

## The Endangered Species Act: Conflict and Compromise

By Paula Hartman

Enacted in 1973, the federal Endangered Species Act (ESA) stands alone among major legislation. The ESA does not exist to protect the environment for humans. Rather it seeks to conserve "the ecosystems upon which endangered species and threatened species depend" and to provide a program to conserve those species. It is not surprising that a law with such noble goals for wildlife preservation is controversial. Already, reauthorization bills are making the rounds in the House and Senate. As reauthorization battles loom in 1994, we can expect much debate about the merits of the ESA. Debate will probably focus on the ESA's effectiveness and its conflict with economic development. Critics claim that the ESA is enormously expensive, has failed in its mission of protecting species, and routinely blocks economic activity. While all of these criticisms can be shot down, this article focuses on the third claim. A close look at how the Department of Interior has managed the ESA reveals why it rarely stops economic activity.

Any proposition that the ESA is a major impediment to economic growth is simply not supported by the facts. The U.S. General Accounting Office and the World Wildlife Fund both issued reports in 1992 on the Section 7 consultation process of the ESA. Section 7 requires federal agencies to consult with either the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service on any action they authorize, fund, or carry out and insure the action is not likely to jeopardize the continued existence of a listed species.<sup>1</sup> Of the over 70,000 consultations conducted by the FWS over a five year period, only 131 findings of potential jeopardy were arrived at, and only 18 projects were eventually terminated.<sup>2</sup> In other words, less than .02% of consultations led to termination of a project. It would appear that the ESA is accommodating both economic activity and endangered species protection with little conflict. Unfortunately, the conflict is much greater than these statistics bear out. From the listing process on down, flexibility that Congress may not have intended has crept into the ESA.

---

*Any proposition that the ESA is a major impediment to economic growth is simply not supported by the facts.*

---

Listing is the first step for protection under the ESA. The decision is to be based "solely on the basis of the best scientific and commercial data available."<sup>3</sup> Jobs, the economy, and politics are not supposed to enter into the decision. After all, a species is either endangered or threatened, or it is not. In practice, the decision may depend on whether or not the listing threatens jobs or development.

Congress granted the Secretary of Interior discretion by creating a category for listing known as "warranted but precluded."<sup>4</sup> Although this category was created to allow the Secretary to turn his attention to those species in greatest need, it is instead used as a delay mechanism. A 1992 General Accounting Office report stated that 105 species have been declared warranted but precluded for more than two years.<sup>5</sup> This backlog of species deserving of listing must be dealt with by the Department of Interior. Increased funding is essential. Although Interior actually resisted increases in its funding in the late 1980's<sup>6</sup>, the pending Studds/Baucus reauthorization bills call for substantial funding increases.<sup>7</sup> If more money becomes available to the Secretary of Interior for implementing the ESA, then the rate of listing species may soon rise. But even if the Secretary decides to list a species, the protection can still be weakened.

The Secretary can list an otherwise endangered species as threatened if efforts of a state (or foreign nation) will protect the species. The California gnatcatcher is a recent example of a reduced-status listing. Because California set up a Natural Community Conservation Planning (NCCP) program to protect the gnatcatcher's habitat, the Secretary listed

---

*This limited definition of critical habitat becomes a moot point if Interior fails to designate critical habitat.*

---

the bird as threatened instead of as endangered. However, funding for the NCCP program is questionable. Three of the five counties with gnatcatcher habitat are not participating in the plan. Of the two remaining counties, San Diego is openly rebelling.

Until California assures the security of the gnatcatcher's habitat, which the NCCP program has yet to do, the bird is still endangered. The threatened listing has simply allowed developers to continue their destructive work.

Habitat protection is essential to survival and recovery of endangered species. The ESA recognizes this fact by requiring Interior, with limited exceptions, to designate critical habitat when a species is listed as endangered.<sup>8</sup> Congress defined critical habitat in the ESA as that essential to the conservation of a species.<sup>9</sup> The ESA defines conservation as using those methods necessary "to bring any endangered species to the

point at which the measures" in the ESA are no longer necessary.<sup>10</sup> Although this definition sounds like recovery, Interior has other plans. Its regulations now require it to be concerned with only those actions that diminish the value of critical habitat for "both the survival and recovery" of listed species.<sup>11</sup> By adding the word "both," any action that negatively impacts habitat essential to recovery (but not survival) does not appear to violate the ESA.<sup>12</sup>

This limited definition of critical habitat becomes a moot point if Interior fails to designate critical habitat. According to the GAO, as of 1992 critical habitat had been designated for only 16% of listed species.<sup>13</sup> Critical habitat is to be designated to the "maximum extent prudent and determinable."<sup>14</sup> Interior's own regulations suggest that critical habitat designation is not prudent if it is not "beneficial" or might lead to a taking.<sup>15</sup> It is inconceivable that habitat could be deemed critical if it is not also beneficial. As for the latter concern, I find it hard to believe that the majority of species are threatened by vandals and collectors. For example, Interior has yet to designate critical habitat for the grizzly bear. Listed since 1975 and thoroughly studied, at least some of the grizzly's critical habitat must be determinable. Furthermore, the critical habitat designation will not expose grizzlies to any greater threat from poachers than they currently face. Perhaps Interior is simply afraid of the political consequences of critical habitat designation.

Critical habitat or not, section 7 requires federal agencies to consult with Interior and avoid actions that would jeopardize listed species. Although Congress has allowed for some exemptions<sup>16</sup>, section 7 is still strongly constructed. But as mentioned *supra*, very few jeopardy opinions are ever issued. Reasons already mentioned include a failure to list appropriate species, listing species as threatened instead of endangered (and thus minimizing their significance), and failure to designate critical habitat. Other reasons are more subtle.

In 1986 Interior decided that consultation only applied to projects with discretionary federal involvement or control.<sup>17</sup> It also decided that section 7 no longer requires consultation for federal actions in foreign countries.<sup>18</sup> In addition, only final biological opinions are open to public comment. The draft opinions are circulated to the affected agencies and private applicants.<sup>19</sup> Finally, Interior shows great deference to project applicants. Instead of stopping a project by issuing a finding of jeopardy, Interior can require the applicant to alter the project to avoid or mitigate

---

*Perhaps Interior is simply afraid of the political consequences of critical habitat designation.*

---

for "take."<sup>20</sup> Interior frequently limits these "reasonable and prudent measures" that it deems necessary to minimize take to "minor changes" that do not alter the basic design of the desired action.<sup>21</sup> For example, in the case of powerboat pier construction in Florida manatee habitat, Interior limited itself to finding alternatives that were commercially feasible.<sup>22</sup> Since applicants are likely to accept and incorporate minor changes, the jeopardy opinion is unlikely.

Conflict with development is reduced in a final way. In a major revision to the ESA, Congress in 1982 allowed for incidental take by private parties under limited circumstances.<sup>23</sup> The parties must have a Habitat Conservation Plan (HCP) approved by the Secretary. On their face, the requirements for approval are stringent. The Secretary must find that the taking is incidental and will not reduce appreciably the likelihood of survival and recovery of the protected species in the wild. Furthermore, the proposed plan must minimize and mitigate the taking's impact to the maximum extent practicable and be funded adequately.

An overview of existing HCPs does show that many involve much

---

*A weakened ESA may do little to protect the species whose survival depend upon the Act.*

---

commitment of resources by the applicant. However, the ultimate contribution to species recovery of even the best plans is questionable. For example, the original HCP was created on San Bruno Mountain in the San

Francisco Bay Area. Today, at least one of the mountain's developers is bankrupt and habitat improvement is in limbo. Meanwhile, completed HCP work is showing signs of failure.<sup>24</sup> This is the model that the entire HCP process was based upon. The worst plans seem designed to fail from the start. One HCP consists of a developer destroying over 40 acres of land containing elderberry bushes occupied by valley elderberry long horned beetles. In return, the developer will relocate 27 bushes onto a highway median strip. The developer guarantees survival of the bushes for five years, but is not required to assure beetle occupation at all.<sup>25</sup>

Pressure from the Reagan and Bush administrations probably helped weaken application of the ESA by Interior to a degree. But perhaps more is going on here than simple pressure from the White House. Strictly applied, the ESA would lead to much more delay or even blockage of development than we have seen in the past decade. By quietly building discretion into the ESA, perhaps the agencies who work with it hoped to help save it from critics. But a weakened ESA may do little to protect the species whose survival depend upon the Act.

Conflicts between human development and non-human species will grow along with the human population. No amount of tinkering with the ESA or its implementation can change this basic fact. This nation, and not just the environmental community, must carefully examine its priorities for the environment we share with all life. Right now, we are slowly chipping away at habitats essential to the survival of so many threatened and endangered species. If the ESA were fully enforced as it now exists, the outlook for long-term viability of most species it cover would be good. However, full enforcement guarantees serious conflict with human activity. I wonder if we are really willing to make the sacrifices necessary to save our "Nation's heritage in fish, wildlife, and plants."<sup>26</sup>

*Paula Hartman is a 2L at King Hall.*

### NOTES

1. 16 U.S.C. § 1536(A)(2) (1988).
2. World Wildlife Fund, For Conserving Species, Talk Is Cheaper Than We Think: The Consultation Process Under the Endangered Species Act (1992).
3. 16 U.S.C. § 1533(b)(1)(A) (1988).
4. 16 U.S.C. § 1533(b)(3)(B) (1988).
5. U.S. General Accounting Office, Endangered Species Act: Types and Number of Implementing Actions (1992).
6. Oliver A. Houck, The Endangered Species Act and Its Implementation By the U.S. Departments of Interior and Commerce, 64 U. Colo. L.Rev. 292 (1993).
7. H.R. 2043, 103d Cong., 1st Sess. § 12, S. 921, 103d Cong., 1st Sess. § 12.
8. 16 U.S.C. § 1533(a)(3)(A) (1988).
9. 16 U.S.C. §1532(5)(A) (1988).
10. 16 U.S.C. § 1532(3) (1988).
11. 50 C.F.R. § 402.02 (1992).
12. Houck, supra note 6, at 298.
13. GAO, supra note 5, at 26.
14. 16 U.S.C. § 1533(a)(3) (1988).
15. Houck, supra note 6, at 304..
16. The Secretary of the Interior is allowed to take into account the economic impact of critical habitat designation. 16 U.S.C. § 1533(b)(2) (1988). Also, the Endangered Species Committee ("God Squad") exemption from the ESA is available. 16 U.S.C. § 1536(g) (1988).
17. 50 C.F.R. § 402.02 (1992).
18. 50 C.F.R. § 402 (1992)
19. Houck, supra note 6, at 325.
20. 16 U.S.C. § 1536(b)(4) (1988).
21. Houck, supra note 6, at 326.
22. Houck, supra note 6, at 320.
23. 16 U.S.C. § 1539(a) (1988).
24. Letter from David Schooley, Bay Area Land Watch, to Secretary of the Interior Bruce Babbitt, August 29, 1993.
25. Houck, supra note 6, at 356.
26. 16 U.S.C. § 1531(a)(5) (1988).