How the Regulated Community Views Regulation to Protect Living Resources: The Endangered Species Act, Biological Diversity, and Ecosystem Management

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HOW THE REGULATED COMMUNITY VIEWS REGULATION TO PROTECT LIVING RESOURCES: The Endangered Species Act, Biological Diversity, and Ecosystem Management

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BIODIVERSITY PROTECTION:
IMPLEMENTATION AND REFORM
OF THE ENDANGERED SPECIES ACT

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A. **BY WAY OF AN EXPLANATION.**

I have been asked to provide the private landowner's perspective on "proposed legislative reforms" for reauthorization of the Endangered Species Act (ESA): Not content with such a broad theme, I intend to widen it further to include: not only the ESA, but also such related topics as biological diversity, ecosystem management, and protection of living resources generally; not only legislative, but also administrative, reforms; and not only private landowners but the larger community of private interests that are regulated for the purpose of protecting living resources. Although much of what I will say here reflects my own thinking, I frequently will grossly simplify and starkly portray (mischaracterize?) issues that are far more subtle. The issues will be addressed in hyperbolic language, with the conspicuous absence of any research or many cited sources, and without any pretense of comprehensive or balanced treatment. I take this approach to be provocative but also to adhere to at least the principal assignment of my speech topic -- the task of imparting the raw-nerved perspective of those who are truly the subject of living resources protection regulation and not the more dispassionate views of the professionals whom they are compelled to retain by the prospect of such regulation.[1]

I will begin with a discussion that will provide some context to the regulated community's views about living resources protection (and also explain why I have used the term "living resources") and then describe nine reasons (they're more but I tired) why the community considers regulation under the ESA, or in the name of biological diversity or ecosystem management, with such substantial trepidation.[2]

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[1] Yes, I said "subject," and this may be the first, and most basic, perspective to be conveyed -- unlike some advocates of the ESA, biological diversity conservation, and ecosystem management, who may consider those laws and policies to be devoted exclusively to the protection of living resources, as seen by the regulated community those laws and policies first and foremost impose burdens on it from which secondarily benefits may be derived for living resources.

[2] A second parenthetical before I begin: By discussing seriatim a goodly number of concerns -- both the reasonable and unreasonable -- about living resource protection in the manner I've described, I am a bit apprehensive that I will unintentionally portray the regulated community as a collection of "scorn[ful] Miniver Cheevy's, who "love[] the days of old" and "assail[]" the entire concept of living resource protection. Suffice it to say that few of the regulated hold all of the concerns I identify and many of the regulated, as has been described by other speakers, are actively working to ensure better protection of living resources and better procedures to secure that protection.

B. A NEW ERA OF ENVIRONMENTAL REGULATION.

The topic of this conference reflects a profound shift in environmental regulation that is already well under way. Over the past two and a half decades since Earth Day, both the regulated -- industry, developers, and property owners -- and the regulators -- State and Federal officials -- have painfully, but for the most part successfully, acclimated themselves to the ever-expanding volume of laws and regulations devoted to environmental protection. Until recently, however, these environmental laws and regulations have required the regulated and regulators to pay close attention to only the non-living resources, such as air, water, and waste.

Certainly before Earth Day and even during much of this era of environmental lawmaking, living resources were largely ignored in the law and practice of environmental protection. If either the regulated or regulators gave thought to living resources at all, it was likely to arise more from a concern for public opinion than from any particular legal obligation. And this concern clearly focussed on the most popular vertebrates -- the so-called charismatic megafauna -- and dissipated rapidly, or was not expressed at all, for species further down the food chain, particularly invertebrates and plants.

Until the enactment, and the recently, more pervasive and invasive implementation of, the Endangered Species Act and except for migratory species protected by international treaties, federal environmental laws and regulations did not feature and seldom referred to living resources. Of the many reasons for this relative lack of attention to living resources, two stand out. First, non-living resources had a more direct connection with human health and safety -- a traditional and constitutionally secure arena for federal regulation. The effects of poisoned air, water, or soil on humans were obvious. However, the most overworked and tiresome analogy in environmental discourse -- the celebrated canary in the coal mine -- had not yet been employed widely to connect the health of living resources with human health. Second, with the exception of the treaty-blessed species, the common law and judicial interpretation of the Constitution placed virtually exclusive responsibility for wildlife management with the States. And the States, of course, for reasons of tradition and revenue concentrated on the management of game animals -- those same charismatic megafauna -- and the regulation of recreational or subsistence activities (hunting and fishing), not economic pursuits.

This era of virtually exclusive concern with non-living resources in environmental regulation quite clearly is passing. Just as clearly, the new era of environmental regulation can be discerned -- and its focus is on living resources. Why this certainty that a new era of regulation to protect living resources is under way? First, the type, quantity, and status of wildlife on both public and private lands have become critical threshold criteria for determining whether and to what

degree a particular industry, company, or landowner is to be regulated under the older laws relating to non-living resources. For example, on federal lands, the status of selected "indicator species" and "sensitive species" has been employed by both the Forest Service and Bureau of Land Management to measure the health of ecosystems and serve as the determinant of the need for, and level of stringency of, the agencies' regulation of such activities as timber harvesting, mining, grazing, and recreation projects. On private lands, not only have test organisms in laboratories and "the protection and propagation of a balanced population of shellfish, fish, and wildlife" in the field (wording found in any number of Clean Water Act sections) served as the basis for discerning and regulating pollution levels of waterbodies, but also the very presence of wildlife has been used to determine whether waterbodies are even subject to regulation in the first place (*e.g.*, the Environmental Protection Agency's audaciously imaginative "glancing duck" test that relies on visits by sojourning migratory waterfowl to transform isolated waters into "waters of the U.S." -- the statutory passwords that allow the agency to regulate under section 404 of the Clean Water Act).

Second, we know that neither the Congress (at least the pre-"Contract" Congress) nor the agencies are satisfied with simply making living resources the predicate for the application of existing environmental regulatory authority concerning non-living resources. They are improvising and advancing a whole new environmental program devoted to living resources. You've heard all about these efforts from previous speakers. Just the same, several scattered examples: Last Congress several (this Congress fewer) bills were introduced that would embed the principle of biological diversity protection in the United States Code. Chairman George Miller of the House Natural Resources Committee (its *nom du jour* last Congress) in an April 29, 1993, memorandum to Committee members announced that the Committee, with the assistance of the Congressional Research Service and General Accounting Office, would "begin a comprehensive examination" of "ecosystem protection, management, and restoration," focusing on the Nation's "most endangered ecosystems" and "what the federal agencies are doing to move toward ecosystem management and what institutional and legal impediments stand in the way of coordinated ecosystem protection and management." As Mr. Irvin reports in his talk, the negotiations on ESA reauthorization legislation under the auspices of Representative Saxton have produced a legislative proposal that would encourage "natural systems conservation planning" that is not species specific. Down from Capitol Hill in the Executive Branch, we've all marvelled at the extraordinary and generally admirable efforts of this Administration to make the Endangered Species Act both more effective and more "user friendly." We've also witnessed the unconditional and unflagging infatuation with ecosystem management experienced by the White House and the various agencies responsible for managing federal, and regulating private, land.

C. **REASONS WHY THE REGULATED COMMUNITY CAN'T SLEEP NIGHTS IN THIS NEW ERA OF ENVIRONMENTAL REGULATION.**

I'm sure I'm not imparting any unusual insight when I tell you that the regulated community has not welcomed this onrushing new era of environmental regulation for living resources with open arms. We do not view this new regulatory emphasis as more of the same or simply a filling of a regulatory gap. We certainly do not accept the facile assurances of some champions of the new regulatory era that thoughtful regulation to conserve living resources will lessen the severity of environmental regulation generally because environmental problems will be discovered and treated at some earlier stage when they are more amenable to regulatory treatment. No doubt earlier regulation will cause more environmental problems to be remedied. But earlier regulation means what it says: "earlier regulation." And those two words are fact; other, more soothing qualifying phrases to describe that regulation -- "less restrictive," "more flexible," "with a lighter hand" -- although continually voiced, are speculative at best.

To the contrary, the regulated community believes there are at least nine reasons why regulation for living resources (whenever it occurs -- early or late in the evolution of environmental problems) will be *far more stringent* than has been regulation for non-living resources. These reasons, discussed below, range from the purely factual, to the purely legal, to raw assumption and myth. Some of the problems these reasons address may be remediable or, on second view, nonexistent, but others may well be inherent in regulation for living resource protection and thus ultimately could be fatal to regulated community support for, or even acquiescence in, the new regulatory era.

1. True-Believer Lawmaking: Absolutist Terms. Living resource laws brook no dissent. They provide no flexibility in their language. From its findings provisions to its effective date clause, the ESA is devoid of moderating phrases which appear in the Clean Water Act, Clear Air Act, and other non-living resource environmental laws, such as "to the extent feasible," insofar as practicable," "best available technology," and "in the public interest." Without such tempering language, the ESA and its mandates are absolute. Indeed, that is exactly what the Supreme Court found 18 years ago in *TVA v. Hill* (437 U.S. 153 (1978)) when it halted construction of the Tellico Dam to benefit the snail darter. The Court stated in unequivocal language that still causes the regulated community to hyperventilate whenever it is repeated: the Act's language "admits of no exception", the "plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost", and the Act "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.* at 173, 194, and 185.

This phenomenon of overbearing statutory certainty is not limited to the ESA; it infects virtually all living resource lawmaking efforts. Take biological diversity on federal lands as an example: The concept and language of biological diversity first appeared in 1976 in the National Forest Management Act (NFMA), governing planning for the National Forest System. This provision (16 U.S.C. § 1604(g)(3)(B)) was much debated and carefully crafted; Congress imbued in it great administrative discretion and flexibility. The statutory language directed the agency, in preparing its resource management plans, to "provide for diversity of plant and animal communities," and to "provide ... for steps to be taken to preserve the diversity of tree species." To make certain that this requirement could not and would not be interpreted as absolute or capable of overriding other statutory direction, Congress saturated the provision with qualifying phrases and redundancies: the Forest Service was to strive for this diversity "in order to meet over-all multiple use objectives ... within the [plan's] multiple use objectives ... where appropriate ... to the degree practicable."

In the intervening years since enactment of the NFMA, the biological diversity concept has quite clearly muscled up; no longer is it phrased in such meek, indecisive terms. On July 23, 1991, the House of Representatives adopted a floor amendment to legislation reauthorizing the Federal Land Policy and Management Act (FLPMA) to provide the Bureau of Land Management (BLM) with a biological diversity protection duty to match the Forest Service's, but with two profound differences. The first removes all of the flexibility or "fudge words"[3] contained in the NFMA provision and provides an absolute mandate -- the BLM shall take "no action to diminish biological diversity." If that isn't enough to curtail drastically BLM management activities, the same language insists that BLM not just maintain biological diversity but also "restore" prior diversity levels (the buffalo, the carrier pigeon, what about the dinosaurs?). Fortunately, such arrogant legislating was unsuccessful, not due to any outraged opposition to this extraordinary provision, but simply because the reauthorization of FLPMA has proven to be a Sisyphean task all of itself.

So long as the ESA and other legislative initiatives for living resources protection contain such peremptory language, federal officials will forever be compelled to emulate Secretary Babbitt's "reform-a-month" protestations that clever, well-meaning bureaucrats can make the law "user friendly." Never mind that these "fixes" may be *ultra vires* and, absent rulemaking (these typically are press release or guidance document reforms), cannot be used by the regulated either to compel government performance or to defend against citizen suits.

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[3] G.C. Coggins, II Public Natural Resources Law § 20.22(3)(d)(iii), pp. 20-22 (1996).

2. Science *Über Alles*. As bad as the ESA's absolute language is, it is made worse by its explicit prohibition against any consideration of economic or other factors in the ESA's most critical decisions -- the determinations that species are endangered or threatened and thereby receive the law's protection. The ESA requires that these decisions be made "solely on the basis of the best scientific ... data." 16 U.S.C. 1533(b)(1)(A). Indeed, Congress added the word "solely" later, after ESA enactment, in order to discipline the government which had had the temerity to merely report on the economic consequences of its purely scientific decisions.

To the regulated community, this is not just an invitation -- it is an order -- to conduct narrowly focussed, tunnel-visioned decisionmaking. This mandate creates nothing less than a tyranny of scientists whose exclusive interest and duty are to ensure the maximum well-being of the fish, wildlife, or plants, all other considerations be damned. There is no "decision space" for the more traditional, generalist decisionmakers who typically leaven the experts' judgment with broader and more balanced considerations. Under the terms of the statute, these decisionmakers become totally reliant on -- indeed, ventriloquists' dummies for -- the scientists. Despite protestations that this is not so, companies and landowners continually hear agency officials confess in their most consoling bedside manner that they would dearly love to reach a different, more favorable decision but their "hands are tied" by the seemingly omnipresent and omniscient scientists, who by law are supreme.

3. Bad or Biased Science? Reliance on science in the context of living resources protection presents two problems. First, is the astounding lack of information. Most species that are sufficiently at risk to be threatened or endangered under the ESA have very small populations which makes the task of collecting adequate and timely information about them almost insuperable. When the intention is to conserve biological diversity or manage whole ecosystems, rather than protect isolated species, the likelihood of generating useful and reliable scientific information is truly bleak. That doesn't mean the decisions to protect living resources should not be made. But, unfair or inappropriate as it may be, faith in the integrity of science suffers exceedingly when later data contradict the information relied on in the initial decisions. The regulated community quickly becomes embittered when, for example, the decision to list the northern spotted owl in 1990 is based on the scientific judgment that there are only 3,000 owls in existence and, yet, after listing the count soars to 10,000 owls.

The burden science bears in protecting living resources is made heavier by the discipline that has invaded the regulatory process -- conservation biology. The discipline's most honest adherents readily admit that it is still immature and is often stretched beyond its capacity when it is called upon, or -- as the regulated see it -- so avidly volunteers, to serve those with the authority to regulate for

living resources protection.[4] Worse, however, conservation biology may not be credible. Science in the service of public policy must be neutral; if it is value-laden or adopts an advocacy role it will skew decisionmaking. Yet, conservation biology is blatantly biased. Time and again in statements adopted by the discipline to describe itself and in credos for its publications, conservation biology is portrayed as not simply the study of living resources and the causes of decline and extinction of species. Instead, conservation biology is accorded the explicit purpose of arresting species decline and extinction and promoting species recovery. With such a mission embedded in the discipline, how can a conservation biologist's findings and judgment serve as a proper basis for sound regulatory decisionmaking?

The regulated community cannot be sanguine about this new era of regulation for living resources when the science on which it is grounded is poorer, weaker, and less reliable than the science which serves regulation for non-living resources.[5]

4. Lock the Gate and Leave the Key With Us; No Engineered Solutions. Despite the mandated ubiquity of scientists, the ESA and other living resources protection concepts such as biological diversity and ecosystem management typically do not admit of engineered solutions similar to those the regulated and regulators together commonly achieve in non-living resource -- air, water, and waste -- regulation. The level of knowledge about living resources, particularly any endangered or threatened species or ecosystem, is almost invariably insufficient to permit confident consideration of less costly and disruptive alternatives to secure the necessary regulatory protection. Scientists find it difficult to risk their professional standing on such minimal information. They are more comfortable advising that it is better to do nothing or refrain from what is already being done -- or simply withholding advice on acceptable activities -- rather than proposing doing something new. This leaves the regulators with the black and white choice of development or no development.

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[4] As Professor J.B. Ruhl put it: "The notion of biodiversity lends itself to misuse because it is so scientifically nascent and 'sufficiently complex that almost any population biology study, with almost any conclusion, can be framed as an effort to measure or conserve biodiversity.' For that reason, many people fear biodiversity conservation, not as a concept but as a policy, when put in the hands of federal regulators." J.B. Ruhl, "Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Non-Federal Lands: Time for Something Completely Different?", 66 Colo. L. Rev. 556, 559 (1995) (quoting Gordon H. Rodda, "How To Lie With Biodiversity", 7 Conservation Biology 959 (1993).

[5] Messrs. Ruhl and Rodda again: "As one federal regulator and scientist has put it, 'for scientists to combine partial data with advocacy is counterproductive in the long run.'" *Id.* at 568 (quoting Rodda at 960).

Much rhetoric has been offered suggesting that this is not the case -- that, instead, scenarios can be devised which accommodate both living resource protection and development. And, unquestionably, Secretary Babbitt and his cohorts have achieved a truly admirable escalation in incidental take permit approvals, and produced a splendid record of pioneering new procedures, to permit limited development in the habitat of endangered and threatened species.

Yet, we see significant counter indications. Biological diversity lost what little support it may have had in the regulated community when environmental organizations launched show-piece lawsuits, supported by a brief from the Society for Conservation Biology, to force the Forest Service to preserve biological diversity in the Chequamegon and Nicolet National Forests.[6] The remedy the plaintiffs requested was the administrative set aside of massive biological diversity reserves. These reserves were to be untouched by man -- no ecosystem management, no adaptive management, no management period. In April 1994, the Sierra Club launched its Critical Ecoregions Program, designed to protect and restore 21 vast regional ecosystems in the United States and Canada. Quite clearly, the Club does not distinguish between federal and private land. Indeed, its policy statement reads:

> Today, the Sierra Club's mission has more to do with planetary survival than with scenery ... Already we have found that it is not enough to protect the Yosemites of the world. We must also save places in between, the places we -- and most of the continent's other species -- call home.

And it's not just those obstreperous environmentalists. The President has determined that so-called ecosystem management in the federal forests of the Pacific Northwest requires the set-aside of 19 million acres in a motley mix of late-successional reserves, riparian reserves, and research areas, as well as wilderness and parks. Accommodating development? The President's Pacific Northwest Forests Plan promised yearly sawlog volume at only a fifth of previous annual timber sale levels. And then, in the first two years, it delivered only a quarter of what it promised! Indeed, so little development can be accommodated under the President's Plan and its ecosystem management philosophy that, when earlier this year Congressional leaders offered to enact an amendment allowing substitute timber sales to the provision in the fiscal year 1995 rescissions bill[7] that mandates completion of previously enjoined timber sales of 650 million board feet, they were told by Forest Service officials that even such modest substitute volume

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[6] *Sierra Club v. Marita*, 843 F. Supp. 1526, 1542, and 845 F. Supp. 1317, 1331 (E.D. Wisc. 1994), *aff'd*, 46 F.3d 606, 623 (7th Cir. 1995).

[7] P.L. 104-19, § 2001(k); 109 Stat. 194, 246.

-- a third less than the amount promised yearly in the Plan -- could not be found on the few remaining areas of federal land left open to timber harvesting.

When the focus shifts from the ESA or ecosystem management to biological diversity protection all pretense of management or accommodation of development is dropped ... and understandably. Whereas the landowner may be able to manipulate (and thus use and develop) a property in a manner that will protect a single, or discrete number of, endangered or threatened species, any such action will have an unavoidable effect on the overall mix of species -- the biodiversity -- on the site, benefitting some species and disadvantaging others. In short, land use inevitably alters biological diversity, and an inflexible policy of conserving existing biological diversity would be hostile to any use whatsoever.

5. What Due Process? Apparently, judging by the ESA, Congress and the Executive Branch adhere to the belief that protection of living resources is so noble a regulatory pursuit that due process procedural protections can be dispensed with. Enacted at a time when citizen participation and open government were legislative watchwords, the ESA is an aberration -- a throwback to an earlier era of lawmaking when the prevailing thought was to let the professionals perform freely without the irksome interference of the public or affected parties.

The ESA works a denial of due process by the provisions it so conspicuously lacks. It offers few hearings; it does not require (and the Executive Branch has excused itself from) writing National Environmental Policy Act (NEPA) documents on critical decisions and thereby considering the effects of, or any alternatives to, those decisions; it establishes closed, virtually secret procedures (agency consultations under ESA § 7); and it provides no administrative appeal rights or opportunities.

And it's not just the ESA. Agencies seemingly feel free to ignore even their own statutory and regulatory procedural constraints whenever they are engaged in regulating to protect living resources under any authority. For example, the Forest Service has invented the new gambit of "interim" policies. When, and only when, a living resource needs protection, the agency indulges in the convenient practice of adopting one-size-fits-all, generic "interim" policies that apply to management activities on federal lands covered by 5, 10, 15 or more individual resource management plans. The policies are adopted without adherence to any of the procedures required by the NFMA for amendments to or revisions of resource management plans, with minimal or no compliance with NEPA, and with wholly inadequate opportunities for public participation. Indeed, one set of "interim" policies applicable to national forests throughout eastern Washington and Oregon was developed in a closed, one-day "bull session" of Forest Service biologists and was *formally* announced in a press release!

These "interim" policies are often implemented without any effort to amend the underlying resource management plans which, by comparison, were prepared under rigorous procedures and with frequent opportunities for participation by the public and affected interests. If the agency decides to amend the plans, however, it typically does so by fiat, declaring all plans to be amended at once, again with none of the procedures required for individual plan amendments under the NFMA and with, at best, a skeletal NEPA document. This practice of imposing generic "interim" guidance on multiple units of federal land prevents any meaningful consideration of local conditions that have been addressed so assiduously in the resource management plans and is indifferent to the many resource management plan policies -- the management goals and objectives, land use allocations, and resource output decisions -- it overrides.

This rage for interim policymaking has no statutory or regulatory license, but the Forest Service, in its proposed new planning regulations, intends to grant itself formal authority to issue "interim amendments" without compliance with significant NFMA plan amendment procedures.

When regulation for living resources is conducted under the guise of biological diversity or ecosystem management, even the minimal procedural safeguards of the ESA are forsaken. Before a landowner can be regulated under the ESA to protect a living resource, that resource must be the subject of a rulemaking to determine whether it is endangered or threatened. Yet, with biological diversity protection and ecosystem management such procedural niceties are jettisoned. Instead, the agencies are free to regulate to protect any living resource they please; indeed, to ensure full biological diversity or to manage an entire ecosystem, they are compelled -- as they see it -- to regulate for *all* living resources ... automatically, without rulemaking. The species obtain federal regulatory protection whether or not they are at risk simply by their presence in the affected ecosystem.

Then, in a truly perverse and ironic twist, the ESA provides (in lieu of administrative appeals, consideration of cost-effective alternatives under NEPA, and other typical procedures to involve, and consider the effect on, the regulated community) two procedures -- the incidental take permit process and the so-called God Committee -- that are extraordinarily costly, time consuming, and, in the latter case, unavailing. The convenient existence of these two procedures allows the government to argue effectively whenever a landowner seeks compensation under the Fifth Amendment that he or she has failed to exhaust administrative remedies. Thus, the ESA manages to deprive the regulated party of due process both before and after regulation is imposed.

6. Unintended Burden Shifting: Let The Private Sector Do It. Living resources protection laws -- at least the ESA -- appear to favor the unorthodox

outcome of imposing a much greater obligation on the private sector than on the public sector. In order for landowners to obtain immunity from the ESA § 9 "take" prohibition, they must meet standards that are far more stringent, submit to procedures that are far more complex and time-consuming, and assume costs that are far more burdensome than those applicable to federal agencies pursuing the same immunity. This reverse of what should be the proper order of responsibilities for protected species -- federal agencies first, landowners second -- may be inadvertent and not what Congress intended, but it is nonetheless the reality of ESA implementation.

Anyone who doubts that the ESA is biased toward federal agencies and against private landowners is referred to the chart on the following page. This chart displays the disparate standards and procedures applicable to federal agencies and private landowners seeking the "take" immunity. Both wish to obtain permission to "take" members of endangered or threatened species as the incidental result of otherwise lawful activities. That permission is received by federal agencies when the Fish and Wildlife Service provides an incidental take statement for a federal project at the end of the consultation process under ESA § 7(a)(2), and by private landowners when the Fish and Wildlife Service issues an incidental take permit after approval of a landowner-prepared conservation plan under ESA § 10(a)(1). The inequities in the two processes are so significant that the federal agencies receive immunity hundreds to thousands of time each year, while landowners (even with the greater emphasis placed on incidental take permitting by Secretary Babbitt) have obtained immunity less than 150 times in the last 13 years. The chart displays the reasons for this unfortunate record. For example:

- A private landowner must seek an incidental take permit if his or her activity will harm or harass a *single member* of a species, whereas a federal agency can obtain an incidental take statement if its activity is merely found not likely to jeopardize the continued existence of the *entire species*.

- A private landowner must seek an incidental take permit if his or her activity will modify *any* habitat which the Fish and Wildlife Service might identify, whereas a federal agency can obtain an incidental take statement if its activity is merely found not likely to adversely modify *only critical habitat* which the Service must designate by rulemaking.

- A federal agency has the benefit of a procedure that is secret, has a mandatory 90-day deadline, and features a document (biological opinion) which the Fish and Wildlife Service, not the agency, prepares, whereas the private landowner is burdened with a procedure that is public, has no statutory deadline, and features a document (conservation plan) which the landowner, not the Service, must prepare.

INEQUITIES IN PROCEDURES AND STANDARDS FOR FEDERAL AGENCIES AND NONFEDERAL LANDOWNERS TO OBTAIN DETERMINATIONS BY FISH AND WILDLIFE SERVICE OF ENDANGERED SPECIES ACT COMPLIANCE ("TAKE" IMMUNITY)

FEDERAL AGENCIES	***PRIVATE, STATE & LOCAL LANDOWNERS***
Projects receive Incidental Take Statements after review by FWS under consultation procedures of ESA § 7	*Projects receive Incidental Take Permits after submission of conservation plans for review by FWS under ESA § 10*
STANDARDS	
Granted "take" immunity if project is not likely to jeopardize continued existence of entire species	Compelled to seek "take" immunity if project is likely to harm or harass a single member of the species
Granted "take" immunity if project is not likely to adversely modify critical habitat which FWS has designated by rule	Compelled to seek "take" immunity if project adversely modifies any habitat which FWS identifies without rulemaking
PROCEDURES	
No additional procedures necessary to receive "take" immunity	Costly and time-consuming procedures required to obtain "take" immunity
DURATION	
FWS must decide in 90 days	FWS has no time limit to decide -- typically, 1-5 years
COST	
Little cost since FWS prepares biological opinion	Steep costs, typically in $100,000's, since landowner prepares and implements the conservation plan
FREQUENCY	
Immunity is granted through consultations which occur 7,600+ times each year	Immunity is granted through the issuance of less than 150 permits in 13 years
VISIBILITY	
Review process is closed; No hearing; No public participation	Review process is open; Public hearing must be held; Activists and public officials may be invited to join a steering committee to consider and revise the landowner's plan
ANTI-TRUST	
Anti-trust laws do not apply	Anti-trust laws do apply; no immunity even with issuance of the permit
EXEMPTION	
Exemption procedure is available to federal agency through application to Endangered Species Committee	Exemption procedure is not available to landowner
PROPERTY RIGHTS	
Property rights are not affected when FWS fails to issue Incidental Take Statement for federal project	Property rights may be lost when FWS denies or heavily conditions Incidental Take Permit for a landowner's activities

- Accordingly, while the federal agency is not subjected to a hearing, can demand a Fish and Wildlife Service decision in 90 days, and does not have to incur any significant additional costs in order to obtain an incidental take statement, the landowner must submit to a hearing and perhaps a steering committee of activists and local officials, undergo an application process with a duration of anywhere from one to five years, and suffer costs as high as hundreds of thousands of dollars to prepare a conservation plan in order to obtain an incidental take permit.

There are other inequities displayed in the chart, but one that is not: even after all of the procedures imposed on a landowner are conducted, before an incidental take permit may be issued the decision to issue still must undergo the very same consultation procedures that federal agencies must follow. Therefore, the landowners not only must run (more accurately, crawl) the gauntlet of procedures applied solely to them (as displayed in the second column of the chart), but then must turn around and sprint (stagger) back through a second gauntlet of the procedures applied to federal agencies (as displayed in the first column).

The regulated community sees no respite from regulation of private lands when living resources are protected not through the ESA, but instead under the concepts of biological diversity and ecosystem management. We are told continually by agency officials not to worry -- that these concepts are to be applied only on federal lands. Yet, with virtually the next breath, these officials note that ecosystems and biological diversity cross, and must be considered across, ownership boundaries. And nothing we've seen leads us to believe that ownership boundaries will be honored. Examples from the Executive Branch:

The President's Commission on Environmental Quality issued a report entitled "Biodiversity on Private Lands." Federal agency officials participated in a conference at the Forest Policy Center, Yale School of Forestry, entitled "Building Partnerships for Ecosystem Management on Mixed Ownerships." The Forest Ecosystem Management Assessment Team responsible for developing the President's Northwest Forests Policy described its voluminous report[8] as "Phase 1" of a multi-phased plan to adopt ecosystem management. Phase 1 is for federal lands (what, pray tell, will be Phase 2?).

And, it's not just studies. On September 19, 1991, four federal agencies (the same agencies -- Forest Service, BLM, National Park Service, and Fish and Wildlife Service -- whose officials have been so quick with the feckless assurances of private lands exclusion) joined with four State agencies to sign a memorandum

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[8] Forest Ecosystem Management Assessment Team (USFS, NMFS, BLM, FWS, NPS, EPA), Forest Ecosystem Management: An Ecological Economic, and Social Assessment, July 1993.

of understanding, entitled "California's Coordinated Regional Strategy to Conserve Biological Diversity." The signatories pledged "to make maintenance and enhancement of biological diversity a preeminent goal in their protection and management policies" -- preeminent, it seems, over whatever may be their statutory missions and guidance. They made it abundantly clear that their intention was to regulate not just federal and State, but also private, lands:

> In addition, the signatories agree to pursue the development of local and regional institutions and practices necessary to conserve biological diversity. These tools may include the establishment of mitigation and development banks, planning and zoning authorities, land and reserve acquisition, incentives, alternative land management practices, restoration, and fees and [last, but never least] regulation.
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> . . . . . .
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> Public lands are to be given first preference as reserves and conservation areas. Impacts on private lands will be minimized to the degree possible.

The Council on Environmental Quality and the Fish and Wildlife Service have embraced private lands with a vengeance. The Council, in new advice on considering biological diversity effects in NEPA documents, has stated:

> [B]iodiversity cannot be adequately conserved on the federal level alone. Even though federal lands and resources play a major role, the protection of biological resources will require concerted efforts by all levels of government and the private sector.[9]

The Service has called for an "ecosystem approach to fish and wildlife conservation that will involve as the agency's partners in its "holistic management strategies" the "other federal agencies, states, tribes, local communities, corporate and individual landowners, and other organizations."[10]

The concepts of biological diversity protection and ecosystem management also have trespassed upon private lands whenever they have appeared in

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[9] Council on Environmental Quality, Executive Office of the President, Incorporating Biodiversity Considerations into Environmental Impact analysis Under the National Environmental Policy Act (1993) at 16-17.

[10] Fish and Wildlife Service, Department of the Interior, An Ecosystem Approach to Fish and Wildlife Conservation: An Approach to More Effectively Conserve the Nation's Biodiversity (1994) at 1 and 3.

Congressional activity. The Clean Water Act reauthorization bill that was reported out of the Senate Committee on Environment and Public Works last Congress added these concepts to all the principal water pollution programs applicable to private lands -- National Pollutant Discharge Elimination System permits, dredge and fill permits, nonpoint source programs, and watershed planning. Most frightening, however, are virtually identical bills to enshrine biological diversity in national policy that have been introduced in several Congresses by senior Democrats, some of whom had been chairmen of the committees of jurisdiction prior to this "Contract" Congress (*e.g.* Senator Moynihan, Rep. Studds, and Rep. Scheuer). Of course, the bills would require all federal land management to be conducted to conserve biological diversity, making biological diversity the overarching, umbrella environmental protection standard. But, they did not stop there; these bills quite clearly embraced private lands in the cause of biological diversity protection. They would require all federal agency actions -- including all permitting on private lands -- to be conducted to conserve biological diversity; order the Council on Environmental Quality (CEQ) to publish regulations to include biological diversity analysis in environmental assessments and environmental impact statements on federal agency actions, including permitting on private land; direct the CEQ to identify what would be endangered and threatened "biotic communities" on private, as well as federal, lands; require all federal agencies to review programs and report to the President on how those programs should be changed administratively or legislatively to better conserve biological diversity; and establish an interagency working committee on biological diversity to develop a coordinated federal strategy for conserving biological diversity.

When faced with these harbingers of future statutory and regulatory controls on private land to conserve biological diversity and the likelihood that biological diversity protection requires no use whatsoever be made of the land (*see* point 4 above), the regulated community will not be reconciled quickly or easily to the biological diversity concept.[11]

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[11] As Professor Ruhl summarizes this issue:

> The focus of federal involvement ... increasingly has been to establish a regime of biodiversity *regulation* through environmental controls of development on *nonfederal* lands. The emphasis on regulation of nonfederal lands is not entirely misdirected as much of our nation's biological resources reside there. The approach for dealing with such areas, however, has been to inject the federal regulatory scheme into the heart of the most basic of state, local and private land use decisions, often to the sharp resentment of state and local jurisdictions and private interests.

Ruhl, *supra* note 4, at 561 (emphasis in original).

Some would say: wait a minute --- if, or more properly when, biological diversity protection or ecosystem management is extended to private lands, it will be in the form of incentives, not regulatory prohibitions. Sure. If those incentives are anything like the incentives proposed by Secretary Babbitt, they are nothing more than the opportunity to be relieved from a regulatory prohibition and civil and criminal sanctions that would otherwise be imposed. First, we threaten you with injunctions against the use of your property, and throw in civil and criminal punishment for good measure; then we offer you as an "incentive" to avoid that fearful fate the opportunity to "voluntarily" agree to impose on yourself all sorts of use constraints and mitigating costs. The word "incentive" is truly corrupted when it is employed in such a manner.

7. Don't Just Quit What You're Doing, Do Something For Us. The ESA is the first environmental law which can be manipulated not only to require private landowners to refrain from productive economic activity in order to avoid damaging the environment, but also to impose on them the affirmative obligation and costs to actively manage their lands for the sole purpose of improving the environment. Several court decisions[12] have made it clear that all "persons" subject to the "take" prohibition of ESA §9 may not only be barred from altering habitat of listed species to the species' detriment but also be made to alter the habitat for the species' benefit. Landowners can be forced to spend money on their property to improve the living conditions for any fish, wildlife, or plants that live there, or can be induced to live there, without any ability to generate even off-setting income from that property. At least, with rare exceptions, under the environmental laws requiring regulation for non-living resources, a landowner may make the admittedly unhappy choice of refraining from using his or her property at all and thereby avoid federal regulation. Not so under the ESA; federal regulators may wield that authority to tell you that you are not allowed not to use your property -- instead, you must use it as they say.

Needless to add, if this presages how future living resource protection regulation treats private land, the regulated community will be distressed.

8. Whatever Happened To Site Specific Decisionmaking? Regulation On An Extraordinary Scale. Under the ESA, critical habitat for the northern spotted owl covers 6.9 million acres of federal land in three States; the proposed rule governing private land activities in northern spotted owl habitat directly impacts

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[12] *Palila v. Hawaii Department of Land and Natural Resources*, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988); *Sierra Club v. Lyng*, 649 F. Supp. 1991 (E.D. Tex. 1988), *aff'd*, *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

20.9 million acres, relaxing ESA "take" requirements on only 409,000 acres.[13] Over 6.5 million acres in four States, including over one million acres of private lands, have been designated as critical habitat for the desert tortoise, while 1980 linear miles of the lower Colorado River and its shorelines have received such designation for four endangered fish. Ecosystem management operates on a similar or even grander scale. The President's Northwest Forest Plan applies to 24 million acres of federal land in three States, the Interior Columbia Basin Ecosystem Management Project covers 75 million acres of federal land (48 national forests and BLM districts) in four States.

Companies and landowners have been accustomed to addressing their fate under non-living resource environmental laws on a site-specific basis or, at worse, within a discrete, relatively small airshed or watershed. Now a decision of an ecoregion planner hundreds of miles and several States removed can dictate where and when a timber sale may be held, grazing may occur, etc., without any opportunity for the affected party to offer his or her own views. Worse, there is no effective avenue for the affected party to offer, or the regulator to consider, alternatives tailored to specific site conditions. Decisionmaking at this scale inevitably leads to a sense in the regulated of disenfranchisement from the regulatory process.

And, to the frustration of the companies, developers, and landowners, there is no place within these vast regions to escape. Even on a site in the most pristine, least polluted, harshest landscape, there will always be myriad ecosystems and biological diversity to contend with. Indeed, in contrast with the usual application of non-living resources law, when regulation is intended to protect living resources it is likely to be more prevalent and intrusive in undisturbed areas than in developed areas.

9. Toward Free-Form Regulation Unfettered By Rules Or Standards. The regulated community has found that the living resource regulators treat statutory and regulatory standards cavalierly. Field biologists confuse the "jeopardy" standard of ESA § 7 with the "take" standard of ESA § 9 and find that the taking of even one member of an endangered or threatened species somehow may "jeopardize the continued existence" of that entire species. These same officials suffer a similar disability in applying the test established by the regulation which defines "take" involving habitat modification (50 C.F.R. § 17.3). In a deposition of a Regional Director -- that's right, a Regional Director -- of the Fish and Wildlife Service we took a year ago, that official managed to say that habitat modification alone constitutes a "take" despite the fact that the regulation

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[13] Comments of the American Forest & Paper Association to the U.S. Fish and Wildlife Service - Region 1 Regarding the Proposed Special Rule for the Conservation of the Northern Spotted Owl on Non-Federal Lands, May 31, 1996.

establishes a three part test of which habitat modification is only the first part -- there must be (1) "significant habitat modification," which (2) "significantly impair[s] essential behavioral patterns" that (3) "actually kills or injures wildlife." How'd the Regional Director do it? Simple. He opined that habitat modification (forget "significant") always alters behavior (forget "essential"), and any change in behavior is injury ("actual"?).

And, it seemingly doesn't matter how many times the agency informs its personnel in guidance documents that only federal agencies have an obligation to pursue "conservation" (defined as recovery by ESA § 3) of threatened or endangered species and that landowners cannot be compelled, even in the so-called "habitat conservation plans," to conserve species, but only to avoid "take." In defiance of that guidance, Fish and Wildlife Service officials continue to insist in approving such plans, in promulgating rules under ESA § 4(d), and in demanding reasonable and prudent measures in consultation on federal permits that landowners take actions the purpose of which is clearly species conservation.

Although the regulated community may take cold comfort in ESA standards that are so readily ignored in practice, it nonetheless is comfort. The community is even more troubled by the newer concepts of ecosystem management and biological diversity which seemingly have no standards, rules, or definitions whatsoever ... an ideal breeding ground for wholly subjective decisionmaking unburdened by the threat of any judicial disciplining. Take ecosystem management. Never mind that there is no commonly accepted definition of an ecosystem, that an ecosystem can be as small as a single spring or plot of ground or as large as a multi-state region (Greater Yellowstone, Columbia Basin, etc.) and every conceivable size in between, that any one site can be located simultaneously within hundreds of different ecosystems each defined by different criteria or by officials with different interests and each possessing different regulatory imperatives, that designation of an ecosystem and delineation of its boundaries are as much an art form as science, that our knowledge about how any ecosystem operates is truly rudimentary, or that to "manage" an ecosystem of any size likely requires the politically impossible task of removing existing management designations such as wilderness, national parks, etc.[14] This concept of ecosystem management is so vague and ephemeral -- so susceptible to subjective judgment or bias -- that the agencies can make of it anything they please and be free of any challenge; it provides no law for the agencies to apply or the courts to enforce. This was brought home by statements of Chief Thomas in a June 1994 Forest Service leadership meeting:

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[14] The description with the most frightening implications for regulation: "An ecosystem is a process ... You never step into the same ecosystem twice." J. Cohen and I. Stewart, The Collapse of Chaos: Discovering Simplicity in a Complex World, 367 (1994).

> What is ecosystem management? I will tell you my concept -- which, of course, is only my view. [*Only his view? Does each and every other Forest Service official have "only his [or her] view"?*] ... New efforts by scientists, philosophers, technologists, leaders and managers can be targeted at the sharpening of evolving [ecosystem] concepts and practices. [*Did you catch that? "Philosophers" right after "scientists" and before "leaders and managers."*] ... Under ecosystem management, small scale actions are judged and tracked for their contributions to particular desired future conditions. These conditions are to be nurtured in the constantly evolving pattern that makes up the multi-scale ecosystem tapestry." [*Well now, there's a constantly evolving, multi-scale -- but otherwise readily understood and easily applied -- standard the law and the regulated can get their hands around. In fact, you would need "philosophers" to discern the meaning of the "constantly evolving pattern that makes up the multi-scale ecosystem tapestry."*]

What is most distressing is that this policy -- which has no sanction from statute and appears nowhere in the agencies' regulations -- is allowed, indeed expected, to override long-standing, truly statutory and regulatory policies such as multiple use and sustained yield. And now, the Forest Service intends to correct its regulatory silence and formalize the investiture of ecosystem management as the autocratic monarch of federal land planning in its proposed planning regulations.

Biological diversity? A recent law review article that was, in fact, favorable to the ecosystem management and biological diversity concepts allowed biological diversity definitions to speak for themselves to demonstrate how devoid of standards that concept is:

> Definitions employed by conservationists and scientists fail to provide concrete factors useful for setting legal standards. For instance, current theories focus on the benefits of biodiversity, which simply refer to the "variety of life." Ecosystem biodiversity in particular is defined as "the various assemblages of plants, animals, and microorganisms that occur in different physical settings."[15]

As Professor Ruhl put it: "Biodiversity is an elusive concept in science and law ... It is no wonder that, given the uncertainty of the scientific community

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[15] L.M. Bernstein, "Ecosystem Communities: Zoning Principles to Promote Conservation and the Economy," 35 Santa Clara L. Rev. 1309 (1995).

about what diversity is, environmental law has charted no clear directions ..."[16] Amen.

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Well there you have it. At last, the diatribe is over. Certainly, the regulated community's views of living resources are neither as homogeneous nor as bleak as I have suggested here. However, I urge those of you who graciously listened to me to take to heart the concerns I've discussed. With all the positive that has been expressed in this conference about living resources protection, it would be a shame if neglect of the negative left that protection unrealized.

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[16] Ruhl, *supra* note 4, at 564-565.