

KLAMATH FARMERS AND CAPPUCCINO COWBOYS¹: THE RHETORIC OF THE ENDANGERED SPECIES ACT AND WHY IT (STILL) MATTERS

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Despite what some of our critics charge, there is no grandiose plot to roll back safeguards or attempt an across-the-board sunset of existing regulations. . . .

The changes we are making at OMB [Office of Management and Budget] are not headline-grabbers: No far-reaching legislative initiatives, no rhetoric-laden executive orders, and no campaigns of regulatory relief. Yet we are making some changes that we believe will have a long-lasting impact on the regulatory state.

- John D. Graham (2001)²

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1. “Suburbanites tend to desire a rural lifestyle and setting, but with urban amenities and an urban level of income, leading to the creation of ‘cappuccino cowboys.’” Robert H. Freilich, *To Sprawl or Not to Sprawl: National Perspectives for Kansas City* 6, at <http://www.umkc.edu/whmckc/PUBLICATIONS/KIMBALL/CNKPDF/Freilich-04-21-97.pdf> (Apr. 21, 1997).

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2. John D. Graham, Ph.D., Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President of the United States, Executive Regulatory Reviews: Surveying the Record, Marking [sic] it Work, Speech to Weidenbaum Center Forum, at http://www.whitehouse.gov/omb/inforeg/graham_testimony060602.html (Dec. 17, 2001).

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ABSTRACT

This Article traces and analyzes the negative, lasting impact of political rhetoric on the Endangered Species Act. The discourse surrounding the Act is consistent in its themes, assumptions, and images, and it is seductively powerful. Taking the form of stories and slogans or catchphrases, this rhetoric paints a picture of imbalance, pitting humans and their prosperity against endangered species and their protection. The political rhetoric has spurred a reform movement to solve the problems that the stories portray. In this way, it influences proposed legislation, regulations, and day-to-day operations of the Executive Branch. Yet, the solutions to these “problems” are ill-advised for several reasons. First, they seek to address problems that do not exist. The stories are misleading; important facts and contexts are omitted. Moreover, they seek to create a new property entitlement for a select segment of the public while at the same time undermining the values that undergird the Endangered Species Act. And because much of the change occurs within the agency’s day-to-day routine, it escapes public scrutiny, not being subject to Congressional debate or notice and comment rulemaking procedures. Thus, it is important to recognize the deflection of the issues, to challenge the rhetoric, and ultimately to develop alternative, expanded narratives that reflect the values of the broader public with respect to species protection.

I. INTRODUCTION

Political rhetoric—through the use of stories and catchphrases—frames debates and influences outcomes. It is directed towards the various branches of government as well as the public and is presented in various formats, including Congressional testimony, press releases, newspaper and magazine articles, and television and radio news broadcasts. Political rhetoric works well with what Zygmunt Plater calls “infotainment,” that is, “the broadcast news departments’ perceived need to be attractive and engaging to their desired audience by producing quick and catchy news segments.”³ It is captivating, enduring, and powerful. Significantly, the law responds to political rhetoric formally through legislation and regulation as well as informally through discretionary acts of the Executive Branch.

As part of the Contract with America, many Republican members of Congress called for significant reform of the Endangered Species Act

3. Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dickey Game of Democratic Governance*, 32 ENVTL. L. 1, 28 (2002).

(“ESA” or “the Act”). Recognizing the political sway of well-told, oft-repeated stories, those members of Congress along with private property rights activists called for reform on behalf of small private property owners who allegedly were having their rights trampled upon and their financial lives ruined by overzealous regulators. These “horror stories” illustrating the Act’s devastating consequences followed a simple, yet intuitively appealing paradigm. In a Lockean world, owners of property have the unfettered right to develop their property as they see fit, perhaps limited only by the law of nuisance and “background principles” of the state’s property law.⁴ If the government, through the Endangered Species Act, wishes to take one of the sticks out of the fabled property bundle by regulating private activity for the public’s benefit, it must compensate the private property owners for their losses. The meta-story was that the relationship among species protection, private property rights, and the economy was out of balance and Congress needed to act to restore the proper balance. With this world view, the 104th Congress proposed a myriad of legislation to limit the impact of the ESA on private lands, including proposals to create a new right of compensation for private landowners whose otherwise lawful activities were prohibited by the Act.

This Article focuses on the nature and persistence of this political rhetoric over the past decade and its negative impact upon species protection. One might argue that political rhetoric just does not matter because it does not represent the actual state of affairs. In law- and rule-making, arguably, it would be difficult to hide one’s agenda behind anecdotes and slogans when the time comes for the careful process of drafting new laws and regulations.⁵ After all, no amendments to the ESA resulted from the Contract with America and its stories.

4. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (“Any limitation so severe [that is, any regulation that prohibits all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”) The U.S. Supreme Court, however, has not elaborated on what it means by “background principles” of state law. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001) (“We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of property law or whether those circumstances are present here.”). The concept has fostered several law review articles, however. See, e.g., James Burling, *The Latest Take on Background Principles and States’ Law of Property After Lucas and Palazzolo*, 24 UNIV. HAW. L. REV. 497 (2002); David L. Callies & J. David Breemer, *Selected Legal & Policy Trends in Takings Law: Background Principles, Custom, and Public Trust “Exceptions” and the (Mis)Use of Investment-Backed Expectations*, 26 VAL. U. L. REV. 339 (2002).

5. Michael Allan Wolf, *Overtaking the Fifth Amendment: The Legislative Backlash Against Environmentalism*, 6 FORDHAM ENVTL. L.J. 637, 640 (1995).

But this Article submits that rhetoric matters, especially in our discourse about the ESA. It matters for a number of reasons, but mainly because, as Margaret Radin offers, rhetoric “might lead less-than-perfect practitioners to wrong answers in sensitive cases.”⁶ And even if the myths are later dispelled, they leave a lasting imprint on the consciousness of the American public.

The implementation of the Endangered Species Act raises sensitive questions and this rhetoric of reform may lead to the wrong answers. Many of those answers are being developed not through traditional legislative and regulatory processes, but through policy decisions affected by bureaucrats that most Americans have never even heard of. That’s right; the real action is happening behind the scenes—scenes painted by these “tales from the regulatory crypt.”⁷ Arguably these stories have affected decisions to list species as endangered or threatened, decisions to designate critical habitat, and decisions to defend against challenges to the Endangered Species Act and its regulations.

Moreover, the rhetoric has steered the U.S. Fish and Wildlife Service (“the Service”), the ESA’s primary implementing agency,⁸ toward compromise and to a kind of enforcement scheme that disregards the Service’s obligations under the Endangered Species Act. Not only has the Service not countered the perception that these horror stories are true, accurate, and representative, but it is shaping its policies as if they are in fact true, accurate, and representative.⁹ The Service is now using “cooperative” and “collaborative” strategies to address the problems portrayed by the horror stories.¹⁰ These strategies may be heralded as creative efforts to involve stakeholders in the development of regulations that will affect them, to

6. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1878 (1987).

7. *Restoring Accountability to Government Rulemaking and H.R. 3277, ‘The Regulatory Accountability Act’: Before the House Judiciary Comm. on Commercial and Administrative Law*, 104th Cong. (1996) (statement of Rep. Smith).

8. The Secretary of the Interior, through the U.S. Fish and Wildlife Service, has responsibility for terrestrial and freshwater species and some marine species, while the Secretary of Commerce, through the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NMFS) has responsibility for most marine species and most anadromous fish. And the two agencies share jurisdiction over some species. 35 Fed. Reg. 15,627, 15,627-30 (Oct. 6, 1970). For simplification, when the text refers to the U.S. Fish and Wildlife Service, the Service, or FWS, it should be read to include NMFS, unless otherwise indicated.

9. *See, e.g.*, 50 C.F.R. § 17.22 (2004) (codifying the “No Surprises” Rule, which provides assurances to encourage conservation of species).

10. U.S. Fish & Wildlife Service, *Our Endangered Species Program and How It Works With Landowners*, at <http://endangered.fws.gov/landowner/landown.pdf> (May 2003) (“By building strong partnerships and initiating early and collaborative conservation efforts, the Service can best achieve the purpose of the Endangered Species Act to conserve endangered and threatened species and the ecosystems upon which they depend.”).

draw upon the stakeholders' expertise, and to save the Act from losing all force. However, these strategies also raise the concern that these negotiations weaken environmental standards and undermine accountability.

The White House through the Office of Management and Budget ("OMB") and the Council on Environmental Quality ("CEQ") also plays an active role in altering the implementation of the Act. "Our approach is 'to maximize the quality of life for America,' said James L. Connaughton, chairman of President George W. Bush's Council on Environmental Quality, 'and that means balancing the environmental equation with the natural resources equation, the social equation and the economic equation.'"¹¹ To achieve this balance, the Bush Administration is insisting upon the use of cost-benefit analyses and "sound science," for example. These measures are directed towards the problems described in the horror stories as well—problems that may not really exist.

Holly Doremus has written about the successful use of political rhetoric to protect nature and the inability of this rhetoric of the past to continue to provide protection in a dynamic world. She explains that nature advocates are unhappy now because though they have obtained what they asked for, they have not in fact asked for what they want.¹² Thus, they need to develop a broader discourse to advance nature protection beyond its current state.¹³ In contrast, this Article demonstrates that the interests seeking reform of the ESA may no longer be asking directly for they want, but they are achieving what they want. This Article expands the scope of scholarship in this area to analyze not only the enduring influence of the rhetoric on formal legal and regulatory processes but also on discretionary acts of agencies.

Part II of this Article will review the Endangered Species Act generally and more specifically will examine the sections of the Act that the political rhetoric targets. Part III will dissect the rhetoric of the legislative reformers as the background against which the legislative proposals described in Part IV are analyzed. Part IV will explain the consequences of the proposals and evaluate how they would affect small landowners, the central characters of the stories told in Part III. Part V will examine the counter-rhetoric against the "rollbacks" used by environmental groups and the Democratic Party. In Part VI, the Article will address the rhetoric of reform as espoused by the Executive Branch and then in Part VII analyze

11. Douglas Jehl, *On Environmental Rules, Bush Sees a Balance, Critics a Threat*, N.Y. TIMES, Feb. 23, 2003, at 1.

12. Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward A New Discourse*, 57 WASH. & LEE L. REV. 11, 14 (2000).

13. *Id.* at 15-16.

how that rhetoric is actualized in the Executive Branch's initiatives. Finally in Part VIII, the Article will argue that all of this rhetoric and attendant policies are part of an effort to secure a new entitlement for certain members of the public. By sidestepping the statute, discounting the common law, and avoiding a discussion of values these reformers are attempting to create new rights for the select few, at the expense of listed species and the American public.

Even when legislative or formal regulatory outcomes do not seemingly implement major changes to the Act, the rhetoric that inspired them and upon which they rely makes lasting changes to the "facts on the ground." And it often does so without the scrutiny of Congressional debate or notice and comment procedures and thus is very dangerous. If the American public ignores the rhetoric and its long-lasting influence, the public does so at its own peril. In this way, "rhetoric matters"¹⁴ today even more than it did before.

II. THE ENDANGERED SPECIES ACT AND TAKINGS

The stated purposes of the Endangered Species Act are to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species."¹⁵ The Act provides several mechanisms through which the Secretary¹⁶ may accomplish these goals. The mechanisms for conservation include land acquisition,¹⁷ cooperation with states¹⁸ through management agreements¹⁹ and cooperative agreements,²⁰ regulation of federal agency actions,²¹ and the prohibition of certain acts on private land.²²

Though there is much debate surrounding the Endangered Species Act, this Article focuses only on certain aspects including: (1) Section 4's requirements for listing a species and designating critical habitat; (2) Sec-

14. *Id.* at 12.

15. 16 U.S.C. § 1531(b) (2000).

16. References to "the Secretary" mean the Secretary of the Interior or the Secretary of Commerce except as otherwise provided. *See* 16 U.S.C. § 1532(15) (2000).

17. 16 U.S.C. § 1534 (2000). The 2004 request for land acquisition appropriations total \$40.7 million, a decrease of \$29.6 million from 2003. H.B. 5092 Dept. of the Interior and Related Agencies Appropriation Act, 2003. For land and water acquisitions, \$82.25 million is to be derived from the Land and Water Conservation Fund and is to remain available until it is expended. *Id.*

18. 16 U.S.C. § 1535 (2000).

19. 16 U.S.C. § 1535(b).

20. 16 U.S.C. § 1535(c).

21. 16 U.S.C. § 1536 (2000).

22. 16 U.S.C. § 1538 (2000).

tion 9's prohibition of the taking of endangered species and the U.S. Constitution's Fifth Amendment prohibition against the taking of private property without just compensation; and (3) Section 10's incidental take permits and habitat conservation plans. In addition, the following discussion of Sections 6 and 7 of the Endangered Species Act will concentrate on the subsections that are relevant to the rhetoric and the reforms.

A. Section 4—Listing Species and Designating Critical Habitat

Section 4(a) of the Act requires the Secretary to determine whether any species' continued existence is "threatened" or "endangered."²³ The Secretary makes her determination of whether a species should be listed as threatened or endangered "solely on the basis of the best scientific and commercial data available."²⁴ Section 4(a) of the Act also requires the Secretary to designate critical habitat "to the maximum extent prudent and determinable," for every listed threatened or endangered species.²⁵ Critical habitat is comprised of "the specific areas within the geographical area occupied by the species at the time it is listed . . . [and] on which are found those physical or biological features essential to the conservation of the species and which may require special management consideration."²⁶ Before designating a particular area as critical habitat, the Secretary must first consider "the economic impact, and any other relevant impact, of" such a designation.²⁷ The D.C. Circuit Court, however, has held that the Service is not obligated to conduct studies to obtain missing data.²⁸ "[T]he Service must utilize the best scientific . . . data *available*, not the best scientific data *possible*."²⁹

B. Section 6—Cooperation with States

Section 6 of the Act provides that the Secretary is to "cooperate to the maximum extent practicable with the States."³⁰ Under Section 6's authority, the Secretary may enter into management agreements "for the admini-

23. 16 U.S.C. § 1533(a) (2000). An endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range" 16 U.S.C. § 1532(6) (2000). A threatened species is "any species which is likely to become an endangered species within the foreseeable future" 16 U.S.C. § 1532(20).

24. 16 U.S.C. § 1533(b)(1)(A).

25. 16 U.S.C. § 1533(a)(3)(A).

26. 16 U.S.C. § 1532(5)(A)(i).

27. 16 U.S.C. § 1533(b)(2).

28. *Southwest Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000).

29. *Bldg. Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001).

30. 16 U.S.C. § 1535(a) (2000).

stration and management of any area established for conservation” of endangered or threatened species.³¹ Also, if a state proposes a conservation program and the Secretary determines that it is in accordance with the Act, the Secretary must enter a cooperative agreement with the state.³² Then the Secretary is authorized to provide financial assistance of up to 75 percent of the estimated cost of the program.³³

During the Clinton Administration, the Service made increasing use of this provision. In 1990, appropriations for programs under section 6 were \$6,671,000, approximately 1 percent of the Services’ budget.³⁴ In 1999, the amount was \$23 million, approximately 3 percent of the budget.³⁵ This trend has continued with the Bush Administration. For FY 2004 the Department requested \$121 million, approximately 13 percent of the budget.³⁶ This section provides the statutory basis for the Cooperative Conservation Initiative, discussed in Section VI.B.3 *infra*.

C. Section 7—Consultation

Section 7 of the ESA applies only to projects with some federal involvement: a “federal nexus.” This section mandates that the Secretary work with federal agencies on “any action authorized, funded, or carried out” that may affect a listed species or its habitat to insure that the action will not “jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species.”³⁷ Also, if any person requiring a permit or license from a federal agency to carry out her plans “has reason to believe that an endangered species or threatened species may be present in the area affected by the project and that implementation of such action will likely affect such species,” the agency also must consult/work with the Service.³⁸

Through the consultation process, the Service lends its expertise to the action agency, which must conduct a biological assessment of the project area.³⁹ The Secretary must provide a “biological opinion” concerning how

31. 16 U.S.C. § 1535(b).

32. 16 U.S.C. § 1535(c).

33. 16 U.S.C. § 1535(d)(2)(i).

34. Pub. L. No. 101-512, 104 Stat. 1915 (1990).

35. Pub. L. No. 106-113, 113 Stat. 1501 (1999).

36. The request included \$42,929,000 from the Cooperative Endangered Species Conservation Fund and \$86,471,000 from the Land and Water Conservation Fund. H.R. 5093, Department of Interior and Related Agencies Appropriations Act, 2003 (Report in House), <http://thomas.loc.gov/cgi-bin/query/F?c107:1:./temp/~c107UtzaJa:e16231>.

37. 16 U.S.C. § 1536(a)(2) (2000).

38. 16 U.S.C. § 1536(a)(3).

39. 16 U.S.C. § 1536(c)(1).

the agency's or applicant's action will affect the species or its habitat.⁴⁰ If "jeopardy or adverse modification is found," the Secretary must suggest reasonable and prudent alternatives which she believes may be taken by the agency or applicant that would not jeopardize the continued existence of a listed species or adversely modify its habitat.⁴¹

Arguably a federal nexus is of significant economic and technical value for an individual landowner when the requirements of section 7 are compared to those of section 10 of the Act for an "incidental" take.⁴² Instances in which a private entity may set in motion the section 7 process "remain the exception rather than the rule,"⁴³ however. Thus, most individual landowners must fulfill the requirements of section 10 themselves if their planned activities are likely to harm listed species.

D. Section 9—Takings Prohibition

Section 9 of the Act is the main provision governing the activities of private entities. This section makes it unlawful for any person to "take any [endangered] . . . species within the United States or the territorial sea of the United States."⁴⁴ The statute defines "take" as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."⁴⁵ *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon* pitted Respondents, who described themselves as "small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast, and organizations that represent their interests," against the Secretary's regulatory interpretation of the term "harm," which included habitat modification.⁴⁶ The U.S. Supreme Court upheld the Secretary's interpretation, finding "that the Secretary reasonably construed the intent of Congress when he defined

40. 16 U.S.C. § 1536(b)(3)(A).

41. 16 U.S.C. § 1536(b)(3)(A).

42. See, e.g., David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 378-79 (1995) (outlining the differential burdens of sections 7 and 10); Donald L. Soderberg & Paul E. Larsen, *Obtaining Incidental Take Permits Under the Endangered Species Act: The Section 7 Alternative*, 20 REAL EST. L.J. 3, 4-6 (1991) (observing that a landowner may be able to receive a permit to take a listed species more quickly under the section 7 process than the section 10 process and that a landowner is more likely to receive a permit under section 7).

43. Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605, 620 (1991).

44. 16 U.S.C. § 1538(a)(1)(B) (2000).

45. 16 U.S.C. § 1532(19) (2000).

46. 515 U.S. 687, 692 (1995).

‘harm’ to include ‘significant habitat modification or degradation that actually kills or injures wildlife.’”⁴⁷

E. *Section 10—Incidental Take Permits and HCPs*

Section 10 of the ESA sets forth the procedures under which the Secretary may grant permits to private entities to conduct activities that otherwise would be violations of section 9 because of the incidental taking of a species.⁴⁸ A take is incidental if it is prohibited under section 9 but “is incidental to, and not the purpose of carrying out an otherwise lawful activity.”⁴⁹ To receive a permit, an applicant must develop a habitat conservation plan.⁵⁰ The plan must specify—

- (i) the impact which will likely result from such taking;
- (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- (iii) what alternative actions to such takings the applicant considered and the reasons why such alternatives are not being utilized; and
- (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.⁵¹

The Secretary may issue a permit for an incidental taking if she is satisfied with the information provided in the plan and that “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.”⁵² Moreover, the Secretary may revoke the permit if the permittee does not comply with permit’s terms.⁵³

Individual entities or groups of entities may develop habitat conservation plans (“HCPs”).⁵⁴ Plans that involve significant governmental participation are often known as regional habitat conservation plans (“RHCPs”) and attempt to provide for large areas of land which involve many different interests. From the small landowner’s perspective, the requirements of an HCP can eviscerate any intentions to exploit the property economically.

47. *Id.* at 708.

48. See 50 C.F.R. § 17.22 (2001) for detailed provisions.

49. 16 U.S.C. § 1539(a)(1)(B) (2000).

50. 16 U.S.C. § 1539(a)(2)(A).

51. *Id.*

52. 16 U.S.C. § 1539(a)(2)(B)(iv).

53. 16 U.S.C. § 1539(a)(2)(C).

54. See J.B. Ruhl, *How to Kill Endangered Species, Legally: The Nuts and Bolts of Endangered Species Act “HCP” Permits for Real Estate Development*, 5 ENVTL. L. 345 (1999) (explaining the fundamentals of HCPs). As of October 1, 2001, over 447 HCPs had been approved, addressing more than 516 species across more than 39 million acres. U.S. Fish & Wildlife Serv., *Habitat Conservation Plans Section 10 of the Endangered Species Act*, at 1, at http://endangered.fws.gov/hcp/HCP_Incidental_Take.pdf (2002).

Costs associated with the development of an HCP may include mitigation fees as well as paying for biological surveys and legal counsel. Although the Service has not compiled any data concerning the costs of developing an HCP,⁵⁵ several sources indicate that these costs exceed the resources of the typical small landowner.⁵⁶ One study of the RHCP for Austin, Texas estimated that in the absence of an RHCP, the cost of compliance with the ESA for landowners would be approximately \$9,000 per acre in 1992 dollars.⁵⁷ The assessment under the RHCP was estimated to be between \$600 and \$3,000 per acre.⁵⁸

The ability of landowners to join together and proportionally share the costs of development can mitigate the effect of the requirement, yet several factors may make this sharing arrangement a non-viable option. Divergent interests, resources, and sizes of landholdings as well as the political climate concerning conservation efforts in the area are a few of the obstacles to building consensus among several landowners.⁵⁹ For example, the HCP developed to address the Stephens' kangaroo rat in California affects approximately 80,000 acres of land and thousands of landowners.⁶⁰ While it may be desirable to include a great number of participants to instill confidence in the process and encourage cooperation in implementation, the

55. *The Endangered Species Act: The Role of Habitat Conservation: Hearing Before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong. 41 (1993) [hereinafter *The Role of Habitat Conservation Hearing*] (testimony of Michael Spears, then Assistant Director for Ecological Services, U.S. Fish and Wildlife Service).

56. See, e.g., Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369, 382 (1994) (stating "cost may be prohibitive for small landowners not covered by regional or project HCPs funded by big developers or state and local governments").

57. Melinda E. Taylor, *Promoting Recovery or Hedging a Bet Against Extinction: Austin, Texas' Risky Approach to Ensuring Endangered Species' Survival in the Texas Hill Country*, 24 ENVTL. L. 581, 587 n.33 (1994) (citing GEORGE W. GAU & JAMES E. JARRETT, *ECONOMIC IMPACT STUDY OF BALCONES CANYONLANDS CONSERVATION PLAN 4-15* (1992)).

58. *Id.* The costs are less per acre because of economies of scale. Rather than requiring developers to acquire a permit for each individual activity, the Service authorizes development in the entire area with one regional permit. *Id.* In 1994 fees ranged from \$250 per acre in Clark County Nevada for the desert tortoise HCP to \$1,950 in Riverside County California for the HCP for the Stephens' kangaroo rat. The San Bruno Mountain HCP collects an annual fee of \$20 per unit for residential property and \$10 per one thousand square feet for commercial property. TIMOTHY BEATLEY, *HABITAT CONSERVATION PLANNING: ENDANGERED SPECIES AND URBAN GROWTH* 38-39 (1994).

59. See BEATLEY, *supra* note 59, at 40-53 (describing the different stakeholders in the HCP process and their perspectives with respect to their level of environmental concern, the value they place on endangered species, their perceived legitimacy of land regulation, their expectations for land holdings, and their interest in quick resolution).

60. *The Endangered Species Act-Incentives to Encourage Conservation by Private Landowners: Hearing Before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong. 13 (1993) [hereinafter *Incentives to Encourage Conservation by Private Landowners*] (statement of Robert D. Thornton).

numbers themselves bode against any one small landowner or even a group of small landowners having significant input in the final plan.⁶¹ Furthermore, the lengthy average time that elapses between submission of a plan and a response from the Secretary is a factor which may be a costly burden for a small landowner.⁶² Another difficulty for the small landowner engaged in the HCP process as contrasted to the large landowner is that the small landowner often cannot shift her development activities to avoid the species' habitat.⁶³

The use of the HCP expanded greatly during the tenure of Secretary Bruce Babbitt.⁶⁴ It could be said that Babbitt perceived the rhetoric of reform as a omen and knew that if the agency did not take some action to quell the cries of the private property rights advocates, one of the compensation bills presented in the 104th-106th Congresses may have passed.⁶⁵ So he tried to balance the interests of the species and the landowners. One such initiative, the "no surprises" policy, is analyzed in detail *infra* Part VII.B.2.b. However, Babbitt was not without his critics arguing that HCPs were of limited effectiveness.⁶⁶

61. MICHAEL J. BEAN, ET AL., RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT: THE HABITAT CONSERVATION PLANNING EXPERIENCE 13 (1991) (stating that "[t]wo obvious problems emerge One is to ensure that all those with an interest in the HCP process have an opportunity to participate in it and the other is to keep the process from involving so many parties as to be unmanageable.").

62. See, e.g., Thornton, *supra* note 62, at 648 (explaining that "[e]ven a relatively simple single-species conservation plan can be expected to require more than a year of processing taking into account NEPA's requirements, the § 10(a) permit process, and local government processing requirements.").

63. "The traditional approach of the HCPs of drawing a line on the map and identifying preservation zones and development zones works OK if you have very large landowners who are able to move their resource development activities around. It does not work where you have thousands of private landowners . . ." *Incentives to Encourage Conservation by Private Landowners*, *supra* note 62, at 60 (statement of Robert D. Thornton, attorney having represented landowners, developers, and local and regional agencies in the area of endangered species). See also Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. 305, 320 (1997) (citing evidence that large landowners may be able to shift burdens onto smaller, less organized landowners).

64. See, e.g., John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary View*, 31 ENVTL. L. 199, 213-14 (2001) (explaining that, during Babbitt's tenure, "hundreds of millions of acres of public and private land . . . came directly under the ESA's influence . . ."); J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 367, 382-83 (1998) (stating that, during the 1990s "hundreds of HCPs [were] approved, many of which encompass large planning areas that include valuable ecosystem features.").

65. See Leshy, *supra* note 64, at 209 ("With the Republican takeover of Congress, the Administration's natural resource legislative agenda conflated into two relatively narrow goals. The first was to play effective defense and damage control, fighting off unacceptable legislation in a host of areas . . .").

66. See e.g., Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of "New Age" Environmental Protection*, 41 WASHBURN L.J. 50, 71-74 (2001); Robert D. Thornton, *Habitat Conservation Plans: Frayed Safety Nets or Creative Partnerships*, 16

III. THE RHETORIC OF LEGISLATIVE “REFORM”

In the lengthy process of reauthorization, members of Congress, administrations, environmentalists, business people, landowners, and others have proposed a number of reforms for the Endangered Species Act. Most environmental interest groups have focused their efforts upon improving the process for developing habitat conservation plans, including increased technical assistance to landowners.⁶⁷ The focus of Congress was altogether different when the Republican Party took control in 1994. Before the 1994 Congressional elections, most of the proposed amendments dealt substantively with the provisions of the Act.⁶⁸ During the first 100 days of the 104th Congress and its Contract with America, however, Congress focused on providing compensation to private property owners if they suffered a specified percentage of diminution in the value of their land due to regulation under the Act.⁶⁹ Moreover, that Congress passed a moratorium, to endure until reauthorization, on the listing of endangered or threatened species and the designation of critical habitat.⁷⁰ That moratorium has been lifted,⁷¹ but the Republicans’ focus on radical change persists into the new millennium.⁷²

NAT. RESOURCES & ENV’T. 94, 95, 96 (2001); Jennifer Jester, Comment, *Habitat Conservation Plans Under Section 10 of the Endangered Species Act: The Alabama Beach Mouse and the Unfulfilled Mandate of Species Recovery*, 26 B.C. ENVTL. AFF. L. REV. 131, 147-58 (1998).

67. See generally *Incentives to Encourage Conservation by Private Landowners*, *supra* note 60, at 78; see also Endangered Species: Push on for Reform of Act During Reauthorization, MGMT. BRIEFING, Jan. 9, 1995 (National Wildlife Federation suggesting encouraging regional habitat conservation plans and setting up a “small landowner grant program” to help landowners prepare HCPs); *Endangered Species Act Reauthorization Before the Subcomm. On Clean Water, Fisheries and Wildlife of the Senate Comm. on Environment and Public Works*, 104th Cong. 162-65 (1994), (statement of Ted R. Brown, President, Foundation for Environmental and Economic Progress advocating that “[t]he HCP process must be refocused”).

68. See, e.g., H.R. 1490, 103d Cong., § 402 (1993); S. 1521, 103d Cong., § 402 (1993). Both of these bills contained basically the same amendments which addressed, *inter alia*, expanding the availability of consultation under section 7 of the Act, establishing an administrative appeals process, and providing financial incentives to private entities for habitat conservation such as “habitat reserve grants”

69. See, e.g., H.R. 925, 104th Cong. (1995); S. 239, 104th Cong. (1995); S. 191, 104th Cong., (1994).

70. Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, ch. 4, 109 Stat. 73, 86 (1995) (rescinding funds from Interior for listing species and designating critical habitat).

71. The omnibus appropriations act of 1996 gave the President the authority to suspend the moratorium, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-34, 110 Stat. 1321-159 to -160 (1996), and former President Bill Clinton suspended the moratorium upon signing the bill into law on April 26, 1996. Robert Dodge, *Clinton Signs Budget Measure, Calls Bill Something We Can All Be Proud Of*, DALLAS MORNING NEWS, Apr. 27, 1996, at 3A.

72. For example, one recent legislative proposal would have lifted the prohibition against the taking of a listed species if the act or omission causing the take occurred on private land. Life, Liberty, and Property Protection Act, H.R. 5809, 107th Cong., § 3 (2002).

The 104th Congress emphasized in its rhetoric the plight of small landowners. Tales were spun of “powerful regulators running roughshod over landowners whose entire financial and emotional lives are closely tied to their land.”⁷³ But the rhetorical effect achieved by those stories goes beyond the harms to those individual landowners. The question arises of not only whether the stories are true with respect to those individuals but also whether those stories are representative of this regulatory regime. One story may not be the common story. Moreover, small landowners and large landowners may have different and often conflicting priorities. For example, a letter to a House Committee by a self-proclaimed “private non-industrial (‘small landowner’) in Washington” stated that while the members of the Washington Farm Forestry Association “share many of the concerns of the industrial landowners, from whom you received testimony[,] . . . we have smaller holdings and different management objectives, and in Washington State we also own almost half the privately held forest land.”⁷⁴ Apparently recognizing these differences, Congressman Bill Thomas once explained, “Small property owners have become endangered species under the ESA’s draconian regulation. Unfortunately, they are rarely noticed.”⁷⁵ Yet even though the small landowners have occupied Congressional soundbites, as these stories are presented in this article query who is really being harmed and who would be benefited by the proposed reforms.

The stories told by legislative and executive branches of government differ slightly and both are worthy of study. In so doing, one should not limit her evaluation of this rhetoric to what stories are being told and the truthfulness and representativeness thereof. Instead, one should also consider what parts of those stories are not being told and, moreover, which stories are being omitted completely.

Equally important in a critical perspective is to notice what is not included in the ongoing streams of words and images, the stories *not* told, the images *not* displayed. As Burke insists, every supposed reflection of some facet of experience is in reality a selection, or a choice from among options selected to represent the idea or issue under focus. Such selections are inevitably deflections; they hide and obscure what lies outside the selection. Over time, one forgets (if indeed one ever realized) that the selection does not reflect the whole, only a chosen aspect or part of that whole. It is then accepted un-problematically as a valid reflection. As

73. Doremus, *supra* note 12, at 43.

74. *Incentives to Encourage Conservation by Private Landowners*, *supra* note 60, at 153.

75. Congressman Bill Thomas, *What is the Most Compelling Environmental Issue Facing the World on the Brink of the Twenty-First Century: Externalization of Federal Public Policy Costs: The Endangered Species Act*, 8 *FORDHAM ENVTL. L.J.* 171, 177 (1996).

Burke notes, this process is an inevitable aspect of symbol use, although it certainly at times may be a conscious strategy.⁷⁶

It is not uncommon for those attempting to persuade to use anecdotes or colorful stories to make a compelling argument, and this Article's concern about rhetoric may seem misplaced. As Michael Wolf argues about the significance of this rhetorical posturing in the legislature, perhaps, as important debates such as this one advance beyond the fifteen-second soundbite stage, the rhetorical posturing that accompanies bill sponsorship often dissolves when votes are officially tallied. Moreover, as the difficult task of drafting the language required to reach a majority or, in the face of a veto, a supermajority,⁷⁷ begins, it becomes increasingly difficult to hide controversial agendas.⁷⁷

Wolf may be correct that the rhetoric can only affect legislative outcomes to a small degree, but the stories that began as a part of the Contract with America have persisted from Congress to Congress. Indeed some of the stories, though largely myths, are a part of the American cultural fabric and appear to undergird many policy decisions time and time again.

For example, the family farmer is often held up as the poster child for legislative reform.⁷⁸ The plight of family farmers was used artfully as a justification for amending the estate tax provisions of the Internal Revenue Code, otherwise known as the "death tax."⁷⁹ As one Wall Street Journal article explained,

76. Mark Mesiter & Phyllis M. Japp, *Introduction: A Rationale for Studying Environmental Rhetoric and Popular Culture*, in *ENVIROPOP 7* (Mark Meister & Phyllis M. Japp. eds., 2002) (citing KENNETH BURKE, *A GRAMMAR OF MOTIVES* (3d ed. 1969) and KENNETH BURKE, *ATTITUDES TOWARD HISTORY* (2d ed. 1984)) (citation omitted).

77. Wolf, *supra* note 5.

78. See e.g., *Harvesting Poverty: The Farmland Bubble*, N.Y. TIMES, Dec. 26, 2003, at A42 ("The family farm. Few institutions are more central—iconic, even—to America's self-image. The words themselves conjure up Norman Rockwell and a shared national heritage that extols self-reliance and the conquest of the frontier. Politics tends to exploit easily romanticized icons, and the family farm has not been spared.")

79. David Cay Johnson, *IRS Data Dispute Danger to Farms*, CHI. TRIB., Apr. 8, 2001, at C17 ("To keep farms in the family, we are going to get rid of the death tax," President Bush vowed a month ago. He and many others have made the point repeatedly."); Gov't Press Release, Fed. Document Clearing House, Conrad Burns, *Senate Will Move to Repeal "Death" Tax, Burns Hopes 99-1 Vote Shows Serious Commitment to Family Businesses, Farms* (July 11, 2000), 2000 WL 7980084 ("The death tax destroys Montana's small businesses and family farms, costing us jobs we cannot afford to lose," Burns said. "In order to pay off the death tax, many families have to sell their businesses and farms. Folks have their incomes taxed throughout their lives only to have their estates taxed on the same income again after they die, which often leaves their families in the lurch."); Richard W. Stevenson, *House Approves A Bill to Repeal the Estate Tax*, N.Y. TIMES, June 10, 2000, at A1 ("The [Republican House] leaders said they were driven in part by a desire to help owners of small businesses and family farms, who have long complained that the estate tax makes it costly or even impossible to pass their holdings along to another generation.")

Invariably, proponents invoke sob stories of struggling Midwesterners forced to sell family farms to avoid onerous estate taxes. But last month the New York Times reported that nobody can find a bona fide example of a farm lost because of estate taxes. Neil Harl, an Iowa state economist and foremost specialist in this area, said he'd searched "far and wide" and found the demise of family farms because of the estate tax "a myth."⁸⁰

And despite the many news reports that the proposed legislation would not have aided the mythical family farms in those stories,⁸¹ the bill ultimately passed, reducing the rates immediately and setting up a complete repeal of the tax in 2010.⁸² Despite the fact that family farms were not experiencing these problems with estate taxes, the rhetoric led the way to the legislative "solution."

Indeed, in political discourse, the goal may be to exalt rhetoric over facts. In the case of environmental regulation, repeatedly these mythical farmers, ranchers, and miners have been woven into simple, yet appealing tales to justify a lack of regulation⁸³ or deregulation.⁸⁴ As a memorandum prepared by the Luntz Research Companies for the Republican Party and the Bush Administration entitled "Straight Talk" explained, "Indeed, it can be helpful to think of environmental (and other) issues in terms of 'story.' A compelling story, *even if factually inaccurate*, can be more emotionally compelling than a dry recitation of the truth."⁸⁵ The memo then explains the problem with relying too heavily upon facts:

80. Albert R. Hunt, *The Trojan Horse Tax Cut*, WALL ST. J., May 10, 2001, at A19.

81. See, e.g., George Soros, *Kill the Death Tax Now . . . No, Keep it Alive to Help the Needy*, WALL ST. J., July 14, 2000, at A14 ("Supporters of repealing the estate tax say the legislation would save family farms and businesses and lift a terrible and unfair burden. I happen to be fortunate enough to be eligible for the tax benefits of this legislation, and so I wish I could convince myself to believe the proponents' rhetoric. Unfortunately, it just isn't so."); Paul Krugman, *For Richer*, N.Y. TIMES, Oct. 20, 2002, § 6 (Magazine), at 62 ("Tales of family farms and businesses broken up to pay the estate tax are basically rural legends; hardly any real examples have been found, despite diligent searching.")

82. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38, 69-86 (codified as amended in scattered sections of 26 U.S.C.).

83. Another example is use of family farms to excuse moving slowly in the regulation of non-point source pollution under the Clean Water Act. *Government: Farmers Fear the EPA Future*, 6 WATER TECH. NEWS, Nov. 19, 1998 (quoting the President of the American Farm Bureau Federation, who explained that "[o]f all the ways government regulations impact the lives of family farmers, arbitrary water quality regulations will likely turn out to be the most harmful.")

84. See discussion *infra* Part IV, noting that while cost-benefit analysis and sound science, for example, are required to justify new regulations under the Bush Administration, anecdotes and myths appear to be sufficient to justify deregulation.

85. Memorandum from the Luntz Research Companies, *Straight Talk* 132 (2002), at <http://www.luntzspeak.com/graphics/LuntzResearch.Memo.pdf> (emphasis added) [hereinafter Luntz Memo].

The facts were beside the point. Facts only become relevant when the public is receptive and willing to listen to them. . . .

How do we avoid such debacles in the future?

[I]t's all in how you frame your argument, and the order in which you present your facts. Don't allow yourself to become bogged down in minutiae when you should be presenting the big picture. You should have the details at hand to back you up, to be sure, but don't be afraid to begin by painting in broad strokes.⁸⁶

Sometimes rhetoric may bring to light the importance of actual issues or elicit the emotional response required to spur needed legislative reform. Yet these "broad strokes" also can become problematic in policymaking for they can lead to misconceptions and bad decisions. As the economists Power and Barrett argue, misunderstandings tend "to distort public decision making."⁸⁷ Decisions are "grossly and irrationally misinformed" and the public sacrifices public goods such as clean air and water and critical habitat to address an imagined or fabricated crisis.⁸⁸ Below are a few examples of stories that may lead to unnecessary and ill-advised sacrifices.

A. *Sample Tales from the Regulatory Crypt*

Before this analysis proceeds any further, it is important to examine some of the "stories". Sketched out below are some of those stories that reformists in Congress and private property rights activists have been telling. The stories, told for roughly the last decade, will likely elicit a strong reaction that something is terribly wrong with the implementation of the ESA if it results in these kinds of "train wrecks." As one reads these stories, consider what facts the storyteller has selected and not selected.

1. John Crawford of Klamath Basin, Tulelake, California

John Crawford lives in a river basin in California. Almost 100 years ago, Mr. Crawford's great grandfather, a World War I veteran, settled in the area after the federal government lured him and other veterans there with the promise of water from a dam to be used for irrigation of crops.⁸⁹ In the spring of 2001, however, Crawford, a fourth generation tender of the land, was forced to stop planting new crops and watch his existing crops

86. *Id.* at 133.

87. THOMAS MICHAEL POWER & RICHARD N. BARRETT, POST-COWBOY ECONOMICS: PAY AND PROSPERITY IN THE NEW AMERICAN WEST 126 (2001).

88. *Id.*

89. *Klamath River Sparks Irrigation War*, ENVTL. NEWS NETWORK, at http://www.enn.com/news/wire-stories/2001/07/07132001/ap_klamath_44232.asp?site=email (July 13, 2001).

turn brown.⁹⁰ That was because the federal government had decided not to release the water from the dam for irrigation in order to keep it in the river for the benefit of an endangered species of fish.⁹¹ It was estimated that Mr. Crawford and his neighbors would lose at least \$300 to \$500 million that year.⁹² If the dam remained closed beyond that year, Crawford and his neighbors in effect would be evicted forcibly from the land that their families had farmed for generations because the government had taken away their right to water.

2. Margaret Rector of Austin, Texas

Approximately thirty years ago, Margaret Rector purchased fifteen acres of land in Austin, Texas and considered it a kind of annuity.⁹³ She planned to wait for the land to appreciate in value and then to sell it to provide for her retirement. In 1990, at the age of seventy, Ms. Rector was told by the Fish and Wildlife Service that her land was the home of a protected species of bird, the golden-cheeked warbler. She may be able to develop her land, but it will cost her tens of thousands of dollars for ecological studies and lawyers. Meanwhile, the market value of the land has fallen from \$830,000 to \$30,000 because of the resulting restrictions on land use.⁹⁴

3. Sam Pullig of Belle Chasse, Louisiana

Sam Pullig owns 1,000 acres of land in Louisiana. Mr. Pullig has been trying for two years to get permission from the Fish & Wildlife Service to harvest \$200,000 worth of timber.⁹⁵ He needs a permit because six red-cockaded woodpeckers, members of an endangered species, are nesting on his land. As Mr. Pullig explained at a congressional field hearing, “with added finance and other expenses, ‘these birds, weighing about 7 ounces each, are costing me about \$6,000 per ounce.’”⁹⁶ He further stated, “I’m tired and angry that I’m being treated so unfairly.”⁹⁷

90. *Id.*; *Growing with Less Water*, HERALD & NEWS, at <http://www.heraldandnews.com/articles/2003/07/31/news/agriculture/awater.txt> (July 31, 2003).

91. Press Release, U.S. Dept. of the Interior, Water Allocation Decision Announced for Klamath Project (Apr. 6, 2001), <http://www.doi.gov/news/010409.html>.

92. John D. Cramer, *Thousands turn out to protest Klamath irrigation shutdown*, THE BULLETIN (Bend, Or.), May 14, 2001, http://www.bendbulletin.com/news/story.cfm?story_no=4014.

93. James V. DeLong, Editorial, *It's My Land, Isn't It?*, N.Y. TIMES, Mar. 15, 1995, at A25.

94. *Id.*

95. Bob Anderson, *Task Force Hears Louisianans' Environmental Law Problems*, THE ADVOC. (Baton Rouge, La.), Mar. 14, 1995, at 1A.

96. *Id.*

97. *Id.*

B. *And Now The Buried Parts of the Tales*

Not surprisingly, some of the less sympathetic details of these stories were omitted or deselected, as have some of the most basic elements of the stories.

1. John Crawford Had Some Immediate Relief Available

Though the Bureau of Reclamation's initial determination was to restrict severely the use of water by farmers in the Klamath Basin,⁹⁸ John Crawford was not as high and dry as one might have thought. First, the federal government provided \$75 million in relief for those affected by the water restrictions.⁹⁹ Secondly, some farms did receive their allotment of water.¹⁰⁰ And federal crop insurance of over \$135 million¹⁰¹ and the Non-insured Crop Disaster Assistance Program were available to the farmers.¹⁰² Thus, this story is certainly not one of lack of compensation. Perhaps the question that really needs to be asked is whether the compensation offered was just. You will not find such a distinction, however, in Mr. Crawford's version of the story nor will you find any details of how he calculated the farmers' expected losses.

98. Press Release, U.S. Dept. of the Interior, *supra* note 91.

99. Twenty-five million dollars in relief is provided by Energy and Water Development Appropriations Act of 2004, Pub. L. No. 108-137, § 132, 117 Stat. 1827, 1840-41 (2003). Of that amount \$2.6 million was provided for reimbursement for expenses incurred by those who did not receive their water allotment and the remainder was designated to improve "efficiency and use" of the existing water supply. H.R. REP. NO. 108-212, at 102 (2003). Also, the Erodable Land and Wetland Conservation and Reserve Program specifically provides \$50 million for water conservation through cost-share payments, incentive payments, and loans to carry out water conservation projects in Klamath Basin to enhance the quality and increase the quantity of water available to farmers and ranchers. 16 U.S.C. § 3839aa-(9)(c) (2000).

100. Press Release, U.S. Dept. of the Interior, *Interior Secretary to Order Water Release to Klamath Farmers*, at <http://www.doi.gov/news/010724a.html> (July 24, 2001) (announcing that seventy to seventy-five thousand acre-feet of water would be released from Upper Klamath Lake to assist farmers in need).

101. In California, farmers in the following counties received insurance payments and in the following amounts: Humboldt – \$509,993; Tehama – \$16,642,145; Siskiyou – \$3,984,788; Shasta – \$1,535,505; Modoc – \$2,524,487; Glen – \$41,491,332; and Butte – \$56,019,285 for a total of \$122,707,535. Data was not available for Trinity and Del Norte counties. In Oregon, farmers in the following counties received insurance payments and in the following amounts: Klamath – \$2,288,777; Lake – \$2,298,275; and Jackson – \$7,756,564 for a total of \$12,343,616. Federal Crop Insurance Corporation, at <http://www3.rma.usda.gov/apps/sob/stateCountyCrop.cfm> (last modified April 19, 2004).

102. Press Release, U.S. Dept. of the Interior, *supra* note 91.

2. Margaret Rector Turned Down an Offer for \$525,000

The government was willing to pay Ms. Rector \$82,500, less than 10% of the tax assessed value in 1989,¹⁰³ but still the government had offered something. Also, in 1994 Ms. Rector had a purchase offer of \$525,000, but wanted \$600,000 and thus turned it down.¹⁰⁴ Lastly, Ms. Rector's land was part of a regional habitat conservation plan and she would have been assessed a mitigation fee of between \$600 and \$3,000 per acre or \$9,000 up to \$45,000 total.¹⁰⁵ The Service uses mitigation fees to purchase land in the same habitat.¹⁰⁶ And "[e]ven Miss Rector doesn't entirely blame the warbler for her troubles. 'I have to say that part of [the decrease] was the economy.'"¹⁰⁷ One prospective buyer of Ms. Rector's land said that he had purchased nearby land for one-fifth of its 1985 value and explained that the drop in price had nothing to do with the Endangered Species Act because it never applied to the property that he purchased.¹⁰⁸ Thus, not taking into account any other market forces that may have affected the value of her land (such as the savings and loan crisis and the faltering real estate market in Texas),¹⁰⁹ and assuming that she would have been unable to recoup the fee when she ultimately sold the property, at most the value of Ms. Rector's land had been diminished by five percent as a result of the enforcement of the Act.

3. Sam Pullig's Birds Were on the Original Endangered Species List

Sam Pullig told his story at a congressional "field hearing" in Belle Chasse, Louisiana in March 1995.¹¹⁰ Yet this account neglected one key detail: Mr. Pullig knew the birds were nesting on the land before he bought it

103. John Anderson, *This Land is My Land*, SMARTMONEY, Sept. 1, 1996, at 106, available at 1996 WL 16053079.

104. George Rodrigue, *Act's Effect on Land Disputed: Habitat Preservation is Blamed for Drop in Value*, DALLAS MORNING NEWS, Mar. 20, 1996, available at 1996 WL 2109750.

105. Melinda E. Taylor, *supra* note 57. One potential buyer of Ms. Rector's land said that the Service told him that upon payment of a \$44,000 mitigation fee, he could develop the land. Rodrigue, *supra* note 104. He believes that the fee is 6% of the land's ultimate value. *Id.*

106. Anderson, *supra* note 103.

107. Rodrigue, *supra* note 104.

108. *Id.*

109. In 1987, "[l]osses at Texas S&Ls comprise more than one-half of all S&L losses nationwide, and of the 20 largest losses, 14 are in Texas. Texas economy in major recession: crude oil prices fall by nearly 50%, office vacancy is over 30%, and real estate prices collapse." FDIC, *The S&L Crisis: A Chrono-Bibliography*, at <http://www.fdic.gov/bank/historical/s&l/> (last updated Dec. 20, 2002). See also Rodrigue, *supra* note 104 (noting the collapse of the savings and loan industry and the drop in real estate prices in Austin).

110. Heather Dewar, *Lawmakers Hear Cajuns' Gripes Over Wildlife Laws*, HOUS. CHRON., Mar. 17, 1995, at A13.

for logging in 1993.¹¹¹ He had planned “to leave a 200-foot circle of uncut trees around each nest but was dismayed to learn that his plan would not satisfy federal wildlife managers.”¹¹² Lest any sympathy remain for this landowner, the red-cockaded woodpecker was listed as an endangered species on June 2, 1970¹¹³ and was designated as a “national species of special emphasis” in 1983.¹¹⁴ Such species “are considered to be of high biological, legal, and public interest and merit special effort and attention by the Service at the national level.”¹¹⁵ The only surprised party in this instance would have been the Service if this landowner had filed a takings claim.

IV. THE PROPOSED LEGISLATIVE REFORMS

Having sampled some of the stories, this Article now turns to some of the proposed reforms. Among them were requirements for “takings impact analysis,” sound science, cost-benefit analysis, and consultation under section 7 of the Endangered Species Act. The legislative proposals for direct compensation for which the horror stories were the prelude would have serious implications for the U.S. Supreme Court’s takings jurisprudence. Simply put, the bills would have compensated landowners for losses that were less than complete, turning Supreme Court precedent on its head. In addition, this Part of the Article addresses the potential for abuse by large landholders and evaluates the choice of remedies offered. It also evaluates them according to how well they address the purported concern for small landowners. This Part also considers the use of appropriations riders to try to accomplish what could not be done through the headline grabbers such as the Private Property Rights Act of 1995.

111. *Id.*

112. *Id.*

113. 35 Fed. Reg. 8495 (1970); 50 C.F.R. § 17.11 (2004) (endangered species list). The U.S. Supreme Court has held that a takings claim is not barred by the fact that title to property was acquired after the effective date of a regulation. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-631 (2001). However, the concurring opinion states that with respect to the reasonable investment-backed expectations factor of *Penn Central* takings analysis, the temporal relationship between the enactment of the regulation and the acquisition of title does help to shape the reasonableness of those expectations and to determine whether a compensable taking has occurred. *Id.* at 632-36.

114. 48 Fed. Reg. 55,049 (1983).

115. *Id.*

A. *The Darling of the “Reform” Movement: Direct Compensation Statutes*

Beginning with the Contract with America in the 104th Congress¹¹⁶ and in almost every Congress thereafter, conservatives have introduced measures to provide private landowners compensation whenever enforcement of the ESA results in any diminution in the value of private land. These bills basically mimic each other but for the percentage (or dollar amount) of diminution in the value of property needed to trigger compensation.¹¹⁷ For this discussion, the Article focuses on the Endangered Species Land Management Reform Act introduced in the 107th Congress.¹¹⁸

The proposed Endangered Species Land Management Reform Act provided that—

No agency may take an action under this Act affecting privately owned property that results in the diminishment of the value of any portion of that property by an amount equal to or greater than 50 percent of the value of that portion unless compensation is offered in accordance with this section.¹¹⁹

Compensation for the diminishment would have taken one of two forms: (1) payment for the diminution in value or (2) at the option of the owner, the agency would have been required to buy the affected portion of the property by paying the “fair market value” of that portion based on the value before the diminution and without regard to the presence of or use by a listed species.¹²⁰ In order to obtain compensation, the private property owner would have to submit a written request.¹²¹ The Endangered Species Land Management Reform Act further provided that if the agency and the property owner were not able to agree upon the amount of compensation

116. *See e.g.*, S. 239, 104th Cong. (1995) (landowner entitled to compensation when “deprived of \$10,000, or 20 percent or more of the fair market value of the affected portion of the property”); H.R. 790, 104th Cong. (1995) (entitled to compensation when “deprived of 50 percent or more of the fair market value, or the economically viable use of the affected portion of the property”).

117. *See, e.g.*, H.R. 472, 107th Cong. (2001) (entitled to compensation or to be bought out for diminution of value of 25% or more); H.R. 1142, 106th Cong. (1999); (entitled to compensation for the fair market value of the federal use of the property or portion thereof); H.R. 495, 106th Cong. (1999) (entitled to compensation for diminution of value of 50% or more); S. 781, 105th Cong. (1997) (entitled to compensation if there is a temporary or permanent diminution in property value greater than 33%); H.R. 4335, 105th Cong. (1998) (entitled to compensation when value of any portion of land is reduced by 50% or more); S. 239, 104th Cong. (1995) (entitled to compensation when “deprived of \$10,000, or 20 percent or more of the fair market value of the affected portion of the property”); H.R. 790, 104th Cong. (1995) (entitled to compensation when “deprived of 50 percent or more of the fair market value, or the economically viable use of the affected portion of the property”).

118. H.R. 1403, 107th Cong. (2001). Thus far, no such bill has been introduced in the 108th Congress.

119. Endangered Species Land Management Reform Act, H.R. 1403, 107th Cong., § 2(a) (2001).

120. *Id.*

121. *Id.*

within 180 days of the property owner's written request for compensation, "the owner of the property may elect binding arbitration through alternative dispute resolution or seek compensation due under this section in a civil action."¹²² The parties could agree to extend the 180-day period without affecting the ability of the landowner to choose arbitration or court action.¹²³ The arbitral proceedings were to be conducted in accordance with procedures established by the American Arbitration Association ("AAA").¹²⁴

Borrowing from the language of the Fifth Amendment, the proposed legislation also provided that a landowner who prevailed in a civil action would be entitled to "just compensation," as well as "attorney's fees and other litigation costs, including appraisal fees."¹²⁵ Moreover, the bill provided for the establishment of the Species Conservation Fund to carry out projects on private land to conserve listed species. No further appropriations would have been made available for this purpose, however.¹²⁶ If money were not available in the fund, the agency would have to pay the award out of the following year's appropriations.¹²⁷

The Endangered Species Land Management Reform Act and other similar proposals for compensation¹²⁸ are interesting for a number of reasons. First, they appear to be an attempt to overrule the Supreme Court's determination of the relevant parcel of land for consideration of lost value in takings cases under the Fifth Amendment.¹²⁹ Second, landowners may abuse the scheme by skewing their development plans to heap the majority of the project onto the regulated portion of their property and then use the amendments' explicit rights of compensation to fund the development of the rest of the property. Interestingly, the larger the landowner's holdings, the better able he would be to profit from the legislation, even if he had no reasonable investment-backed expectations. These proposals also have been criticized as nothing more than an entitlement for large landowners

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* § 3(a).

127. *Id.* § 2(a).

128. For the purposes of this discussion, the Endangered Species Act Amendments of 2000, H.R. 472, 107th Cong. is essentially the same proposal, though differing in three significant respects. It sets the threshold level of diminution in value at 25% and it does not establish a special fund for compensation. It also attempts to "clarify" the definition of "take" as now defined in the regulations, 50 C.F.R. § 17.3 (2001), that was the source of controversy in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 515 U.S. 687 (1995).

129. *See e.g.*, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (holding that Court must consider the parcel as a whole).

and lawyers.¹³⁰ And finally, they provided for arbitration of claims because arbitration was argued to be a more viable option than litigation for small landowners. The following discussion will examine these criticisms as well as analyze the bill's impact on small landowners.

1. Implications for the U.S. Supreme Court's Takings Jurisprudence
In *Penn Central Transportation v. New York City*,¹³¹ the U.S. Supreme Court, although unable to establish a "set formula," identified several factors to be weighed in determining whether a regulation has effected a taking.¹³² These factors included (1) the character of the regulation, (2) the economic impact of the regulation upon the private property owner, and (3) the extent to which the regulation interferes with the distinct investment-backed expectations of the property owner.¹³³ The Court used these factors as a balancing test to resolve conflicts between the interests of the affected private property owner and the interests of the general public. The Court has consistently held that regulations cannot force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹³⁴ Yet, the Court has also recognized that in fulfilling its function as a protector of the public good, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."¹³⁵ The Court thus saw a need to balance these interests and consequently has engaged in "essentially ad hoc, factual inquiries"¹³⁶ to strike a balance between these competing interests. The Court, however, has "found categorical treatment appropriate where regulation denies all economically beneficial or productive use of land."¹³⁷ The Court acknowledged, however, that this rule does not "make clear the 'property interest' against which the loss of value is to be measured."¹³⁸ Thus, it appears that the Court will continue making ad hoc factual inquiries.

The proposed legislation attempts to provide "categorical treatment" as an answer to the Court's open question.¹³⁹ It seems on its face that rather

130. *E.g.*, 141 CONG. REC. E823-25, E823 (1995) (statement of Rep. Miller) (arguing that large companies would receive most of the compensation).

131. 438 U.S. 104 (1978).

132. *Id.* at 124.

133. *Id.*

134. *Id.* at 123 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

135. *Id.* at 124 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

136. *Id.*

137. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

138. *Id.* at 1016 n.7.

139. "In any event, we avoid this difficulty in the present case . . ." *Id.* at 1016.

than investigating the extent to which the regulation has interfered with the reasonable investment-backed expectations of a particular landowner, the bill would grant blanket relief regardless of the characteristics of the specific property or the legitimate expectations of the landowner (for example, at the time of acquisition did the owner know of the existence of the endangered species and the likely limitations on the development of the parcel). Yet, the Court's fact-based approach arguably is the only sensible one because it recognizes the potential conflict between the interests of the individual property owner and the public.

Takings determinations are a judicial matter. The judicial compromise . . . entails an inquiry—often detailed and fact-laden—into which rights are “vested” or legitimately expected and which are not, and how much damage is an unacceptable burden on an existing owner. Such inquiries are necessarily case-by-case, messy though it seems. . . . [E]xpectations vary enormously, and include questions of timing and conditions of purchase, and other quite individualized questions.¹⁴⁰

And the Court has reaffirmed the *Penn Central* analysis recently in *Palazzolo v. Rhode Island*.¹⁴¹ Justice O'Connor explained in her concurring opinion that *Penn Central* remains the “polestar” in cases of partial takings.¹⁴²

Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.

. . . .

. . . The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.¹⁴³

The tribunals would have to determine at what point in time the relevant investment-backed expectations formed. Should value be judged against the expectations at the time of acquisition, at the time of discovery of a listed species on the property, at the time the landowner devises a development plan that concentrates her activity in the habitat of the listed species, or at some other point in time which the tribunal believes accurately reflects the loss suffered by the landowner?

What may be the most significant part of the legislation is that it would change the relevant parcel for determination of diminution of value,

140. *Private Property Rights, Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) [hereinafter *Private Property Rights Hearing*] (statement of Carol M. Rose, Gordon Bradford Tweedy Professor of Law & Organization, Yale Law School), 1995 WL 152059.

141. 533 U.S. 606 (2001).

142. *Id.* at 633.

143. *Id.*

which would indicate the economic impact of the regulation. Instead of looking at the parcel as a whole, the bill would allow the landowner to claim a taking if the ESA's prohibitions lowered the value of a *portion* of her land. Compare this legislative approach with that of the Court.

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether the rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole¹⁴⁴

If a landowner could be compensated for a percentage loss of any portion of her parcel, the tribunals settling these claims would still need to ascertain the relevant parcel, for “[t]o posit a 10% or 20% or 30% diminution in value as a taking still does not answer the question, ‘percent of what?’”¹⁴⁵ Recently, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court answered that question and rejected the petitioners’ “conceptual severance” argument because it ignored *Penn Central*’s direction to consider the parcel as a whole.¹⁴⁶

Furthermore, the legislative proposal would allow a landowner to manipulate her development plans to concentrate them in the area affected by the legislation and thus receive compensation, even though the regulations could have had a minimal economic impact but for her skewing her activities. The potential for such abuse is discussed more fully in the next section.

2. Potential for Abuse

Like the many compensation bills that preceded it, the Endangered Species Land Management Reform Act is rife with potential for abuse. Small landowners would not be the chief beneficiaries of such a provision. Instead, entities with large holdings would be able to manipulate their development to take advantage of the compensation offered under the legislation. For example, Representative Sam Farr of California criticized a similar proposal, the Private Property Rights Act of 1995,¹⁴⁷ because, in his view, creating a right of compensation for a diminution of value of a por-

144. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978).

145. *Private Property Rights Hearing*, *supra* note 141 (statement of Carol M. Rose, Gordon Bradford Tweedy Professor of Law & Organization, Yale Law School), 1995 WL 152059.

146. 535 U.S. 302, 331 (2002).

147. H.R. 925, 104th Cong. (1995).

tion of one's property would generate numerous bad faith claims.¹⁴⁸ Landowners who had no reasonable, investment-backed expectations of profiting from the portion of the land affected by the Act could concoct plans to focus development on the affected portion.¹⁴⁹ In one floor debate, Representative Farr spun out the following worst-case scenario:

Just think, you can own a piece of land and you know that land may be thousands of acres, but you have a couple of acres that are in wetlands. Maybe you have a couple of acres that are in that habitat of an identified endangered species; not the whole property, just that couple of acres.

You can say, "All right, I want to do all my development right on those couple of acres." You know that the government will prohibit you from taking, and you can then say, "That is a taking. You have taken my land. Compensate me for it. Then I am going to use that compensation to build all over the rest of the land."¹⁵⁰

Interestingly, large landowners will have a greater ability to manipulate their land holdings to both the benefit and detriment of U.S. taxpayers. Under a scheme in which preserving a portion of one's land for the listed species is required, large landowners are more able to adjust their development plans to provide for such a preserve than small landowners are. This ability to manipulate development could also be used to gain unjust compensation by skewing development plans to concentrate the activity in the habitat areas. Thus large landowners could be the big winners under this legislation.

Representative Martin Olav Sabo pointed out a variation on this potential bad faith scheme. He opposed The Private Property Rights Act of 1995 in part because "[c]ompensation would be due even when the Government was simply denying permission for an activity that the landowner knew would not be allowed when he acquired the land."¹⁵¹ It is not difficult to imagine sham acquisitions. Remember Sam Pullig of Belle Chase, Louisiana in Part III.A.1. and how an endangered species of bird was costing him about \$6,000 an ounce? Mr. Pullig knew the birds were nesting on the land before he bought it for logging in 1993.¹⁵² Under the proposed compensation statutes, Mr. Pullig would have been compensated for his "loss."

148. 141 CONG. REC. H2470 (daily ed. Mar. 1, 1995) (statement of Rep. Farr); *Private Property Rights Hearing*, *supra* note 141 (statement of John R. Schmidt, Associate Attorney General), 1995 WL 152039.

149. See S. Rep. No. 104-239, at 58 (1996) (citing written statement of Prof. Carol M. Rose of Apr. 6, 1995 at 12-13 on the Omnibus Property Rights Act of 1995, S. 650, 104th Cong. (1995)).

150. 141 CONG. REC. H2470 (daily ed. Mar. 1, 1995) (statement of Rep. Farr); *Private Property Rights Hearing*, *supra* note 141 (statement of John R. Schmidt, Associate Attorney General), 1995 WL 152039.

151. 141 Cong. REC. H2463 (daily ed. Mar. 1, 1995) (statement of Rep. Sabo).

152. Heather Dewar, *supra* note 110.

3. Arbitration Not a Panacea

The Endangered Species Land Management Reform Act would have provided a “choice of remedies,” giving the landowner the option of arbitration or civil litigation if she and the agency could not agree upon the amount of compensation due.¹⁵³ This choice, however, would not have necessarily made the process less expensive or complex. For example, one would expect the parties frequently to disagree on the appropriate amount of compensation, if any, and thus battle to demonstrate why the facts of the particular situation merit the compensation each party proposes.

This choice of remedies also could create a windfall for attorneys involved in the resulting litigation or arbitration to settle disputes about the fair market value of the parcel.¹⁵⁴ Concurrently, this provision would increase the workload of the Service and the U.S. Department of Justice in defending against these claims.¹⁵⁵ One local government planning official described such legislation as “a nightmare of dueling appraisers and dueling lawyers.”¹⁵⁶ And these proposals were occurring “at a time when the Government downsizing is the rallying cry.”¹⁵⁷ Using either dispute resolution mechanism, each side would employ appraisers and the tribunal would decide whose appraisal was accurate.¹⁵⁸ Also, note that while this type of legislation was pending, agricultural corporations—not family farmers—in California’s Central Valley were already preparing lawsuits in anticipation of the passage of this legislation.¹⁵⁹

153. H.R. 1403, 107th Cong., § 2 (2001).

154. As Representative Conyers retorted in the Congressional floor debate trying to push through another bill with similar provisions, “Better this bill be entitled ‘Bureaucrats and Lawyers Relief Acts?’” CONG. REC. H2465 (daily ed. Mar. 1, 1995).

155.

Agencies would need to hire more employees to process compensation claims, more lawyers to handle claims, more investigators and expert witnesses to determine the validity of claims, more appraisers to assess the extent to which agency action has affected property value, and more arbiters to resolve claims. The sheer volume of entitlement requests under these schemes would be overwhelming. The result would be far more government, not less.

Omnibus Property Rights Act of 1995: Hearing on S. 605 Before the Senate Comm. on the Judiciary, 104th Cong. (1995) (statement of John R. Schmidt, Associate Attorney General), 1995 WL 152039, at *8. *But see* Tom Turner, *Unsettling Development*, ENVTL. FORUM, Jan./Feb. 2004, at 32, 33 (arguing that the Department of Justice is not defending the laws, is excluding intervenors who might defend the law, and is quickly and quietly settling cases on highly favorable terms for the industry groups or states who challenge the laws).

156. Charles McCoy, *Private Matter: The Push to Expand Property Rights Stirs Both Hopes and Fears*, WALL ST. J., Apr. 4, 1995, at A1.

157. *Id.*

158. *See id.* (“Property owners will have their appraisers, and we’ll have ours, and we’ll go around and around and around.”).

159. *See id.* The Department of Agriculture’s latest Census of Agriculture indicates that 3% of the farms in this country produce more than 60% of the country’s agricultural products. “The data offered

Furthermore, while it is true that not everyone has the financial means to sue the U.S. Government, arbitration is not without costs. The American Arbitration Association's initial filing fee and case service fee (due at the first hearing) are based upon the amount of the claim and are set out below in Figure 1.¹⁶⁰

Figure 1 – AAA Initial Filing Fees

Amount of Claim	Initial Filing Fee	Case Service Fee
Above \$0 to \$10,000	\$500	\$200
Above \$10,000 to \$75,000	\$750	\$300
Above \$75,000 to \$150,000	\$1,500	\$750
Above \$150,000 to \$300,000	\$2,750	\$1,250
Above \$300,000 to \$500,000	\$4,250	\$1,750
Above \$500,000 to \$1,000,000	\$6,000	\$2,500
Above \$1,000,000 to \$5,000,000	\$8,000	\$3,250
Above \$5,000,000 to \$10,000,000	\$10,000	\$4,000
Above \$10,000,000 ¹⁶¹		

Thus, a claimant would pay between \$700 and \$14,000 for a case in which a hearing was held for claims ranging from \$0 to 10,000 up to claims of \$10 million.¹⁶² In addition to these fees, the parties are responsible for any expenses of AAA representatives working on the claim.¹⁶³

Then an arbitrator or panel of arbitrators would be selected. Currently, the rules of the AAA provide that if the claim does not exceed \$50,000, the AAA will appoint a single arbitrator.¹⁶⁴ If all the parties request a list of potential arbitrators, upon payment of a service charge the AAA will provide such a list.¹⁶⁵ Unlike litigation, wherein our system of checks and balances has selected the judge, here either the AAA will choose the arbitrator or the

evidence that American farming is being powered more and more by size . . .” Ira Dreyfuss, *Big Farms Continue to Squeeze Smaller Ones*, HOUS. CHRON., June 4, 2004, at 3C.

160. American Arbitration Association, *Arbitration Rules for the Real Estate Industry (Including a Mediation Alternative)*, at <http://www.adr.org/index2.1.jsp?JSPssid=16235&JSPsrc=upload/livesite/focusArea/commercial/AAA120current.htm> (as amended and effective July 1, 2003).

161. Parties must contact their local AAA office for fees applicable for claims in excess of \$10 million. *Id.*

162. *See id.*

163. *Id.*

164. *Id.*

165. *Id.*

property owner may have input on the choice, without regard to the competency of the owner to make a wise selection.

Then there is the cost of the arbitrator. Reviewing the resumes of the 265 mediators¹⁶⁶ who list “construction” among their specialties reveals that the average costs are \$255 per hour for the mediator’s compensation and \$75.00 per hour for administrative fees.¹⁶⁷ Mediators are paid at their regular rates for study time (for such tasks as studying pre-hearing briefs and exhibits¹⁶⁸) as well as writing opinions or findings of facts and conclusions.¹⁶⁹ Arbitrators are also paid for travel expenses including transportation, lodging, and meals if appropriate.¹⁷⁰

Parties to arbitration also must pay the cost of a hearing room¹⁷¹ and meeting rooms if appropriate. By contrast taxpayers pay the fees of the institution in litigation, *i.e.*, the U.S. courts. A report by the public interest group Public Citizen contends that the costs of arbitration will almost always be more than the costs of litigation.

The same support personnel that expedite cases at a courthouse, such as file clerks and court administrators, are also necessary to manage arbitration cases. But because arbitration provider organizations handle fewer cases over larger geographic areas, the economy of scale in a court clerk’s office cannot be achieved, increasing the administrative cost per case. Thus, while it costs the Clerk of the Circuit Court of Cook County an average of \$44.20 to administer a case, AAA’s administrative cost per case averages \$340.63, about 700 percent more.¹⁷²

This report is not without its critics, however, who argue that the conclusions drawn are largely inapplicable to the typical lower-income claimant involved in consumer and employment disputes.¹⁷³ These critics cite the re-

166. Information regarding arbitrators is not publicly available. Presumably, their rates would be comparable, if not higher.

167. Data compiled from resumes *available at* <http://www.mediatorindex.com> (fees range from \$75 to \$600 per hour).

168. The AAA lists among possible exhibits that could be relevant in this context, appraisal reports; a survey of the parcel; real estate assessed valuation, appropriate local tax rates, and aggregate tax charges; building plans and specifications; executed copies of leases in force; environmental audits; any feasibility, market, or other advisory reports; and environmental impact studies. American Arbitration Association, *supra* note 162.

169. <http://www.mediatorindex.com> (last visited May 5, 2004).

170. *Id.*

171. American Arbitration Association, *supra* note 162.

172. Public Citizen, *The Costs of Arbitration* (Apr. 2002), http://www.citizen.org/publications/print_release.cfm?ID=7173#o.

173. Samuel Estreicher & Matt Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen’s Jeremiaid on the “Costs of Arbitration”*, DISP. RESOL. J., Nov. 2002/Jan. 2003, at 8, 10.

port's use of a dispute involving a \$605,000 custom-designed home,¹⁷⁴ but for purposes of this analysis the size of that claim fits squarely within the parameters of this private property rights conflict.¹⁷⁵ For example, Margaret Rector claimed that enforcement of the ESA caused her property to lose approximately \$800,000 in value. If she were to pursue arbitration under the current rules, the initial filing fee would be \$6,000 and for a hearing the case service fee would be \$2,500. On the other hand, if she filed her case in the United States District Court for the Western District of Texas, in Austin, her filing fee would be \$150¹⁷⁶ and there would be no "case service fee."

Then, of course, in arbitration each party has the option of being represented by counsel. One would not expect the hourly rates to be lower for arbitration than for litigation. In fact, the rates may be greater in arbitration because of the need for legal counsel experienced in arbitration and real estate.¹⁷⁷

Even with these fee differentials and additional party-borne costs (arbitrator vs. judge; hearing room vs. courtroom), the total fees still have the potential to be lower in arbitration than in litigation, however, because arbitration is usually a shorter process than litigation.¹⁷⁸ Yet a recent survey of commercial arbitrators showed that 72% of them "believe that arbitration is becoming too much like court litigation and thereby losing its promise of providing an expedited and cost-efficient means of resolving commercial disputes."¹⁷⁹ Thus, the argument that arbitration uniformly is a better choice than litigation for small or large private landowners is doubtful at best and may lead to a wasting of the very resources the bill claims to protect.

174. *Id.* (comparing litigation and arbitration costs and pointing out how arbitration associations have recently lowered fees for consumers and employees with businesses paying the bulk of the fees).

175. *See, e.g.*, DeLong, *supra* note 93 (citing Margaret Rector's market value loss of approximately \$800,000); Leslie Spencer, *No Dream House for Mr. Burris*, FORBES, July 18, 1994, at 78 (describing Burris' market value loss of approximately \$1.5 million).

176. Fee Schedule for the United States District Court for the Western District of Texas at <http://www.txwd.uscourts.gov/fees/feesched.htm> (last visited Feb. 29, 2004).

177. Compare MAXWELL J. FULTON, COMMERCIAL ALTERNATIVE DISPUTE RESOLUTION 67-69 (1989) ("Most disputes now require an arbitrator who is more experienced in law than engineering and who can assemble a team of specialist lawyers. An arbitrator who is acceptable to both parties may not be available for more than 12 months and can cost several thousand dollars."), and Harry Kaminsky, *Cave Arbitration? . . . Let's Get Real!*, ARIZ. ATT'Y, Nov. 31, 1994, at 11 ("savings are generally found in the amount of attorneys fees paid as a result of limited discovery and decreased time involved in achieving a final disposition") (Kaminsky was a Regional Vice President of the American Arbitration Association).

178. Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?* DISP. RESOL. J., Feb./Apr. 2003, at 37, 39; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 678-79 (1996).

179. Phillips, *supra* note 180, at 37, 38.

To assess the comparative societal values of binding arbitration and litigation one must analyze both the costs and benefits of the two alternatives. From a cost standpoint, not everyone would agree that binding arbitration is cheaper and quicker than litigation. As arbitrations become more complex they become more like litigation and just as expensive. Further, even to the extent one can show that resolving a case through arbitration is cheaper than resolving the case through trial, the fact is that most claims never make it to trial. To the extent that parties choose to take a case to arbitration that either would not have been litigated or would have settled quickly had it been litigated, arbitration may actually increase societal costs.¹⁸⁰

Nothing ensures that the battle will be less costly with the American Arbitration Association, for example, than in the courtroom. What is more, unlike earlier versions of this bill,¹⁸¹ the Endangered Species Land Management Reform Act does not provide that a property owner who prevails in arbitration is entitled to receive costs. Only through a civil action is the owner entitled to receive reasonable attorney's fees and other litigation costs, including appraisal fees.¹⁸² Also, going to arbitration does not assure a property owner that she also will not be involved in litigation. The government may appeal the arbitration decision to a U.S. district court or to the U.S. Court of Federal Claims.¹⁸³

B. *The Appropriations Approach*

Here is where the administration and Congress have joined ranks effectively to set the agenda for the Fish and Wildlife Service. Because the Act has not been reauthorized, the administration must make a yearly budget request to fund the activities of the Service. Not surprisingly, an increasing amount of money has been devoted to grants as opposed to enforcement or designation of critical habitat. The administration congratulates itself for requesting more total funds each year and then Congress in turn gets to congratulate itself for appropriating even more money than requested. Yet the purposes of the increased appropriations are not manifest. For example, even though the Service had a larger budget for FY 2003 than FY 2002,¹⁸⁴ it announced in March 2003 that it would be unable to designate critical habitat for 33 species before fiscal year-end September 30 be-

180. Sternlight, *supra* note 180, at 695.

181. Private Property Protection Act of 1995, H.R. 925, 104th Cong. § 6(d) (1995).

182. Endangered Species Land Management Reform Act, H.R. 1403, 107th Cong. § 2(a) (2001).

183. *Id.* § (e)(2)(A).

184. Department of the Interior, *Fish and Wildlife Service* at <http://www.doi.gov/budget/2003/03Hilites/BH53.pdf> (last visited May 5, 2004).

cause its \$6 million budget was \$2 million short.¹⁸⁵ The same problem occurred in fiscal year 2002.¹⁸⁶ The Service attributes the problem to litigation costs from both sides: environmental groups and developers.¹⁸⁷ Yet although the number of lawsuits regarding critical habitat has been increasing yearly since sometime during the Clinton Administration,¹⁸⁸ the Bush Administration has not requested more money from Congress to deal with its present reality.¹⁸⁹

Though the head-line grabbers of the 104th Congress and forward dealt with such bills as the Omnibus Property Rights Act of 1995,¹⁹⁰ the Private Property Owners' Bill of Rights,¹⁹¹ the Landowners Equal Treatment Act,¹⁹² and the Life, Liberty, and Property Protection Act,¹⁹³ Congress also tried to make substantive changes to the ESA through riders on appropriations bills.¹⁹⁴ As John Leshy, the Solicitor for the Department of Interior from 1993 until 2001, so colorfully explained, "The Interior Appropriations bill seemed to attract mischievous riders like flies. The White House led the mostly successful fight against them, but it often required a substantial personal commitment of the Secretary."¹⁹⁵ Notwithstanding this commitment, apparently former Secretary Babbitt engaged in this appropriations game as well to prevent the use of other funds to address critical habitat, fearing that the lawsuits and the resultant studies would deplete the Service's resources so that it could not perform many of its other functions.¹⁹⁶ As attorneys for the EarthJustice Legal Defense Fund described the situation,

185. Jennifer 8. Lee, *Money Gone, U.S. Suspends Designations of Habitats*, N.Y. TIMES, May 29, 2003, at A18.

186. See U.S. Dept. of Interior, *Press Release: Endangered Species Act Broken—Flood of Litigation over Critical Habitat Hinders Species Conservation* available at http://endangered.fws.gov/criticalhabitat/ch_pressrelease.pdf (May 28, 2003).

187. *Id.*

188. Lee, *supra* note 185.

189. *Id.*

190. S. 605, 104th Cong. (1995).

191. S. 953, 105th Cong. (1997).

192. H. R. 1142, 106th Cong. (1999).

193. H.R. 5709, 107th Cong. (2002).

194. *E.g.*, Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, ch. 4, 109 Stat. 73, 86 (1995) (creating moratorium on listing species and designating critical habitat by rescinding funds to Interior).

195. Leshy, *supra* note 64, at 209. Though these efforts to amend the Act through such riders were largely unsuccessful when former President Bill Clinton was in office, with Republicans controlling the White House and the legislature, however, one commentator has predicted the revival of this strategy. Dan Fagin, *A New Environment: Bush Seeks to Reshape Laws of the Land (and Air)*, NEWSDAY, Jan. 12, 2003, at A04.

196. Lee, *supra* note 185. For example, the budget for 2003 provides that funds—

For fiscal year 1998, for instance, the service [sic] asked for a tiny budget increase of \$190,000 for the listing and critical habitat program, for a grand total of \$5.19 million for the entire year—less than 7% of the entire endangered species budget, and less than any other agency budget request since the early [Former President George H.W.] Bush years. Only rarely will Congress exceed a presidential budget request, and the FWS duly received the starvation diet it had requested.

Even more mind-boggling is that in fiscal 1997, 1998, and 1999 the FWS also specially *demand*ed that Congress limit its budget for critical habitat designation and listing. The House Conference Report on the 1998 budget specifically reflects DOI's role in obtaining a budget cap: "As requested by the Department of the Interior, the managers reluctantly have agreed to limit statutorily the funds for the endangered species listing program."¹⁹⁷

This insistence on a limited budget for section 4 activities provides support for these lawyers' further contention that the FWS unilaterally decided that the designation of critical habitat was an expensive and worthless process, though there was no actual amendment of the statute.¹⁹⁸ In their estimation, the FWS had succumbed to the will of private property rights groups and developers¹⁹⁹ and had freed itself from complying with law.²⁰⁰ "At its bottom, the tactic is nothing less than collusion between the execu-

not to exceed \$9,077,000 shall be used for implementing subsections (a), (b), (c), and (e) of section 4 of the Endangered Species Act, as amended, for species that are indigenous to the United States (except for processing petitions, developing and issuing proposed and final regulations, and taking any other steps to implement actions described in subsection (c)(2)(A), (c)(2)(B)(i), or (c)(2)(B)(ii)), of which not to exceed \$6,000,000 shall be used for any activity regarding the designation of critical habitat, pursuant to subsection (a)(3), excluding litigation support, for species already listed pursuant to subsection (a)(1) as of the date of enactment this Act.

Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, 117 Stat. 11, 220-21 (2002). *See also* Department of the Interior and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-63, 115 Stat. 414, 419 (2001) (limiting to \$9 million the amount to be used to implement subsection (a), (b), (c), and (e) of section 4 of the ESA); Department of the Interior and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-201, 114 Stat. 922, 926 (2000) (limiting to \$6,355,000 the amount to be used to implement subsection (a), (b), (c), and (e) of section 4 of the ESA), Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-139 (1999); Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-236 (1998) (limiting to \$5,756,000 the amount to be used to implement subsection (a), (b), (c), and (e) of section 4 of the ESA); Appropriations for the Department of the Interior and Related Agencies Act of 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1547 (1997) (limiting to \$5,190,000 the amount to be used for implement subsection (a), (b), (c), and (e) of section 4 of the ESA).

197. Robert Wiygul & Heather Weiner, *Critical Habitat Destruction*, THE ENVTL. FORUM, May/June 1999, at 13, 18.

198. *Id.* at 13.

199. *Id.*

200. *Id.* at 16.

tive and the Congress to weaken a popular substantive law in a way that keeps the public out of the loop.”²⁰¹

Bush’s proposed 2004 Budget provides \$129 million for the endangered species program. This budget request is said to include a 35 percent increase for the listing program to handle litigation. In contrast, the administration anticipates dispersing \$822 million through grants, including \$50 million for the Landowner Incentive and Private stewardship programs.²⁰²

C. *The End Result in Congress*

Some may consider Congress to have failed miserably in its efforts to change species protection.²⁰³ The parade of bills, falling by the wayside session after session, has been described as a “successful juggernaut” in that Congress has kept the agency from moving forward with some needed changes. But it has been successful in another way as well. As one commentator observed,

Democrats still have enough leverage to block major legislation in the closely divided Senate and House, but Bush now has a freer hand to make policy changes through administrative actions in key agencies such as the Interior Department . . . That’s because agency officials will no longer face hostile scrutiny from Democratic Senate committee chairs with the power to convene oversight hearings and issue subpoenas.²⁰⁴

Indeed, this “successful juggernaut” has laid the groundwork for that which the Executive Branch is evolving. As J.B. Ruhl has explained, legislative proposals were nothing but “wish lists” for both sides.²⁰⁵ He predicted that Congress would not make any changes to the ESA, but “[i]nstead, rhetori-

201. *Id.* at 18.

202. OMB, *Department of Interior*, at <http://www.whitehouse.gov/omb/budget/fy2004/interior.html> (last visited May 5, 2004).

203. Although the U.S. Congress has been unsuccessful in passing any “takings” legislation, many states have been successful. *See e.g.*, ARIZ. REV. STAT. ANN. §§ 41-1311 to -1313 (West 1999 & Supp. 2001); COLO. REV. STAT. ANN. §§ 29-20-201 to -205 (West 2001); DEL. CODE ANN. tit. 29, § 605 (1997); FLA. STAT. ANN. § 70.001 (West Supp. 1998); Idaho Code §§ 67-8001 to -8004 (Michie 1995); IND. CODE ANN. § 4-22-2-32 (West 1991 & Supp. 1998); KAN. STAT. ANN. §§ 77-701 to -711 (Supp. 2000); LA. REV. STAT. ANN. §§ 3:3609-3:3611 (West Supp. 2002); ME. REV. STAT. ANN. tit. 5, § 3341 (West Supp. 2001); MICH. COMP. LAWS ANN. §§ 24.421 to -425 (West Supp. 1999); MISS. CODE ANN. §§ 49-33-1 to -19 (Supp. 1996); MO. ANN. STAT. § 536.017 (West Supp. 1999); MONT. CODE ANN. § 2-10-101 (1997); NEV. REV. STAT. ANN. § 533.425 (Michie 1995); N.M. STAT. ANN. § 74-6-12 (Michie Supp. 2000); N.D. CENT. CODE § 28-32-02.5 (Supp. 1997); OR. REV. STAT. § 197.772 (1997); TENN. CODE ANN. §§ 12-1-201 to -206 (Supp. 1998); TEX. GOV’T CODE ANN. § 2007.001 (Vernon Supp. 2000); UTAH CODE ANN. §§ 63-90-2 to -4 (2001); VA. CODE ANN. § 9-6.14:7.1 (Michie 1998); WASH. REV. CODE ANN. § 36.70A.370 (West Supp. 2002); W. VA. CODE §§ 22-1A-1 to -6 (1998); WYO. STAT. ANN. § 9-5-301 (Michie 2001).

204. Fagin, *supra* note 195.

205. *See* Ruhl, *supra* note 64, at 369.

cal, picky, and amorphous statutory reform has been proposed which operates at the periphery of the matter and leaves the most difficult questions to the agencies that implement the law.”²⁰⁶

In reading this Part of the Article, the following question may have arisen: where is the counter-rhetoric by environmental interests groups and liberals? Part V will provide the contours of that counter-rhetoric before going on to examine how well the Executive Branch has taken its cues from Congress.

V. THE COUNTER-RHETORIC AGAINST “ROLLBACKS”

Environmentalists and Democrats have countered the reformists’ rhetoric by characterizing the proposals as “rollbacks” of environmental protection.²⁰⁷ In many ways, one could say that the counter-rhetoric of “rollbacks” versus “reforms” has been successful in that Congress has been unable to weaken significantly species protection despite trying to for almost ten years. But several dangers lurk ahead for the environmental movement. One is the concern that its message is no longer appealing to the mainstream; instead these groups are viewed as extremists. The images of cuddly creatures such as the World Wildlife Foundation’s panda bear, or stately creatures such as the bald eagle, are fairing poorly against the constant imagery of small landowners and simple communities caught in the crossfire between human development and species protection. Moreover, the Republican leadership has realized that wholesale reform will not be successful and has instead opted for more subtle changes that have enormous potential. Representative Richard Pombo, chair of the House Resources Committee says that he will no longer try to amend the Act in one sweeping piece of legislation, but instead will “break it down” one piece at a time.²⁰⁸ And unfortunately, it will be more difficult for environmental interests groups to engage and impassion the public over changes that appear to be mostly procedural.²⁰⁹

206. *Id.* at 370.

207. *E.g.*, Leshy, *supra* note 64, at 204; Joel Connelly, *Environmental Groups Target Suburban Voters*, SEATTLE POST-INTELLIGENCER, Apr. 29, 1998, at B1; Timothy Noah, *GOP’s Rollback of the Green Agenda is Stalled by a Public Seeing Red Over Proposed Changes*, WALL ST. J., DEC. 26, 1995, at A8.

208. Erica Werner, *Endangered Species Act Targeted: House Resources Chairman Plans to ‘Break it Down’*, WASH. POST, Jan.13, 2004, at A15.

209. *See id.*

A. *The Environmental Interest Groups*

National environmental interest groups somehow arguably have become known as extreme or largely irrelevant to the average citizen's life. For example, one group of communications scholars analyzed the use of the term "tree-hugger" in newspapers in the spring of 1999²¹⁰ and found that the use of the term may be characterized as "reduction to absurdity,"²¹¹ making "environmentalists and their positions appear unrealistic and foolish."²¹² The term is used as "attack discourse"²¹³ to ridicule²¹⁴ and delegitimize²¹⁵ the movement and its advocates. The mental imagery of this term is too concrete²¹⁶ and comical²¹⁷ to be of great use to the environmental movement. As evidence of its extreme connotations, the term has been used as a rhetorical "moderating device,"²¹⁸ according to this study, to define an advocate's position as something less than radical.²¹⁹ Indeed one conservative analyst offered that "'environmentalists realize they are in a ghetto, and they are trying to figure out a way out of it,' said Myron Ebell, an environmental analyst at the conservative Competitive Enterprise Institute. 'They're realizing that these things relate to people's lives and not just wonky policy debates.'"²²⁰

Against the Bush Administration, national environmental interest groups are coming on strong with the rhetoric, however. For example, the Natural Resources Defense Council's report on the Bush Administration's environmental policy characterized the administration as a greater threat than any posed since the advent of the environmental movement in 1970. "Environmental protections have been challenged before, most notably in the James Watt era and in the Newt Gingrich Congress, but never through a campaign as far-reaching and destructive as the threat posed today by the Bush Administration and the 108th Congress."²²¹ It is unclear whether this

210. Michael DeLoach, et al., *An Analysis of the "Tree-Hugger" Label* in ENVIROPOP 95, 96-97 (Mark Meister & Phyllis M. Japp, eds. 2002).

211. *Id.* at 97.

212. *Id.* at 98.

213. *Id.*

214. *Id.* at 105.

215. *Id.* at 98.

216. *Id.* at 100.

217. *Id.* at 105.

218. *Id.* at 102.

219. *Id.*

220. Katharine Q. Seelye, *Democratic Field Tries to Add Punch to Environment Issue*, N.Y. TIMES, July 2, 2003, at A22.

221. Robert Perks & Gregory Wetstone, *Rewriting the Rules, Year-End Report 2002: The Bush Administration's Assault on the Environment* iv, at <http://www.nrdc.org/legislation/rollbacks/>

rhetoric will shift policy, but as a consultant for the Sierra Club who worked to counter some Republican rhetoric remarked, “‘It’s like a tennis game. The ball is back in our court, and we need to spend time and energy educating voters.’”²²²

B. *The Democratic Party*

The Democrats are realizing that to defend effectively against threats to species protection, they need to develop a framework for counter-rhetoric and information. Professor Zygmunt Plater made the following observation with respect to public interest cases: “*it ultimately is the public’s perception of the case that is the most important and determinative factor. What the public knows (or, significantly, does not know) of the case, ultimately determines outcomes.*”²²³ And arguably the same is true with respect to legislation and policy. Some Democrats are forming “a political research institute in an effort to counter what they see as the domination of the national political debate by well-organized, well-financed conservatives at the White House, in Congress, and in a variety of media and policy institutes all over Washington.”²²⁴ As Carol Browner, EPA Administrator during the Clinton Administration noted, “‘The conservative movement has been effective in building the echo chamber for themselves . . . both through the media—talk radio, Fox News, The Weekly Standard—and through effective institutions like the Heritage Foundation, which reinforces their ideas and focuses on communicating them.’”²²⁵

Congressional Democrats are working to disseminate information about the Bush Administration’s environmental policies²²⁶ and the Department of Interior’s record.²²⁷ The Democratic presidential candidates for the 2004 election are changing their rhetoric as well to begin telling stories as

execsum.asp (January 2003); see also *The Bush Archives*, at http://www.sierraclub.org/sierra/bush_archive.asp (last visited Feb. 20 2004) (criticizing the Bush Administration record on the environment); Green Peace at http://www.greenpeaceusa.org/index.fpl?article=422&object_id=8035 (last visited Feb. 20, 2004) (calling President Bush “The Toxic Texan”).

222. See Jennifer 8. Lee, *A Call for Softer, Greener Language*, N.Y. TIMES, Mar. 2, 2003, at A24.

223. Plater, *supra* note 3, at 2.

224. Katharine Q. Seelye, *Democrats, Seeing Dominance of Conservatives’ Message, Form Group to Fight It*, N.Y. TIMES, June 5, 2003, at A31.

225. *Id.*

226. United State House of Representatives, Comm. on Gov’t Reform – Minority Staff, Special Investigations Division, *Politics and Science in the Bush Administration 2* at http://www.house.gov/reform/min/politicsandscience/pdfs/pdf_politics_and_science_rep.pdf (Nov. 13, 2003) (prepared for Rep. Henry A. Waxman).

227. Democratic Staff of Comm. on Resources, *Weird Science: The Interior Department’s Manipulation of Science for Political Purposes* at <http://www.ourforests.org/weirdscience.pdf> (Dec. 17, 2002) (Rep. Nick J. Rahall, Ranking Member).

opposed to referring to scientific data. For example, in support of air regulations, they are talking about children with asthma, and with respect to the clean-up of hazardous waste they are pointing out that many more minorities than whites live near toxic waste dumps.²²⁸ As former Governor of Vermont Dr. Howard Dean offered, “his fellow Democrats should speak concretely rather than in abstractions, and so link environmental problems with real-world consequences. Instead of talking about greenhouse gases,” Dr. Dean said, “they should talk about what it is like to take a child to the emergency room because of an asthma attack.”²²⁹

“The Democrats old approach largely motivated a set of activists,” Mr. Podesta, said, but “hadn’t had as broad a reach as a voting issue into the general public.”²³⁰ As the Luntz memo points out, the term “environmentalists” has a negative connotation,²³¹ perhaps that of an activist, whereas “conservationists” are reasonable, moderate, and practical.²³² Democrats are now trying to extend their appeal to minorities, independents, and “queasy suburban Republicans.”²³³ Mr. Ebell of the Competitive Enterprise Institute says that the Democratic message is “so shrill and so at odds with reality” that it does not resonate in states other than California, Massachusetts, and New York, states where Democrats already win.²³⁴ Juxtaposing this rhetoric, the Bush Administration appears to be more intuitive and widely appealing, describing the plight of America as an entire country, not just those of small landowners.

VI. THE EXECUTIVE BRANCH’S RHETORIC

Because the reform horror stories may support one political worldview or value system over another, their propagation also depends on the policy or rhetorical goals of an administration. These stories may take on an even broader sweep as they seek to define general principles of law. Examples from the current administration include Department of Interior Secretary Gale Norton’s 4Cs: “communication, consultation and cooperation, all in service of conservation.” This mantra is not about the ruination of one farmer or one small landowner but rather the destruction of whole commu-

228. Seelye, *supra* note 220.

229. *Id.*

230. *Id.*

231. See Luntz Memo, *supra* note 85, at 142, at <http://www.luntzspeak.com/graphics/LuntzResearch.Memo.pdf> (last visited May 5, 2004).

232. *Id.*

233. Seelye, *supra* note 220.

234. *Id.*

nities by insensitive legislators and bureaucrats.²³⁵ For example, rural ranching communities of the “Mountain West”²³⁶ have been held up as victims of environmental policies developed by federal officials who are characterized by some as being unresponsive to local concerns.²³⁷ The popular conception is that environmental restrictions on extraction of natural resources are strangling the economy through elimination of the region’s only high-wage jobs.²³⁸ The basic understanding is as follows:

1. Every economy has a base.
2. The Mountain West’s economic base is its natural resources industry, which is on the decline.
3. The Mountain West economy is on the decline.²³⁹

Industry, politicians, and news media have painted a rather bleak picture of that regional economy.²⁴⁰ And what is rather clever about this story is that it turns private interests—those of the natural resources industry—into something that looks like a public interest—that of the entire region.²⁴¹ Two economists from the University of Montana, Thomas Michael Power and Richard N. Barrett, however, have researched and written extensively

235. *But see* P. Lynn Scarlett, *A New Approach to Conservation: The Case for the Four Cs*, 17 NAT. RESOURCES & ENV’T 73, 112 (2002) (arguing that the Dept. of the Interior is “developing a four Cs new environmentalism framework by exploring ways to . . . enhance landowner and other citizen participation in public land management decisions, to reduce procedural hurdles, and to dismantle bureaucratic barriers.”).

236. The Mountain States are Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. BARRETT & POWER, *supra* note 87, at xvii.

237. *See id.* at 13, 17-18; *See also* 141 CONG. REC. S6339 (1995) (statement of Sen. Gorton) (characterizing the ESA as pitting “working people” and “their families” against “uncompromising, intrusive, and unrelenting Federal mandates.”).

238. *See* POWER & BARRETT, *supra* note 87, at 17-18; *See also* 141 CONG. REC. S7612 (1995) (statement of Sen. Craig) (“The practice of forestry is at a standstill on our western public lands, and the primary culprit is the Endangered Species Act.”).

239. *See* POWER & BARRETT, *supra* note 87, at 125. *See also* 141 CONG. REC. S6340 (1995) (statement of Sen. Gorton) (explaining how the Service’s listing of the Northern Spotted Owl in 1989 as endangered caused the following chain of events: a decline in timber industry, a rise in unemployment, families falling apart, an increase in divorce and domestic violence, “skyrocketing” use of foodbanks, a rise in sale of homes, and ultimately “once proud, and productive members of our society . . . becom[ing] society’s burden.”).

240. *See* POWER & BARRETT, *supra* note 87, at 133-34; *See e.g.*, 141 CONG. REC. S6340 (1995) (statement of Sen. Gorton).

241. *See* POWER & BARRETT, *supra* note 87, at 125-26. Power and Barrett define “cowboy economics” as the conventional understanding of the regional economy that is at odds with the reality of our national market economy and how it effects regional economies. *Id.* at xix. Their book is an attempt to provide a more accurate view, that is, “post-cowboy economics.” *Id.* at xix-xx. *See also* 141 CONG. REC. S6340 (1995) (statement of Sen. Gorton) (focusing on the plight of “timber communities,” family, and individuals rather than the timber companies).

to try to debunk this myth.²⁴² Images of open-pit mines, farms, and ranches, however, distort the communities' understanding of its current and evolving economic base. New jobs are found in small firms and anonymous office buildings, not out on the range.²⁴³ Moreover, these economists argue that not only is the story inaccurate in saying that environmental law detrimentally affects the region's economy, but environmental law actually "enhances welfare and protects the very source of economic vitality that the Mountain West enjoys."²⁴⁴ Despite this research to the contrary, the Bush Administration forges ahead with stories about the need to balance the environment and the economy, and accordingly promotes such programs as Clear Skies and Healthy Forests.

A. *Clear Skies, Healthy Forests, and other Euphemisms*

In 2002, the White House launched two environmental initiatives: Clear Skies²⁴⁵ and Healthy Forests.²⁴⁶ President Bush described the Clear Skies legislation as a new approach "based on this common-sense idea: that economic growth is key to environmental progress, because it is growth that provides the resources for investment in clean technologies."²⁴⁷ He touted this program as combining "the power of markets, the creativity of entrepreneurs, and . . . the best scientific research."²⁴⁸ According to President Bush, the proposed legislation would "dramatically reduce the three most significant forms of pollution from power plants, sulfur dioxide, nitrogen oxides and mercury."²⁴⁹

Environmental groups,²⁵⁰ Democratic presidential candidates, and others²⁵¹ quickly criticized the plan as a mere weakening of the Clean Air Act.

242. POWER & BARRETT, *supra* note 87, at 133-34; *See e.g.*, 141 CONG. REC. S6340 (1995) (statement of Sen. Gorton).

243. POWER & BARRETT, *supra* note 87, at 131.

244. *Id.* at xix. Though salaries may be low compared to other regions of the country, the amenities are high and attract many of the new residents of the region. *See id.* at xviii, 17-18.

245. Clear Skies Act of 2003, S. 485, 108th Cong. (2003); Clear Skies Act of 2003, H.R. 999, 108th Cong. (2003).

246. Healthy Forests Restoration Act of 2003, H.R. 1904, 108th Cong. (2003).

247. George W. Bush, President Announces Clear Skies & Global Climate Change Initiatives, Address at National Oceanic and Atmospheric Administration, Silver Spring, Maryland (Feb. 14, 2002), at <http://www.whitehouse.gov/news/releases/2002/02/20020214-5.html>.

248. *Id.*

249. *Id.*

250. *See, e.g., The Bush Administration's Air Pollution Plan*, at <http://www.nrdc.org/air/pollution/qbushplan.asp> (Sept. 5, 2003) (describing the initiative as the "misnamed 'Clear Skies' initiative, which would gut existing health protections and do nothing to curb global warming").

251. *See, e.g., Empty Promises*, N.Y. TIMES, Jan. 31, 2003, at A28; Patrick Leahy, *President Bush's 'Clear Skies' Plan Would Hurt Northeast Most of All*, at <http://leahy.senate.gov/press/200204/>

For example, the Sierra Club described the initiative as “a smokescreen for more pollution.”²⁵² And presidential candidate Reverend Al Sharpton described the Clear Skies proposal as being nothing more than a gift from President Bush to his corporate supporters.²⁵³

The Healthy Forests Initiative has not fared much better among those groups. This initiative was billed as making our forests “healthy” by thinning undergrowth and brush to prevent forest fires.²⁵⁴ Touring an area severely damaged by forest fires, President Bush stated, “[t]oo many communities like this have known too many hardships that fire causes We’ve got a problem in the country, a problem which has built up over decades and a problem we’d better fix before more people go through the grief the people of Summerhaven have gone through.”²⁵⁵

Some environmentalists called President Bush’s Healthy Forests Initiative the “Horizontal Forest Initiative” because it is less about “fuel reduction”—the process of reducing forest material that could fuel a fire—than about catering to the timber industry.²⁵⁶ The new legislation provides federal money for commercial logging in national forests,²⁵⁷ but it does not provide any money for fuel reduction on private land “where it is needed to safeguard commercial and residential development.”²⁵⁸ Moreover, Representative Jay Inslee of Washington State criticized the legislation as not providing enough money to the Forest Service. Without more money, he says, the Forest Service will have a greater incentive to allow the logging of more valuable old-growth stands in order to pay for the thinning.²⁵⁹ Similarly, “[e]nvironmental groups contend that the legislation will enable timber companies to log healthy trees and will not do enough to reduce the

042202c.html (“The Administration’s ‘Clear Skies’ initiative is more fitting for April Fool’s Day than for Earth Day.”) (last visited Feb. 29, 2004).

252. *President Bush’s New “Clear Skies” Proposal: A Smokescreen for More Pollution*, at http://www.sierraclub.org/cleanair/clear_skies.asp (Feb. 22, 2002).

253. Seelye, *supra* note 220.

254. George W. Bush, President Announces Healthy Forest Initiative, Remarks by the President on Forest Health and Preservation, The Compton Arena, Central Point, Oregon (Aug. 22, 2002), at <http://www.whitehouse.gov/news/releases/2002/08/20020822-3.html>.

255. Press Release, Office of the Press Secretary, President Bush Promotes Healthy Forests in Arizona (Aug. 11, 2003), at <http://www.whitehouse.gov/news/releases/2003/08/20030811-4.html>.

256. *Healthy Forests: Proposal More Logging Bill than Forest Fire Prevention*, HOUS. CHRON. Aug. 14, 2003, at 32A.

257. Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, § 108, 117 Stat. 1887 (2003).

258. *Healthy Forests: Proposal More Logging Bill than Forest Fire Prevention*, HOUS. CHRON., at 32A. See also Elizabeth Bumiller, *Bush Flies over Fire Site to Promote ‘Healthy Forests’*, N.Y. TIMES, Aug. 12, 2003, at A10 (quoting president of Wilderness Society who charges that initiative does nothing to make people safer).

259. Mike Soraghan, *Forest-thinning Funds Modest Plan Called Thrifty; Dems Cry Sellout*, DENV. POST, Dec. 5, 2003, at A4.

fire danger to homes. ‘There’s a real danger that the president’s pen might as well be a chainsaw,’ said Amy Mall, a forest specialist with the Natural Resources Defense Council.”²⁶⁰ Or as one resource conservation professor described the situation, “[t]his is like letting the fox guard the henhouse.”²⁶¹ One such unlikely protector of listed species is Secretary Norton.²⁶² She too has a story to tell.

B. *The Four C’s or the Three M’s?*

Secretary Norton explains her approach to regulation as the “4 C’s”: communication, consultation and cooperation, all in service of conservation. She believes that the agency should be considering more “the role nonregulatory conservation—the willing partnerships between citizens and all levels of government—can play.”²⁶³ In an op-ed regarding the protection of wetlands, Norton extolled the virtues of partners programs through which the federal government provides funds and technical assistance to individuals and groups to rehabilitate wetlands.²⁶⁴ However, Secretary Norton is not without her critics.

Some of her critics call Norton’s signature phrase the “Three M’s: maddening, meaningless mantra.”²⁶⁵ Though her words may appear uncontroversial and daresay enchanting, they are stirring up considerable opposition. This language has softened what is perceived by environmentalists as the Bush Administration’s attack on the environment. Advised by a party strategist, Republican politicians have changed their rhetorical approach with respect to environmental issues to appeal to suburban voters.²⁶⁶ As the

260. Elizabeth Shogren & Richard Simon, *New Forest-Thinning Policy Drops Safeguard for Wildlife*, L.A. TIMES, Dec. 4, 2003, at A19.

261. Michael Hill, *The Political Environment*, BALTIMORE SUN, Dec. 14, 2003 at 1C (quoting Sandy Parker of the Department of Geography and Environmental Systems at the University of Maryland, Baltimore County).

262. See e.g., Michael Powell, *The Westerner’s Interior Motives: To Gale Norton, Ranchers and Environmentalists Don’t Have to Be at Loggerheads*, WASH. POST, Mar. 13, 2001, at C1 (describing Gale Norton as a “rebel occup[ying] the palace” and a “Western politician who waged a decades-long war against the distant bureaucracies at Interior, one of those conservatives who fancy themselves guerilla fighters against Washington’s command-and-control regimens.”); Douglas Jehl, *Transition in Washington: The Interior Department; Interior Choice Faces Sharp Questioning*, N.Y. TIMES, Jan. 19, 2001, at A30 (discussing the advertisement, paid for by a coalition of eighteen environmental groups, which describes Gale Norton as “so far on the fringe” that “she’s off the page” and stating “America deserves an interior secretary who will protect our air, water and natural resources not the polluters who seek to exploit them”).

263. Gale Norton & Ann Veneman, *There’s More than One Way to Protect Wetlands*, N.Y. TIMES, Mar. 12, 2003, at A25.

264. *Id.*

265. John Tierny, *Trying for Balance at Interior*, N.Y. TIMES, June 9, 2003, at A26.

266. See Lee, *supra* note 222.

president of the Environmental Working Group noted with respect to the Bush Administration, “They are showing the message discipline they need to get these anti-environmental policies past suburban voters.”²⁶⁷

Below, this Article attempts to flesh out the contours of Norton’s philosophy and to determine what is lurking behind it. Though public explanations of this philosophy are scant at best,²⁶⁸ the Department of Interior’s actions speak louder than any slogan its chief administrator may chant.

1. Communication

Secretary Norton says that she is working to change the tone of political discussions regarding environmental protection. She opines that “[t]oo often political conversation becomes bitter and divisive.”²⁶⁹ Too often the casualties of this culture of partisan conflict are the very creatures and places that both sides are seeking to defend.²⁷⁰ She believes that the federal government should be communicating with local property owners, elected officials, and others whose lives would be affected by federal action.²⁷¹ Here the idea is that local expertise will lead to solutions that are better than those emanating from administrators and theorists in Washington, DC.²⁷²

Perhaps the Department of Interior plans to follow EPA’s lead in this area. EPA had increased the quantity and quality of information available to the public.²⁷³ Yet critics of EPA’s approach say that these programs are just an attempt to improve public relations and not meaningful involvement or participation by the public.²⁷⁴ Currently, the Department of Interior has no formal or specific mechanism for fostering the type of communication that Norton advocates.

267. *Id.* But see Christie Whitman, *The Vital Republican Center*, N.Y. TIMES, Jan. 12, 2004, at A19 (“Some Republican consultants say that since we’re not going to win the votes of environmentalists anyway, we needn’t worry about what they think. Yet there are plenty of voters who care about the environment, even if it’s not the first thing they mention in polls.”).

268. Scarlett, *supra* note 235, at 74 (explaining that the “4Is”—innovation, incentives, information, and integrated-decision-making—gird the 4Cs).

269. Gale Norton, Secretary of the Interior, Remarks Prepared for Delivery at the National Newspaper Association (Mar. 23, 2001), at <http://www.doi.gov/news/010323.html>.

270. *Id.*

271. *Id.*

272. See Scarlett, *supra* note 235, at 76.

273. See J. Charles Fox, *A Real Public Role*, THE ENVTL. FORUM, Nov./Dec. 1998, at 19-20. In 2003, EPA issued a new “Public Involvement Policy.” 69 Fed. Reg. 33,946 (June 6, 2003). The guidance for implementing this policy can be found at <http://www.epa.gov/publicinvolvement/policy2003/guidance.pdf> (May 2003). See generally the EPA’s website regarding public involvement at <http://www.epa.gov/publicinvolvement/> (last updated Mar. 9, 2004).

274. Lisa Pelstring, *Good Start, Long Way To Go*, THE ENVTL. FORUM, Nov./Dec. 1998, at 22-23.

Despite this call for greater local involvement, environmentalists criticize, for example, Norton's new policy that prevents the Bureau of Land Management from protecting 600,000 acres in Colorado that Representative Diana DeGette has proposed to be designated as wilderness.²⁷⁵ The policy is the result of settlement with the state of Utah, yet it was developed without public input.²⁷⁶ Conservationists are essentially arguing that Norton selectively applies her 4C's philosophy in similar situations. Some communities have been allowed to participate while others have not.²⁷⁷ Though on the one hand the Bush Administration seems to have signaled that it will listen to local governments and user groups in way that the Clinton Administration did not,²⁷⁸ critics are concerned that the Bush Administration's actions may be designed to shut out some voices while privileging others.

Also, the Bush Administration's efforts to "streamline" the National Environmental Policy Act ("NEPA") convey quite a different message than its rhetoric about its desire to include the public in the decision-making process.²⁷⁹ In 2002, the CEQ created the NEPA Task Force to study how the processes of NEPA could be improved and modernized.²⁸⁰ "Republicans and their allies say the drive to change NEPA is aimed at . . . making sure that agencies listen to the people and companies, who are most affected by their decisions. 'If we can streamline NEPA, we're going to finally get many of these [logging] projects moving,' said Tom Partin of the Oregon-based American Forest Resource Council,"²⁸¹ a trade association for timber interests.²⁸² However, critics argue that the Task Force's actual goal is to limit public access to environmental policymaking and information.²⁸³ As Carl Pope, Executive Director of the Sierra Club, contends, "[t]he administration knows that if it can get the public out of the process the power relationships will change, and then they'll be able to change the policy."²⁸⁴

275. Theo Stein, *BLM Planning Effort Lauded: Interior Chief Says Colorado Canyons Process Successful*, DENV. POST, July 6, 2003, at A-24.

276. *Id.*

277. *Id.*

278. Fagin, *supra* note 195.

279. *Id.*

280. 67 Fed. Reg. 45,510 (July 9, 2002).

281. Fagin, *supra* note 195.

282. "The American Forest Resource Council strives to provide a positive operating environment for the forest products community, representing nearly 100 forest product manufacturers and forest landowners—from small, family-owned companies to large multi-national corporations—in twelve states, west of the Great Lakes." American Forest Resource Council, at <http://www.afrc.ws/> (last visited Feb. 29, 2004).

283. Fagin, *supra* note 195.

284. *Id.*

One of the suggestions for streamlining the process is directing agencies to create more categorical exclusions—using broad criteria—for projects that do not significantly impact the environment to give the agencies greater flexibility in determining which actions would require an Environmental Impact Statement.²⁸⁵ Although CEQ Chairman James Connaughton said that they were working towards a more timely and collaborative process that is therefore more efficient,²⁸⁶ some environmentalists such as an attorney for the National Resources Defense Council respond that “[t]heir focus is on speed rather than on meaningful public participation and environmental review.”²⁸⁷

“This administration has actively supported greatly expanding the list of activities that would be put in this category because once it’s in this category you don’t have the ‘nuisance’ of public participation,” said ‘Robert B. Smythe, an environmental consultant and White House official in the Ford and Carter administrations. “The language appears to provide some basis for reopening the question of categorical exclusions without any substantive justification.”²⁸⁸

2. Consultation

Though generalized accounts of what Norton means by “consultation” are elusive, with respect to the ESA she appears to be referring to the expansion of the section 7 process by having the Service “consult” with private landowners as well as federal agencies. The current provisions of the Act only require consultation with private landowners when there is a “federal nexus,” that meaning whenever an agency of the federal government must provide a permit, license, or other authorization for the development to proceed. Without consultation, a private landowner must satisfy the requirements of section 10 with her own resources.

Through the Consultation program, the Service works with private landowners and other non-Federal entities to develop Habitat Conservation Plans that authorize the incidental take of listed species. The HCP process allows private economic development to proceed while promoting listed species conservation.²⁸⁹

285. The NEPA Task Force Report to the Council on Environmental Quality, *Modernizing NEPA Implementation* at 57-63 (Sept. 2003), available at <http://ceq.eh.doe.gov/ntf/report/>; John Heilprin, *Environmental Study Exemption Recommended/Report also Calls for New Rules for Managing Natural Resources*, HOUS. CHRON., Sept. 25, 2003, at A2; Michael Burnham, *Regulations: CEQ Panel Suggests Measures for Reforming Environmental Review Process*, GREENWIRE, Sept. 24, 2003, at 2.

286. John Heilprin, *supra* note 285.

287. Burnham, *supra* note 287.

288. Eric Pianin, *Panel Backs Faster Environment Review*, WASH. POST, Sept. 25, 2003 at A31.

289. U.S. Fish & Wildlife Service, *supra* note 10.

Through a policy initiative, the Service is able to accomplish what the 103d Congress could not accomplish.²⁹⁰ For example, in 1993 Senator Kempthorne proposed a bill that would allow any person—even in the absence of a “federal nexus”—to initiate consultation with the Secretary if that person thought her activities could have an effect on a listed species.²⁹¹ The potential benefits of invoking section 7, as discussed in Part II.C *supra*, include that the Secretary must act on the petition within ninety days,²⁹² whereas under section 10, there is no limit to the amount of time the Secretary may take to review an incidental take permit application.²⁹³

The proposed bills and Norton’s new policy of offering the potential benefits of consultation were designed to address the criticism that the burdens associated with preparing an HCP under section 10 overwhelm all but the largest of landowners.²⁹⁴ Yet despite the numerous accounts that the current HCP process fails small landowners, John Sawhill, former President and CEO of The Nature Conservancy, painted a slightly different picture when faced with the question of whether section 10 is a viable option for small landowners. He argued that:

Carried out as Congress intended, . . . the Section 10(a) process is a viable option for small private landowners . . . For example the [RHCP] . . . [for Austin,] Texas, has been proven through several detailed economic studies to be the most economical alternative for private landowners in a setting where many are vying for land development permits. Not only is it more efficient than every individual attempting to comply with the ESA alone under any mechanism, but also the unit cost of compliance is dramatically reduced. The official economic study . . . showed that participation in the plan by small landowners reduced their financial obligation of compliance by 85%.²⁹⁵

It may be true that the American public wishes to pay more of the cost of species protection on private lands by expanding the applicability of sec-

290. See, e.g., Endangered Species Reform Act of 1995, S. 768, 104th Cong., §§ 401-06 (1995); Endangered Species Conservation and Management Act of 199, H.R. 2275, 104th Cong. § 203; The Endangered Species Act Procedural Reform Amendments of 1993, H.R. 1490, 103d Cong. § 108 (1993).

291. Endangered Species Conservation Act of 1995, S. 1364, 104th Cong. § 12(a) (1994).

292. *Id.*

293. See Albert C. Lin, *Participants’ Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 *ECOLOGY L.Q.* 369, 398 (1986) (stating that studies for all but the smallest HCPs require several months or years to complete before an HCP can be finalized).

294. See, e.g., *The Role of Habitat Conservation Hearing*, *supra* note 55, at 79 (“The current section 10 process is not a viable option for the ‘little guy.’ The costs, time requirements, and uncertainties of section 10 HCPs prohibit most landowners from using them.”) (testimony of Ed Sauls, The Sauls Company & member, National Association of Homebuilders). Interestingly, this criticism is often launched by representatives of large landowners.

295. *Id.* at 49-60.

tion 7. No consensus has arisen in Congress, however, and the agency has not provided the public with a formal opportunity to comment on the expansion. Instead the agency has taken the lead in effect to amend the Act, without any of the Constitutional safeguards associated with lawmaking.

Contrast this initiative to increase consultation with private landowners with the Bush Administration's move to eliminate consultation with agencies under certain circumstances. For example, in December 2003, the Services along with the Bureau of Land Management, the National Park Service, the Bureau of Indian Affairs, and the Forest Service ("Action Agencies") issued joint "counterpart" consultation regulations.²⁹⁶ These regulations provide an "optional alternative" to the existing consultation process for agency projects that support the National Fire Plan ("NFP") under the Healthy Forests Initiative.²⁹⁷ The optional alternative "eliminates the need to conduct informal consultations and eliminates the requirement to obtain a written concurrence from the Service for those NFP actions that the Action Agency determines are 'not likely to adversely affect' ("NLAA") any listed species or designated critical habitat."²⁹⁸ These regulations are intended to accelerate the rate at which the Action Agencies may implement their responsibilities under the NFP.²⁹⁹ What is significant about the alternative is that if the Action Agency has entered into an "Alternative Consultation Agreement", it may make an NLAA determination without consultation with or concurrence of the Service.³⁰⁰

There were many criticisms of the rule when it was proposed and they included three general categories of concerns: urgency, expertise, and capture. Commenters on the proposed rule expressed doubt about the need to accelerate the current process³⁰¹ and suggested that rather than delegating authority to the Action Agencies, the Service could shorten the timeline for formal consultations and biological opinions.³⁰² Another critique of this delegation was that the Action Agencies lacked the requisite expertise.³⁰³ And finally opposition arose from the concern that the Action Agencies' missions differ from that of the Services and thus the Action Agencies

296. Counterpart Regulations for Implementing the National Fire Plan, 50 C.F.R. §§ 402.31-.34 (2004).

297. Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 68 Fed. Reg. 68,254-02, 68,255 (Dec. 8, 2003) (to be codified at 50 C.F.R. pt. 402).

298. *Id.* at 68,254-02.

299. *Id.*

300. Counterpart Regulations for Implementing the National Fire Plan, 50 C.F.R. § 402.33 (2004).

301. Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 68 Fed. Reg. 68,258-02 (Dec. 8, 2003) (to be codified at 50 C.F.R. pt. 402).

302. *Id.* at 68,260.

303. *Id.* at 68,258.

would be less sensitive to protection of listed species and critical habitat. Moreover, commenters speculated that the alternative would give industry “free reign” to increase timber sales on public lands in a manner that is not in the best interest of the public.³⁰⁴ The current consultation process was seen as part of the “checks and balances inherent in the Act.”³⁰⁵ This new regulation did not receive much media attention,³⁰⁶ though its ramifications could be significant.

Receiving more media attention, however, was the Service’s promulgation in August 2004 of counterpart consultations with EPA and the Department of Agriculture with respect to pesticides for actions taken under the Federal Insecticide, Fungicide and Rodenticide Act.³⁰⁷ These regulations provide two optional alternatives.³⁰⁸ The first is similar to the December 2003 regulation in that it allows EPA to make NLAA determinations without consultation with or concurrence from the Service.³⁰⁹ Criticisms were likewise similar.³¹⁰ The second alternative is the “new optional formal consultation process.”³¹¹ It is optional in that EPA decides whether to initiate formal consultation by submitting a written request along with an “effects determination” to the Service.³¹² In conducting this consultation, the Service may adopt EPA’s findings with respect to the ecological effects of pesticides without issuing its own independent biological opinion.³¹³

Despite these formal changes, it is unclear that the review of pesticides will be more or less protective of listed species and their habitats because in the past EPA “frequently failed” to consult with the Service with

304. *Id.*

305. *Id.*

306. A search of Westlaw’s ALLNEWS database and Lexis’ Newspaper Stories, Combined Papers database yielded no mainstream articles on this regulation.

307. *E.g.*, Juliet Eilperin, *EPA Will Not Have to Consult Wildlife Agencies on Pesticides*, WASH. POST, July 30, 2004, at A07; John Heilprin, *EPA Eases Rule Approving Pesticides*, CHI. SUN-TIMES, July 30, 2004, at 34. The Services receive more than 50,000 comments on the NFP rule, Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 68 F.R. 68,259, 68,257 (Dec. 8, 2003) (to be codified at 50 C.F.R. pt. 402) but more than 125,000 on the pesticide rule, Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 69 Fed. Reg. 47,732, 47,740 (Aug. 5, 2004) (to be codified at 50 C.F.R. pt. 402).

308. Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 69 Fed. Reg. 47,732 (Aug. 5, 2004) (to be codified at 50 C.F.R. pt. 402).

309. Counterpart Regulations Governing Actions by the U.S. Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act, 50 C.F.R. § 402.45 (2004).

310. Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 69 Fed. Reg. 47,732, 47,740-57 (Aug. 5, 2004) (to be codified at 50 C.F.R. pt. 402).

311. Counterpart Regulations Governing Actions by the U.S. Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act, 50 C.F.R. § 402.46 (2004).

312. *Id.* § 402.46(a).

313. *Id.* § 402.46(c)(i).

respect to new pesticides.³¹⁴ The agencies completed only a dozen consultations in the last decade.³¹⁵ The rationale for the failure to comply with the Act was that the consultations would have been too complex.³¹⁶ Rather than comply with existing law, the Service justifies these regulations by stating that the process needs to be streamlined, the Action Agencies have the requisite expertise, and the Service will maintain oversight.³¹⁷ Despite EPA's expertise with respect to pesticides, critics challenge its expertise with respect to the Endangered Species Act. As an attorney for Earthjustice quipped, "If you take the experts out of the room because you don't like what they're saying, that's one way to streamline the registration of dangerous pesticides'"³¹⁸ An attorney for the Natural Resources Defense Council objected to the new regulation arguing that complexity counsels in favor of more protection of listed species and their habitats, not less protection.³¹⁹

The consultation process has played a crucial role in the regulation of agency action. Section 7 is the "institutionalization" of caution.³²⁰ Traditionally, the Services have relied upon the action agencies to notify them when an agency action might affect listed species and their habitats and to notify them early in the process. Without informal consultation, the Services may be excluded from all but the major agency actions, and thus these new regulations have the potential to vitiate the prophylactic benefits of consultation. The regulations threaten to create a culture of willful ignorance. Though the Services may intervene and seek injunctive relief, they would not be able to until later in the planning and implementation of the agency actions upon somehow learning of likely adverse effects. Thus there exists greater potential for adverse impacts to listed species and their habitats.

3. Cooperation

Secretary Norton is said to be emphasizing "cooperation at the local level rather than federal edicts."³²¹ What this policy translates into is less enforcement of federal law while "moving to impose regionally tailored policies that give much more deference to local industry and local commu-

314. Eilperin, *supra* note 311.

315. Eilperin, *supra* note 311; Heilprin, *supra* note 311.

316. Heilprin, *supra* note 311.

317. *See id.*

318. Eilperin, *supra* note 311.

319. Heilprin, *supra* note 311.

320. H.R. Rep. No. 93-412, 93d Cong., at 4-5 (1973).

321. John Tiery, *Trying for Balance at Interior Dept.*, N.Y. TIMES, June 9, 2003, at A26.

nities.”³²² As James Connaughton, chair of the CEQ, explained, “[w]hat we’ve changed is this idea that Northeasterners who don’t really know the West ought to be able to dictate how the West or the Midwest or anyplace else can best achieve environmental improvements.”³²³ Mr. Connaughton intimates that national environmental groups and cappuccino cowboys in the northeast have too much control over national environmental policy. However, laws are still passed by a representative body, *i.e.*, Congress. The agencies, to the contrary, are marching to the steady cadence of the White House and perhaps are not giving due regard to those laws. Tailoring policies to meet regional needs has some common sense appeal; however, one of the bedrock principles of federal environmental law is that at some level there must be uniformity in order to accomplish the goals of environmental law.³²⁴ Congress has established the minimum level of protection and has not given the agencies the authority to change it.

In keeping with the spirit of cooperation, President Bush issued an executive order in August 2004 directing the Department of Interior, among others, to “implement laws . . . in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking.”³²⁵ Environmentalists have criticized the executive order as another attempt to deemphasize the role of the federal government in the management of public lands.³²⁶ The order also requires the Department to act in a manner that “takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources.”³²⁷ This language concerns environmentalists because it could lead the Department to privilege private property rights over public property rights.³²⁸

And criticism of this cooperative approach comes from many different groups. Some libertarians are concerned that Norton spends so much time trying to cooperate with established interest groups such as environmentalists and miners that she is ignoring the free-markets principles with which she was so enamored previously.³²⁹ Some environmentalists have ex-

322. Fagin, *supra* note 195.

323. *Id.*

324. See, e.g., Joshua D. Sarnoff, *The Continuing Imperative (But Only From a National Perspective) for Environmental Protection*, 7 DUKE ENV'T L. & POLY. F. 225, 251-91 (1997); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 600-05 (1996).

325. Exec. Order No. 13,352, 69 Fed. Reg. 52,989, 52,989 (Aug. 26, 2004).

326. Dan Berman, *Bush Orders Departments to Encourage Cooperation with Communities, States*, GREENWIRE, Aug. 30, 2004.

327. Exec. Order No. 13,352, 69 Fed. Reg. 52,989, 52,989 (Aug. 26, 2004).

328. Berman, *supra* note 330.

329. Tierny, *supra* note 265.

pressed skepticism about this approach as well, arguing that the agency is actually only interested in cooperating with industry.

Hogwash, say prominent conservationists. “This isn’t about empowering local communities, it’s about serving the Republicans’ core backers: the extractive industries and big manufacturers,” said Carl Pope, the long-time executive director of the 700,000-member Sierra Club. “Bush campaigned as a populist but he’s governing as a Whig. These guys think the sole proper function is to serve business.”³³⁰

When confronted with such criticism, Norton points to the cooperative projects that the Department sponsors.³³¹ For example, the Cooperative Conservation Initiative is comprised of many programs, including the Cooperative Endangered Species Conservation Fund, the Landowner Incentive program, the Partners for Fish and Wildlife program, and the Private Stewardship program.³³² The Cooperative Endangered Species Conservation Fund provides funding under section 6 of the Act for states and territories to engage in species protection on non-federal land.³³³ In order to qualify for a grant under this program, the state or territory must enter into a “cooperative agreement” with the Service.³³⁴ For fiscal year 2002-03, the Service had approximately \$80 million available for such grants.³³⁵ The Partners for Fish and Wildlife program offers technical and financial assistance to private landowners who would like to restore wildlife habitat on their property.³³⁶ The Private Stewardship Program, with almost \$10 million in funding for fiscal year 2002-03, provides grants to private entities involved in voluntary measures to protect listed, proposed, or candidate species.³³⁷

330. Fagin, *supra* note 195.

331. Tierny, *supra* note 265.

332. U.S. Fish & Wildlife Service, *supra* note 10.

333. *Id.*

334. *Id.*

335. U.S. Fish & Wildlife Service, *supra* note 332. Four grants are available through this fund. The majority of the funds, \$63.8 million or almost 79%, is designated for acquisition of land, with \$51.1 million for the fiscal year 2002-03 designated for HCP Land Acquisition Grants, which states and territories may use to purchase land associated with approved HCPs and \$12.7 million for the Recovery Land Acquisition Grants, which they may use to purchase land in support of approved recovery plans for endangered or threatened species. States and territories may use the Conservation Grants, \$7.5 million to help conserve listed and at-risk species and the Habitat Conservation Planning Assistance Grants, \$6.6 million, to develop HCPs. See U.S. Fish & Wildlife Service, *Partnerships With States: Tools for Helping Communities and Landowners Conserve Species Habitat*, at <http://endangered.fws.gov/landowner/grants.pdf> (March 2003).

336. U.S. Fish and Wildlife Service, *Partners for Fish and Wildlife Program—Our Partners, Goals and Accomplishments*, at <http://partners.fws.gov/old/What%20we%20do/overview.html> (June 24, 2002). Between 1987 and 2002, 27,000 landowners participated in this program. Scarlett, *supra* note 235, at 75.

337. U.S. Fish & Wildlife Service, *supra* note 10.

a. Cooperation as Compensation

Many members of Congress have tried unsuccessfully—session after session—to pass legislation to provide compensation for private landowners whose development activities have been curtailed by operation of the Endangered Species Act. The stories of small landowners losing the ability to develop their land, however, lost considerable force as then Secretary Bruce Babbitt worked to make the Act more “flexible.” Under Babbitt, the Service increased its use of section 10, creating boilerplate HCPs for small landowners.³³⁸ The Service also developed the “No Surprises” policy to give assurances that once the Service issued an incidental take permit under section 10, very little, if anything, more would be required of the permittee even if circumstances regarding the listed species changed or later became known.³³⁹ Babbitt’s actions diffused the situation created by the private property rights activists and dissipated the political will to overhaul the Act.³⁴⁰ Though his actions were well-intentioned and likely meant to save the Act from what appeared to be its imminent demise, Part VII.B.1.b. of this Article critiques the “No Surprises” policy as successful in achieving its primary goal (calming the legislative rancor) but nonetheless misguided.

Despite elimination of some of the most compelling arguments for compensation, the reformists still desired to compensate private landowners. Although unable to amend the ESA directly, the reformers have been able to increase appropriations for certain aspects of the implementation of the Act. Raising the level of funding to the Service would seem neutral to positive for species protection, but the use of that funding in some programs rather than others may ignore the will of the public not to compensate private landowners regardless of the size of their holdings.

With Secretary Norton’s programs and the help of Congress’ appropriations, the Service is accomplishing now what Congress could not do on its own. The argument is that the most effective means for protecting listed species on private land is to provide landowners with financial incentives rather than penalties. In essence, the Service is choosing to pay landowners to comply with existing law. The Service is using existing mechanisms to administer these grants and some environmental interest groups have em-

338. See Eric Pryne, *A Tale of Two Tree Farmers-Specter of Law Causes One Man to Log Early, While Other Struggles to Conserve Habitat*, SEATTLE TIMES, June 19, 1995, at A1. See also Patrick A. Parenteau, *Who’s Taking What? Property Rights, Endangered Species, and the Constitution*, 6 FORDHAM ENVTL. L.J. 619, 623 (1995).

339. 50 C.F.R. § 17.22(b)(5) (2003). See also Patrick A. Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction*, 22 WM. & MARY ENVTL. L. & POLY. REV. 227, 291-92 (1998).

340. Leshy, *supra* note 64, at 213-14.

braced these types of programs.³⁴¹ At the same time, however, the Service is not requesting adequate funding to carry out its primary functions under the Act.

b. Cooperation as Capture

Norton says that the 4 C's apply to relationships "[b]etween landowners and environmentalists; between all levels of government and federal officials; between government leaders and the media; and between all the people of goodwill who share the common goal of protecting our wild places and the habitat[s] that surround them."³⁴² Yet, there is much debate concerning the wisdom of these collaborative efforts.³⁴³ The criticism that EPA faced several years ago could apply with equal force to Norton's approach. EPA began to engage more frequently in negotiated rulemaking³⁴⁴ and to develop programs similar to the Common Sense Initiative³⁴⁵ and Project XL.³⁴⁶ Critics of these programs suggest that these approaches lead to under-representation of certain groups, which then leads to decisions that reflect the desires of the most powerful and well-connected among the stakeholders.³⁴⁷ Thus true consensus may never be reached.

Moreover, consensus can also hamstring efforts toward real solutions. As one commentator discussed with respect to water disputes in the West—

[W]e abdicate our ability to make something happen whenever an outspoken, insistent minority does not want it. Another pernicious result is that we waste tons of money on solutions everyone can buy into but achieve little. Consensus-seeking makes us all feel good. But, in Margaret Thatcher's apt phrase, it is another term for lack of leadership; it

341. See generally Lee P. Breckenridge, *Nonprofit Environmental Organizations and the Restructuring of Institutions for Ecosystem Management*, 25 *ECOLOGY L.Q.* 692 (1999) (discussing the evolving role of non-profit organizations in partnership agreements between private entities and governments).

342. Norton, *supra* note 269.

343. Compare Dennis A. Rondinelli, *A New Generation of Environmental Policy: Government-Business Collaboration in Environmental Management*, 31 *ENVTL. L. REP.* 10891 (2001) with Michael McCloskey, *The Skeptic: Collaboration Has Its Limits*, *HIGH COUNTRY NEWS*, at http://www.hcn.org/servlets/hcn.Article?article_id=1839 (May 13, 1996).

344. For a general discussion of the benefits and drawbacks of negotiated rulemakings, see Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 *CAP. U. L. REV.* 21 (2001).

345. 59 *Fed. Reg.* 57,178 (Nov. 14, 1994) (proposing plan for EPA to work with outside groups to find less expensive means to produce a cleaner environment).

346. See e.g., Thomas E. Caballero, *Project XL: Making it Legal, Making it Work*, 17 *STAN. ENVTL. L.J.* 399 (1998) (describing Project XL and the barriers to its success).

347. See, e.g., McCloskey, *supra* note 343; see also Daniel A. Farber, *Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection*, 2000 *U. ILL. L. REV.* 61, 74 (2000) (proposing something short of the collaborative governance model).

means you must accept minority tyranny over majority will whenever an implacable few have gummed the works.³⁴⁸

Furthermore, these collaborative efforts may provide an opportunity for “collusion” or some heightened version of “agency capture.”³⁴⁹ Collusion will occur because agencies may be tempted to strike bargains with repeat players without giving proper attention to the larger public interest. Also, negotiations naturally will tend to favor the more powerful groups. These repeat players will also take on the mantle of authority and may not adequately disclose their “rational self-interest.” Often, the most powerful group will be industry and if its positions prevail, it can be argued that environmental standards inevitably will be weakened. While such dangers may already exist, the potential for problems will only increase as agencies steer in the direction of a more collaborative model of rulemaking.

In addition, a greater degree of subdelegation can be expected as a result of this move toward collaboration. Subdelegation occurs when an agency delegates some of its statutory responsibilities to another entity.³⁵⁰ The agencies are not only shouldering more responsibility with respect to lawmaking, but they are now faced with the limiting legislation that was enacted in fulfillment of the Contract with America. For example, legislation such as the Unfunded Mandates Reform Act of 1995³⁵¹ placed greater analytic demands on agencies requiring more extensive cost-benefit analysis and risk assessment, as well as adding the burden of reporting to various administrative arms of Congress. At the same time, the White House continues to heap new requirements on the agencies. And because of the limbo that the Act has been in since its last authorization, the agencies have not been provided with adequate resources to implement these demands. Accordingly, agencies can be expected to welcome the opportunity to reallocate regulatory responsibility to private entities, a delegation of power that was not authorized by Congress or the voters.

Norton, however, cannot be credited or blamed for initiating this approach to the enforcement of natural resources law. Former Secretary Bruce Babbitt was also interested in pursuing alternative dispute resolution mechanisms. Babbitt described what he and his agency were doing as “an

348. Marc Reisner, *The New Water Agenda: Restoration, Deconstruction, and the Limits to Consensus*, 20 J. LAND RESOURCES & ENVTL. L. 1, 10 (2000).

349. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 83-87 (1997).

350. See generally Allyson Barker, et al., *The Role of Collaborative Groups in Federal Land Resource Management: A Legal Analysis*, 23 J. LAND RESOURCES & ENVTL. L. 67 (2003) (discussing subdelegation doctrine).

351. 2 U.S.C. §§ 1501-71 (2000).

entirely extralegal process in which stakeholders are convened.”³⁵² Babbitt admitted that this “extralegal, extra-constitutional body” may not be what it ought to be, but he thought it was the only mechanism working in the country at the time.³⁵³

VII. THE EXECUTIVE BRANCH’S INITIATIVES

The role of the Executive Branch has shifted noticeably with respect to the Endangered Species Act since the Contract with America. While neither Congress nor the courts have advanced significantly the positions of various stakeholders, the Department of Interior and the White House have been working diligently to do so.³⁵⁴ As Former Secretary Bruce Babbitt explained, “[w]hat we’re doing is effectively what Congress used to do. We are resolving disputes, creating administrative law, legislating and appropriating. Now how do we do that outside the normal circle of our institutions?”³⁵⁵ In essence, the Department of Interior was exceeding the scope of its authority under the Act and the U.S. Constitution. This trend continues with the Bush Administration.

Business leaders are pleased with the direction the administration is moving with respect to agency action. For example, the vice president for environmental policy of the U.S. Chamber of Commerce explained, “‘I’m very optimistic’ ‘I think we’re going to see a lot of changes that are friendly to business, and a lot of that is going to happen in the agencies. They’re going to make a lot of headway.’”³⁵⁶ Unfortunately, that headway likely will be made “outside the limelight,”³⁵⁷ and yet these changes are terribly disquieting. As a review of the Bush Administration’s track record with regard to wilderness and wildlife points out,

the Bush Administration’s approach . . . has generally not involved the outright declaration of anti-conservation policy objectives. Instead, the

352. Bruce Babbitt, *ADR Concepts: Reshaping the Way Natural Resources Decisions Are Made, in INTO THE 21ST CENTURY: THOUGHT PIECES ON LAWYERING, PROBLEM SOLVING AND ADR*, 13, 14 (CPR Institute for Dispute Resolution and Alternatives to the High Cost of Litigation), Vol. 19, No. 1, Jan. 2001 [hereinafter Babbitt, *ADR Concepts*]; see also Bruce Babbitt, *Remarks to the Society of Range Management*, 29 LAND & WATER L. REV. 399, 401 (1994) (“These new groups bring together ranchers, environmentalists and interested citizens to meet over coffee at the kitchen table and out on the range to listen to each other to develop mutual confidence and to search for consensus in solving public land issues.”).

353. Babbitt, *ADR Concepts*, *supra* note 352, at 15.

354. See *id.* at 14 (discussing congressional abdication and the failures of courts).

355. *Id.* at 14-15.

356. Fagin, *supra* note 195.

357. See Paul Stanton Kibel, *Nature of the Beast: An Introduction to the Issue*, 33 GOLDEN GATE U. L. REV. 333, 336-37 (2003) (describing how George W. Bush’s Administration has “quietly” backed away from the Clinton Administration’s direction).

administration's public pronouncements have continued to stress the importance of protecting wilderness areas and endangered species. Notwithstanding these pronouncements, however, significant changes appear to be afoot. Through the settling of industry-initiated lawsuits against federal agencies, unannounced shifts in internal agency policy, and discretionary inaction on proposals inherited from the Clinton Administration, President George W. Bush has quietly set a new course for wilderness and wildlife policy.³⁵⁸

That course has been set in part by encouraging agencies to develop "a smarter regulatory process based on *sound science* and *economics*: a smarter process adopts new rules when market and local choices fail, modifies existing rules to make them more effective or less costly and rescinds outmoded rules whose benefits no longer justify their costs."³⁵⁹ From the economics standpoint, the administration is expanding upon an Executive Order issued by former President Bill Clinton.³⁶⁰ Under this order, an agency must assess the costs and benefits of proposed regulation and only propose the regulation if its benefits justify the costs.³⁶¹ If an agency proposes "significant regulatory action," it must provide OMB with additional information regarding the costs and benefits expected from the regulatory action and the costs and benefits of any feasible alternatives.³⁶² In 2003 OMB provided guidance to the agencies on how to develop the required "regulatory analysis," with the bulk of it being cost-benefit analysis.³⁶³

The administration has also issued the rallying cry for the use of "sound science" in regulatory decisionmaking. "Ours is going to be an administration that makes decisions on science, what's realistic, common-sense decisions."³⁶⁴ This approach intentionally and unintentionally can

358. *Id.*

359. Graham, *supra* note 2 (emphasis added).

360. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2000) (seeking to "reform and make more efficient the regulatory process").

361. *Id.* ("Each agency shall assess both the costs and the benefits of the intended regulation and . . . propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.").

362. *Id.*

363. OMB Circular A-4, *Regulatory Analysis*, Sept. 17, 2003 at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf> [hereinafter OMB Circular A-4]. In the event that agencies do not follow this guidance, OMB is using what is known as the "dreaded return letter" and other forms of persuasion. Graham, *supra* note 2. The return letter is one that OMB may use to "return" a proposed rule to an agency for reconsideration if OMB makes any number of determinations, including that the quality of the agency's analysis is unacceptable or the standards adopted are not supported by the analysis. John D. Graham, *Memorandum for the President's Management Council re Presidential Review of Agency Rulemaking by OIRA*, at 6 at <http://www.whitehouse.gov/omb/pubpress/2001-38-attach.pdf>. (Sept. 20, 2001) (emphasis added).

364. Press Release, White House, Press Conference by the President (Mar. 29, 2001) at <http://www.whitehouse.gov/news/releases/2001/03/20010329.html>.

lead to intolerable delays or even “analysis paralysis” wherein the agency undertakes to study and restudy issues such that no action is ever taken. Thus, this call for sound science may be little more than an elaborate, expensive delay tactic.

Also “White House officials say ‘sound science’ fits with Bush’s market-based approach to environmental protection. The administration says it’s possible to balance the need for biodiversity, clean air and clean water with economic growth, energy production and reduced regulation.”³⁶⁵ One market-based approach is the development of conservation banks for critical habitat.³⁶⁶ Another is the development of the “No Surprises” policy to provide an incentive for private landowners to protect listed species on their land. This policy, however, is in effect deregulation, exceeding the scope of the Department of Interior’s statutory authority. This part of the Article will explore the implications of these policies for species protection.

A. *The Problem with the ESA and Cost-Benefit Analysis*

Quantifying the costs of compliance with existing law seems to be a practical idea. The costs of habitat conservation plans, mitigation measures, loss of intended economic use of land, etc., seem readily quantifiable. Indeed, at first glance, such a requirement would appear to be a good, “common sense” policy to implement. But an examination of the goals and provisions of the ESA call this common sense approach into question because one then must turn to the valuation of threatened and endangered species, critical habitat, and biodiversity. There’s the rub. Here policy-makers encounter the difficulty, the impossibility, or the folly of quantifying in dollars the value of biodiversity.

Some commentators suggest that environmentalists have evaded questions of efficiency and cost-benefit analyses,³⁶⁷ but environmentalists respond that cost-benefit analysis ignores “important ‘noneconomic’ values or that economic analyses are inadequate means to evaluate decisions af-

365. Julie Deardorff, *The Politics of Nature; Bush Has Said his Environmental Strategies Won’t Harm Nature or Man—A Claim Some Doubt*, CHI. TRIB., Dec. 19, 2003, at C1.

366. U.S. Dept. of Interior, Guidance for the Establishment, Use, and Operation of Conservation Banks 2-19 (May 2, 2003) at <http://endangered.fws.gov/policies/conservation-banking.pdf>. The Department of Interior released guidance without a notice and comment period. *Interior Department Issues First Guidance on Conservation Banks for Habitat Protection*, DAILY REP. FOR EXECUTIVES (BNA), No. 103, at A-26 (May 29, 2003).

367. See, e.g., BRYAN G. NORTON, WHY PRESERVE NATURAL VARIETY 28-45 (1987); David Ehrenfeld, *Why Put a Value on Biodiversity?*, in BIODIVERSITY 212, 214-15 (E.O. Wilson ed. 1988) (“The sad fact that few conservationists care to face is that many species, perhaps most, do not seem to have any conventional value at all, even hidden conventional value.”).

fecting the environment.”³⁶⁸ And in the attempted “translation” of these values into dollar values, we lose what is most important to us about the environment.³⁶⁹ Moreover, Federico Cheever argues that it is unwise to weigh the value of endangered listed species against the cost of their protection. “Once a species is perched on the brink of extinction, compromise becomes unacceptably dangerous; what may look like ‘reasonable’ accommodation may lead to annihilation.”³⁷⁰

Putting aside these criticisms of applying this analytic framework to decisions about endangered species, more difficulties remain. One such difficulty with quantification stems in part from the reasons for preserving biodiversity. There are a number of conceptual frameworks in this area that include distinguishing between anthropocentric and biocentric rationales,³⁷¹ demand values and transformative values,³⁷² and utilitarian, esthetic, and ethical bases for preservation.³⁷³ Many of these reasons hinge upon speculative calculations about what discoveries will or could be made in the future which make quantification difficult.³⁷⁴

Despite these limitations, many attempts have been made to quantify the value of preservation. The first and most obvious route for cost-benefit analysis is to attempt to assign some market value to the species. Yet many would argue that because no market exists for many species, cost-benefit analysis is not a rational decision-making tool.³⁷⁵ However, economists have made attempts to hypothesize a market for these species “by determining what the individual would be willing to pay . . . for an increment of . . . [the good] or what compensation the individual would be willing to

368. BRYAN G. NORTON, *supra* note 340, at 28.

369. See FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 39-40 (2004).

370. Federico Cheever, *Butterflies, Cave Spiders, Milk-Vetch, Bunchgrass, Sedges, Lilies, Checker-Mallows and Why the Prohibition Against Judicial Balancing of Harm Under the Endangered Species Act is a Good Idea*, 22 WM. & MARY ENVTL. L. & POL’Y REV. 313, 315 (1998).

371. See, e.g., PAUL W. TAYLOR, RESPECT FOR NATURE 44-53 (1986); TIMOTHY BEATLEY, ETHICAL LAND USE: PRINCIPLES OF POLICY AND PLANNING 6-9 (1994) (describing rationales as ranging from utilitarian and instrumental views to those that focus upon the intrinsic or inherent value of other species).

372. See, e.g., BRYAN G. NORTON, *supra* note 367, at 6-14 (describing values we place on things we demand now versus values to be gained in the future because the existence of the thing and the experience of the thing transform us).

373. See, e.g., Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 269-75 (1991).

374. Congressional debates have touched upon this quandary in citing the example of the discovery of the medicinal value of the yew tree. 141 CONG. REC. S3576 (daily ed. Mar. 7, 1995) (statement of Sen. Boxer).

375. Cf. BRYAN G. NORTON, *supra* note 367, at 28.

accept as compensation for the decrement of it.”³⁷⁶ A number of criticisms have been launched against the use of this hypothetical or contingent valuation, however.³⁷⁷ First, people’s expressed preferences, that is what they say they would do, often contradict their revealed preferences, what they have done.³⁷⁸ Also, the answers to questions about one’s willingness to pay or willingness to accept compensation vary with the structure of the survey.³⁷⁹ For example, the order of questions and reminders of budgetary constraints often change the responses.³⁸⁰ Furthermore, the amount people are willing to pay for preservation or to accept as compensation for degradation does not move in a step-wise progression. Greater gains or losses are not matched by equal changes in amount of money to be paid or accepted.³⁸¹

Admittedly, OMB’s guidance to the agencies does acknowledge that some values may not be expressed in terms of monetary or physical units and that attempting to use cost-benefit analysis in those instances is “less useful” and “can even be misleading.”³⁸² But more troubling is the ability of this requirement “to reorder agency priorities or to stall or foreclose some protective rulemakings,”³⁸³ despite recognition of its limitations. This policy objective mimics one important aspect of the various amendments proposed by Congress that would require agencies to engage in “takings impact analysis.”³⁸⁴ That proposed legislation would have required the U.S. Attorney General to certify that agency actions were in compliance with

376. *Id.* See also BEATLEY, *supra* note 371, at 50-52 (1994) (sampling various contingent valuation techniques).

377. See generally CONTINGENT VALUATION: A CRITICAL ASSESSMENT (Jerry A. Hausman ed., 1993).

378. Peter Passell, *Disputed New Role for Polls: Putting a Price Tag on Nature*, N.Y. TIMES, Sept. 6, 1993, at A1.

379. See, e.g., Jeffrey C. Dobbins, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages*, 43 DUKE L.J. 879, 883 (1994) (“The bulk of the economic debate regarding . . . [contingent valuations] has focused on the sensitivity of the results—or the lack thereof—to factors like the framing of questions, the means of conducting the survey . . .”); ROBERT CAMERON MITCHELL & RICHARD T. CARSON, USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD 214-16 (1989) (discussing the affect of the survey instrument on reliability).

380. Passell, *supra* note 378.

381. See *id.* (citing a study which showed that the public was willing to spend the same amount to save 2,000; 20,000; and 200,000 migratory birds from oil-covered ponds).

382. OMB Circular A-4, *supra* note 363.

383. Wendy E. Wagner, *The “Bad Science” Fiction: Reclaiming the Debate Over the Role of Science in Public Health and Environmental Regulation*, 66 LAW & CONTEMP. PROBS. 63, 123 (2003).

384. E.g., Private Property Rights Act of 2001, S. 1412, 107th Cong. § 5 (2001); Private Property Protection Act of 2001, H.R. 212, 107th Cong. § 5 (2001); Private Property Rights Act of 1999, S. 246, 106th Cong § 5 (1999); Ominbus Property Rights Act of 1997, S. 781 105th Cong. § 403 (1997); Ominbus Property Rights Act of 1995, S. 605, 104th Cong. § 403 (1995).

Executive Order 12,630 or similar procedures to assess the potential for taking private property.³⁸⁵ Executive Order 12,630 required every agency to “identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications.”³⁸⁶ Supporters of such proposals believed that it would force bureaucrats to address the government’s obligations under the Fifth Amendment rather than ignore them.³⁸⁷ On the other hand, these proposals were thought merely to have added another layer of bureaucracy to decision-making.³⁸⁸ And self-interested parties could use them to delay governmental action that is considered to be desirable for the country.³⁸⁹ Indeed, rather than making government officials analyze the impact of their actions, the proposed legislation perhaps was an attempt to frighten those officials away from performing their statutory obligations.³⁹⁰ As John Graham explains, OMB is “using both the carrot and the stick” so that “agencies are beginning to invite OMB into the early stages of regulatory deliberations, where our analytical approach can have a much bigger impact.”³⁹¹ And when invited in, this administration has the opportunity to use the policy pronouncement to excuse itself from implementing the Act as intended by Congress. Below is a discussion of how the Executive Branch may use cost-benefit analysis to abdicate its responsibilities under the Act for listings and designations of critical habitat.

1. Listing Species

Environmental law is one of the few areas in which consideration of cost often is strictly prohibited.³⁹² For example, with respect to listing decisions, the ESA requires the Secretary to make those decisions “solely on

385. Private Property Protection Act of 2001, H.R. 212, 107th Cong. § 5 (2001).

386. Exec. Order 12,630, 3 C.F.R. 554 (1988), reprinted in 5 U.S.C. § 601 (2000).

387. Lynda J. Oswald, *Property Rights Legislation and Police Power*, 37 AM. BUS. L.J. 527, 543 (Spr. 2000).

388. *Id.*

389. Robert C. Ellickson, *Takings Legislation: A Comment*, 20 HARV. J.L. & PUB. POL’Y 75, 78-79 (1996).

390. Compare Mark Tushnet, *The Canon(s) of Constitutional Law*, 17 CONST. COMMENT. 187, 195 (2000) (“Even there, however, the constitutional claim is more likely to be a threat used to intimidate the other side in negotiations.”), and Glenn P. Sugamel, “*Takings*” *Bills Threaten People, Property, Zoning, and the Environment*, 31 URB. LAW. 177, 193 (Spr. 1999) (arguing that property rights bills would allow developers to intimidate municipalities into approving inappropriate projects), with Daniel Pollak, *Have the U.S. Supreme Court’s 5th Amendment Takings Decisions Changed Land Use Planning in California* (California Research Bureau, California State Library), Mar. 2000, at 77-81 (reporting that while most municipalities surveyed did not make major changes in their regulation of land use, a significant minority did report that they have changed their strategies).

391. Graham, *supra* note 2.

392. See, e.g., Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000).

the basis of the best scientific and commercial data available to him”³⁹³ The plain language of this provision appears to bar absolutely consideration of the economic impacts of listing decisions, and thus concern about the use of cost-benefit analysis may be misplaced. Yet, when one carefully examines the implementation of the Act as Oliver Houck has done, the provision’s language is no longer plain.³⁹⁴ In the context of what Houck describes as “exploitation of some very limited flexibility Congress provided for listing, and chronic resistance to the Act itself,”³⁹⁵ the Department of Interior has made this and other provisions of the Act more discretionary than mandatory.³⁹⁶

This discretion coupled with the cry for more cost-benefit analysis allows the Service to slow down the listing process, and during this slow-down more species become extinct. Given the statute’s language, it is unlikely that the Service will cite cost-benefit analysis as a reason for denying a petition to list a species or for refusing to take the initiative itself. But the force of this rhetoric could serve as a significant unspoken rationale of its decisions not to list, and as such may do violence to the “environmental ethics”³⁹⁷ underlying the statute.

Consider the example of the northern spotted owl. Environmental groups sued the Department of Interior for its failure to list the northern spotted owl as threatened or endangered in the face of biological evidence of its endangerment.³⁹⁸ The listing decision may not have been problematic for the Secretary absent the requirements of section 4(a)(3). Section 4(a)(3) requires that the Secretary upon listing “to the extent prudent and determinable . . . designate any habitat of such species which is then considered to be critical habitat.”³⁹⁹ Only at this point, may the Secretary explicitly consider the economic impact of her decisions. But with the need for economic analysis overshadowing implementation of the Act, the Secretary may be hesitant to carry out her obligations with respect to one portion of the Act because she does not wish to set into motion the seemingly non-discretionary processes described below. The reformers worry that the Secretary does not consider the socioeconomic impact of her determinations

393. 16 U.S.C. § 1533(b)(1)(A) (2000) (emphasis added).

394. See generally Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993).

395. *Id.* at 285.

396. See *id.* at 297 (stating that the Endangered Species Act permitting system is conducted “largely at the Department’s discretion”).

397. See Alyson C. Flournoy, *In Search of an Environmental Ethic*, 28 COLUM. J. ENVTL. L. 63, 65 n.5 (2003) (defining “environmental ethics”).

398. *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988).

399. 16 U.S.C § 1533(a)(3)(A)(i) (2000).

thus setting the stage for inevitable political “train wrecks;”⁴⁰⁰ the conservationists argue that the Secretary impermissibly takes into account the socioeconomic impact of future determinations and thus lists an artificially low number of species to avoid political “train wrecks.”⁴⁰¹

2. Designating Critical Habitat

As soon as the Secretary makes the initial decision to list a species, without factoring in economics, she appears to be required statutorily to take a number of non-discretionary actions. One of those is that the Secretary is to concurrently with making the decision to list a species, to the extent prudent and determinable, also designate critical habitat.⁴⁰² Yet as Houck explains, in many instances the Department has “simply refused to designate critical habitat at all.”⁴⁰³

In describing the Interior’s reluctance and/or refusal to designate and protect critical habitat during Bruce Babbitt’s tenure, lawyers from the EarthJustice Legal Fund argued that “[t]his action—or inaction—by the Department [of Interior] is a deliberate subversion of public process by an agency that has made a conscious decision not to enforce a law that the vast majority of the American public supports.”⁴⁰⁴ This behavior has apparently continued with Secretary Gale Norton. The administration has been described as entering into “behind-the-scenes settlements with industry litigants that are challenging critical habitat designations.”⁴⁰⁵ The settlements

400. Former U.S. Department of Interior Secretary Bruce E. Babbitt repeatedly used the term “train wrecks” to describe the conflicts between landowners and the ESA. *See, e.g.*, Marla Cone, *Protection for Owl Challenged*, L.A. TIMES, Oct. 7, 1993, at A3 (“‘economic train wrecks’ that occur when the federal government steps in with the Endangered Species Act to save species headed toward extinction”).

401. *See* Wiygul & Weiner, *supra* note 197, at 13 (“Put simply, DOI has bowed to political pressure from property rights groups and corporate developers.”).

402. 16 U.S.C. § 1533(a)(3)(A)(i) (2000).

403. Houck, *supra* note 394, at 297.

404. Wiygul & Weiner, *supra* note 197, at 13. *See also* Thomas F. Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 224 (2000) (noting that as of 1999 critical habitat had been designated for only ten percent of the listed species); Houck, *supra* note 394, at 302 (1993) (noting that as of 1992, critical habitat had been designated for only sixteen percent of the listed species). As of June 2003 it was estimated that the Service had designated critical habitat for approximately one-third of the listed species. U.S. GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES: FISH AND WILDLIFE SERVICE USES BEST AVAILABLE SCIENCE TO MAKE LISTING DECISIONS, BUT ADDITIONAL GUIDANCE NEEDED FOR CRITICAL HABITAT DESIGNATIONS 6, 8 (Aug. 2003) (stating that 1,263 species were listed as endangered and that, of those, 417 had critical habitat designated) at <http://www.gao.gov/new.items/d03803.pdf>.

405. Michael Senatore et al., *Critical Habitat at the Crossroads: Responding to the G. W. Bush Administration’s Attacks on Critical Habitat Designation Under the ESA*, 33 GOLDEN GATE U. L. REV. 447, 448 (2003).

typically involve a remand of the designation to allow for extensive economic impact analysis while no critical habitat is protected.⁴⁰⁶

Another way to assure that few designations are made is to include the cost of listing the species in the economic impact analysis for the designation of critical habitat for that species. Before *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*,⁴⁰⁷ the Department of Interior used an “incremental baseline approach.” Under such an approach, the costs from listing the species were ignored because the decision to list a species must be made *solely* on the basis of the best available scientific and commercial data. In *New Mexico Cattle Growers*, the industry challengers argued, however, that Congress intended for all costs, including those associated with listing, to be included in the economic impact analysis for designations of critical habitat.⁴⁰⁸ The Service responded that if it were required to abandon this approach, it would improperly consider economic impacts in its listing decisions.⁴⁰⁹ The Court of Appeals for the Tenth Circuit, however, agreed with the industry challengers and rejected the baseline approach.

The Service did not appeal the ruling. Then, “[w]ithout soliciting public comment or waiting for the judgment of any other Circuit Court, and without revisiting its controversial assertions about the redundancy of critical habitat, the Bush Administration has quietly adopted the *New Mexico Cattle Growers* holding as administration policy”⁴¹⁰ for all Circuits.⁴¹¹ Indeed, Secretary Norton and industry plaintiffs urged the U.S. District Court for the District of Columbia to adopt the Tenth Circuit’s approach.⁴¹² The district court declined that invitation but vacated the Service’s use of the baseline approach in two final rules designating critical habitat and ordered it to revise the rules by July 30, 2004.⁴¹³ If the Service is correct that aban-

406. *Id.* at 448, 463-66, 465 n.103.

407. 248 F.3d 1277 (10th Cir. 2001) (industry challenge of Service’s economic analysis of designating critical habitat for the southwest willow flycatcher).

408. *Id.* at 1280 (“baseline approach to measuring economic impact . . . is an erroneous construction, and thus, a violation of the ESA”).

409. *Id.* at 1285.

410. *Endangered Species Act Before the Comm. on Senate Environment and Public Works, Subcomm. on Fisheries, Wildlife and Water*, 108th Cong. (2003) (statement of John Kostyack, Senior Counsel, National Wildlife Federation), available at 2003 WL 11717440 [hereinafter Kostyack].

411. *Home Builders Associations of Northern California v. Norton*, 293 F. Supp. 2d 1, 4 (D.D.C. 2002).

412. *Building Industry Legal Defense Foundation v. Norton*, 231 F. Supp. 2d 100, 102 (D.D.C. 2002).

413. *Id.* at 105, 108-09. The Department states that it will propose critical habitat for these species on April 1, 2004. Unified Agenda, Proposed Rule Stage, 68 Fed. Reg. 73,091-01 (Dec. 22, 2003). Be-

doning the baseline approach will inject inappropriately economic impacts into the listing of new species, there is every expectation that listing new species will become increasingly difficult.⁴¹⁴

B. *Sound Science*

The Executive Branch is also at least rhetorically endorsing the use of “sound science,” with peer review as its centerpiece.⁴¹⁵ Pursuant to the Information Quality Act,⁴¹⁶ an appropriations rider, OMB directed agencies to (1) “[i]ssue their own information quality guidelines” for the information they disseminate, (2) establish administrative procedures to allow the public to challenge the correctness of information that the agencies disseminate, and (3) report periodically to OMB on the complaints the agencies receive about the accuracy of their information.⁴¹⁷ Citing the Information Quality Act as its statutory authority, OMB recently proposed guidance for agencies to engage in a peer-review process,⁴¹⁸ because “[a] more uniform peer review policy promises to make regulatory science more competent and credible, thereby advancing the administration’s ‘smart regulation’ agenda.”⁴¹⁹

This appropriations rider and the ensuing executive actions replay a theme of the Contract with America⁴²⁰ and bills that have been introduced

cause the court vacated the baseline approach, the Service will in effect have to develop another methodology for economic impact analysis by the end of July 2004 as well.

414. Kostyack, *supra* note 410.

415. *But see* Jennifer 8. Lee, *The President’s Budget Proposal: The Outlays—Environment; Research Budget is Lowered Again*, N.Y. TIMES, Feb. 3, 2004, at A16 (noting that the budget for the agency’s competitive grants program, which pays for studies outside the agency, had been cut by about a third from previous levels).

416. Pub. L. No. 106-554, § 515(a), 114 Stat. 2763, 2763A-153-54 (2000).

417. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452, 8458 (Feb. 22, 2002). The Department of Interior’s guidelines became effective on October 1, 2003. U.S. Fish and Wildlife Service, Information Quality Guidelines 2, at <http://irm.fws.gov/infoguidelines/FWS%20Information%20Quality%20Guidelines.pdf> (last visited Feb. 28, 2004).

418. Proposed Bulletin on Peer Review and Information Quality, 68 Fed. Reg. 54,023 (Sept. 15, 2003); *Politics, Science Like Oil, Water*, ATLANTA J. CONST. Jan 20, 2004, at 10A.

419. Press Release, Office of Management and Budget, OMB Proposes Draft Peer Review Standards for Regulatory Science (Aug. 29, 2003) at <http://www.whitehouse.gov/omb/pubpress/2003-34.pdf>.

420. *E.g.*, Comprehensive Regulatory Reform Act of 1995, S. 343, 104th Cong. § 637 (1995) (requiring agencies to develop program for independent, external peer review); Endangered Species Fair Regulatory Process Reform Act, H.R. 4556, 105th Cong. §§ 2, 4 (1998) (requiring independent peer review, issuance of rules to establish criteria to be met for the data, inclusion of species field observation studies in the data, and “substantial evidence” for the listing process).

in the years following it.⁴²¹ For example, in the Sound Science Saves Species Act of 2002, Congress proposed that in order to designate critical habitat, the Service would be required to “give greater weight to scientific or commercial data that is empirical or has been field-tested or peer-reviewed.”⁴²² Another proposal would have required all listing decisions to be supported by “clear and convincing evidence,”⁴²³ and such decisions would have to be reviewed by an independent board to determine the “sufficiency of all relevant scientific information and assumptions.”⁴²⁴

This emphasis on the use of sound science implies that one of the major problems with the Endangered Species Act is that the Fish and Wildlife Service is making decisions based upon unreliable or untested information. The Act requires the Secretary to make her decisions based on “the best scientific and commercial data available.”⁴²⁵ Though the statute does not provide much guidance on this criteria, in 1994 the Fish and Wildlife Service along with the National Marine Fisheries Service and the National Oceanic and Atmospheric Administration adopted a policy to use a wide variety of sources of information, including informal sources such as oral, traditional, or anecdotal, as well as more formal sources such as peer-reviewed scientific studies.⁴²⁶ The Service committed itself to evaluating the information impartially and ensuring that any information used to implement the ESA would be reliable and credible in addition to representing “the best scientific and commercial data available.”⁴²⁷ The Service adopted another joint policy to incorporate independent peer review.⁴²⁸

Though the Service has taken these affirmative steps to ensure that it bases its decisions upon reliable and credible scientific information, the perception has arisen in Congress and the administration that the Service is using “unsound” science to make its determinations. There is scant evi-

421. *E.g.*, Sound Science For Endangered Species Act Planning Act of 2002, H.R. 4840, 107th Cong. (2002).

422. Scientifically Identifying the Need for Critical Habitat Act, H.R. 2602, 108th Cong. § 3(a) (2003); *see also* Sound Science for Endangered Species Decisionmaking Act of 2002, S. 1912, 107th Cong. (2002); Endangered Species Fair Regulatory Process Reform Act, H.R. 4556, 105th Cong. § 2 (1998).

423. Sound Science Saves Species Act of 2002, H.R. 3705, 107th Cong. § 3(a) (2002).

424. *Id.* § 3(c).

425. *E.g.*, 16 U.S.C. §§ 1533(b)(1)(A), 1536(c)(1) (2000).

426. Notice of Interagency Cooperation Policy on Information Standards Under the Endangered Species Act, 59 Fed. Reg. 34,271 (July 1, 1994).

427. *Id.*

428. Notice of Interagency Cooperation Policy for Peer Review in Endangered Species Act Activities, 59 Fed. Reg. 34,270 (July 1, 1994).

dence, however, that this perception bears any relation to reality.⁴²⁹ In fact a 1999 study of the use of science in habitat conservation plans found that the Service was making good use of the available data.⁴³⁰ Instead, as Kathleen McGinty, former chair of CEQ, “denounced the reform efforts [of the 104th Congress] as hiding a destructive deregulatory agenda beneath rhetoric about sound science,”⁴³¹ arguably, the same could be said of the current administration’s efforts.

1. Subversive Mechanisms

Some would argue that through the proposed guidance on peer review, OMB is trying hijack the process from the agencies⁴³² to advance a subversive, deregulatory agenda. Outlined below are some of the guidance’s key provisions to that end. For example, under the proposal, each agency would be required to submit a report to OMB at least once a year with a summary of “existing, ongoing, or contemplated scientific or technical studies that might (in whole or in part) constitute or support significant regulatory information the agency intends to disseminate.”⁴³³ OMB may require “formal, independent, external peer review” of any agency information that it selects,⁴³⁴ and if requested, the agency must discuss with OMB a specific document and whether the planned review of that document is sufficient.⁴³⁵ The proposal also discourages the use of academic experts who have received grants from agencies but does not issue similar warning against using experts with connections to regulated industries.⁴³⁶ Additionally, agen-

429. Cf. Wagner, *supra* note 383 (examining three sound science reforms and finding that none of them “are supported by meaningful evidence that the purported problem—‘bad science’, or more precisely, science that is methodologically unsound—occurs with any regularity in administrative decisionmaking”).

430. Peter Kareiva, et al., *Using Science in Habitat Conservation Plans 4*, at <http://www.nceas.ucsb.edu/nceas-web/projects/97KAREI2/hcp-1999-01-14.pdf> (last visited on Feb. 28, 2004). The study noted that the Service did not have the resources to obtain the necessary data. *Id.* The study urged the Service to err on the side of caution and not approve habitat conservation plans when data is scarce, though it acknowledged that the statute does not require the Secretary to obtain more data but to base her decision on the best available data. *Id.* at 45-46. Thus, the study seemed to question the quantity not the quality of the science used in the decisionmaking process.

431. Ronald Begley, *Deregulatory Moves in Congress Meet Resistance from Administration*, CHEM. WK., Feb. 22, 1995, 1995 WL 10012152.

432. *Politics, Science Like Oil, Water*, ATLANTA J. CONST., Jan. 20, 2004, at A10.

433. Proposed Bulletin on Peer Review and Information Quality, 68 Fed. Reg. 54,023, 54,029 (Sept. 15, 2003).

434. *Id.* at 54,027.

435. *Id.* at 54,028.

436. Rick Weiss, *Peer Review Plan Draws Criticism Under Bush Proposal: OMB Would Evaluate Science Before New Rules Take Effect*, WASH. POST, Jan. 15, 2004, at A19. See Proposed Bulletin on Peer Review and Information Quality, 68 Fed. Reg. 54,023, 54,025, 54,027 (Sept. 15, 2003); See also Letter from Linda Greer, Director, Health and Environment Program, Natural Resources Defense

cies must provide OMB with a copy of any request from the public for correction of information within seven days of receipt.⁴³⁷ Further, upon OMB's request, an agency must provide a copy of its draft response at least seven days before issuing it, and OMB must approve the response before issuance.⁴³⁸

One motivation for wresting control of the peer review process is that according to a report prepared for Representative Henry A. Waxman, the administration is skewing science on a number of issues, many of which have significant economic impact for President Bush's large corporate donors.⁴³⁹ The report argues that the administration has used three basic strategies: (1) manipulating the composition of scientific advisory committees, (2) suppressing or distorting scientific information, and (3) interfering with scientific research.⁴⁴⁰ Similarly, a report prepared by the Democratic staff of the House Committee on Resources accuses the Department of Interior of manipulating scientific information for political purposes.⁴⁴¹ Because Interior often appears to ignore the expert advice of its own scientists, the report dubs the administration's scientific approach to regulation "weird science."⁴⁴² One climate policy expert observed, "[p]olitical staff are becoming increasingly bold in forcing agency officials to endorse junk science."⁴⁴³ More than sixty prominent scientists, including twenty Nobel Laureates, signed a statement criticizing the Bush Administration for its misuse of science.⁴⁴⁴ Below are some specific examples of how the admini-

Council to Dr. Margo Schwab, Office of Management and Budget 2-5 (Dec. 11, 2003), at <http://www.whitehouse.gov/omb/inforeg/2003iq/72.pdf> (arguing that if scientists who receive government funding are eliminated as possible peer reviewers, the result would be the use of scientists whose research is funded by the regulated industries); Letter from Winston H. Hickox, Agency Secretary, California Environmental Protection Agency, to Dr. Margo Schwab, Office of Management and Budget 2, at <http://www.whitehouse.gov/omb/inforeg/2003iq/64.pdf> (Oct. 28, 2003) (citing need to address potential for economic conflicts of interest beyond that of reviewers who have worked with an agency or received a grant from an agency).

437. Proposed Bulletin on Peer Review and Information Quality, 68 Fed. Reg. 54,023, 54,029 (Sept. 15, 2003).

438. *Id.*

439. MINORITY STAFF OF COMM. ON GOV'T REFORM, POLITICS AND SCIENCE IN THE BUSH ADMINISTRATION 2 at http://www.house.gov/reform/min/politicsandscience/pdfs/pdf_politics_and_science_rep.pdf (Nov. 13, 2003) (prepared for Rep. Henry A. Waxman).

440. *Id.* at 2-3.

441. DEMOCRATIC STAFF OF COMM. ON RESOURCES, WEIRD SCIENCE: THE INTERIOR DEPARTMENT'S MANIPULATION OF SCIENCE FOR POLITICAL PURPOSES at <http://www.ourforests.org/weirdscience.pdf> (Dec. 17, 2002) (Rep. Nick J. Rahall).

442. *Id.* at 1.

443. Andrew C. Revkin & Katharine Q. Seelye, *Report by the E.P.A. Leaves Out Data on Climate Change*, N.Y. TIMES, June 19, 2003, at A1.

444. *RSI [Restoring Scientific Integrity] Signatories* at http://www.ucsusa.org/global_environment/rsi/page.cfm?pageID=1335 (last revised Apr. 16, 2004).

stration's use of science (sound, weird, junk or otherwise) has impacted species protection negatively.

2. Pernicious Results

Many believe that OMB's proposal is designed "to inject White House politics into the world of science and to use the uncertainty that surrounds science to delay new rules that could cost regulated industries millions of dollars."⁴⁴⁵ Indeed, the promotion of "sound science" has provided the Bush Administration's basis for delaying several new regulations,⁴⁴⁶ yet the absence of science has not prevented the administration from dismantling current regulations.⁴⁴⁷ On the side of increasing or even maintaining environmental protections, this strategy is important, for as Oliver Houck points out, "to decision-makers who require irrefutable proof, the uncertainty is fatal."⁴⁴⁸ According to Houck, what President Bush means by using sound

445. Weiss, *supra* note 436; *see also* Greer, *supra* note 414, at 6 (proposal "will magnify the excessive delays that already plague the rulemaking process"); Hickox, *supra* note 409, at 1, 3 (commenting that proposed guidelines would burden the agencies and delay the release of information needed for science-based regulation).

446. *See, e.g.*, Seth Borenstein, *Scientists Frustrated with Administration*, HOUS. CHRON., July 24, 2003, at 5A. In March 2001, the Bush Administration withdrew the new arsenic standards established in the waning days of the Clinton Administration. Eric Pianin & Cindy Skrzycki, *EPA to Kill New Arsenic Standards; Whitman Cites Debate On Drinking Water Risk*, WASH. POST, Mar. 21, 2001, at A1. In April 2001, EPA announced that a new rule would be released in eleven months, after a study by the National Academy of Sciences. Mike Allen, *EPA to Lower Level for Arsenic in Water*, WASH. POST, Apr. 19, 2001, at A8. EPA then reinstated the rule seven months later after the study showed an even greater risk than had been thought previously to exist. As Senator Barbara Boxer explained, "They ordered a new study as a delaying tactic, and it came back and bit them in the arsenic." Edward Walsh, *Arsenic Drinking Water Standard Issued; After Seven-Month Scientific Review, EPA Backs Clinton-Established Levels*, WASH. POST, Nov. 1, 2001, at A31.

447. *See* Ann McFeatters, *Bush Accused of Hiding Rule Rollbacks with War*, PITTSBURGH POST-GAZETTE, June 8, 2003, at A10 (listing examples of the Bush Administration using "sound science" to justify relaxing regulations). For example, in changing in the Clean Air Act's New Source Review regulations to give industry greater flexibility to modify their facilities without meeting more stringent standards, EPA cited no evidence that the changes would not adversely affect air quality. *See Politics of Pollution*, DENV. POST, Sept. 2, 2003 at B7, at 2003 WL 5510408 (citing General Accounting Office's statement that EPA had no scientific data supporting its assertion that the new rules will not make air pollution worse).

448. Oliver Houck, Editorial, *How Industry Hijacked 'Sound Science'*, TIMES-PICAYUNE, Jan. 29, 2004, at 7. Consider the delay tactic concerning global warming and the Kyoto Protocol. Rather than join the Protocol, the Bush Administration has recommended a 10-year study of the issue because the science is too uncertain. Maureen Lorenzetti, *Climate Control*, OIL & GAS J., Aug. 11, 2003, 2003 WL 9183441; Global Climate Change Policy Book, Exec. Summ., Feb. 2002 at <http://www.whitehouse.gov/news/releases/2002/02/climatechange.html>. Apparently following the advice of the Luntz memo, the Administration has worked "to make the lack of scientific certainty the primary issue in the debate." Luntz Memo, *supra* note 85, at 137.

science is, “[w]e will not act until the science is conclusive, *i.e.*, a cold day in hell.”⁴⁴⁹

a. Delay: A River Doesn’t Run Through It

Following OMB’s lead, CEQ is flexing its muscles to make the agencies fall in line.⁴⁵⁰ It ordered the Fish and Wildlife Service and the Army Corps of Engineers to rethink their plans to release more water down the Missouri River to save endangered fish and birds.⁴⁵¹ Acting under the direction of the CEQ, the Corps “intended to seek to rewrite the Fish and Wildlife Services’ ‘biological opinion’” that dam operations needed to be refashioned to save three endangered species.⁴⁵² Though the National Academy of Science supported the release, President Bush supported the status quo during a campaign trip to Missouri. Representative John Thune urged President Bush to support the release, but as he explained, of course Bush “wants to honor the commitments he made in Missouri.” To that end, the White House endorsed a five-year plan to study the impact of increased water levels.⁴⁵³

Later, according to a report by the Union of Concerned Scientists (UCS), the Bush Administration formed a new team to review the situation and make a quick judgment.⁴⁵⁴ According to UCS, the new fifteen-member team included two of the scientists from the original team and was lead by co-leaders with little expertise on the Missouri River. Unlike the original

449. Houck, *supra* note 448.

450. This phenomenon is not limited to the Department of Interior. For example, CEQ, with a few changes from OMB, sent back to EPA a report on the state of the environment ordering it to change the section on climate change. As reported by the New York Times,

An April 29 memorandum circulated among staff members said that after the changes by White House officials, the section on climate “no longer accurately represents scientific consensus on climate change.” Another memorandum circulated at the same time said that the easiest course would be to accept the White House revisions but that to do so would taint the agency, because “E.P.A. will take responsibility and severe criticism from the science and environmental communities for poorly representing the science.”

Andrew C. Revkin & Katharine Q. Seelye, *Report by the E.P.A. Leaves Out Data on Climate Change*, N.Y. TIMES, June 19, 2003, at A1.

451. Michael Grunwald, *Bush Delays Action on Missouri River; Agencies Ordered to Consult on ‘Spring Rise’*, WASH. POST, June 14, 2002, at A29.

452. *Whitehouse, Army Corps Sound Retreat on Missouri River*, U.S. Newswire, June 13, 2002, 2002 WL 22068412.

453. Bill Lambrecht, *White House Backs Delay in River Changes: Move is Victory for Officials Here; Plan Would Have Mimicked Missouri’s Natural Flow*, ST. LOUIS POST-DISPATCH, July 14, 2002, at A1.

454. UNION OF CONCERNED SCIENTISTS, *SCIENTIFIC INTEGRITY IN POLICYMAKING: AN INVESTIGATION INTO THE BUSH ADMINISTRATION’S MISUSE OF SCIENCE* 16 (2004), available at http://www.ucsusa.org/documents/RSI_final_fullreport.pdf.

report, the new team's report was not independently peer-reviewed.⁴⁵⁵ Though UCS is not certain whether the new plan will protect the at-risk species effectively—

What is clear, however, is that the Bush administration's political agenda has interfered with the scientific integrity of the policy making process in this case. Allyn Sapa, a recently retired biologist with the U.S. Fish and Wildlife Service who supervised the Missouri River project for more than five years, commented about the whole affair: "It's hard not to think that because our findings don't match up with what they want to hear, they are putting a new team on the job who will give them what they want."⁴⁵⁶

Thus, it would appear that the Bush Administration supports the use of sound science as long as it does not cause the president to break a campaign promise or cause his corporate donors to expend more resources on environmental protection.⁴⁵⁷ As one commentator opined, when President Bush receives sound science, he says, "hear no science, see no science, delete all science."⁴⁵⁸

With respect to the Klamath River Basin, the Department of Interior disregarded the recommendation of the Fish and Wildlife Service and the National Marine Fisheries Service that endangered fish in that basin should receive more water. Instead, Secretary Norton commissioned further study by the National Academies' National Research Council ("NRC").⁴⁵⁹ Though the Act requires the Secretary to make her decisions based upon the best *available* information,⁴⁶⁰ and the Services made their recommendations based on such, Secretary Norton chose to disregard the statutory mandate. Here the problem seemed not to be that the Service had used unsound science, but that it did not have enough science.⁴⁶¹ As one Fish and Wildlife Service official explained, the NRC's report "didn't say the science proves we were wrong; they just said there wasn't enough science to

455. *Id.*

456. *Id.*

457. See Grunwald, *supra* note 451 ("[Thune] acknowledged that scientific studies and legal requirements might not be the final arbiter of this battle.")

458. Derrick Z. Jackson, *Bush Doesn't Hear 'Sound Science'*, SEATTLE POST-INTELLIGENCER, Aug. 5, 2003, at B7. After several lawsuits, the controversy over the flows of the Missouri River continues. A new management plan for the river is due to be released in March 2004. Ben House, *Missouri Manual Awaited in March*, ARGUS LEADER, Feb. 20, 2004, at 1A.

459. Michael Grunwald, *Scientific Report Roils a Salmon War*, WASH. POST, Feb. 4, 2002, at A1.

460. 16 U.S.C. § 1536(c)(1) (2000).

461. Grunwald, *supra* note 459 (reporting the interim finding was that there "was 'no substantial scientific foundation'" for the Service's conclusion about the effect of the irrigation project on the endangered fish).

prove us right.”⁴⁶² Wendy Wagner persuasively argues that earnest debates about science are not about the quality of science but rather the quantity of science required to establish protective regulations.⁴⁶³ She argues that this “misdirected focus on the quality of science might be an accident, although it is more likely to be at least partly deliberate. Regulated parties fare better when the focus is on the quality of scientific research, rather than on the value choices undergirding protectionist policies.”⁴⁶⁴

Yet another example of the Bush Administration’s dismissal of science is its proposal to count hatchery salmon along with wild salmon to determine whether the Endangered Species Act should continue to protect Pacific salmon.⁴⁶⁵ Six leading salmon experts argue that counting hatchery salmon “could have devastating consequences” by “confound[ing] risk of extinction in the wild.”⁴⁶⁶ Indian tribes are said to favor the move insofar as the proposal is used to improve hatchery stock,⁴⁶⁷ without regard to its impact on wild salmon.

These two examples can be characterized as policy erosion at a macro-level.⁴⁶⁸ Yet still more problematic is the erosion that likely is occurring at the micro-level, and unfortunately, this activity largely can go unnoticed by the public.⁴⁶⁹ Many of these moves are not headline grabbers but part of iterative day-to-day discretionary decision making. Despite the widespread public support for protecting endangered species and Congress’ inability to amend the Act, the Executive Branch very well may be chipping away at

462. *Id.* The final report from NRC is not yet available to the general public, but it states that there is no causal link between water levels and the survival of the endangered species. “While the committee that wrote the report endorsed proposals for a water storage bank and for special seasonal flow adjustments, it was skeptical of the value of increasing restrictions on the U.S. Bureau of Reclamation’s Klamath Project . . .” Press Release, The National Academies, Broader Approach Needed for Protection And Recovery of Fish in Klamath River Basin (Oct. 22, 2003) at <http://www4.nationalacademies.org/news.nsf/isbn/0309090970?OpenDocument>.

463. Wagner, *supra* note 383, at 109-32.

464. *Id.* at 112.

465. Endangered and Threatened Species: Proposed Policy on the Consideration of Hatchery-Origin Fish in Endangered Species Act Listing Determinations for Pacific Salmon and Steelhead, 69 Fed. Reg. 31,354 (June 3, 2004). The National Oceanic and Atmospheric Administration has already proposed listings using this proposed policy. Endangered and Threatened Species: Proposed Listing Determinations for 27 ESUs of West Coast Salmonids, 69 Fed. Reg. 33,102 (June 14, 2004).

466. Ransom A. Myers, et al., *Hatcheries and Endangered Salmon*, 303 SCI. MAG. 1980 (2004).

467. Charles Pope, *Bush Plan Could Change Protections for Salmon*, HOUS. CHRON., May 2, 2004, at 7A.

468. *Cf.* Thomas O. McGarity, *Politics By Other Means: Law, Science, and Policy in EPA’s Implementation of the Food Quality Protection Act*, 53 ADMIN. L. REV. 103, 194-97 (2001) (describing erosion of EPA’s policymaking at a macro-level in implementing the Food Quality Protection Act).

469. *Cf. id.* at 198 (describing policy erosion “[b]ecause micro-policymaking at the staff level is largely hidden from public view” for implementation of the Food Quality Protection Act).

that protection. Thomas McGarity explains the process of how agencies can subvert statutory policies,

as the program office within the implementing agency engages in considerably less visible day-to-day resolution of science/policy questions on a case-by-case basis. In both cases, strongly articulated statutory policies can erode away under constant pressures from interests groups that opposed those policies during the legislative debates and continue to oppose them during the implementation stage.⁴⁷⁰

Moreover, this focus on the procedural aspects of scientific review excludes all but the most resourceful, “attentive regulatory participants,” namely “regulated industries or their advocates.”⁴⁷¹ The poster-children for many of these reforms—small landowners—realistically cannot be expected to engage in this type of analysis and advocacy.⁴⁷² Instead, well-financed developers are the ones likely to take advantage of the guidance’s procedures, such as challenging information disseminated by the Service.⁴⁷³ And challenges by industry may be numerous because the costs of such challenges are minimal, whereas “the benefits of abusing these provisions can be considerable to private parties; at best they can lead to the exclusion or discrediting of pivotal studies that undergird protective regulation, and at worst, they can divert the agency’s resources and priorities away from developing protection policies.”⁴⁷⁴

b. Deregulation: The “No Surprises” Rule

One of the criticisms of the Act is that it does not provide landowners adequate notice of prohibitions or adequate assurance that development can proceed without fear of prosecution. In partial response to this concern, the Service implemented a “no surprises” policy⁴⁷⁵ as part of the incidental take permitting process under section 10 of the Act. This policy “quietly” assured landowners that if they took conservation measures pursuant to a habitat conservation plan, they would not be subjected later to demands for additional commitments of land or money, even if the needs of the pro-

470. *Id.* at 194 (2001) (citation omitted).

471. Wagner, *supra* note 383, 103-04 (2003).

472. *Cf. id.* at 63, 103-04 (suggesting that resources and expertise are necessary to participate meaningfully under such reforms).

473. The Fish and Wildlife Service has received only two challenges under the Information Quality Act. The national public interest group, Public Employees for Environmental Responsibility initiated one challenge and Fjord Seafood initiated the other one. OMB Watch, *Data Quality Challenges*, at <http://www.ombwatch.org/article/articleview/1419#fws> (last visited May 11, 2004).

474. Wagner, *supra* note 383, at 105.

475. Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed. Reg. 8859, 8860 (Feb. 23, 1998).

tected species changed over time.⁴⁷⁶ The Service stated that Congress “envisaged and allowed the Federal government to provide assurances . . . through the § 10 incidental take permit process [and a] driving concern during the development of this policy was the absence of adequate incentives for non-Federal landowners to factor endangered species conservation into their day-to-day land management activities.”⁴⁷⁷ Concerns abounded, however, about whether the administration could make regulatory changes to accomplish that which Congress had been unable to do.⁴⁷⁸ Despite the many questions regarding the soundness of this policy,⁴⁷⁹ the Service formalized it as a regulation in 1998.⁴⁸⁰

The chief practical concern among conservationists was that the rule would not allow the Service to require additional conservation or mitigation measures if in the future the need arose to take more protective measures to ensure that development activities would “not appreciably reduce

476. George T. Frampton, Jr., ‘*Quiet Success*’ of *Endangered Species Act*, ROLL CALL, Apr. 3, 1995 (Frampton was the Assistant Secretary for Fish, Wildlife, and Parks, Department of Interior.).

477. Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed. Reg. 8859, 8860 (Feb. 23, 1998). *But see* Houck, *supra* note 394, at 285 (arguing that Congress intended this provision to give limited flexibility).

478. *Cf.* Bradford C. Mank, *The Environmental Protection Agency’s Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization*, 25 *ECOLOGY L.Q.* 1 (1998) (arguing that EPA exceeded its legal authority). Another example of an environmental agency recently exceeding its statutory authority is EPA with respect to the Clean Air Act and the regulations for New Source Review. In October 2003 it changed the types of modifications to stationary sources of pollution such as power and industrial plants that would be subject to certain regulations. Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance Repair and Replacement Exclusion, 68 Fed. Reg. 61,248-01 (Oct. 27, 2003) (to be codified at 40 C.F.R. pts. 51, 52). There had been many legislative initiatives to amend the Clean Air Act in this fashion, but none were successful. However, Vice President Dick Cheney’s energy task force made a recommendation to EPA after studying industry complaints about enforcement actions and out of that recommendation sprang this revised rule. Katherine Q. Seelye & Jennifer 8. Lee, *Court Blocks U.S. Effort to Relax Pollution Rule*, N.Y. TIMES, Dec. 25, 2003, at A1. *See* Reliable, Affordable, and Environmentally Sound Energy for America’s Future: Report of the National Energy Policy Development Group (May 6, 2001), at <http://www.whitehouse.gov/energy/National-Energy-Policy.pdf>. A three-judge panel of the United States Court of Appeals for the District of Columbia questioned whether the Administration had the authority to make this change and stayed the rule pending litigation. *New York v. EPA*, No. 03-1380, 2003 U.S. App. Lexis 26520, at *10 (D.C. Cir. Dec. 24, 2003); *see also* Seelye & Lee, *supra* note 478, at A1.

479. *See* Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed. Reg. 8859, 8861-68 (Feb. 23, 1998) (summarizing comments on the proposed rule).

480. 50 C.F.R. § 17.22 (2004). The rule was finalized initially as a part of the Endangered Species Habitat Conservation Planning Handbook in 1996. 61 Fed. Reg. 63,854-02 (Dec. 2, 1996). A non-profit organization sued the Service and as part of the settlement, the Service agreed to subject the rule to further public comment and ultimately reissued the rule in 1998. Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed. Reg. 8859, 8860 (Feb. 23, 1998).

the likelihood of the survival and recovery of the species in the wild.”⁴⁸¹ In fact, a group of scientists meeting at Stanford University objected to the rule “because it runs counter to the natural world, which is full of surprises.”⁴⁸² Nature and scientific research both will produce “surprises;” timing is the only question.⁴⁸³ The “No Surprises” Rule does not allow the Service to require amendments to habitat conservation plans when “surprises” occur, however, except under limited conditions.

In providing this assurance to private landowners, the rule draws a distinction between “changed circumstances” and “unforeseen circumstances,” and the rule is problematic in either case. “Changed circumstances” reasonably can be anticipated and planned for,⁴⁸⁴ whereas “unforeseen circumstances” cannot reasonably be anticipated and result in substantial, adverse change to the condition of the listed species.⁴⁸⁵ If additional conservation or mitigation measures not provided for in the plan are necessary to address *changed* circumstances, the Service will not require additional measures.⁴⁸⁶ If additional conservation or mitigation measures are necessary to address *unforeseen* circumstances, the Service *may* require additional conservation or mitigation measures, but it “will not involve the commitment of additional land, water or financial compensation or additional restriction on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan or without the consent of the permittee.”⁴⁸⁷

The Spirit of Sage Council, a coalition of Native Americans, community groups, and citizens, recently renewed their challenge of the No Surprises Rule on a several grounds, including that the rule violates sections 2, 3(3), 7(a)(1), and 7(a)(2) of the Endangered Species Act. The rule, the Council argued, prevents the Service from making changes to incidental take permits that may be necessary for the continued survival of listed species and it allows the Service to issue permits under conditions not author-

481. 16 U.S.C. § 1539(a)(2)(B)(iv)(2004) (one of the conditions for issuing an incidental take permit).

482. A Statement on Proposed Private Lands Initiatives and Reauthorization of the Endangered Species Act from the Meeting of Scientists at Stanford University (March 31, 1997), at <http://www.defenders.org/esa-6.html>.

483. *Id.*

484. 50 C.F.R. § 17.3 (2004).

485. *Id.*

486. 50 C.F.R. § 17.22(b)(5)(ii) (2004) (endangered species); 50 C.F.R. § 17.32(b)(5)(ii) (2004) (threatened species).

487. 50 C.F.R. § 17.22(b)(5)(iii)(B) (2004) (endangered species); 50 C.F.R. § 17.32(b)(5)(iii)(B) (2004) (threatened species).

ized by the Act.⁴⁸⁸ In December 2003, the District Court for the District of Columbia remanded the rule for reconsideration by the Service⁴⁸⁹ and in June 2004, the court prohibited the issuance of new incidental take permits with “‘No Surprise’ assurances” pending adoption of new revocation rules.⁴⁹⁰ The No Surprises Rule was an attempt to diffuse a volatile situation, but it failed to give due consideration to some of the principles and values undergirding species protection.

VIII. A QUESTION OF VALUES AND NEW ENTITLEMENTS

The initiatives proposed to address the problems that political rhetoric describes often involve the use of certain types of analysis, such as taking impact analysis, cost-benefit analysis, and sound science. Much of the reliance upon these seemingly objective analyses, however, is likely subterfuge for a discussion of values.⁴⁹¹ The political rhetoric blurs the issues in this important debate and precludes meaningful discussion. Amid this noise, some would argue that we need “to restore a sense of moral urgency to the protection of life, health, and the environment.”⁴⁹²

The rhetoric assumes that certain values hinge upon unfettered private property rights and that these initiatives promote those values. These values include wealth, autonomy, and freedom.⁴⁹³ Privileging these values over others results in policies that do not adequately take into account other values that the public has expressed as important. These include anthropocentric and biocentric values such as human health, ecology, aesthetics, and cultural heritage.

And the rhetoric excludes certain segments of the public from the conversation. The National Academies formed the Public Participation in Environmental Assessment and Decision Making panel to study ways in which federal agencies can improve public participation in environmental

488. *Spirit of Sage Council v. Norton*, 294 F. Supp. 2d 67, 80 (D.D.C. 2003).

489. *Id.* The court did not reach the merits of the No Surprises Rule but found that it was sufficiently intertwined with the Permit Revocation Rule, Safe Harbor Agreements, and Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,706, 32,712-14 (June 17, 1999), which it had vacated, to justify remand. *Spirit of Sage Council v. Norton*, 294 F. Supp. 2d at 85, 91-92.

490. *Spirit of Sage Council v. Norton*, No. 98-1873, 2004 U.S. Dist. LEXIS 10789, at *4 (D.D.C. June 10, 2004).

491. Pete Bodo, *What Rules Are Needed to Keep the Wilderness Wild?*, N.Y. TIMES, Jan. 18, 2004, at 10 (“This really is about a clash of values . . . You have people who cherish solitude, exercise and backcountry traditions versus people who have grown accustomed to complete freedom of motorized access.” (quoting Rollen Sparrowe, Pres. Wildlife Management Institute)).

492. ACKERMAN & HEINZERLING, *supra* note 369, at 11.

493. Alyson C. Flourmoy, *In Search of an Environmental Ethic*, 28 COLUM. J. ENVTL. L. 63, 68 (2003).

assessment and decision-making. As an EPA scientist explained, agencies “are concerned that they hear from only certain segments of the public and that ‘huge gaps’ remain in the perspectives provided Different segments of the public have divergent information and values that are important for federal agencies to understand.”⁴⁹⁴ One of the panel members remarked that too often Congress thinks that risk and cost-benefit analysis can solve complex environmental problems, but public participation and appreciation of divergent values are also needed.⁴⁹⁵

Victor Flatt argues that we cannot successfully implement environmental laws without consideration of certain “squishy” values that have not been traditionally quantifiable by cost-benefit analysis.⁴⁹⁶ Yet “[b]oth sides of the regulatory debate often engage in a conspiratorial silence about these values.”⁴⁹⁷ Flatt suggests that even if the participants in the debate are aware of these values they do not discuss them because they are afraid. On one side they are afraid that they will be considered irrational, and on the other they fear that acknowledgement of these values will give the values legitimacy.⁴⁹⁸ Flatt acknowledges that including these squishy values makes the decision-making process susceptible to a certain amount of subjectivity. Being aware of and recognizing the limitations arising from this subjectivity would force decision makers to make the difficult choices by openly including these values rather than disingenuously asserting that the agency can simply apply a technical formula and derive the solution.⁴⁹⁹

In this debate, these unspoken or blurry values heavily influence the implementation of the ESA and proposals for reform. The outcomes are consistent with the values hidden in the political rhetoric but not necessarily with those that the public has expressed for species protection. For example, despite the Contract with America having as one of its aims the

494. *Academies to Review Ways to Boost Public Involvement in Decisionmaking*, DAILY REP. FOR EXECUTIVES (BNA), No. 153, at A-19 (Aug. 8, 2003) (remarks of Michael Slimak, an ecological scientist in EPA’s Office and Research and Development).

495. *Id.*

496. Victor B. Flatt, *Saving the Lost Sheep: Bringing Environmental Values Back Into the Fold With A New EPA Decisionmaking Paradigm*, 74 WASH. L. REV. 1, 3 (1999).

497. Victor B. Flatt, *The Human Environment of the Mind: Correcting NEPA Implementation by Treating Environmental Philosophy and Environmental Risk Allocation as Environmental Values under NEPA*, 46 HASTINGS L.J. 85, 102 (1994).

498. *Id.*

499. Flatt, *supra* note 496, at 3. This phenomenon is also known as the “science charade”, wherein agencies exaggerate the contributions of science in developing regulations in order to shirk accountability for their underlying policy decisions. Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1617 (1995).

elimination of many entitlements,⁵⁰⁰ the proposed Endangered Species Land Management Reform Act would have created a new entitlement. Under the common law “public ownership doctrine,” the government owns all wildlife for the benefit of the public and has the right to protect that wildlife on private property. No property owner may claim a right to harm wildlife absent authorization from the public.⁵⁰¹ Courts consistently have sanctioned the government’s ability to regulate, without compensation, private land use for the benefit of wildlife under this doctrine.⁵⁰² Thus, by providing compensation under the Endangered Species Land Management Reform Act, Congress would have created a new right.

Moreover, if the government holds threatened and endangered species in trust for its citizenry, should not a developer who wishes to take such resources be required to compensate the citizenry for what Professor Richard Epstein deems the converse eminent domain? Professor Epstein asks first whether the government should transfer public property to private entities and then if it does make such a transfer, what compensation is due.

The problem of disposing of public property thus raises the mirror image of public use and just compensation questions under the Fifth Amendment: “Nor shall private property be taken for public use, without just compensation.” The underlying problems are not any simpler when dealing with property which was originally held by the public in common, for now the guiding principle is in a sense the converse of the original eminent domain clause, to wit: “No *public* property may be transferred to *private use*, without just compensation,” payable to the public at large.⁵⁰³

The common law and the Endangered Species Act place an obligation upon the government to protect these public trust assets. In the event that the government decides to alienate them, it must receive compensation for such transactions.⁵⁰⁴

And although every reform-minded member of Congress seemingly had a horror story to tell about a small landowner in his district, the Endan-

500. *E.g.*, Contract With America Advancement Act of 1996, 42 U.S.C. § 423(d)(2)(C) (2000) (removing drug addiction or alcoholism as a basis for awarding disability benefits under the Old Age Survivor and Disability Insurance program); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a (2000) (changing, *inter alia*, direct payments to individuals under Assistance to Families with Dependent Children (AFDC) to block grants to states to use at their discretion).

501. John D. Echeverria & Julie Lurman, “*Perfectly Astounding*” *Public Rights: Wildlife Protection and the Takings Clause*, 16 TULANE ENVTL. L.J. 331, 333 (2003).

502. *Id.* at 346-50. *See also* Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute “Takings”?*, 80 IOWA L. REV. 297, 308-321 (1995) (outlining country’s tradition of protecting wildlife without compensating landowners beginning with the English common law roots and continuing into the present).

503. Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 419 (1987).

504. *Cf.* Gerald Torres, *Who Owns the Sky?*, PACE ENVTL. L. REV. 515 (2002) (proposing a “sky-trust” to capture the value of the public’s interest in the atmosphere).

gered Species Land Management Reform Act primarily would have benefited large landowners (and lawyers). A relatively small number of private entities own the majority of private land. "Approximately 125,000 timber or farm owners, less than two-tenths of one percent of all private landowners, own 38% of all the private land in the United States. Timber and farm interests that amount to less than 3% of all landowners, own more than 80% of all private land."⁵⁰⁵ Representative John Conyers of Michigan criticized a similar bill, arguing that "[t]he result of such a measure passing would be . . . hard-working American taxpayers . . . forced to watch as their hard-earned wages are collected by the Government, as taxes are paid out to corporations . . . and large landowners as takings compensation."⁵⁰⁶

Though Congress was unsuccessful in passing such "takings" legislation, the Bush Administration has been able to compensate those landowners through incentive programs designed to encourage conservation. The beneficiaries of these new subsidies may tend to be the wealthy, at the expense of the average taxpayer.⁵⁰⁷ Such compensation schemes create a "two-tiered system of laws" with one group of people simply complying with the ESA, while another group would be paid by the government to comply.⁵⁰⁸ American jurist James Kent espoused private property rights to the extent that they are "consistent with good order, and the reciprocal rights of others."⁵⁰⁹ Such a compensation scheme is inconsistent with both of these goals.

IX. CONCLUSION

The political rhetoric surrounding the Endangered Species Act is seductive. It lures its audience into a world where costs eclipse benefits, conjecture prevails over sound science, and species protection abrogates private property rights. It is a world that is out of balance and needs to be righted by some common sense initiatives. Though the Contract with

505. *Hearing on Endangered Species Act Before the Senate Subcomm. on Fisheries, Wildlife and Water of the Senate Comm. On Environment and Public Works*, 107th Cong. (2001) (statement of John D. Echeverria, Director, Environmental Policy Project, Georgetown University Law School), 2001 WL 2007868.

506. 141 CONG. REC. H2459, H2470 (daily ed. Mar. 1, 1995) (statement of Rep. Conyers).

507. *See Hearing on Endangered Species Act Before the Senate Subcomm. on Fisheries, Wildlife and Water of the Senate Comm. On Environment and Public Works*, 107th Cong. (2001) (statement of John D. Echeverria, Director, Environmental Policy Project, Georgetown University Law School), 2001 WL 2007868 (criticizing proposal for extensive use of tax-payer funded incentive programs to complement or replace enforcement of the ESA).

508. *See* Tanya L. Godfrey, Note, *The Reauthorization of the Endangered Species Act: A Hotly Contested Debate*, 98 W. VA. L. REV. 979, 1018-20 (1996) (discussing compensation statutes).

509. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 265 (1st ed. 1827).

America failed in “reforming” the Act, it advanced this ideological ball considerably and the Executive Branch has picked up that ball and is running with it.

Though purporting to protect private property rights and promote a smarter regulatory process, these actions advance a set of values that are in conflict with those that undergird the ESA. The legal regime they engender creates new entitlements, otherwise known as “incentives,” for private property owners who never held the right to harm wildlife without express permission from the sovereign as the public’s representative.

This Article demonstrates that left unchecked, this rhetoric influences outcomes both formally and informally, whether through appropriations riders, regulations, or day-to-day discretionary agency actions. Moreover, its influence over the day-to-day activities of the agency is even more pernicious because policy erosion at this level, by its very nature, is difficult to document and challenge. Yet there is compelling evidence that the rhetoric is eroding the efficacy of the Endangered Species Act to the detriment of the imperiled species and the public. Indeed, rhetoric still matters.