

# RECIPE FOR REAUTHORIZATION OF THE ENDANGERED SPECIES ACT

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Few pieces of environmental legislation are currently under as much scrutiny as the Endangered Species Act.<sup>1</sup> While the Act's supporters tout its achievements in fully recovering some species and stabilizing many more,<sup>2</sup> those advocating reform argue that the Act neglects to consider the human costs of preserving all species.<sup>3</sup> Congress first enacted the ESA in 1973 in order to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in [the Act]."<sup>4</sup> If Congress still supports these purposes, then it should endeavor to fully understand the degree to which ecosystems and species in this country are still imperilled and the way to best stem the present tide of decline. In connection with its likely reauthorization of the ESA, the 104th Congress should take the following steps to ensure a balanced approach that protects natural ecosystems while also striving to improve human welfare.

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1. Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (1988). For a discussion of the ESA see generally DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT* (1989); Jason M. Patlis, *Biodiversity, Ecosystems and Species: Where Does the Endangered Species Act Fit In?*, 8 TUL. ENVTL. L.J. 33 (1994); Lindell L. Marsh, *Conservation Planning Under the Endangered Species Act: A New Paradigm For Conserving Biological Diversity*, 8 TUL. ENVTL. L.J. 97 (1994); J. Michael Scott et al., *Socioeconomics and the Recovery of Endangered Species: Biological Assessment in a Political World*, 9 CONSERVATION BIOLOGY 214 (1995).

2. See, e.g., U.S. FISH & WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR, REPORT TO CONGRESS: ENDANGERED AND THREATENED SPECIES RECOVERY PROGRAM (1992).

3. See, e.g., CHARLES C. MANN & MARK L. PLUMMER, *NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES* 212-13 (1995).

4. ESA, 16 U.S.C. § 1531(b) (1988).

### 1. *Form a National Commission on Species Extinction*

The President and Congress should immediately convene a National Commission on Species Extinction to conduct a scientific inquiry into the seriousness of the endangered species issue.<sup>5</sup> This Commission would follow up on the work commenced by the Environmental Protection Agency's Science Advisory Board, convened by the Bush Administration in 1990. The Science Advisory Board identified species extinction and natural habitat loss as two of the planet's most pressing environmental crises.<sup>6</sup> The formation of a National Commission on Species Extinction would also complement an upcoming National Academy of Sciences report that assesses how well the ESA achieves its scientific mission.<sup>7</sup>

This proposed Commission should perform a thorough and objective evaluation of three crucial and related questions: (1) What is the extent of the destruction of ecosystems and the decimation of plant and animal populations? (2) If species extinction is a serious problem, what are the implications for human welfare? (3) If species extinction poses a threat to human welfare, how might Congress take steps to prioritize the protection of all plant and animal species? Formation of this Commission would be the best way to provide Congress with crucial answers to these questions, answers it needs to adequately consider the numerous proposals that have been made for reauthorizing the Endangered Species Act.

### 2. *Protect Plant and Animal Species Before Their Populations are Threatened or Endangered*

Congress should promote management plans that proactively protect species, rather than waiting until species are threatened with extinction before taking action.<sup>8</sup> The ESA should be amended to

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5. Rodger Schlickeisen, *Let's Not Ignorantly Debate The Endangered Species Act*, CHRISTIAN SCI. MONITOR, Mar. 10, 1995, at 18.

6. SCIENCE ADVISORY BOARD, U.S. ENVTL. PROTECTION AGENCY, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION 13 (1990).

7. See Memorandum from National Academy of Sciences, Oct. 18, 1994 (on file with author).

8. In order to prevent the need to list species, proactive habitat protection is necessary. However, in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), cert. granted, 115 S.Ct. 714 (1995), the D.C. Circuit invalidated the habitat modification prohibitions established by the Fish & Wildlife Service (FWS) under section 9 of the ESA. If upheld by the U.S. Supreme Court, *Sweet Home* could remove the ability of the FWS to prevent the further decline of both listed and unlisted species on nonfederal lands.

explicitly authorize federal agencies to work with each other and with the states to protect wildlife species, to inventory species and habitats, and to identify and protect key species that serve as indicators of broader ecosystem health.

Under no circumstances should species be allowed to decline on public lands such as national forests, rangelands, or wildlife refuges. Preventative actions should focus on computer mapping and other modern technological tools that provide valuable biological information; conservation actions should be encouraged where they are most needed.<sup>9</sup> Information gleaned from long-term research and monitoring conducted by scientists of the National Biological Survey<sup>10</sup> is essential to the protection of all species on public lands, not just those which are currently listed under the ESA.

### 3. *Establish Economic Incentives for Protecting Species on Private Lands*

Because roughly half of all listed species spend at least part of their existence on private land, Congress should explicitly provide incentives for private landowners to conserve species.<sup>11</sup> It is essential that Congress require mechanisms that preserve the biotic community and promote economic expedience. Many potential solutions for endangered species protection can be found outside of the ESA. Though not yet released in Congress, one version of the 1995 Farm Bill contains a number of provisions on habitat conservation.<sup>12</sup> Wildlife conservation incentives can also be included in the tax code.<sup>13</sup> Having a unique or rare species on one's property should be

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9. One form of computer mapping, "gap analysis," has been touted as an innovative approach to locating endangered species. See Elizabeth Pennisi, *Filling in the Gaps: Computer Mapping Finds Unprotected Species*, 144 SCI. NEWS 248 (1993).

10. For a general overview of the potential responsibilities of the National Biological Survey, see NATIONAL RESEARCH COUNCIL, *A BIOLOGICAL SURVEY FOR THE NATION* (1993).

11. For a discussion of various incentive-based approaches to protecting endangered species and critical habitat, see *BUILDING ECONOMIC INCENTIVES INTO THE ENDANGERED SPECIES ACT* (Defenders of Wildlife ed., 1993).

12. The 1985 Farm Bill Conservation Reserve Program (CRP) included an incentive to remove highly erodible lands from production for at least 10 years. The 1990 Farm Bill broadened the CRP to include wildlife habitat conservation: 16 U.S.C.A. § 3821(b)(2) (West Supp. 1985). Over 36 million acres have been enrolled to date. *THE WILDLIFE SOCIETY, 1995 FARM BILL: WILDLIFE OPTIONS IN AGRICULTURAL POLICY* 4 (1995). We suggest that candidate, threatened, and endangered species be explicitly included in CRP eligibility criteria.

13. Tax incentives operate on the premise that it is sometimes cheaper for the private landowner to perform conservation actions than it is for the federal or state governments. Examples of such incentives include income tax credits for expenses attributable to listed species

an asset, not a liability. Congress should avoid the temptation to meddle with Constitutional "takings" jurisprudence by enacting obtuse and potentially harmful legislative fixes.<sup>14</sup> Aldo Leopold himself believed we should "[e]xamine each question in terms of what is ethically and esthetically right, as well as economically expedient. A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise."<sup>15</sup>

In the 103d Congress, economic incentive provisions were included in legislation to amend the ESA that was introduced in the Senate (S. 921)<sup>16</sup> by Senators Baucus (D-MT) and Chafee (R-RI), and in the House (H.R. 2043)<sup>17</sup> by Reps. Studds (D-MA), Gingrich (R-GA), Saxton (R-NJ), and Dingell (D-MI). Perhaps the most promising proposal was the "Habitat Conservation Planning Pilot Project" proposed in H.R. 2043.<sup>18</sup> That proposal would have instructed the Secretaries of the Interior and Commerce to develop a market-based conservation plan and to report the results of the plan to Congress. The prime benefit of such a pilot approach is that it would have granted the federal government significant flexibility to test incentives without unduly hindering a strong regulatory approach to species conservation. In addition, H.R. 2043 and S. 921 proposed to grant federal assistance directly to private landholders who conserved listed, proposed, and candidate species, so long as there

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management, and property tax credits for landowners committing to temporary or permanent land use restrictions. Some tax incentives could be included within the ESA, but most require modifications of either the income tax or property tax codes.

14. During the 1995 Congressional session, bills have been introduced in the House and Senate that would require the federal government to compensate a landowner whenever a land use requirement protecting a listed species or its habitat, or conserving wetlands, decreases the value of that property by a certain percentage. Known as the "Private Property Owners Bill of Rights," this provision was successfully incorporated into H.R. 9 by House Republicans. H.R. 925, 104th Cong., 1st Sess. (1995). At the time of this writing, similar provisions have been introduced, but not yet approved, in the Senate. S. Res. 22, 104th Cong., 1st Sess. (1995); S. Res. 135, 104th Cong., 1st Sess. (1995); S. Res. 145, 104th Cong., 1st Sess. (1995); S. Res. 239, 104th Cong., 1st Sess. (1995).

15. ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 224-25 (Oxford Univ. Press 1968) (1949).

16. S. Res. 921, 103d Cong., 2d Sess. (1994).

17. H.R. 2043, 103d Cong., 2d Sess. (1994).

18. *Id.* See generally MICHAEL BEAN ET AL., *RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT: THE HABITAT CONSERVATION PLANNING EXPERIENCE* (1991) (discussing the effectiveness of habitat conservation plans and lessons learned from their use).

was not a taking under ESA Section 9 and the anticipated action was consistent with other federal law.

#### 4. *Encourage Greater State Involvement*

Another way to promote effective conservation strategies is to encourage states to assume greater responsibility for the protection of threatened and endangered species.<sup>19</sup> In order to effectively address localized threats to listed species and their habitats, much of the authority now vested in the federal government should be transferred to or shared with state governments. At present, the ESA provides mechanisms for the transfer of authority from the federal government to state wildlife agencies through federal-state cooperative agreements.<sup>20</sup> With proper federal oversight, the authority to manage candidate species, engage in recovery planning initiatives, and administer incidental take permits could be effectively transferred to states. It is important, however, that state agencies undertaking species conservation activities be required to meet the same standards that apply to the federal government.

#### 5. *Establish Regional Planning Mechanisms*

A larger scale regional planning mechanism is needed in the ESA to achieve true ecosystem management and to address concerns about ecosystem fragmentation.<sup>21</sup> Such a mechanism should be designed to protect ecologically important areas by identifying fragile habitats and guiding human development away from the most sensitive areas. Under a regional ecosystem management plan, general guidelines for habitat conservation and multi-species management could be established through a cooperative effort between the federal, state, and local governments.<sup>22</sup>

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19. "Reauthorization of the Endangered Species Act: General Principles," Public Statement of the International Association of Fish and Wildlife Agencies, Mar. 21, 1993 (on file with author).

20. ESA, 16 U.S.C. § 1535 (1988).

21. For example, the black-tailed prairie dog is a keystone species for the dwindling and fragmented Great Plains prairie lands. Regional ecosystem management efforts to conserve this species would also improve recovery efforts for other species such as the endangered black-footed ferret, the swift fox, the mountain plover, and the ferruginous hawk. Brian Miller et al., *The Prairie Dog and Biotic Diversity*, 8 CONSERVATION BIOLOGY 677 (1994).

22. One example of such a coordinated plan is the California initiative to protect coastal sage brush habitat. See Ronald B. Taylor, *Crusade for the Gnatcatcher*, DEFENDERS, Fall 1994, at 26; John McCaull, *The Natural Community Conservation Planning Program and the Coastal Sage Scrub Ecosystem of Southern California*, in ENVIRONMENTAL POLICY AND BIODIVERSITY

Before the 104th Congress undertakes any extensive amendments to the ESA, it should expressly examine the benefits that the Act provides to human and wildlife populations. The reauthorized ESA should expand its focus beyond the current emphasis on last-ditch efforts to save endangered species to also include effective mechanisms that prevent the decline of species in the first place. The starting point for such an approach is science. Only by incorporating a scientific analysis of the health of ecosystems and the impact of the destruction of ecosystems on human welfare into the ESA can Congress hope to achieve the articulated goal of adequate species protection.