

(a) REQUIREMENT.—Section 4(b) of the Endangered Species Act (16 U.S.C. 1533(b)) is amended by adding at the end the following paragraph:

(a) Notwithstanding any other provision of law, an action shall not be taken under this Act if—

(A) the potential economic benefits to society do not outweigh the potential costs to society of the action, as those benefits and costs are determined under Executive Order 12291, as in effect on the 12 June 1991.

. . .

124. It appears to make sense that environmentalists would want to keep the same basic structure because their primary criticisms of the Act have focused on insufficient funding and the speed at which its provisisons are being followed. The most vocal critics of the Act have been those whose property or economic interests have been hurt by the law's application. They want protection for their interests, as offered by the Human Rights Protection Act, discussed in Section IIIC or provisions making it more difficult to list a species, such as suggested by the Smith Bill, discussed in Section IIIA.

125. For example, the Human Protection Act, H.R. 1414, 103rd Cong., 1st Sess. (1993), described in Section III(c) of the text.

126. One of 1991's more interesting related proposals was S.58, proposed by Senator Daniel Moynihan on July 26, 1991. His bill would have made biodiversity a national goal, and establish an interagency working committee to prepare federal strategy for biodiversity convservation. It would broaden the scope of the Endangered Species Act and expand the National Environmental Policy Act's environmental impact states process to require agencies to access the impact of actions on biodiversity. *General Policy: Scientist urges Federal Biodiversity Protection; Administration Opposes Impact Analysis*, 22 ENV'T L. REP. 844 (1991).

1993,[127] although they may be reintroduced in 1994. It appears that the key debates will appear to be over whether citizens should retain their right to sue to enforce the Act and whether the process for listing species should continue to be based solely on the basis of the best scientific and commercial data available.

Most proposed bills appear to be responding to those criticisms of the Act's emphasis on species protection rather than economic factors. Only the Studds Bill seems to preserve the intent of the original ESA. If environmentalists wish to preserve the thrust of the original ESA, they may wish to support a reauthorization such as the bill proposed by Studds.

In its current form, no one expresses satisfaction with the ESA. While the sources of unease are diverse and often conflicting, every voice agrees that appropriations are insufficient to accomplish the stated objectives. The rejuvenated debate may have as its most beneficial outcome an increased legislative willingness to more generously fund the ESA in its modified form.

127. For a thorough discussion of the 1992 proposals for reauthorization, *see*, Davina Kaile, Evolution of *Wildlife Legislation in the United States: An Analysis of the Legal Efforts to Protect Endangered Species and the Prospects for the Future*, 5 GEORGETOWN U. INT. ENV'T. L. REV. 441 (1993).