

# ENDANGERED SPECIES

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MID-TERM GRADE: C | FINAL GRADE: C

Candidate Conservation Agreements & Safe Harbor Programs	C
Critical Habitat Designation Reform	C
Section 7 Reforms	A
Truth in Accounting	F

**B**y many measures, the Endangered Species Act (ESA), which is charged with protecting plants and animals from extinction, is ineffective.<sup>1</sup> Out of 1,263 species listed as endangered or threatened (Fish and Wildlife Service [FWS] 2003)—up from 114 in 1973—only 15 species have actually been recovered (FWS 2004b). Out of the 33 species removed from the list over the past three decades, seven were removed because they went extinct, and 12 were removed because they should not have been listed in the first place.<sup>2</sup> According to the General Accounting Office, most species are closer to extinction than when they were first listed (Huggins 2003).

The underlying reason for the ESA's failure is that it penalizes property owners whose land is inhabited by an endangered or threatened species. Under ESA requirements to protect the species and its surrounding habitat, property

owners can lose the use and value of their land when a listed species is found on their property. This understandably discourages landowners from protecting or reporting the species. As Environmental Defense attorney Michael Bean observed back in 1994, landowners' actions are "not the result of malice toward the environment" but are "fairly rational decisions motivated by a desire to avoid potentially significant economic constraints" (quoted in Simmons and Simmons 2003-2004).

## THE MID-TERM REPORT

The PERC mid-term report gave the Bush administration an overall grade of C for endangered species policy. Three elements entered the calculation. The candidate conservation program earned a C. Habitat conservation plan-

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ning, the weakest part of endangered species policy, was hit with a D. And estate tax policy, offered as a way to limit some perverse effects, received a B. The mid-term report expressed concern about the perverse incentives contained in endangered species protection policy and whether or not the Bush administration would do more than tinker at the margin of current policy.

Over the last two years, the Bush administration has attempted to modify the regulations that discourage protection. After taking office, Interior Secretary Gail Norton spoke of the administration's plan to bring about change by invoking the four Cs: "communication, cooperation, consultation, and conservation" (U.S. Department of the Interior 2001). This theme has been the basis for the administration's blueprint to encourage landowners to participate with government.

Unfortunately, though, "cooperate" too often means enabling the government to intrude, although with the owner's permission. The administration, particularly in the last two years, has made positive changes to some of the most onerous sections of the ESA, but real change can only occur through a complete overhaul of the act. Until species are no longer considered a liability to property owners but rather viewed as having value, there will be little protection for either endangered species or landowners.

### ASSESSING THE FULL FOUR YEARS

This final review focuses on three reform actions taken by the administration. It also

addresses the problem of inadequate accounting of the costs imposed by the Endangered Species Act.

### CANDIDATE CONSERVATION AGREEMENTS AND SAFE HARBOR PROGRAMS

Since President Bush came to office, his administration has emphasized the need for replacing the ESA's command-and-control elements with positive incentives that encourage voluntary stewardship and promise regulatory relief—a carrot-over-the-stick approach. Too often, however, these initiatives have merely softened the blow, focusing on cooperation rather than full voluntary involvement.

Candidate Conservation Agreements with Assurances (CCAA), started by President Clinton and expanded under President Bush, provide permits to property owners who accept certain obligations to protect candidate species—those not yet listed as endangered or threatened but facing potential endangerment. In return for harboring the species, landowners receive assurances from the government that they will not be subjected to future regulations beyond the ones to which they agree. The purpose of the program is to recover any potentially threatened species before they are endangered and subject to ESA listing.

Safe Harbor Agreements are similar to CCAAs but apply to species that have been listed as endangered or threatened. Like CCAAs, these agreements began under President Clinton in 1999 and were ex-

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panded under President Bush. The purpose of the agreements is to encourage property owners to voluntarily manage their land to protect endangered species on their property. The program promises that no further regulations will be imposed beyond those the landowner and the government have agreed to.

While CCAAs and Safe Harbor Agreements are improvements, they simply do not go far enough in protecting either species or property owners. Owners must still follow requirements and restrictions on the use and value of their land. The threat of future regulations may be weakened, but a candidate or listed species still remains a liability to the property owner.

Not surprisingly, the programs have failed to attract many applicants or to satisfy those who have already participated. To date, only 32 safe harbor agreements have been issued (Environmental Defense 2003). Some participants have complained of regulatory uncertainty and of inconsistencies between the government's stated objective and the actual terms of the permit (Gable 2003). For example, although the safe harbor policy "assures" regulatory relief for future actions, the program contains loopholes that still give the Fish and Wildlife Service authority to require landowners to take protection measures without their consent (Simmons 2003).

In April 2004, the Interior Department revised the program administratively to provide better regulatory certainty and to clarify "activities for which permits can be issued to enhance species survival" (FWS 2004a). The revisions are a significant im-

provement and treat candidate and endangered species less like liabilities. Moreover, they expand the number of property owners who qualify for the permit and give the landowner greater flexibility.

However, the new programs also increase the paperwork burden of the permit holder and still give the Fish and Wildlife Service too much discretion in determining the terms of individual permits. All in all, they fail to change the fact that a candidate or endangered species still creates a regulatory and economic burden on the landowner, even when a property owner "voluntarily" comes forward for fear of future repercussions. Until that is reversed and the species is considered an actual benefit, property owners will have little incentive to come forward.<sup>3</sup>

### *Candidate Conservation Agreements & Safe Harbor Programs C*

## CRITICAL HABITAT DESIGNATION REFORM

Critical habitat designation is a particularly counterproductive provision of the ESA. The law requires the Fish and Wildlife Service to determine critical habitat—that is, habitat considered by the ESA to be necessary—for all endangered or threatened species at the time they are listed. This point occurs long before there is sufficient information on the species and their recovery needs. While providing habitat can in some cases be an important aspect of protection, it is not always beneficial, particu-

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larly if designations are too encompassing and divert attention away from more important conservation techniques—as officials in both the Clinton and Bush administrations have testified (U.S. Department of the Interior 2003).

Time and resources are needed to make the best designations of a species' habitat, and the timetables mandated in the Endangered Species Act prevent officials and scientists from making optimal choices. According to the National Research Council, “designation of critical habitat is often controversial and arduous, delaying or preventing the protection it was intended to afford” (National Research Council 1995).

The courts have not seen it this way, however. In 1997, a court determined that it was a violation of the ESA to miss deadlines or to deny critical habitat designation, even if administration officials determined that designating critical habitat was “not prudent”—that is, it would not benefit the species. A second court ruled that designations should be made even if they are lower in priority than other conservation measures. Environmental activists pounced on the issue, launching a tirade of lawsuits against the Clinton and Bush administrations for missed deadlines and for “not prudent” determinations. This litigation is costly to taxpayers and has diverted funds, scientists, and other resources away from other species protection requirements. According to Craig Manson, assistant secretary of the Interior for Fish, Wildlife and Parks, two-thirds of the endangered species listing budget is consumed by litigation expenses (U.S. Department of the Interior 2003).

The designation requirements have attracted critics on both sides of the political aisle. For example, in a 2001 *New York Times* article entitled “Bush Isn’t All Wrong About the Endangered Species Act,” former Interior Secretary Bruce Babbitt wrote that critical habitat designations are flawed because they require habitat to be determined “at the beginning of the process, when there is often not much information available.” Environmentalists, he wrote, were “overreacting” in resisting President Bush’s efforts to reform the designation process (Babbitt 2001, sec. 4, p. 11).<sup>4</sup>

The Bush administration has been a strong vocal opponent of the ESA’s “broken” critical habitat designation provision. Early in 2003, the administration called on Congress to move designation requirements to the recovery planning phase and to allow them to be waived when they are redundant. In some cases, ESA programs already provide critical habitat to species deemed endangered; these include habitat conservation plans and safe harbor agreements. The Fish and Wildlife Service also began in the spring of 2003 to add a disclaimer to critical habitat designations published in the *Federal Register*, stating that the designation “provides little additional protection to species” and “is driven by litigation rather than biology” (Henry 2003).

But the administration has failed to support significant and meaningful reform of designations. In the summer of 2003, Rep. Dennis Cardoza (D-Calif.) introduced much-needed critical habitat reform legislation, H.R. 2933.<sup>5</sup> It passed the House Resources Committee in the summer of

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2004. If enacted, it would require that critical habitat designations be established during the recovery phase rather than at the time of listing. The legislation also would require that designations be made only when they are determined to be “practicable, economically feasible, and determinable.” It would also require that Interior officials use existing habitat inventory data and maps showing local areas of species’ habitat, when available from state or local governments, and it would avoid some duplication of designation requirements by excluding land already designated under habitat conservation plans.

Fully eliminating critical habitat designation requirements and allowing for species protection, when appropriate, under voluntary agreements and contracts between landowners and third parties would be the best solution. Short of this, the reform measures found in H.R. 2933 would remove some egregious elements of the law. The administration should endorse H.R. 2933. Its full support for the bill could help to ensure its passage.

### *Critical Habitat Designation Reform* C

#### SECTION 7 REFORMS — PESTICIDE REGISTRATION AND HAZARDOUS FUEL REDUCTION

Under Section 7 of the Endangered Species Act, the Environmental Protection Agency (EPA) must engage in an extensive consultation process with the Fish and Wildlife Service and the National Marine Fisheries Service (NMFS) to determine whether

or not a new pesticide would have debilitating effects on endangered species. This is redundant and wasteful, because under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) the EPA is already required to conduct a full risk assessment, which includes determining its effects on species.

Furthermore, according to a recent General Accounting Office study, increasing workloads at the Fish and Wildlife Service and the National Marine Fisheries Service caused by a rapid rise in the number of listed species since the 1990s have created enormous obstacles to fulfilling the pesticide registration requirements. The report also found that the EPA and other agencies often feel forced into consultations even when they believe they are unnecessary. They fear both Section 7’s draconian mandates and being sued (GAO 2004).

These fears are not misplaced. Environmental activists, opposed to pesticides and chemicals of any kind, have used missed deadlines to launch numerous lawsuits against the agencies. This litigation has halted the approval of many effective pesticides, preventing farmers from selling their products (Miller 2004).

The Bush administration changed the pesticide approval regulations administratively. A new rule released in the summer of 2004 ends the exhaustive consultation process and shifts responsibility to the EPA to approve new pesticides under the existing FIFRA requirements. It gives FWS and NMFS authority to challenge the decisions only if they believe that further inquiry is warranted.

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In a related issue, the administration also amended the interagency consultation process over proposals to reduce forests' hazardous fuel. Under this provision of the Healthy Forests Restoration Act, enacted in 2003, the U.S. Forest Service and the Bureau of Land Management would make the decisions. This is appropriate because they already use their biologists to analyze the data and determine thinning's effect on endangered species. As with the pesticide reforms, FWS and NMFS could request further "formal" consultations, but they are not required to do so. This was an important move to enable the Forest Service to expedite needed thinning projects, which are key to staving off deadly forest fires and to protecting threatened and endangered species (Berman 2003).

### *Section 7 Reforms*    **A**

#### TRUTH IN ACCOUNTING

A 2004 study by economist Randy T. Simmons and research assistant Kimberly Frost reveals that the Fish and Wildlife Service significantly underreports government spending for endangered species (Simmons and Frost 2004). The agency is required by the Endangered Species Act to report annual expenditures to Congress. According to the authors, the federal report, *Three-Year Summary of Federal and State Endangered Species Expenditure, Fiscal Years 1998-2000*, shows annual federal and state spending at \$610 million. Simmons and Frost put the number at \$2.4

billion, four times that amount.

The researchers also found that the Fish and Wildlife Service excludes billions of dollars in property owners' compliance costs, federal agency expenditures that simply aren't reported, state and local spending for enforcement and compliance that is underreported, litigation costs, costs due to denial of private development projects, and other costs incurred by the private sector in lost economic value.

It is crucial to know—and to reveal to the public—the true cost to taxpayers and the economy in even attempting to save an endangered species. As the authors conclude from calculating actual costs, the Endangered Species Act "may be a waste of taxpayer dollars since only a few species benefit from the government's expenditures" (Simmons and Frost 2004, v). The Administration gets a failing grade for misleading the public on the true costs of endangered species protection.

### *Truth in Accounting*    **F**

#### THE FINAL GRADE

The Bush administration has made some attempts to soften some of the blow of the Endangered Species Act, giving landowners more flexibility in determining the use of their land and reforming some of the worst aspects of the Section 7 provisions. However, the administration has failed to make real, substantive changes to the ESA to provide property owners with positive incentives that would help protect endangered

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species. Until policies recognize and treat endangered species as an asset and not a liability, the ESA will continue to fail to protect both endangered species and property owners. For its efforts to make administrative changes, yet also failing to seek substantive change, the Bush administration receives a C.

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#### RECOMMENDATIONS FOR THE NEXT ADMINISTRATION

The next administration should take a leadership role in replacing the current ineffective, costly system of species protection with one that relies on fully voluntary, incentive-based policies and that recognizes landowners' rights. With the Endangered Species Act still up for reauthorization and a new Congress in office, the political climate in 2005 may be more favorable for re-vamping the act.

Close to 80 percent of all listed species are located on private land. The best form of species protection on private lands is an individual-based, mutually acceptable contractual arrangement between a property owner and a third party that compensates the owner for conservation measures or for the value of land that cannot be fully used. This could be accomplished through rental payments or conservation easements (Bourland and Stroup 1996), assuming that terms are developed on an individual basis.

Short of replacing the ESA, the new administration should support legislation that

requires sound science—that is, field-tested or peer-reviewed science—in determining which species are endangered or threatened. It should also use the administrative process where possible to limit critical habitat designations and Section 7's cumbersome, ineffective requirements.

#### NOTES

1. See Terry Anderson's response in the *Stanford Review* when asked, "If you could change or repeal one piece of U.S. environmental law, what would you pick?" (Mayhugh 1997).

2. For more on this, see Simmons and Simmons (2003-2004, 8).

3. For a good discussion, see Daniel R. Simmons (2003).

4. President Clinton's director of the Fish and Wildlife Service, Jamie Rappaport Clark, was also a harsh critic of the designation regulations. She placed a moratorium on 25 endangered species under consideration for protection so that she could handle the flood of court orders. Calling the situation a "biological disaster," she protested that litigation "has turned our priorities upside-down. Species that are in need of protection are having to be ignored" (Knudson 2001).

5. Critical Habitat Reform Act of 2003.

#### REFERENCES

Babbitt, Bruce. 2001. Bush Isn't All Wrong About the Endangered Species Act. *New York Times*, April 15.

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- Berman, Dan. 2003. Bush Admin Says Wildfire Thinning Projects Do Not Need ESA Consultations. *Greenwire*, December 4.
- Bourland, Thomas R., and Richard L. Stroup. 1996. Rent Payments as Incentives. *Journal of Forestry* April: 18–21.
- Environmental Defense. 2003. Safe Harbor Agreements by Date (September 12). Online: [www.environmentaldefense.org/article.cfm?ContentID=403](http://www.environmentaldefense.org/article.cfm?ContentID=403) (cited August 6, 2004).
- Fish and Wildlife Service. 2003. Summary of Listed Species, Threatened and Endangered Species System (TESS). Online: [ecos.fws.gov/tess\\_public/html/boxscore.html](http://ecos.fws.gov/tess_public/html/boxscore.html) (cited August 6, 2004).
- . 2004a. Assistant Secretary Manson Announces Revised Regulations for Endangered Species: Conservation Agreements on Private Lands. News release (April 28). Online: [endangered.fws.gov/candidates/news\\_release.pdf](http://endangered.fws.gov/candidates/news_release.pdf) (cited August 6, 2004).
- . 2004b. Delisted Species Report as of 8/6/04, Threatened and Endangered Species System (TESS). Online: [ecos.fws.gov/tess\\_public/TESSWebpageDelisted?listings=0](http://ecos.fws.gov/tess_public/TESSWebpageDelisted?listings=0) (cited August 6, 2004).
- Gable, Eryn. 2003. FWS Aims to Boost Protections for Endangered Species on Private Land. *Land Letter*, September 18.
- General Accounting Office. 2004. *More Management Attention Is Needed to Improve the Consultation Process*. GAO-04-93, March.
- Henry, Natalie M. 2003. Administration Says Critical Habitat Has Little Value under ESA. *Greenwire*, May 29.
- Huggins, Laura E. 2003. A Better Way to Protect Endangered Species. *Weekly Essays* (February 10). Hoover Institution. Online: [www.hoover.stanford.edu/pubaffairs/we/2003/huggins02.html](http://www.hoover.stanford.edu/pubaffairs/we/2003/huggins02.html) (cited August 6, 2004).
- Knudson, Tom. 2001. Litigation Central: A Flood of Costly Lawsuits Raises Questions About Motive. *Sacramento Bee*, April 24. Online: [www.sacbee.com/static/archive/news/projects/environment/20010424.html](http://www.sacbee.com/static/archive/news/projects/environment/20010424.html) (cited September 2004).
- Mayhugh, Candice Jackson. 1997. New Hoover Fellow Terry Anderson Explains Free Market Environmentalism (October 21). *Stanford Review*. Online: [www.perc.org/publications/interview/intv\\_ta\\_hoover.php?s=2](http://www.perc.org/publications/interview/intv_ta_hoover.php?s=2) (cited August 6, 2004).
- Miller, Henry I. 2004. Stopping the Real Pests. *Tech Central Station*, February 12. Online: [www.techcentralstation.com/021204C.html](http://www.techcentralstation.com/021204C.html) (cited August 6, 2004).
- National Research Council. 1995. *Science and the Endangered Species Act*. Washington, DC: National Academy Press.
- Simmons, Daniel R. 2003. Public Interest Comment on Fish and Wildlife Service's Revisions to "Safe Harbor Agreements and Candidate Conservation Agreements with Assurances" (November 10). Mercatus Center, Regulatory Studies Program, George Mason University. Online: [www.mercatus.org/regulatory\\_studies/article.php/520.html](http://www.mercatus.org/regulatory_studies/article.php/520.html) (cited August 6, 2004).
- Simmons, Daniel R., and Randy T. Simmons. 2003-2004. The Endangered Species Act Turns 30. *Regulation*, Winter 2003-2004. Online: [www.cato.org/pubs/regulation/](http://www.cato.org/pubs/regulation/)

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- regv26n4/mercreportcom.pdf (cited August 6, 2004).
- Simmons, Randy T., and Kimberly Frost. 2004. *Accounting for Species: The True Costs of the Endangered Species Act* (April). PERC. Online: [www.perc.org/publications/articles/esa\\_costs.php?s=2](http://www.perc.org/publications/articles/esa_costs.php?s=2) (cited August 6, 2004).
- U.S. Department of the Interior. 2001. Remarks Prepared for Delivery: The Hon. Gale Norton, North American Wildlife and Natural Resource Conference (March 19). *News*. Online: [www.doi.gov/news/010319.html](http://www.doi.gov/news/010319.html) (cited August 6, 2004).
- . 2003. Endangered Species Act ‘Broken’—Flood of Litigation over Critical Habitat Hinders Species Conservation (May 28). *News*. Online: [endangered.fws.gov/criticalhabitat/ch\\_pressrelease.pdf](http://endangered.fws.gov/criticalhabitat/ch_pressrelease.pdf) (cited August 6, 2004).