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Using the Market to Conserve Endangered Species: Promising Approach or a Pipe Dream?

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The federal Endangered Species Act has been referred to by legal scholars as the “pit bull” of environmental statutes, because of its “sharp teeth and strong grip.” The ESA’s structure is simple compared to other environmental laws: animals and plants that are at risk of becoming extinct may become “listed” as “threatened” or “endangered” and, once listed, are covered by the Act’s protective measures. The Act packs a potent punch. The ESA’s protective measures include a broad prohibition on “taking” that applies to individuals, corporations, state and federal government agencies, and even foreign entities, and a requirement that federal agencies must consult with the U.S. Fish and Wildlife Service (for terrestrial and freshwater species) or the National Marine Fisheries Service (for marine species) to insure that any action they undertake avoids jeopardizing the continued existence of the species. The ESA has been used to halt construction of major federal projects, including dams and highways, and to modify the design of numerous projects, such as shopping malls, subdivisions, and wind farms.

The concept of mitigation is a cornerstone of the ESA. The ESA requires that federal agencies use their powers to conserve listed species and to minimize unavoidable impacts of their activities. Non-federal entities, including individuals, corporations, and local government agencies, must “minimize and mitigate” impacts to listed species associated with their activities, in order to obtain an “incidental take” permit. The minimization and mitigation measures are required by the ESA to be outlined in an approved habitat conservation plan, or HCP.

The concept of what constitutes appropriate mitigation has evolved over time. In 2003, the Fish and Wildlife Service published national guidance for the establishment, use, and operation of conservation banks to satisfy the mitigation requirements of the ESA. The Conservation Banking Guidance provided that conservation banks should preserve habitat with long-term conservation value to mitigate the loss of isolated and fragmented habitat that has no long-term value to listed species. The Guidance defines “conservation bank” as “a parcel of land containing natural resource values that are conserved and managed in perpetuity, through a conservation easement held by an entity responsible for enforcing the terms of the easement, for specified listed species and used to offset impacts occurring elsewhere to the same resource values on non-bank lands.” Once a bank is established and approved by the Fish and Wildlife Service, the bank owner may sell “credits” to public and private entities that are required to mitigate for the impact of their projects on the covered species.

Conservation banks offer advantages to project proponents who are required to mitigate. By mitigating through a bank, the project applicant saves money and time, because the regulatory compliance process is greatly simplified.

Aggregating smaller individual mitigation projects into a bank also provides greater benefits to the species. Banks may be sited to facilitate dispersal of species between two patches of habitat. Banks can be used to prevent habitat fragmentation and provide a buffer for other protected areas.

Conservation banks also provide benefits to landowners. Some of the advantages are financial: banks transform what was previously a liability for many landowners into a revenue-generating asset. The landowner can profit from selling credits and even lower their property taxes in some instances. Other advantages are psychological: rather than considering the presence of a listed species to be a hindrance to land use decisions, it can become an asset.

A robust conservation banking industry has been established over the last twenty years. As of May 2013, there were 111 conservation banks listed in the federal government’s data base. Bank owners include timber companies, non-governmental organizations such as land trusts, family farmers, and municipal and county governments.

In Texas, conservation banks have been built into several recent regional habitat conservation plans. In Hays County, for example, the County established a bank to protect habitat for the endangered golden-cheeked warbler and black-capped vireo, two song birds that nest in Central Texas. Project developers in the County can satisfy mitigation requirements by paying a fee that is used to buy credits.

Large scale HCPs currently under development by the wind industry in the Midwest and in the Appalachian Mountain region would incorporate conservation banks as one of the mitigation options. The banks would be used to mitigate the impacts of wind farms on the whooping crane and piping plover, as well as the greater sage grouse, a species that may be listed soon.

The Service issued an advanced notice of proposed rulemaking in March 2012 requesting comments on the idea of approving conservation banks for candidate species, species that are not yet listed. Conservation banks for the lesser prairie chicken and sage grouse, species with expansive ranges across the Midwest, could conceivably preclude the need to list the species, if they protect enough habitat. The Service is required by a court order to finalize listing decisions for more than 750 species by 2018. Conservation banks could be used to stave off the need to list a substantial number of these species, if there is a market for conservation credits.

The long-term success of banks as a conservation strategy depends on how well the market for credits functions. Demand is driven by the regulatory framework; the legal mitigation requirements embedded in the ESA. Enforcement of the ESA’s prohibition on “take” has been uneven in many parts of the country. The conservation banks that have been established to date depend largely on federal demand (generated by federal agencies’ consultations with the Service associated with projects like federal highway construction) and the willingness of some private project sponsors to voluntarily follow the law.

A robust banking industry also depends on clear, transparent standards. The federal Conservation Banking Guidance is quite flexible, with considerable discretion left to the bank applicant and the Service. While flexibility can be important, it has also led to very lengthy reviews of draft banking agreements by the Service, and the sense that the “goal posts” are continually shifting. Some regional FWS offices, such as Region 2 in the Southwest, are preparing policies that will apply to the development of conservation banks within the region. Such policies should help clarify the requirements and simplify the application process.

Finally, in order to maintain the momentum that has been established to date, it is essential that the Service and the Corps have sufficient staff and resources to process applications quickly and efficiently. Would-be bank operators find it extremely frustrating to face interminable delays in gaining approval, often at the expense of selling credits to willing buyers.

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