The Endangered Species Act Turns 40 in 2013

Melinda E. Taylor January 25, 2013

On December 28, 1973, President Richard M. Nixon signed the Endangered Species Act into law. Nixon, whose veto of the Clean Water Act had been overridden by Congress a year earlier, said in his signing statement, "Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we all share as Americans." His words echoed Congress's findings in Section 1 of the ESA that "these species of fish, wildlife and plants are of esthetic, ecological, education, historical, recreational, and scientific value to the Nation and its people." Both statements reflected the American public's strong support for the law that was intended to reverse a decades-long trend of species extinctions. The law had passed the Senate on a voice vote and the House by a vote of 355 – 4.

The ESA is arguably the most powerful environmental law on the books. Over 1,400 animals and plants have been placed on the official threatened and endangered species list by the federal government, a step that triggers the law's protection. Once listed, activities that would cause the "take" of the species are prohibited, unless authorized by the U.S. Fish and Wildlife Service or NOAA-Fisheries Service. Take is defined very broadly in the ESA and its implementing regulations as any action that causes harm to an endangered species or its habitat. Otherwise legal activities ranging from dam construction to housing developments that would go so far as to jeopardize the continued existence of a listed species are prohibited by the ESA. The act is designed to bring rare species and the ecosystems upon which they depend back from the brink of extinction and promote their full recovery.

Today, almost 40 years after its original passage, the ESA continues to enjoy strong bipartisan support from the public. More than 80% of Americans polled in 2011 expressed support for the law, and more than 90% said it was an important safety net to prevent extinctions. But despite the overwhelming public sentiment in favor of the ESA, its implementation has been controversial.

The ESA has been used by environmentalists in many parts of the country to slow down (and very occasionally stop) an array of development projects, including dams, subdivisions, wind farms and pipelines. The mitigation requirements imposed on projects that could affect endangered species can be expensive and time-consuming to put in place. In some places, enforcement of the act by the federal agencies has run headlong into the prior appropriation doctrine, the common law by which the western states regulate the use of surface water by farmers, cities, and industry. The result has been a series of high profile controversies, such as a debate about usage of the Klamath River in Oregon and California, that can rage for years and lead to major changes in the water management framework. Critics claim that the law puts the needs of endangered species ahead of humans, and that it simply costs too much.

Despite the controversy, there is a growing consensus among policy makers, environmentalists, and the regulated community that the law has achieved a great deal over the last four decades. The U.S. Fish and Wildlife Service is celebrating the 40th anniversary of the ESA this year and touting the law's important success stories. Though only a small number of listed species have fully recovered, the act has successfully prevented the extinction of hundreds of plants and animals. According to a study published by the Center for Biological Diversity, 93% of listed species are stable or recovering due to the law's protections. The bald eagle, gray wolf, peregrine falcon, American crocodile, and many others have recovered to the point that they have been down-listed or delisted.

The ESA's achievements are important and the act's champions take justifiable pride in the progress that many listed species have made toward recovery. The act is flawed in several fundamental respects, however, and as a result the law has not lived up to the lofty goals articulated by President Nixon and Congress when the law was enacted. One of the most glaring problems with the ESA is its lack of incentives for private landowners to protect endangered species.

More than half of the listed species in the United States occur entirely on private land. In states like Texas with little public land, virtually all listed species occur on private land. The ESA prohibits the take of listed species regardless of where they are found, which means that private landowners with endangered species on their property can be prosecuted if they clear timber, mow prairie grass, or dam a creek without approval from the federal government. The penalties for violating the ESA are stiff: up to $25,000 – $50,000 fine per violation and possible criminal penalties. Private landowners have no incentive to conserve rare species on their property by enhancing or expanding their habitats. To the contrary, they have every incentive to prevent endangered species from inhabiting their land in the first place, or from expanding if they are already present, because their presence is likely to lead to restrictions on what they can legally do with their property.

During the Clinton Administration, Interior Secretary Bruce Babbitt promulgated several policies designed to address the ESA's disincentives for private landowners. The safe harbor policy and regulations that set up "candidate conservation agreements with assurances" were designed to remove the ESA's disincentives by giving private landowners flexibility with respect to managing their land in return for commitments to enhance the quality of the habitat they owned. The Clinton Administration also issued a policy designed to promote conservation banking, a mechanism by which private landowners can actually profit from creating and maintaining habitat for endangered species. Today, some 2 million acres of private land are being managed under safe harbor agreements and more than 40 conservation banks in 10 states are up and running.

Those are impressive numbers, but a huge amount of work remains to be done. To date, the Obama Administration has failed to put forth any new initiatives to encourage habitat conservation on private lands, and has dragged its feet on approving conservation banks and safe harbor agreements. During the depths of the Great Recession, construction projects were stopped or slowed in many parts of the country, giving rare species on private land a temporary respite from habitat destruction. With the resurgence of economic activity and housing starts, however, pressure on sensitive habitats is certain to increase. It imperative that the Administration use the tools available and expand the list of possible incentives to encourage conservation of habitat on private land. Doing so will ensure that the ESA continues to rack up success stories for another 40 years.

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