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The Living Dead: Why One Species' Interference With Development May Undermine the Entire Endangered Species Act

Melissa Chalek*

PART I: INTRODUCTION

“Species once lost do not reappear.”¹ Charles Darwin made this point in his infamous book, *On the Origin of Species by Means of Natural Selection* back in 1895.² Yet in the 112th Congress, Representative Joe Baca asked Congress to declare that species not yet lost will not reappear. Representative Baca proposed H.R. 1042, the Discredit Eternal Listing Inequality of Species Takings Act (“DELIST Act”), which would have amended the Endangered Species Act (“ESA”).³ If passed, the DELIST Act would require that an endangered species that does not show “substantial” recovery within fifteen years of being listed be changed in status from endangered to extinct.⁴

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1. CHARLES DARWIN, *ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION* 196 (Dover Publications, Thrift ed., 2006).

2. *See id.*

3. *See* DELIST Act, H.R. 1042, 112th Cong. pmb. § 1 (2011).

4. *Id.* § 3.

The DELIST Act was a vague, scientifically unsound bill that would have unwisely taken away agency control of the endangered species listing process and doom many species to extinction. Therefore, Congress rightfully rejected the bill. However, this bill was also part of a larger attack on the ESA. In the 112th Congress alone, there were over two dozen proposed amendments to the ESA, all but one poised to weaken the Act's protection of endangered species.⁵ Although many of these bills may have seemed minor or unlikely to pass, passage of just a few of them could undermine the protective intent of the ESA to the point of stripping the Act of its value. Additionally, the mere garnering of support for these proposals shows that more than a few congressional representatives are placing politics above science and logic.⁶ The ESA is under attack, and the DELIST Act is one of the most deadly shots that has been fired so far.

This article will examine the attack on the ESA through an examination of the DELIST Act as a prime example of the flawed legislation that has recently been proposed. Part II of this article provides general background information on the ESA including both its structure and legislative history. Part III analyzes the shortcomings of the proposed DELIST Act. Part III.A explains the details of the DELIST Act, and Part III.B analyzes its various problems. Part III.C places the DELIST Act in context with the other ESA amendments proposed during the 112th Congress. Finally, Part IV provides a proposal for what action should be taken regarding the ESA and listing procedures going forward into the 113th Congress.

PART II: BACKGROUND

A. The Endangered Species Act

In 1973, recognizing that the rate of species' extinction was increasing both in the United States and globally and that such

5. See Elly Pepper, *May Threats to the Endangered Species Act*, SWITCHBOARD NAT. RES. DEF. COUNCIL STAFF BLOG, (May 26, 2011), http://switchboard.nrdc.org/blogs/epepper/may_threats_to_the_endangered.html. Nearly a dozen additional bills were proposed after the date of this blog, which listed the number of bills at twenty-three.

6. During its lifetime, the DELIST Act garnered sixteen co-sponsors. The Library of Congress, *Bill Summary & Status: H.R. 1042*, THOMAS (last visited Jan. 4, 2013), <http://thomas.loc.gov/cgi-bin/thomas>.

extinction posed problems to the “balance of nature,” Congress enacted the ESA.⁷ The primary purpose of the ESA was to prevent species’ extinction for the “esthetic, ecological, historical, recreational, and scientific value” that they give to the nation.⁸ To accomplish this, Congress set up a comprehensive scheme where the Secretary of the Department of Interior (“Secretary”)⁹ creates lists of endangered and threatened plant and animal species,¹⁰ identifies habitat that is critical to those species’ survival,¹¹ and prohibits takings of those species¹² or degradation of their critical habitat.¹³

Congress delegated the duty of executing the ESA to the Secretary.¹⁴ The Secretary then delegated that duty and authority to the Fish and Wildlife Service (“FWS”), specifically to the Director of FWS.¹⁵ The FWS maintains two lists: one of species that it identifies as endangered and the other of species that it identifies as threatened.¹⁶ FWS must review the species on

7. S. REP. NO. 93-307, at 2990 (1973); *see* Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2006).

8. 16 U.S.C. § 1531(a)(3).

9. *Id.* § 1532(15). Listing of marine species is also under the jurisdiction of the Secretary of Commerce. *See id.*

10. *Id.* § 1533(c). Under the ESA, an “endangered” species is “any species which is in danger of extinction throughout all or a significant portion of its range” unless it is a pest insect. *Id.* § 1532(6). A species’ range is the geographical area that the species occupies, excluding animals held in captivity. A “threatened” species is “any species which is likely to become an endangered species within the foreseeable future.” *Id.* § 1532(20). The ESA does not explicitly define an “extinct” species; however, the general acceptance is that a species is extinct if there are no known individuals remaining, which is usually manifested by a long period of time without any confirmed identification in the wild. *See* U.S. FISH & WILDLIFE SERVICE, DELISTING REPORT, *available at* http://ecos.fws.gov/tess_public/DelistingReport.do (last visited Nov. 25, 2011).

11. 16 U.S.C. § 1533(a)(3)(A).

12. *Id.* § 1538(a)(1). The ESA defines takings as any action or attempt to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” a species. *Id.* § 1532(19).

13. *Id.* § 1538(a)(1)(G).

14. *See id.* § 1532(15).

15. *See* 50 C.F.R. §§ 10.1, 10.12 (2011). Although the wording of the ESA places all authority in the Secretary, to avoid confusion and to capture the reality of this delegated authority, this article will refer to these mandates as applying to FWS.

16. 16 U.S.C. § 1533(c)(1). FWS may also choose to list a species as threatened or endangered over only a portion of its range if FWS determines

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these lists at least once every five years and reclassify them, such as from endangered to threatened or endangered to extinct, as the review dictates.¹⁷ After listing a species, FWS is also charged with developing a recovery plan for the species.¹⁸ These plans must include proposed management methods, objective criteria that will measure the species' recovery progress, and predictions of the time and cost required before the species is likely to meet those criteria.¹⁹ Even after a species recovers and is removed from the threatened species list, the ESA still requires that FWS implement a monitoring system of that species for at least five years to ensure that it does not again succumb to prior threats.²⁰

Once FWS has listed a species as endangered or threatened, the ESA places protective restrictions on human impacts on that species.²¹ The ESA prohibits any person from taking or transporting any endangered species, and it provides for both civil penalties and criminal fines for violations.²² Additionally, the ESA requires federal agencies to evaluate the potential impact of any projects orchestrated or funded by the agency on an endangered species and its critical habitat.²³ The agency and the FWS must consider the impacts using "the best scientific and commercial data available," and the project can only be allowed to go forward if both agencies agree that it will not "jeopardize the continued existence" of any endangered species.²⁴ This provision is often the target of attack because it frequently inhibits development projects.²⁵

that the species has populations that are not at risk in other portions of its range. *Id.*

17. *Id.* § 1533(c)(2).

18. *Id.* § 1533(f)(1).

19. *Id.* § 1533(f)(1)(B).

20. *Id.* § 1533(g)(1).

21. *See id.* § 1538.

22. *See id.* §§ 1538(a), 1540(a), 1540(b).

23. *Id.* § 1536(a)(2).

24. *Id.*

25. For example, the listing of the Delhi Sands flower-loving fly as endangered has placed regulations on development in the San Bernardino area, and these restrictions spurred introduction of the proposed ESA amendment examined in this article, the DELIST Act. *See* Letter from Josie Gonzales, Chair, Bd. of Supervisors of Legislative Affairs of San Bernardino County, to Joe Baca, Rep., United States H.R., on support by the San Bernardino County Administrative Office for the DELIST Act (Mar. 21, 2011) *available at* [http://www.sbcounty.gov/legislativeaffairs/docs/SB%20County%](http://www.sbcounty.gov/legislativeaffairs/docs/SB%20County%20)

Although its prohibitions can be restrictive, the ESA provides exemptions for both the takings prohibition and the development project prohibitions.²⁶ Take permits may be granted for such purposes as scientific research, population management, undue economic hardship, and incidental take.²⁷ Agencies or project license applicants may seek an exemption from the ESA's prohibition on jeopardizing endangered species if the applicant can show that (1) there is no reasonable alternative to their project, (2) the project benefits outweigh the potential harm to the endangered species, (3) the project is "of regional or national significance," (4) no one associated with the project has made any "irreversible" commitments of natural resources, and (5) the license applicant will take steps to mitigate the harm to the species.²⁸ By utilizing these exceptions, project developers are able to move forward even if their projects run the risk of harming an endangered population.

B. The Process of Making Listing Decisions

In making listing decisions, the ESA lays out a five-factor analysis for FWS to apply.²⁹ FWS must make its listing decisions based on (1) destruction of the species' habitat, (2) overutilization of the species by humans, (3) disease or predation, (4) inadequate regulatory mechanisms currently managing the species, and (5) "other natural or manmade factors."³⁰ Upon weighing these factors, FWS will classify a species as endangered if it "is in danger of extinction throughout all or a significant portion of its range."³¹

20Support%20HR%201042%20(Baca)%20The%22Discredit%20Eternal%20Li
sting%20Inequality%20of%20Species%20Takings%20Act.pdf.

26. 16 U.S.C. §§ 1536(g)(1), 1539.

27. *Id.* § 1539(a)(1).

28. *Id.* § 1536(h)(1). This exemption decision is made by the Endangered Species Committee, commonly referred to as the "God Squad" because the Committee essentially chooses whether a species lives or dies by allowing potentially harmful projects to move forward when protection is unlikely and the project has high societal importance. *See id.* §1536; Sarah Matsumoto, Cara Pike, Tom Turner, and Ray Wan, *Citizens Guide to the Endangered Species Act*, EARTHJUSTICE.ORG 38 (2003), available at http://earthjustice.org/sites/default/files/library/reports/Citizens_Guide_ESA.pdf.

29. *Id.* § 1533(a)(1).

30. *Id.*

31. *Id.* § 1532(6).

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After determining that a species should be listed as endangered, threatened, or extinct, FWS is required to publish its intent to list that species and take public comments; however, FWS has broad discretion in choosing to list a species and is not bound to follow the public comments.³² This discretion even goes so far as to allow FWS to list a species that closely resembles another threatened or endangered species if FWS finds that distinguishing between the two species would prove difficult to enforcement personnel.³³

After listing a species and promulgating any necessary protective regulations, FWS is charged with monitoring the species and altering its classification as appropriate.³⁴ In performing a species review, which is mandated every five years, FWS re-evaluates the species' status based on the same five factors it used to make the initial classification.³⁵ These re-evaluations must be based on the "best available scientific and commercial information. . . without reference to possible economic or other impacts."³⁶ Re-evaluations may result in removal of a species from the lists for only three reasons: extinction, recovery, or because new data has shown that the original classification was improper.³⁷ The ESA and associated regulations do not further define extinction, but the general practice has been to find extinction only when a species has been determined to be completely eliminated from its range.³⁸

32. *Id.* § 1533(b)(5); S. REP. NO. 93-307, at 2991 (1973).

33. 16 U.S.C. § 1533(e).

34. *Id.* § 1533(c)(2).

35. *Id.*; H.R. REP. NO. 95-1625, at 9456 (1978); 50 C.F.R. § 424.11(d) (2011).

36. 50 C.F.R. § 424.11(b).

37. *Id.* § 424.11(d).

38. There is some recognition of quasi-extinction, in which a population has reached a size that it will no longer be able to sustain itself and will inevitably succumb to extinction. E.E. Holmes et al., *A Statistical Approach to Quasi-extinction Forecasting 2* (2007) available at <http://faculty.washington.edu/eeholmes/Files/Holmes%20et%20al%202007.pdf>. However, there is no official allowance for reclassifying a quasi-extinct species as extinct in the ESA or related regulations. The FWS has never classified a quasi-extinct population as extinct. See U.S. FISH & WILDLIFE SERVICE, *DELISTING REPORT*, available at http://ecos.fws.gov/tess_public/DelistingReport.do (last visited Nov. 25, 2011) [hereinafter *DELISTING REPORT*] (listing some form of "no confirmed sightings" for an extended period of time as the reason for reclassifying each species as extinct).

C. Congressional Intent Behind the ESA

Congress's primary goal in enacting the ESA was to protect threatened and endangered species from extinction.³⁹ When enacting the ESA, Congress acknowledged that the rate of human-caused species extinction was increasing and protective action was required to avoid massive loss of species.⁴⁰ Congress's intention to protect endangered species went "beyond the aesthetic" and recognized the important roles that various species play in ecosystems and the benefits that humans derive from functioning ecosystems.⁴¹ Congress sought to enact powerful legislation to bring this accelerated loss of species to a halt or at least slow the rate of loss.⁴² Recognizing that the existing species protection statutes were inadequate to meet this goal, Congress enacted the ESA.⁴³

Congress drafted the ESA to provide maximum protection for endangered species, and this desire for strong protection is evident in some ESA provisions. While prior endangered species protection had only provided for the identification of *endangered* species, the ESA provides broader protection by requiring identification of *threatened* species as well.⁴⁴ Also for the first time, the ESA provides for criminal fines for violations, which indicates that Congress found the risk of extinction severe enough to justify authorizing criminal prosecution.⁴⁵ As a final protection for endangered species, Congress included a provision for citizen suits.⁴⁶ This provision provides a check on FWS's decisions under the ESA by allowing individuals to bring suit if they believe that FWS had failed to perform a nondiscretionary duty under the ESA.⁴⁷ Overall, Congress enacted a strong statute to provide maximum protection for endangered species.

39. See S. REP. NO. 93-307, at 2989-90 (1973).

40. See 16 U.S.C. § 1531(a)(1) (2006); S. REP. NO. 93-307, at 2990; H.R. REP. NO. 95-1625, at 9455.

41. S. REP. NO. 93-307, at 2990.

42. *Id.* at 2991.

43. *Id.*

44. 16 U.S.C. §§ 1532(20) (2006), 1533(c); S. REP. NO. 93-307, at 2992.

45. See 16 U.S.C. § 1540(b) (2006); S. REP. NO. 93-307, at 2992.

46. 16 U.S.C. § 1540(g). Citizen suits are a key element of environmental protection because few individuals would have standing to sue for violations of such statutes in the absence of a citizen suit provision.

47. *Id.* § 1540(g)(1)(c).

Shortly after the ESA came into effect in 1973, Congress recognized that the statute needed more flexibility.⁴⁸ The problems of the rigidity of the ESA were made clear in *Tennessee Valley Authority v. Hill*.⁴⁹ In *Hill*, the Supreme Court upheld an injunction against a federally-funded dam, which was almost complete at the time of the opinion, because an endangered fish, the snail darter, was discovered in the waters and would be impacted by the project.⁵⁰ The Court held that the language of the ESA was “explicit” that federally-funded projects could not go forward if the Secretary determined that the project would unduly harm an endangered species.⁵¹ The Court held that the clear language of the ESA indicated that Congress intended endangered species preservation to take precedent, even when the government had already invested substantial time and money in a project.⁵²

Although the Supreme Court voiced the strong need to protect endangered species, the backlash from this case caused Congress to reconsider the ESA’s provisions.⁵³ In the wake of *Hill*, the General Accounting Office alleged that FWS chose to not list two insect species even though FWS had determined that such listing was proper.⁵⁴ Allegedly, FWS knew that the listings would have hindered development projects and feared that causing such interference would result in a Congressional amendment to the ESA, weakening FWS’s abilities to protect endangered species.⁵⁵

In response, Congress authorized an amendment to the ESA to add flexibility and avoid improper considerations of a political agenda in making listing decisions.⁵⁶ To add the necessary flexibility into the rule, the 1978 amendments included a provision to allow exemptions from the requirement that federally organized or funded projects have no impacts on endangered species.⁵⁷ Although this amendment weakened some ESA protection, it had an overall positive effect because it added flexibility and therefore

48. See H.R. REP. NO. 95-1625, at 9453.

49. 437 U.S. 153 (1978).

50. *Id.* at 168, 195.

51. *Id.* at 173.

52. *Id.* at 174.

53. See *id.* at 172-73; H.R. REP. NO. 95-1625, at 9460.

54. H.R. REP. NO. 95-1625, at 9463.

55. *Id.*

56. *Id.*

57. *Id.* at 9453, 9464.

encouraged listing of species because FWS could grant exemption permits when it deemed such action appropriate.⁵⁸ Even with the addition of flexibility, Congress stayed true to its initial purpose of providing high levels of protection for endangered species.⁵⁹

D. The ESA Today

Even though the initial goal of Congress was to ensure protection for endangered and threatened species at virtually any cost, today members of both the House and the Senate are seeking to undermine endangered species protections, usually in the name of development.⁶⁰ In the 112th Congress alone, dozens of bills that would weaken the ESA were proposed.⁶¹ Three major flaws dominated the ESA-amending bills of the 112th Congress: (1) they undermined the purpose of the ESA and its reliance on FWS agency expertise, (2) they were completely unnecessary, and (3) they were large, comprehensive bills with detrimental ESA amendments hidden among their many provisions. The large number of flawed amendment proposals during the 112th Congress clearly indicates that the ESA is under attack.⁶²

While passage of most of these bills was unlikely and many would have only impacted one species, the real danger is the quantity of the proposed bills. Even a powerful statute like the ESA can only withstand such an onslaught for so long before its protections succumb to political will. If the 113th Congress follows the 112th Congress's pattern of dozens of bills proposed to weaken the ESA, the risk of harmful changes to the ESA increases because this pattern indicates a political swing away from species protection. If politics wins out on a bill like the DELIST Act, the entire statutory scheme could crumble.

58. *See id.* at 9464.

59. *See id.*

60. *See* S. REP. NO. 93-307, at 2990 (1973).

61. Pepper, *supra* note 5 (noting twenty three bills in the 112th Congress). Nearly a dozen additional bills were proposed after the date of this blog.

62. *See infra* Part III.C.

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ENDANGERED SPECIES THAT IS ALSO COMPLETELY UNNECESSARY

A. Details of the DELIST Act

Among the proposals attacking the ESA during the 112th Congress was the DELIST Act, which was proposed by California Representative Joe Baca to the House of Representatives on March 11, 2011.⁶³ The general purpose of the bill was to streamline the process of changing a species' status from endangered to extinct by mandating that the Secretary shall reclassify as extinct any limited listed endangered species⁶⁴ that does not exhibit "a substantial population increase" within fifteen years of being listed as endangered.⁶⁵ Approval of this bill would change the process of reclassifying a species as extinct from the current requirement of complete species loss.⁶⁶ Instead, the bill would mandate reclassification after fifteen years without "substantial" recovery.⁶⁷

The only justification for this legislative change provided in the findings of the DELIST Act is the state of the endangered Delhi Sands flower-loving fly ("the fly").⁶⁸ The fly is an insect of the genus *Rhaphiomidas* that is known to exist only in five locations in southern California.⁶⁹ It was placed on the endangered species list in 1993.⁷⁰ As a result of its endangered status, there are restrictions on land uses in its known range in the Riverside and San Bernardino Counties.⁷¹

The motivation for the DELIST Act was the desire to bypass the habitat protections that the ESA provides.⁷² Josie Gonzales,

63. See DELIST Act, H.R. 1042, 112th Cong. (2011).

64. The DELIST Act would only apply to limited listed species, but as is explored in Section B.1, this term could be applied to almost any species. See *infra* Part III.B.1.

65. H.R. 1042 § 3.

66. See 50 C.F.R. § 424.11(d)(1) (2011).

67. H.R. 1042 § 3.

68. *Id.* § 2.

69. Determination of Endangered Status for the Delhi Sands Flower-loving Fly, 58 Fed. Reg. 49881, 49881 (Sept. 23, 1993) (to be codified at 50 C.F.R. pt. 17).

70. *Id.*

71. *Id.* at 49881, 49886.

72. Holly Doremus, *Endangered Species Bizarro-bill Introduced*, THE BERKELEY BLOG, (Apr. 8, 2011), <http://blogs.berkeley.edu/2011/04/08/>

the Chair of the Board of Supervisors of Legislative Affairs for the County of San Bernardino, wrote a letter of support to Representative Baca stating that San Bernardino has suffered from “severely limited economic development” because of the “unneeded regulations” of the ESA as a result of the listing of the fly.⁷³ The language of the bill stated that protection of the Delhi Sands flower-loving fly might conflict with economic development and that there was little public support for the conservation efforts.⁷⁴ Because the reclassification would be of no benefit to the fly, the only logical reason for the legislation would be to free the communities of Riverside and San Bernardino of the development restrictions imposed by the ESA.

B. The Shortcomings of the DELIST Act

There are several problems with both the structure and content of the bill: the bill uses unique terms such as “limited listed species” and “substantial increase in population” but does not adequately define these terms, the reasoning underlying the bill is scientifically unsound, the bill does not fit with the legislative purpose of the ESA, and the bill is unnecessary to meet its goals.⁷⁵ Because of all of these flaws, the DELIST Act would undermine the ESA. Fortunately, the DELIST Act did not pass during the 112th Congress, but analysis of its flaws provides insight on the types of attacks facing the ESA in today’s political climate.

1. *The DELIST Act Uses Vague Terms Without Adequately Defining Them*

Although the DELIST Act does define “limited listed species,” the definition is unclear and could be read to encompass almost any species.⁷⁶ The bill would only apply to:

endangered-species-bizarro-bill-introduced/; Ben Goad and Darrell R. Santschi, *Congress: Baca Bill Aims to Swat Bothersome Fly*, THE PRESS-ENTERPRISE, (Mar. 21, 2011), <http://www.pe.com/local-news/politics/ben-goad-headlines/20110321-congress-baca-bill-aims-to-swat-bothersome-fly.ece>; see Gonzales, *supra* note 25.

73. Gonzales, *supra* note 25.

74. DELIST Act, H.R. 1042, 112th Cong. §§ 2(3), 2(9) (2011).

75. *See id.* § 3.

76. Doremus, *supra* note 72.

any species that is listed. . .as an endangered species for which it is not reasonably possible to determine whether the species has been extirpated from the range of the species that existed on the date the species was listed because not all individuals of the species were identified at the time of such listing.⁷⁷

As Professor Holly Doremus points out, this definition seems to apply to *every* endangered species unless all individuals of that species were identified at the time the species was listed.⁷⁸ This will almost never happen as population counts in nature are extremely difficult.⁷⁹ Every individual in a population could only be counted when there is a small population of large animals in an isolated location.⁸⁰ Therefore, although the DELIST Act's reach is unclear, the most logical reading is that it will apply to every endangered species.⁸¹

For a species to avoid reclassification as extinct under the DELIST Act, it needs to exhibit a "substantial increase in population."⁸² The two key problems with requiring a "substantial increase" are in defining "substantial" and establishing whether any species has met the requirement. The bill itself provides no definition or guidance on what a "substantial increase" would entail.⁸³ There is also no definition for this term in the ESA or the associated regulations.⁸⁴ Without a given definition, this term is ambiguous and open to multiple interpretations in its implementation.⁸⁵

The most likely result of this bill will be that FWS's burden of

77. H.R. 1042 § 3.

78. Doremus, *supra* note 72. Professor Doremus notes regarding the definition of "limited listed species" given in H.R. 1042, "I'm not sure I understand that definition." *Id.*

79. COLIN R. TOWNSEND, JOHN L. HARPER & MICHAEL BEGON, *ESSENTIALS OF ECOLOGY* 167 (Blackwell Science, Inc. ed., 2000).

80. *Id.* Logically, the isolated location would also have to be barren to reduce the likelihood of hidden individuals. This is not a likely scenario. See Doremus, *supra* note 72.

81. See H.R. 1042 § 3.

82. *Id.*

83. See *id.*

84. See 16 U.S.C. § 1532; 50 C.F.R. § 424.02 (2011).

85. See Ya-Wei Li, *Baca Bill to Delist Many Endangered Species*, DOTWILD, (Apr. 1, 2011), <http://experts.defendersblog.org/2011/04/baca-bill-to-delist-many-endangered-species/>.

proof to show species' recovery at the end of fifteen years will be so high that FWS will not be able to meet that burden for many species. This inability will occur because of the difficulty of accurately tracking endangered species with limited agency resources.⁸⁶ Considering how difficult it can be to get just one population count, which will almost always be an estimate, it may be nearly impossible for FWS to show multiple conclusive population counts that demonstrate a "substantial increase."⁸⁷ With no guidance on what constitutes a "substantial increase" and very little guidance on what a "limited listed species" is, the application of the DELIST Act will be open to attack, and accepted interpretations could undermine the heart of ESA by improperly allowing removal of protection of many listed species.

2. *The DELIST Act is Not Supported By the Best Available Science*

Providing an endangered species, which is already fighting a battle for survival, with only fifteen years to recover is scientifically unsound for many species, especially vertebrates. When a population has a small number of individuals, as endangered species do, that population will increase more slowly than larger populations because there are limited opportunities for reproduction.⁸⁸ Many species have an annual reproductive cycle, producing offspring only once per year.⁸⁹ Additionally, all species begin life in a nonreproductive juvenile phase, the length of which varies by species.⁹⁰

Differences in the length of the juvenile phase, the reproductive cycle, and the average number of surviving offspring produced at each cycle will impact the rate at which a population can grow.⁹¹ Insects, as well as some fish and plants, tend to produce large numbers of offspring at one time, a reproductive

86. *See id.*

87. *See* TOWNSEND, *supra* note 79; Ya-Wei Li, *supra* note 85.

88. TOWNSEND, *supra* note 79, at 192.

89. *Id.* at 174.

90. *Id.* at 175.

91. *See* NEIL A. CAMPBELL, JANE B. REECE & LAWRENCE G. MITCHELL, *BIOLOGY* 1085-86 (Erin Mulligan et al. eds., 5th ed. 1999); TOWNSEND, *supra* note 79, at 180.

cycle known as semelparity.⁹² However, most vertebrates will produce far fewer offspring each breeding season, a reproductive cycle known as iteroparity.⁹³ Semelparous species tend to have faster population growth rates despite the higher mortality rates of their offspring because they often reproduce all potential offspring in a single occurrence; in contrast, iteroparous species reproduce throughout a portion of their lives and frequently die before giving birth to all potential offspring.⁹⁴

For iteroparous species, the younger the females begin reproduction, the faster the population will grow because each female will produce more offspring in a lifetime.⁹⁵ However, even for species that breed young, allowing just fifteen years for recovery is inadequate for species that breed annually, produce less than a dozen offspring at one time, and may not successfully breed every year.⁹⁶ However, this will be a largely species-specific inquiry because of the diverse life cycles of various species.⁹⁷

The DELIST Act relies on the Delhi Sands flower-loving fly to justify the fifteen-year limit on population recovery. However, this species should not determine the fate of all endangered species because its life history is largely unknown.⁹⁸ The fly, *Rhaphiomidas terminatus abdominalis*, was listed as an

92. See CAMPBELL, *supra* note 91, at 1089. Although, many of these species will reproduce only once in a lifetime. *Id.*

93. See *id.*

94. See *id.*; Ryan P. Kelly, *Spineless Wonders: How Listing Marine Invertebrates and Their Larvae Challenges the U.S. Endangered Species Act*, 19 PENN ST. ENVTL. L. REV. 1, 4 (2011). Although Kelly's article focused on marine invertebrates, many of his life-cycle arguments could apply equally to terrestrial invertebrates, although the concerns he expressed for de minimis take and ocean acidification would be inapplicable.

95. See CAMPBELL, *supra* note 91, at 1091.

96. Individuals may frequently fail to successfully breed because a female may not encounter a male during the often short mating season, mating may not be successful, or the female may not successfully carry the fetus to term.

97. See Kelly, *supra* note 94, at 21.

98. See DELIST Act, H.R. 1042, 112th Cong. § 2 (2011); U.S. FISH AND WILDLIFE SERV., DELHI SANDS FLOWER-LOVING FLY (*RHAPHIOMIDAS TERMINATUS ABDOMINALIS*) 5-YEAR REVIEW: SUMMARY AND EVALUATION, 7 (2008) [hereinafter FLY 5-YEAR REVIEW]. The final rule in the federal register listing the fly noted that the fly's life history was "not well known, but is probably similar to that of other members of this genus." Determination of Endangered Status for the Delhi Sands Flower-loving Fly, 58 Fed. Reg. 49881, 49882 (Sept. 23, 1993) (to be codified at 50 C.F.R. pt. 17).

endangered species in 1993.⁹⁹ Even at the time of listing, the fly was recognized as having a low potential for recovery.¹⁰⁰ In fact, the life history of the fly was so unknown and its habitat so degraded that FWS could not even set delisting criteria for the fly because it could not evaluate population abundance.¹⁰¹ After listing, little new information on the species came to light.¹⁰² The 2008 species review by FWS described the fly's life history as "largely unknown" and posited little hope for additional information because of the fly's "cryptic nature and rarity" and the lack of funding for further research.¹⁰³ To rely on such a mysterious animal to alter a core function of the ESA, determination of a species' status, is illogical and dangerous.

Aside from the general lack of information on the life history of the Delhi Sands flower-loving fly, use of an invertebrate as the sole example species is ill-founded because of the typically high reproductive rate of invertebrates that allows such a population to increase more rapidly than a vertebrate population.¹⁰⁴ As noted above, invertebrates tend to be semelparous, producing large numbers of offspring at one time.¹⁰⁵ Invertebrates' generally high reproductive rates make them more likely to recover than other, more slowly reproducing species.¹⁰⁶ This potential advantage supports the point that an adequate recovery time span for an invertebrate species cannot be haphazardly applied to vertebrate species as it would be under the DELIST Act. In fact, several species that would have been listed as extinct under the scheme of the DELIST Act have recovered from the risk of extinction or are well on their way to reclassification, including the red wolf, the bald eagle, and the Okaloosa darter.¹⁰⁷

99. FLY 5-YEAR REVIEW, *supra* note 98, at 9.

100. *Id.* at 3.

101. *Id.* FWS is required to set delisting criteria when listing a species as threatened or endangered. Delisting criteria are "objective, measurable criteria which, when met, would result in a determination...that the species be removed from the list." 16 U.S.C. § 1533(f)(1)(B)(ii).

102. See FLY 5-YEAR REVIEW, *supra* note 98, at 7 (noting that between the establishment of the management plan in 1997 and this review in 2008, only one paper was published on the fly).

103. *Id.* at 7, 11.

104. See Kelly, *supra* note 94.

105. CAMPBELL, *supra* note 91, at 1089.

106. Kelly, *supra* note 94, at 4.

107. See Reclassification of the Okaloosa Darter From Endangered to

The red wolf, once ranging throughout the southeastern United States, was driven to a small area of Texas and Louisiana and nearly eliminated entirely by the 1970s,¹⁰⁸ but because of extensive captive breeding and reintroduction programs, the red wolf currently has a stable captive population and a small but hopeful wild population.¹⁰⁹ Red wolf decline occurred before the ESA was even promulgated, and the wolf was listed as endangered under the ESA's predecessor, the Endangered Species Preservation Act, in 1967.¹¹⁰ The red wolf continued to decline because of inter-breeding and hybridization with coyotes, human-caused deaths, and loss of habitat.¹¹¹

Recognizing the imminent extinction of the red wolf, FWS initiated a program to capture the remaining wild wolves for an extensive captive breeding program.¹¹² Between 1973 and 1980, over 400 wolves were captured.¹¹³ Forty-three of these wolves proved to be pure red wolves, the remainder being red wolf-coyote hybrids, and fourteen of the pure red wolves successfully produced offspring in captivity.¹¹⁴ In 1987, FWS began reintroductions of captive-born red wolves into the wild.¹¹⁵ To date, there have been over 200 red wolves released into the wild.¹¹⁶ By 1998, a small, but viable wild population had been established in North

Threatened and Special Rule, 76 Fed. Reg. 18,087, 18,087 (Apr. 1, 2011) (to be codified at 50 C.F.R. pt. 17); Reclassify the Bald Eagle From Endangered to Threatened in Most of the Lower 48 States, 59 Fed. Reg. 35,584, 35,585 (July 12, 1994) (to be codified at 50 C.F.R. pt. 17); R.M. Nowak and N.E. Federoff, *Validity of the Red Wolf: Response to Roy et al.*, 12:3 CONSERVATION BIOLOGY, 722, 722 (1998) (citations omitted). These species are discussed only as examples. Other species have exhibited the same delayed recovery. These species were chosen to provide diversified examples (a fish, a bird, and a mammal).

108. Frank T. Van Manen, Barron A. Crawford & Joseph D. Clark, *Predicting Red Wolf Release Success in the Southeastern United States*, 64(4) J. WILDLIFE MGMT. 895, 895 (2000).

109. P.W. Hedrick and R.J. Fredrickson, *Captive Breeding and the Reintroduction of Mexican and Red Wolves*, 17 MOLECULAR ECOLOGY 344, 344, 348 (2008).

110. Van Manen, *supra* note 108.

111. Nowak, *supra* note 107.

112. Hedrick, *supra* note 109 (citation omitted); Van Manen, *supra* note 108.

113. Van Manen, *supra* note 108.

114. Hedrick, *supra* note 109, at 348; Van Manen, *supra* note 108.

115. Van Manen, *supra* note 108.

116. *Id.* at 896.

Carolina,¹¹⁷ and by 2007 that population had grown to about 100 wolves.¹¹⁸ Additionally, about 200 wolves were in captivity in the United States in 2006.¹¹⁹

Beyond the protection provided by the ESA, the red wolf's successful survival is also attributed to the efforts by FWS and countless institutions to initiate the captive breeding program.¹²⁰ The captive red wolf breeding program was managed under a Species Survival Plan, a comprehensive breeding program run by a non-governmental body.¹²¹ This intensive breeding plan was necessary to ensure species survival given that only fourteen wolves comprised the founding generation of the program and small populations are inherently prone to genetic problems if breeding is not carefully managed.¹²²

The red wolf is now on the path to recovery, but it never would have had this chance if the DELIST Act had been a part of the original ESA.¹²³ The red wolf was listed as endangered in 1967; therefore, under the DELIST Act, it would have been reclassified as extinct in 1982 without "substantial" population recovery.¹²⁴ Given that the first proposal to reintroduce red wolves back into the wild was not made until 1986, FWS would have been unable to find a substantial population increase by 1982.¹²⁵ Although the red wolf is still fighting for survival today, it has made a return from the brink of extinction that could never have happened under the framework of the DELIST Act.

Perhaps the best known species recovery story in the United

117. Nowak, *supra* note 107 (citations omitted).

118. Hedrick, *supra* note 109, at 344.

119. *Id.* at 348.

120. *See id.* at 344 (citation omitted).

121. *See id.* at 348 (citation omitted). Species Survival Plans are management programs for captive populations of at-risk species designed to promote the continued survival of the species. Association of Zoos & Aquariums, *Species Survival Plan Program*, AZA.ORG, <http://www.aza.org/species-survival-plan-program/> (last visited Mar. 4, 2013).

122. *See* TOWNSEND, *supra* note 79, at 502; Hedrick, *supra* note 109, at 348.

123. *See* Hedrick, *supra* note 109, at 349 (citations omitted).

124. *See* DELIST Act, H.R. 1042, 112th Cong. § 3 (2011); Van Manen, *supra* note 108.

125. *See* Proposed Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, 51 Fed. Reg. 26,564, 26,564 (July 24, 1986) (to be codified at 50 C.F.R. pt. 17).

States is the story of the bald eagle, which was facing serious threats of extinction when it was listed as endangered in 1967 under the Endangered Species Preservation Act.¹²⁶ Because of human recovery efforts, the bald eagle has recovered and was delisted in 2007.¹²⁷ Bald eagle populations were in serious decline because of low productivity resulting from widespread use of the pesticide dichloro-diphenyl-trichloroethane (“DDT”), which causes female eagles to lay eggs with very thin shells that cannot protect the embryo long enough to allow hatching.¹²⁸ Fortunately, the major source of this reproductive drop ended in 1972 when the United States banned the use of DDT, which gave the bald eagle an opportunity to recover.¹²⁹

With DDT banned and the bald eagle and its habitat protected from hunting and degradation under the ESA, bald eagle numbers increased.¹³⁰ The bald eagle was reclassified as threatened in 1995¹³¹ and completely removed from both lists in 2007.¹³² Although the eagle went from the verge of extinction to complete recovery in just forty years, it likely would have been reclassified as extinct in 1982 under the DELIST Act. A study of eagle populations in Texas, an area shown to have high reproductive rates, indicated that the eagle had reached its recovery goals by the late 1980s.¹³³ This recovery would have come too late for the DELIST Act, however, given that the fifteen year limit would have tolled in 1982.¹³⁴ Even this study noted that the “most dramatic” population increases did not begin until 1995.¹³⁵ Given that this population was identified as one of rapid

126. See Endangered Species, 32 Fed. Reg. 4001, 4001 (Mar. 11, 1967).

127. See Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife, 72 Fed. Reg. 37,346, 37,346 (July 9, 2007) (to be codified at 50 C.F.R. pt. 17).

128. Reclassify the Bald Eagle From Endangered to Threatened in Most of the Lower 48 States, 59 Fed. Reg. at 35,584; Sarah T. Saalfeld et al., *Recovery of Nesting Bald Eagles in Texas*, 8(1) S. NATURALIST 83, 88 (2009).

129. Reclassify the Bald Eagle From Endangered to Threatened in Most of the Lower 48 States, 59 Fed. Reg. at 35,584.

130. Saalfeld, *supra* note 128, at 83, 88.

131. Final Rule to Reclassify the Bald Eagle From Endangered to Threatened in All of the Lower 48 States, 60 Fed. Reg. at 36,000.

132. Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife, 72 Fed. Reg. at 37,346.

133. Saalfeld, *supra* note 128, at 84, 88.

134. See DELIST Act, H.R. 1042, 112th Cong. § 3 (2011).

135. Saalfeld, *supra* note 128, at 83.

recovery, the bald eagle likely would have been labeled as extinct throughout its entire range in 1982.¹³⁶

To the contrary, in the absence of the DELIST Act, the bald eagle population has recovered.¹³⁷ This recovery was effectuated through significant human effort, mainly in the form of government regulations to protect the bird and its habitat. The three major causes of eagle population decline were habitat destruction that limited nesting site availability, direct hunting, and use of DDT that caused lower reproductive rates.¹³⁸ Once listed as an endangered species, the prohibition on taking helped protect the eagle from the hunting threat.¹³⁹ Additionally, critical habitat protection under the ESA protected nesting sites to allow the eagle space to reproduce.¹⁴⁰ The ban on DDT use in 1972 reduced the threat on reproductive rates as the chemical concentrations slowly reduced, so the eagle's reproductive success also increased.¹⁴¹ These human management efforts allowed the bald eagle to recover in the forty years following its listing, but under the DELIST Act, this human intervention would have been too late because the bald eagle would have already been reclassified as extinct and therefore doomed to true extinction.

Another success story is that of the Okaloosa darter, a small fish that inhabits Florida stream systems located almost entirely

136. See H.R. 1042, § 3; see generally Saalfeld, *supra* note 128. A 1984 species review by FWS revealed "substantial improvements since the early 1970's." However, that report also noted that the eagle's status should not be altered because of its low reproductive rate and long juvenile period before reaching reproductive age. In 1987, FWS used this report and determined not to reclassify the bald eagle as threatened because severe threats still remained that were keeping the eagle population from making a full recovery. Given that this report still came after the 15-year listing limit and did not reveal a very positive story for the eagle, there remains a strong probability that the eagle would not have survived DELIST Act review. See Findings on Petitions and Initiation of Status Reviews, 52 Fed. Reg. 2,239, 2,240 (Jan. 21, 1987) (to be codified at 50 C.F.R. pt. 17).

137. See Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife, 72 Fed. Reg. at 37,346.

138. Bald Eagle: Proposed Modification of Endangered Status in Conterminous 48 States, 41 Fed. Reg. 28,525, 28525-26 (July 12, 1976) (to be codified at 50 C.F.R. pt. 17).

139. See Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B) (2006).

140. See *id.* §§ 1533(a)(3)(A), 1536(a)(2).

141. See Reclassify the Bald Eagle From Endangered to Threatened in Most of the Lower 48 States, 59 Fed. Reg. 35,584, 35,584 (July 12, 1994) (to be codified at 50 C.F.R. pt. 17); TOWNSEND, *supra* note 79, at 166.

on Eglin Air Force Base, which was listed as endangered in 1973.¹⁴² The sole threat to the darter's survival was habitat degradation from various construction projects on the Air Force Base.¹⁴³ Although in 1993, the darter population was still dwindling, after the Air Force undertook major remedial work on the site to clean up the streams, the darter was able to recover.¹⁴⁴ Habitat recovery efforts gave the fish an opportunity to recover and be reclassified as threatened in 2011.¹⁴⁵

Here, a population that was confined to a small location, that was almost entirely manageable because it was on a cooperating Air Force Base, still required over twenty years and an intensive human conservation effort to recover.¹⁴⁶ Under the DELIST Act, the Okaloosa darter would have been reclassified as extinct in 1988, well before Air Force clean-up efforts had given the darter an opportunity to begin recovery.¹⁴⁷ Just like the red wolf and bald eagle, the Okaloosa darter would have been lost under the DELIST Act, but under the existing ESA statutory scheme, the darter recovered with the help of human conservation efforts.¹⁴⁸

3. *The DELIST Act Will Allow Politics to Rule Endangered Species' Survival*

The species discussed as examples above demonstrate an additional problem with the terms of the DELIST Act: the fifteen year recovery period begins on the date the species is listed as

142. Robert M. Dorazio et al., *Improving Removal-based Estimates of Abundance by Sampling a Population of Spatially Distinct Subpopulations*, 61 BIOMETRICS 1093, 1094 (2005); Kari C. Barlow, *Okaloosa Darter Rebounds*, NORTHWEST FLORIDA DAILY NEWS, FORT WALTON BEACH, Mar. 27, 2011, available at 2011 WLNR 5939887.

143. U.S. FISH AND WILDLIFE SERV., OKALOOSA DARTER (*ETHEOSTOMA OKALOOSAE*) 5-YEAR REVIEW: SUMMARY AND EVALUATION, 3 (2007) [hereinafter DARTER 5-YEAR REVIEW]; Dorazio, *supra* note 142.

144. DARTER 5-YEAR REVIEW, *supra* note 143, at 9, 13; Barlow, *supra* note 142. One study indicated that the darter population had tripled in size from 1995 to 2004. Barlow, *supra* note 142.

145. Barlow, *supra* note 142.

146. *See id.*

147. *See* DELIST Act, H.R. 1042, 112th Cong. § 3 (2011); Tom McLaughlin, *Darter Rebounds From Near Extinction*, NORTHWEST FLORIDA DAILY NEWS, FORT WALTON BEACH, Mar. 27, 2006, available at 2006 WLNR 5056019.

148. *See* H.R. 1042, § 3; Barlow, *supra* note 142.

endangered.¹⁴⁹ However, most endangered species' populations will not begin to recover until some sort of recovery plan has been put into place, which FWS is authorized to do after it lists a species.¹⁵⁰ These plans generally are not initiated immediately after listing a species.¹⁵¹ As previously explained, fifteen years is often not long enough for a species to recover. Based on the wording of the DELIST Act, each species would actually have less than fifteen years to recover because the fifteen years starts before recovery efforts begin, so most species will lose vital years of recovery opportunity.¹⁵²

Many endangered species will require not just basic recovery plans but extensive human intervention via some management plan.¹⁵³ Such extensive programs take time to develop, but under the DELIST Act, the more time that is spent developing such plans, the less time will be available to carry them out.¹⁵⁴ FWS would have only fifteen years from the list date, so it would need to implement a plan quickly if it hoped for success.¹⁵⁵

FWS might respond to this time pressure in one of two ways: develop and initiate plans quickly or delay the initial listing. Either option will be detrimental to endangered species. Developing recovery and management plans quickly is less likely to result in workable plans, because the agency will not have adequate time to research the species' life history and current status, analyze its interactions with humans and the ecosystem as a whole, take localized concerns into account, and evaluate the various options for species management and recovery. The agency will instead be encouraged to implement a plan as quickly as possible to allow the species the maximum amount of time possible to recover.

149. H.R. 1042, § 3.

150. See U.S.C. § 1533(f).

151. For example, the red wolf was listed as endangered in 1967, but the recovery effort that saved the wolf did not begin until 1973. Van Manen, *supra* note 108. Even the Delhi Sands flower-loving fly, which was listed as endangered in 1993 did not have a recovery plan issued until 1997. H.R. 1042, § 2.

152. See H.R. 1042, § 3.

153. For example, the extensive breeding and reintroduction plan FWS established for the red wolf. Van Manen, *supra* note 108.

154. See H.R. 1042, § 3.

155. See *id.*

Alternatively, FWS could choose to delay the date that it lists a species as endangered in order to delay the tolling of the DELIST Act's fifteen year recovery limit. This risk harkens back to the early days of the ESA when FWS was accused of intentionally refraining from listing species as endangered.¹⁵⁶ A different, but no less political, fear could spur the FWS into delaying listings under the DELIST Act: the fear that FWS will be forced to declare a species extinct after just fifteen years with even fewer years of management. Congress explicitly admonished this approach of considering political concerns in evaluating a species' status during the early days of the ESA,¹⁵⁷ and the need for FWS to make its decisions based exclusively on scientific data continues to mandate a flexible ESA today.¹⁵⁸ The FWS was charged with deciding on species' statuses based on the best available science, and Congress should not directly or indirectly undermine the authority it granted to FWS as the experts in ecology and population dynamics.¹⁵⁹

The DELIST Act makes reclassification to extinct mandatory after fifteen years without a substantial population increase, and this takes the power to determine species' status away from the scientists at FWS and instead places it with the politicians in Congress.¹⁶⁰ Although FWS will still make the listing and reclassification decisions, its authority to evaluate a species' status will be limited to deciding whether that species has had a "substantial increase" in population.¹⁶¹ FWS will have to justify its determinations or face court challenges to its listing decisions and will lose a substantial amount of its independence in evaluating species' status.¹⁶² This is contrary to the original intent of the ESA for FWS, an agency of wildlife experts, to evaluate species' statuses based on specified criteria and the best available science.¹⁶³

156. See H.R. REP. NO. 95-1625, at 13 (1978).

157. See H.R. REP. NO. 95-1625, at 9463.

158. See *id.*

159. See 16 U.S.C. § 1533(a)(1).

160. See DELIST Act, H.R. 1042, 112th Cong. § 3 (2011).

161. See *id.*

162. See 16 U.S.C. § 1540(g)(1)(C); H.R. 1042, pmbl. § 3.

163. See 16 U.S.C. §§ 1533(a)(1), 1533(b)(1)(A).

4. *The DELIST Act is Not Just Harmful, It Is Unnecessary*

Baca and other supporters of the DELIST Act focus solely on the need to remove development restrictions put in place by the ESA in order to promote jobs and stimulate the economy specifically in Riverside and San Bernardino, and presumably in other regions facing similar hardships.¹⁶⁴ However, this purpose diverges from the original intent of the ESA to protect species from extinction at nearly any cost.¹⁶⁵

The DELIST Act emphasizes the hopelessness of recovery for the Delhi Sands flower-loving fly as justification for the fly's reclassification to extinct, and for the same reclassification of similarly situated species by implication.¹⁶⁶ However, evidence that the fly's recovery is impossible could be presented to FWS as a petition to reclassify the fly as extinct, which would solve the development interference problems without creating a new dangerous legislative scheme.¹⁶⁷ This route would be a challenge for California because the fly does still exist, so FWS would have to recognize quasi-extinction as a valid reason to reclassify a species, which it has never done before.¹⁶⁸ However, convincing FWS to accept quasi-extinction for a single species may be easier than passing a generalized statutory amendment, and it would be less harmful because it would only relate to management of a single species.

Even if FWS determines that it is improper to reclassify the fly, the counties of Riverside and San Bernardino may also seek refuge from the ESA restrictions by applying for permits for specific development projects.¹⁶⁹ Under the ESA, project developers could apply to FWS for permits to take flies¹⁷⁰ as long as certain conditions are met, including that steps are taken to mitigate impact on the fly species as a whole¹⁷¹ and that the

164. Goad, *supra* note 72.

165. See H.R. REP. NO. 95-1625, at 9460 (1978).

166. H.R. 1042, §§ 2(19), 2(28), 3.

167. See 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.11(d)(1) (2011).

168. See DELISTING REPORT, *supra* note 38.

169. See 16 U.S.C. §§ 1536(b)(4), 1536(h)(1).

170. By obtaining a take permit, the developers would be able to move forward with their projects even if the projects might kill some flies or degrade fly habitat.

171. For example, a developer might preserve a certain portion of the

project will not “appreciably reduce the likelihood of the survival and recovery of the species in the wild.”¹⁷² Given that the Delhi Sands flower-loving fly already seems to be doomed to extinction, applicants have a higher likelihood of demonstrating that their projects will not “appreciably” impact the extinction risk.¹⁷³

Riverside and San Bernardino’s projects *could* qualify for an exemption from ESA requirements even if the projects will have an impact on the continued existence of the fly.¹⁷⁴ To obtain an exemption, the project applicant would have to demonstrate five factors: (1) there is no reasonable alternative to the project, (2) the benefits of the project will outweigh the harm to the fly,¹⁷⁵ (3) the project is of regional significance,¹⁷⁶ (4) there has been no irreversible commitment of resources,¹⁷⁷ and (5) the project will involve some mitigation efforts to protect the fly and its habitat.¹⁷⁸ If the Endangered Species Committee granted an exemption, there would be no undue burden on the people of Riverside and San Bernardino from protection of the fly.

While the *goals* of Baca and the other supporters of the DELIST Act are understandable, the *methods* to achieve those goals are overly broad. As a whole, the DELIST Act is incompatible with the purposes of the ESA and unnecessary to reach its goals; therefore, the DELIST Act is one of several dangerous current attacks on the ESA that Congress cannot pass.

C. Current Attacks on the Endangered Species Act

Although the DELIST Act itself did not seem very likely to pass from its early days, it was still a threat to the ESA because it

property to be used by the fly and maintain a preserved habitat pathway traversing the property if possible.

172. 16 U.S.C. § 1539(a)(2).

173. *See id.*; DELIST Act, H.R. 1042, 112th Cong. §§ 2(24), 2(29) (2011).

174. *See* 16 U.S.C. § 1536(h)(1).

175. This seems likely to be proven given the depressed conditions of San Bernardino and the already unlikely survival of the fly. *See* H.R. 1042, §§ 2(24), 2(29); Gonzales, *supra* note 25.

176. This will easily be shown given the need for economic development in the region. Gonzales, *supra* note 25.

177. At this point, San Bernardino has been restricting development in order to protect the critical habitat of the fly, so that restriction should satisfy this requirement. *See* H.R. 1042, § 2(20).

178. *See* 16 U.S.C. § 1536(h)(1).

was one part of a larger attack.¹⁷⁹ In the 112th Congress, there were over two dozen proposed amendments to the ESA, all but one of which would have weakened the ESA's protections either generally or against specific species.¹⁸⁰ All of these bills would have weakened FWS's ability to protect endangered and threatened species. The large quantity of proposed harmful amendments clearly indicates that the ESA was under siege and that several congressional representatives placed their own political agendas ahead of policy that is based on sound science and data. Although the DELIST Act is a prime example of the weak scientific and political reasoning behind ESA proposed amendments, all of the bills suffered from at least one of three significant flaws: (1) they undermined the purpose of the ESA and its reliance on FWS agency expertise, (2) they were completely unnecessary, and (3) they were large, comprehensive bills with detrimental ESA amendments hidden among their many provisions.

The majority of the amendments proposed in the 112th Congress would have undermined either the purpose of the ESA or FWS's expertise in endangered species management. Several proposed amendments would have explicitly delisted or prohibited initial listing of specific species.¹⁸¹ These bills provided no findings or reasoning as to why the species should not be protected under the ESA, which runs counter to the ESA's requirement to use the best available science in making such determinations.¹⁸²

179. See Doremus, *supra* note 72 (noting that the eight sponsors the bill had at the time was "nowhere near enough to move the bill forward, but it's enough to be discouraging").

180. One bill's purpose was to enact the National Park System as positive law. As part of that bill, the authority of the federal government to acquire land for protection of endangered species was expressly recognized. H.R. 1950, 112th Cong. § 200306(a)(2)(C) (2012). Although this bill was not detrimental to the ESA, it merely recognized an existing ESA authority. 16 U.S.C. § 1534(a). Also, this bill did not pass. For simplicity, this article's continued discussion of "all" bills or proposals will exclude this particular bill.

181. Polar Bear Delisting Act, H.R. 39, 112th Cong. § 2 (2011) (delisting the polar bear); S. 249, 112th Cong. § 1 (2011) (delisting the gray wolf); H.R. 509, 112th Cong. § 1 (2011) (delisting the gray wolf); Salamander Community Conservation Act, S. 3446, 112th Cong. § 2 (2012) (prohibiting listing of four salamander species); Salamander Community Conservation Act, H.R. 6219, 112th Cong. § 2 (2012) (same as S. 3446).

182. See 16 U.S.C. § 1533(b)(1)(A).

Additionally, by making listing decisions itself, Congress would imprudently have taken away authority that it delegated to FWS, the experts in species management.¹⁸³

In other bills, Congressional representatives sought to undermine FWS expertise through making management decisions for listed species, most commonly by turning species management decisions over to the respective states.¹⁸⁴ These bills would unquestionably weaken species' protections by inhibiting total population management by a centralized authority of experts and instead shifting management decisions into fragmented state-by-state management. Just like the DELIST Act and the Polar Bear Delisting Act, these bills take away management authority that was explicitly delegated by Congress when it enacted the ESA.¹⁸⁵ Congress intended for FWS to make these specific management decisions using its professional expertise and the best available scientific data,¹⁸⁶ and proposals like these undermine this intention.

Other proposals sought to alter the workings of the ESA on a more fundamental level,¹⁸⁷ and these proposals reach the heart of undermining the purpose of the ESA, because they affect all species rather than just one. For example, identical bills in the

183. *See id.* § 1532(15); 50 C.F.R. §§ 10.1, 10.12.

184. More Water for Our Valley Act, H.R. 1251, 112th Cong. § 2(b) (2011) (prohibiting FWS from making water diversion restrictions to protect the delta smelt during seasons when water diversion is necessary for agriculture in the San Joaquin Valley); State Wildlife Management Act of 2011, H.R. 1819, 112th Cong. § 2(a) (2011) (removing FWS management powers over gray wolves and placing these powers with the individual states in which the wolf populations are located); State Management of Recovered Wolves Act, H.R. 3453, 112th Cong. § 2 (2011) (permitting state authorization of wolf takings in states where wolf populations exceed recovery goals).

185. *See* 16 U.S.C. § 1532(15); 50 C.F.R. §§ 10.1, 10.12.

186. *See* 16 U.S.C. § 1533(b)(1)(A); H.R. REP. NO. 95-1625, at 13 (1978), reprinted in 1978 U.S.C.C.A.N. 9450, 9463.

187. S. 3500, 112th Cong. § 2(3) (2012) (proposing procedural changes to the ESA including requiring state and county approval for any settlements reached on cases filed against a federal agency for an ESA violation); Freedom from Over-Criminalization and Unjust Seizures Act of 2012, H.R. 4171, 112th Cong. § 2 (2012) (proposing to convert criminal sanctions for ESA violations into civil penalties); Freedom from Over-Criminalization and Unjust Seizures Act of 2012, S. 2062, 112th Cong. § 2 (2012) (same as HR 4171). The DELIST Act also would be one of these fundamental ESA alterations by changing the procedure for listing and delisting species. H.R. 1042, §3.

Senate¹⁸⁸ and House¹⁸⁹ would remove the criminal fines called for in the ESA and reduce them to civil penalties. As noted above,¹⁹⁰ Congress included criminal fines in the ESA as a means of giving the Act great weight. By undercutting key strengths of the ESA, such as criminal fines¹⁹¹ and long-term recovery efforts,¹⁹² these bills had the potential to deal heavy blows upon the ESA.

Other proposed amendments would have dealt less of a blow to the ESA, but instead showcase the lack of careful consideration by some Congressional representatives in proposing amendments. Two identical amendments proposed in the Senate¹⁹³ and House¹⁹⁴ sought to amend the ESA by prohibiting penalties for a taking of a grizzly bear if the person can demonstrate that she or he took the bear for self-defense or defense of another. While the reasoning behind these bills was sound, this self-defense exemption is already provided for in the ESA, so the bills were completely unnecessary.¹⁹⁵

Finally, the most dangerous of proposed amendments were those that were for more generalized reform, but contained language to amend the ESA as well.¹⁹⁶ The Senate's Jobs Through Growth Act would have allowed a governor to completely nullify all ESA protections within his/her State by declaring an emergency.¹⁹⁷ The House also considered a similar bill with identical impacts on the ESA.¹⁹⁸ The final bill of this nature, the only ESA amendment bill to actually pass in the 112th Congress, removed protections against incidental takes of the Southern Sea Otter in military readiness areas.¹⁹⁹

188. S. 2062 § 2.

189. H.R. 4171 § 2.

190. *See supra* Part II.A.

191. S. 2062 § 2.

192. H.R. 1042 § 3.

193. S. 1552, 112th Cong. § 1 (2011).

194. H.R. 2929, 112th Cong. § 1 (2011).

195. *See* 16 U.S.C. §§ 1540(a)(3), 1540(b)(3) (2006).

196. Jobs Through Growth Act, S. 1720, 112th Cong. § 4136(a) (2011); 3-D, Domestic Jobs, Domestic Energy, and Deficit Reduction Act of 2011, H.R. 1287, 112th Cong. §§ 306, 308 (2011); Energy Exploration and Production to Achieve National Demand Act, H.R. 4301, 112th Cong. § 401 (2012).

197. *See* Jobs Through Growth Act, S. 1720, 112th Cong. § 4136(a) (2011).

198. *See* H.R. 1287, 112th Cong. §§ 306, 308.

199. National Defense Authorization Act for Fiscal Year 2013, H.R. 4310, 112th Cong. § 316(a) (to be codified at 10 U.S.C. § 2283(b)) (2012).

The major danger of bills like these is that they have an increased likelihood to pass because they capitalize on strong social needs: economic stimulation and national security. Additionally, because these are such comprehensive bills, the ESA amendments are buried among hundreds of provisions, and are therefore less likely to attract attention.²⁰⁰ Fortunately, the Jobs Through Growth Act and its House companion did not pass. However, the National Defense Authorization Act for Fiscal Year 2013 did pass, and was signed into law by the President on January 3, 2013.²⁰¹ Additionally, a rider nearly mimicking the State Wildlife Management Act found its way into another “must-pass appropriations bill.”²⁰²

Clearly, harmful amendments pose the greatest threat when they are folded into complex bills covering more politically-charged topics. Fortunately, the two ESA amendments that did pass in the 112th Congress were isolated harms on particular species rather than an across the board weakening of the ESA like the DELIST Act.²⁰³ However, if a proposal like the DELIST Act were to make its way into one of these comprehensive bills in the 113th Congress, it could spell disaster for the ESA and the species it protects.

PART IV: PROPOSAL FOR CHANGE (OR LACK THEREOF)

Based on the foregoing arguments, clearly all of these proposed amendments, particularly the DELIST Act, should not have passed through Congress.²⁰⁴ The ESA was designed to be a strong protector of the species of the world based on the best available science.²⁰⁵ The current system in place for listing

200. See S. 1720 § 1 (table of contents showing 132 sections); H.R. 4310, § 2 (table of contents showing over 500 sections).

201. The Library of Congress, *Bill Summary & Status: H.R. 4310*, THOMAS (last visited Jan. 4, 2013), <http://thomas.loc.gov/cgi-bin/thomas>.

202. Matthew Koehler, *Action Alert: Senator Tester and His Wolf Rider*, LEFT IN THE WEST (Apr. 15, 2011, 08:22 MST), <http://www.leftinthewest.com/diary/4630/action-alert-senator-tester-and-his-wolf-rider>.

203. See H.R. 4310 § 316(a) (removing protection for sea otters in one location); Pub. L. No. 112-10, § 1713 (2011) (including a rider that handed over management of gray wolf populations to states).

204. And fortunately, all but two of the proposals did fail, one passing as a bill and the other via an unrelated rider. H.R. 4310 § 316(a); Pub. L. No. 112-10, § 1713.

205. See 16 U.S.C. § 1536(a)(2); S. REP. NO. 93-307, at 2991.

species allows for the most scientifically sound listing decisions.²⁰⁶ FWS, an agency of wildlife experts, is charged with objectively evaluating each individual species based on criteria laid down by Congress²⁰⁷ and applying the “best scientific and commercial data available” to those criteria.²⁰⁸ The specific criteria having been laid down by Congress and the allowance of a judicial check in the form of citizen suits provide adequate assurance that FWS will not abuse its power and list species unnecessarily.²⁰⁹

If, however, a bill similar to the DELIST Act is introduced in the 113th Congress, it would need some major modifications, although it is questionable whether a DELIST Act-style bill could be modified to avoid the inherent harms and still be worth passing at all. The first, most obvious change is that clearer definitions need to be provided in the bill. The definition of “limited listed species” would either need to be clarified or eliminated because as it is currently written it can be read to include virtually every species.²¹⁰ More importantly, “substantial increase in the population” would need to be given a definition.²¹¹ In its current form, the ESA provides very clear guidelines on making listing decisions, which FWS is accustomed to working with.²¹² However, the DELIST Act would demand change in listing decisions without specifying what new method should be used.²¹³ Vague terms lead to unpredictable results and greater risk of abuse. If Congress is going to take greater control over listing decisions, which itself is unwise, it should at least provide clear guidelines on what its legislation requires.

The fifteen year time period for recovery would also need to be altered.²¹⁴ One possible approach would be to extend the time

206. See 16 U.S.C. § 1533.

207. *Id.* § 1533(a)(1).

208. *Id.* § 1533(b)(1)(A).

209. See *id.* §§ 1533(a)(1), 1540(g). The ESA provides an allowance for citizen suits against parties (private or government) that violate any provision of the ESA as well as suits against the Secretary (and therefore against FWS) for failing to take a nondiscretionary listing action. *Id.* § 1540(g)(1).

210. See DELIST Act, H.R. 1042, 112th Cong. § 3 (2011); Doremus, *supra* note 72.

211. See H.R. 1042 § 3.

212. See 16 U.S.C. § 1533(a)(1).

213. See H.R. 1042 § 3.

214. See *id.*

limit. However, agreeing upon an appropriate time is unlikely to happen in Congress. Longer lengths of time would be struck down by supporters of legislation like the DELIST Act as being too long to be of any value. Shorter lengths, such as the fifteen years called for by the DELIST Act, would be struck down by environmentally-conscious members of Congress as not allowing adequate recovery time for most species. Setting a variable recovery time allowance may be the best choice. The allowance could be calculated for each individual species by multiplying some base number by the scientifically determined reproductive rate of the species. This might be the most satisfying common ground if the DELIST Act were to be passed. However, given the individual analysis required by this method, it would be of greater value and require little additional effort to simply maintain the listing and reclassification process currently in effect.

PART IV: CONCLUSION

The ESA was enacted to protect animal and plant species in recognition of the important services they provide for humans and the ecosystem as a whole.²¹⁵ From the time of enactment, the courts have affirmed that Congress intended the ESA to be powerful and protect species even at extreme costs.²¹⁶ Although the ESA was amended to allow more flexibility shortly after its enactment, the main reasoning for that change was to allow the FWS increased freedom to exercise its expertise without fear of political reprisal.²¹⁷ As the scheme of the ESA currently stands, FWS evaluates each species' status based on factors laid out by Congress²¹⁸ and using the best available scientific information to determine the need for listing and protecting each species individually.²¹⁹

Representative Baca's DELIST Act, as well as the other proposed ESA amendments, would have undermined both the goal of the ESA to protect threatened and endangered species to the greatest extent practicable and the intent of Congress to delegate

215. S. REP. NO. 93-307, at 10 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2980, 2990.

216. H.R. REP. NO. 95-1625, at 10 (1978); *see* Hill, 437 U.S. at 174.

217. *See* H.R. REP. NO. 95-1625, at 13.

218. 16 U.S.C. § 1533(a)(1).

219. *Id.* § 1533(b)(1)(A).

the decision-making authority under the ESA to FWS.²²⁰ Although Baca's end goal of bringing development to a depressed area may have been more beneficial than attempting to preserve an insect that seemed doomed,²²¹ this bill was not the proper format for effectuating that goal. Baca or the affected California counties could take two alternative actions to effectuate the same goal: file a petition with FWS to reclassify the fly as extinct²²² or apply for an exemption.²²³

By taking action through a general amendment to the ESA rather than one of the methods already allowed for in the statutory scheme, the DELIST Act would have impacted every protected species. This generalized route was both unnecessary and improper. This amendment alone could have spelled disaster for the ESA and the plants and animals that it protects, which is especially alarming in light of the dozens of other bills that arose in the 112th Congress to amend and weaken the ESA. Even though the majority of these bills failed, the risk remains that similar proposals will appear in the 113th Congress, and passage of just a few of them²²⁴ could undermine the ESA to the point of making it ineffectual. The DELIST Act is an extreme remedy to an isolated problem, and Congress should continue to reject such attacks until these dangerous bills are extinct.

220. See *id.*; S. REP. NO. 93-307, at 10.

221. See DELIST Act, H.R. 1042, 112th Cong. § 2(29) (2011); Goad, *supra* note 72.

222. See 16 U.S.C. § 1533(b)(3).

223. See *id.* § 1539(d).

224. Bills similar to the DELIST Act, the Jobs Through Growth Act, and appropriations bills with provisions to amend substantive law are particularly harmful to the ESA. *Supra* note 196.