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ENDANGERED SPECIES ACT REFORM PROPOSALS:
AN ENVIRONMENTALIST'S PERSPECTIVE

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BIODIVERSITY PROTECTION:
IMPLEMENTATION AND REFORM OF THE
ENDANGERED SPECIES ACT

Natural Resources Law Center
University of Colorado
School of Law
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**ENDANGERED SPECIES ACT REFORM PROPOSALS:
AN ENVIRONMENTALIST'S PERSPECTIVE**

by Wm. Robert Irvin

I. SUMMARY

A. ESA Reform in the 104th Congress

With the advent of the 104th Congress in January 1995, the new majority served notice of its intent to dramatically reform a quarter century's worth of environmental legislation. Chief among their targets was the Endangered Species Act (ESA), 16 U.S.C. §§ 1531, *et seq.* Enacted in 1973, the ESA has been variously described as the "crown jewel" or the "pit bull" of U.S. environmental law. Praised as essential to the conservation of biological diversity and pilloried as a law running roughshod over private property rights, the ESA is, at once, our Nation's strongest environmental protection statute and its most vulnerable.

Advocates of ESA reform moved quickly in the 104th Congress to transform the law. Senator Slade Gorton (WA) introduced a bill, S. 768, which he candidly admitted was drafted for him by lawyers and lobbyists for the timber industry. Representative Don Young (AK), Chairman of the House Resources Committee, and Representative Richard Pombo (CA) held a series of field hearings around the country at which the witness lists were stacked decidedly in favor of ESA critics. Young and Pombo subsequently introduced their own bill, H.R. 2275, which, has been reported by the House Resources Committee and, if enacted into law, would undermine virtually every protection afforded by the ESA, from listing to recovery. Senator Dirk Kempthorne (ID), Chairman of the Environment and Public Works Committee's Subcommittee on Drinking Water, Fisheries, and Wildlife, introduced his own comprehensive ESA reform bill, S. 1364, which in many ways combined the most extreme provisions of the Gorton and Young-Pombo efforts. Common to all these bills is a retreat from the ESA's central goal of recovery, burdensome restrictions on listing and conservation of species, and broad requirements for compensation in one form or another to property owners for restrictions on property use resulting from endangered species conservation requirements. In short, major changes to the ESA seemed imminent.

Faced with this situation, environmentalists had the daunting task of regaining political support for the ESA that had once been taken for granted. Although the environment was not identified as a major issue in the 1994 elections and the word "environment" does not appear in the Contract With America, clearly, the new majority in Congress felt it had a mandate to make major environmental reforms. In working to capitalize on this perceived mandate, however, the majority seriously overreached. By introducing bills that were widely viewed as extreme, advocates of ESA reform were unable to push through any of their reform agenda. The emergence of a block of Republican environmental moderates in the House, the resistance of congressional leaders such as House Speaker Newt Gingrich (GA) and Senate Environment and Public Works Committee Chairman John Chafee (RI) to moving ESA reform bills, and the discovery by the White House of the environment as a wedge campaign issue have all worked to slow the ESA reform bandwagon.

The shift in political support for the environment is best symbolized by two Senate votes on the ESA. In March 1995, the Senate voted 60-38 to place a moratorium on listing additional species as threatened or endangered under the Endangered Species Act. While the moratorium was in place, more than 500 species that warranted protection were denied protection under the ESA. A year later, in March 1996, the Senate voted to retain the moratorium. This time, however, the vote was much closer: 51-49. A shift in just one vote would have resulted in Vice President Gore casting a tie-breaking vote to lift the moratorium.

While the 1996 Senate vote was a defeat for endangered species conservation, it also, paradoxically, demonstrated the sea change in support for environmental protection in the 104th Congress. In 1995, not a single Republican voted against the moratorium. In 1996, led by Senator Chafee, seven Republicans (DeWine (OH), Gregg (NH), Jeffords (VT), Roth (DE), Specter (PA), and Thompson (TN)) voted to lift the moratorium. In 1995, six Democrats voted for the moratorium. In 1996, two of them (Feinstein (CA) and Exon (NE)) voted for endangered species protection. In 1995, Senator Kay Bailey Hutchison (TX), the author of the moratorium, felt no need to compromise. In 1996, to stave off the move to lift the moratorium, she offered a small compromise, permitting emergency listings.

At the same time, however, in a truly cynical move, Senator Hutchison and her allies increased funding by a mere \$1 to cover any emergency listing activities.

Subsequent to the 1996 Senate vote on the ESA listing moratorium, Congress and President Clinton reached a compromise on a bill funding Fiscal Year 1996 operations of the government. A major stumbling block to resolving the budget impasse was removed when Congress, bowing to increasing political pressure in support of the environment, agreed to allow the President to waive the ESA listing moratorium and several other anti-environmental appropriations riders. President Clinton promptly exercised his authority, clearing the way for resumption of listing new species under the ESA.

B. The ESA Working Group Proposals

Despite the lifting of the ESA moratorium, it is not business as usual for the ESA. Reauthorization continues to be stalled, while endangered species conservation suffers. Funding for ESA implementation has been slashed, severely handicapping effective implementation of the law by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). Moreover, both agencies have been reluctant to vigorously pursue endangered species conservation efforts while the political fate of the ESA is up in the air.

In addition, while the ESA has been responsible for notable successes, including the restoration of such species as red wolves, gray wolves, and black-footed ferrets to the wild and the recovery of the bald eagle, the law has been less successful in other ways. In particular, the ESA has not provided adequate incentives to private landowners to conserve species on their property and, in some instances, has actually worked as a disincentive to voluntary conservation efforts on private lands.

Recognizing these problems, in early 1996, four national environmental organizations (Center for Marine Conservation, Environmental Defense Fund, The Nature Conservancy, and World Wildlife Fund) initiated a series of discussions with members of the regulated community (National Realty Committee, Western Urban Water Coalition, Plum Creek Timber Company, and Georgia Pacific Corporation) as well as representatives of State interests (Western Governors' Association and International Association of Fish and Wildlife Agencies). The goal of this ESA Working Group has been to develop a set of

proposals for ESA reauthorization that preserves the basic principles of the ESA, addresses legitimate concerns that have been identified by both the environmental and regulated communities regarding the ESA's effectiveness, and, importantly, enjoys support from elements of both the environmental and regulated communities. In short, we sought to find common ground on which to move forward with ESA reauthorization.

Our efforts have been fruitful. A detailed summary of the ESA Working Group's proposals is appended. From an environmentalist's perspective, what is not contained in the ESA Working Group's proposals is as important as what is there. The proposals leave the current definition of "harm" intact, preserving the U.S. Supreme Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S.--, 115 S. Ct. 2407 (1995). The proposals do not alter the ESA's fundamental goal of recovery. The proposals do not impose new procedural or substantive hurdles in the path of listing of species. Nor do the proposals require compensation for restrictions on the use of private lands resulting from the ESA.

At the same time, adoption of the ESA Working Group's proposals will significantly advance the conservation of endangered species and their habitats. The ESA Working Group's proposals will make implementation of recovery plans part of the affirmative conservation obligations of every Federal agency. The proposals extend the application of Section 7 to Federal actions outside the U.S., clarifying the issue which gave rise to the litigation in *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), *reversed*, -- U.S. --, 112 S. Ct. 2130 (1992). The proposals provide estate tax relief for landowners who enter into agreements benefitting endangered species and tax credits to landowners who enroll land in an endangered species habitat reserve program analogous to the Conservation Reserve Program. The proposals also provide incentives for landowners to voluntarily enter into pre-listing agreements that benefit species before they decline to a point where they need to be listed. In addition, the proposals codify authority for safe harbor agreements, under which landowners will actively manage habitat for endangered species in exchange for assurances that their ESA obligations will not increase as a result.

The centerpiece of the proposals is provision for Natural Systems Conservation Plans

(NSCP's), patterned after the Natural Communities Conservation Plans (NCCP's) currently underway in southern California. NSCP's are habitat-based plans that promote the protection, restoration or enhancement of ecosystems, natural communities, or habitat types. NSCP's will afford protection to both listed species and unlisted species which are rare or vulnerable. NSCP's will be subject to approval by the Secretary of the Interior, applying a stronger conservation standard than provided under existing Section 10 of the ESA for habitat conservation plans. In exchange for the substantial commitments of land and money necessary to carry out an NSCP, landowners will receive so-called "no surprises" assurances that their obligations will not be subsequently increased. In addition, activities within the scope of an approved NSCP will be exempt from further requirements under Sections 7 and 9 of the ESA.

C. Reaction to the Proposals

Reaction to the ESA Working Group's proposals has been all too predictable in some quarters. Rather than addressing the merits of the proposals, extremists on both the left and the right have attacked the ESA Working Group participants for daring to break their respective ranks. On the one hand, small fringe environmental groups like the Southwest Center for Biological Diversity have attacked the national environmental group participants as "corporate front group[s]." On the other hand, right-wing environmental columnist Alston Chase has described the ESA Working Group as a "mushrooming collusion between Republicans, big business and environmentalists," an "unsavory triumvirate [that] would enact policies that further enrich the privileged classes at the expense of ordinary citizens."

Fortunately, more rational consideration of the ESA Working Group's proposals is also occurring. Representative Jim Saxton (NJ), Chairman of the House Resources Committee's Fisheries, Wildlife and Oceans Subcommittee, has drafted an ESA reauthorization bill incorporating the ESA Working Group's proposals. Representative Saxton plans to introduce his bill later this year. House Speaker Gingrich was recently quoted as saying that the Young-Pombo bill would not be brought to the House floor, but Saxton's bill could provide the vehicle for ESA reauthorization this year. In the Senate, the ESA Working Group proposals are being considered for inclusion in a consensus ESA

reauthorization bill under negotiation by Senators Chafee, Kempthorne, Max Baucus (MT), and Harry Reid (NV).

The ESA Working Group proposals have also received some important support from grassroots environmental activists and prominent scientists. In a recent letter, Dan Silver, Coordinator of the Endangered Habitats League, a grassroots conservation group in southern California which has fought for years to protect the California gnatcatcher and its habitat, wrote that multi-species natural systems planning "is literally giving us hope where none existed before" for conserving fragmented habitat on private lands. And in another recent letter to Senators Chafee and Baucus and Representative Saxton, Cornell University Professor Thomas Eisner and Harvard University Professor Edward O. Wilson wrote that the ESA Working Group's proposals "clearly move[] the Endangered Species Act in the direction that we and many other scientists have long advocated."

Nevertheless, even with the progress made by the ESA Working Group, the likelihood of ESA reauthorization this year is small, particularly as the 1996 election campaigns heat up. Regardless of the outcome of the elections, however, ESA reauthorization will remain a subject of heated debate and deep divisions, unless responsible voices in the environmental community and the regulated community are willing to reach across the divide and bridge our differences. As the only ESA reauthorization proposals which have the support of environmental groups, regulated interests, and scientists, the ESA Working Group proposals are a step in the right direction.

APPENDIX:

SUMMARY OF ESA WORKING GROUP PROPOSALS

A working group consisting of representatives of the Environmental Defense Fund, Center for Marine Conservation, The Nature Conservancy, and World Wildlife Fund, together with the National Realty Committee, Western Urban Water Coalition, Plum Creek Timber Company, Georgia-Pacific Corporation, and in cooperation with the Western Governors' Association and the International Association of Fish and Wildlife Agencies has developed a set of proposals for improving conservation of threatened, endangered, and candidate species and their habitats and providing the regulated community with regulatory and financial incentives for voluntarily undertaking conservation obligations beyond those currently required by the Endangered Species Act (ESA). The proposals are:

Natural Systems Conservation Planning

The proposed authorization of Natural Systems Conservation Plans (NSCP) is designed to provide a mechanism under the ESA for habitat-based planning to protect, restore, and enhance ecosystems, natural communities, and habitat types upon which threatened, endangered, and candidate species depend. NSCP's will be subject to approval by the Secretary of the Interior, who must conclude that the plan provides reasonable certainty that the ecosystems, natural communities, or habitat types within the plan area will be maintained in sufficient quality, distribution, and extent to support the species typically associated with those ecosystems, natural communities, or habitat types, including any listed or candidate species.

NSCP's will identify indicator species and specialized species, which are listed, candidate, or other rare or vulnerable species whose ecological needs are not adequately addressed by the use of indicator species. The Secretary is prohibited from approving a plan if the Secretary determines that the plan will jeopardize the continued existence of any indicator or specialized species or cause any unlisted indicator or specialized species to be listed. The Secretary may permit incidental taking of listed species during the development of the plan, provided that the taking will have only a negligible impact on the survival or recovery of the species and will not prejudice the completion of the plan or preclude the consideration of any significant alternative to the plan.

The proposal provides two major incentives to the regulated community to make the commitments necessary to develop and implement NSCP's. First, so long as there has been notice and at least a 60-day opportunity for public comment, the development and approval of NSCP's is not subject to NEPA requirements. Second, once the Secretary has approved an NSCP, activities within the scope of the plan are not subject to ESA Section 7 consultation

requirements or Section 9 take prohibitions.

The Secretary may revoke approval of an NSCP if the parties breach the agreement, fail to cure the breach, and the effect of the breach is to significantly diminish the likelihood that the plan will achieve its goals. The Secretary may also revoke NSCP approval if the plan no longer has the funding necessary to implement it. Legal challenges to the development and approval of an NSCP may only be filed by persons who filed written comments on the NSCP and who file suit within 60 days of the action being challenged. Legal challenges of any noncompliance with an NSCP require 60 days notice to the Secretary and the party alleged to be in noncompliance.

No Surprises and Other Regulatory Incentives

In order to provide the regulated community with an incentive to enter into habitat conservation plans (HCP) and NSCP's, a "no surprises" policy will be codified. Under this policy, once an HCP or NSCP has been approved, federal, state, and local governments would be prohibited from requiring any additional mitigation or compensation from the permittee unless the permittee consents, the Secretary has revoked approval of the HCP or NSCP, or the Secretary has found that the modifications do not impose any additional restrictions on land use or water rights and the modifications will not increase the costs to the permittee.

The NEPA limitations and requirements for legal challenges applicable to NSCP's will also apply to HCP's. At the time of approval of an HCP, the Secretary is to issue a permit for the incidental take of any unlisted species covered by the plan. The permit will take effect if the species should become listed.

Pre-Listing Agreements

To encourage the conservation of species before they decline to the point at which they should be listed, pre-listing agreements are authorized. The Secretary, in cooperation with the relevant state fish and wildlife agency, may enter into a pre-listing agreement with any non-federal person if, after notice and public comment, the Secretary finds that the agreement provides reasonable assurances that the species is likely to be sufficiently maintained as to reduce the likelihood that the species will need to be listed. To encourage such agreements, the activities of the non-federal person in accordance with the agreement will not be subject to Section 7 consultation requirements and Section 9 take prohibitions will apply only to the extent provided for in the agreement.

State Roles

To promote greater participation by state fish and wildlife

agencies in endangered species conservation, a new statement of policy will be added to ESA Section 2(b), recognizing the broad trustee and enforcement powers of the States with respect to fish and wildlife, including threatened and endangered species. In addition, cooperation with the state fish and wildlife agencies will be required throughout the ESA. The Secretary may delegate the lead role in formulating draft recovery plans or draft revisions to recovery plans to a state fish and wildlife agency or, where more than one state is affected, to any particular state agency with the concurrence of all the affected states. The Secretary may also provide Section 6 funds to states for recovery planning. Furthermore, ESA implementation activities undertaken in cooperation with the state fish and wildlife agencies are exempted from the Federal Advisory Committee Act (FACA).

Implementation of Recovery Plans

To strengthen the obligation of federal agencies to implement recovery plans, the definition of "conserve" is amended to specify that implementation of recovery plans is a method or procedure for bringing species to the point at which the ESA's protection is no longer necessary. Thus, the duty of federal agencies to conserve species under Section 7(a)(1) will include the duty to implement recovery plans.

Application of Section 7 Abroad

To strengthen the role of the U.S. in conservation of endangered species globally, Section 7(a) is amended to clarify that consultation is required on all federal agency actions, including those conducted, or with effects, outside the U.S.

Modifications to Existing Projects

To clarify the scope of Section 7 consultation where modifications to existing projects are undertaken, regulations governing the scope of consultation are codified and amended. Existing regulations, set forth at 50 C.F.R. § 402.02, define "effects of the action" that are considered for purposes of Section 7 consultation so as to make clear that past and present impacts in an area are to be considered as part of an environmental baseline, against which the additional impacts of an action can be measured. This regulatory definition will be codified.

In addition, a provision will be added making clear that, when consultation is required to consider the effects of a modification to an existing project, any changes that are necessary to avoid jeopardy or to further the conservation of a species must be directed at the modification, not the existing project. For example, if the operator of a dam located on federal land proposes to modify the dam, and the modification may affect a listed species or critical habitat, Section 7 consultation would be required. In

determining the impacts of the proposed modification, the impacts of the existing dam would be considered as part of the environmental baseline. The additional impacts of the proposed modification would then be assessed to determine if a species will be jeopardized by the proposed modification. While changes to the proposed modification could be required, changes to the existing dam could only be required if the applicant asked that they be included in the formulation of reasonable and prudent alternatives. Even if the applicant does not make such a request, Section 7 consultation could still result in a jeopardy opinion, requiring the action agency or the applicant to seek an exemption from the Endangered Species Committee.

Cooperation With Stakeholders

To promote cooperation with private landowners and entities in addition to the state fish and wildlife agencies, Section 6(a) is amended to direct the Secretary to also cooperate with affected parties with substantial interests in land or water affected by the Secretary's actions. In addition, the Secretary is authorized to accept donations or loans of money, equipment, staff, or technical assistance to carry out the ESA.

Safe Harbors

To encourage landowners to voluntarily undertake land management practices which promote endangered species conservation, the Secretary is authorized to enter into "safe harbor" agreements with landowners, codifying the Clinton Administration's regulatory policy. Under a safe harbor agreement, a landowner who agrees to manage land so as to promote endangered species habitat receives assurances that his or her obligations under the ESA will not increase beyond what they are at the outset of the agreement. For example, a landowner who owns pine forest currently containing 10 red-cockaded woodpeckers, and who agrees to manage his property so as to attract more woodpeckers, will only be obligated to protect habitat for the baseline of 10 woodpeckers should he choose in the future to cut his trees.

Financial Incentives

A number of financial incentives are also created to promote endangered species conservation. A revolving loan fund to finance the development of HCP's is created, as was done in the Studds-Dingell/Baucus-Chafee ESA legislation in the 103rd Congress. Deferral of estate taxes on property dedicated to endangered species conservation is authorized. A tax credit for property managed for endangered species conservation is also created. These tax provisions are found in S. 1365 and S. 1366, the Kempthorne ESA incentives bills.