The Endangered Species Act of 1973: An Overview

By Phillip M. Kannan, guest contributor

The Endangered Species Act of 1973 (ESA) was enacted to prevent the disappearance of species from existence, that is, to prevent the irreversible loss of biodiversity. The model adopted by Congress to achieve this objective is quite straightforward. "Endangered species" is defined to mean "any species which is in danger of extinction throughout all or a significant portion of its range," and "threatened species" is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." The ESA then specifies a process which the secretary of interior must use to list a terrestrial or freshwater species; there is no protection of a species unless it is listed. The Fish and Wildlife Service (FWS) has been delegated the authority to make final decisions regarding listing under the ESA. The listing of a species triggers four categories of obligations.

First, the FWS must designate the critical habitat of the species. This includes areas where physical or biological features essential to conservation of the species are found. The designation and protection of critical habitat should be an integral part of efforts to "conserve" the species. The term "conserve" has major significance under the ESA; it is defined to mean "to use … all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." Thus, the FWS must develop a recovery plan and designate critical habitat once a species is listed. This has been done for very few listed species.

Second, all federal agencies are prohibited from any action that is likely to jeopardize the continued existence of a listed species and from modifying its critical habitat. Thus, the Environmental Protection Agency (EPA) cannot issue a permit allowing the discharge of pollutants into a river and the Forest Service cannot sell timber in a national forest if doing so would jeopardize the continued existence of a listed species or degrade the critical habitat of a listed species.

Third, all federal agencies are obligated "to utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of [listed species]." The word conserve here has the same meaning as given above regarding the FWS; all federal agencies are obligated "to use … all methods and procedures which are necessary to bring any [listed] species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." The goal is full recovery of the "patient," not perpetual life support, and this provision of the ESA enlists all federal agencies in the effort to accomplish this. There is limited data regarding the compliance with this obligation by the various agencies; however, it appears to be uneven and disappointing.

Fourth, all persons are prohibited from taking a listed species. Taking is defined very broadly; it includes harming, harassing, killing, or modifying critical habitat if the modification results in actual harm to an essential function (such as breeding or feeding) of the species.

The four restrictions have caused much opposition to the ESA, not because of the limits on hunting or other direct exploitation of listed species. Almost all of the resistance to the enforcement of the ESA comes from its limitations that apply to both federal agencies and to all persons on modification of critical habitat. The famous northern spotted owl case arose not from a desire of the local population in Oregon to hunt the owls, but from their desire to log, and hence modify, the owls' critical habitat. These disputes reflect a conflict between the possible value to the public of protecting biodiversity and the immediate economic benefit to a local community from exploiting critical habitat.

In a famous case involving a small fish called the snail darter, the Supreme Court held that when the ESA was enacted in 1973, Congress intended for the public's interest in protecting biodiversity to prevail over economic interests in exploiting critical habitat of the listed species.

Since that case, Congress has amended the ESA to allow some taking of listed species under certain circumstances. First, Congress amended the ESA to create a committee, informally called the "God Squad," that can approve a federal agency's request to take action that will result in the taking, even the elimination, of an endangered species. Second, Congress added a provision that allows any person to apply for a permit for action that will result in the incidental taking of some specimens of an endangered species. The taking must be "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." An incidental taking permit cannot be issued unless the person seeking it submits a habitat conservation plan detailing the impact which will likely result, the steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement the plan, what alternative actions to such taking the applicant considered, and the reasons why such alternatives are not being utilized. The FWS can approve the application only if it finds that the applicant will minimize the harm to the endangered species, the taking will not appreciably reduce the likelihood of the survival and recovery of the species, and that the applicant has adequate funds to carry

About the author: Phillip M. Kannan is distinguished lecturer and legal-scholar-in-residence at Colorado College.

out the plan. A person who wants to develop a thousand-acre parcel that is included in the critical habitat of an endangered species can develop a habitat conservation plan under which 600 acres will be set aside and enhanced as habitat for the species; development would take place only on the remaining 400 acres, and that development might cause the taking of a stated number of members of the species. The developer might create and fund a trust to be administered by an environmental organization for the perpetual management of the 600-acre preserve.

Habitat conservation plans are becoming more popular; however, there is little data on their effectiveness. They have been criticized by some environmental groups as no less than a license to kill. Supporters of habitat conservation plans and similar policies claim they are a reasonable way to balance economic development with protecting listed species. They assert that such balancing is one way to prevent the government from converting their private property into a nature preserve. This logic is based on the assumption that the restrictions on the use of private property when it is included as critical habitat of a listed species amounts to a taking of the private property for a public use. From this assumption it follows that the government must either compensate the owner of the property or provide a balanced approach that allows some economic benefits to remain with the owner.

In 2005, a bill to amend the ESA was introduced in the House by Representative Richard Pombo, a Republican from California, with 97 cosponsors, 23 Democrats and 74 Republicans. This bill, if it becomes law, would remove the authority of the federal government to designate critical habitat under the ESA. It was passed by the House on September 29, 2005, by a vote of 229 in favor to 193 opposed; however, the Senate has not taken any action on the bill.

The conflict between property owners' interest in their land and the public's interest in protecting biodiversity stems from the basic approach taken by Congress in the ESA. Although Congress stated one of the purposes of the ESA was "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," the focus of the ESA is otherwise. The ESA's approach is based on the assumption that species can be protected one at a time, and thus the ESA is focused on individual species.

An alternative approach would have been to focus the law on protecting habitat. The famous biologist E.O. Wilson has stated, "The reduction of wildland habitats to less than the critical amount necessary for the survival of a species is by far the greatest cause of modern extinctions." Daniel M. Bodansky reached the same conclusion: "The bigger threat to species, however, is not overharvesting by humans but rather habitat loss." These are but reformulations of John Muir's teaching that to manage animals, you manage their habitat. The modern name for this model is ecosystem management.

That ecosystem management is a powerful model to protect species can be understood by considering the major causes of extinction. First on this list, as Wilson has observed, is habitat loss. Other causes include climate change, pollution, over exploitation, and invasive species. This list is not exhaustive, nor are the categories mutually exclusive; however, the list makes it clear that the focus of the problem is habitat, and this strongly suggests that habitat should be also the focus of the solution.

The ESA does not completely ignore ecosystem management. It authorizes the secretaries of agriculture and interior to expend funds to purchase interests in land and water to "conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species." These can be purchases of title to land or less expensive interests such as conservation easements. Moreover, the habitat conservation plan process discussed above reflects the ecosystem management approach.

There are political as well as ecological advantages to the ecosystem management approach to protecting species. The basic premise in this approach is the government will protect land through its rights as the owner of that land or the owner of conservation easements in that land; the authority of the government as owner of interests in property, rather than the regulatory power of the government as sovereign, is the basis of protection. This should reduce greatly the complaints of private property owners that by including their property in critical habitat of listed species the government has taken their land.

The fact that the ESA is not focused on ecosystem management does not mean that it cannot become a powerful complement to the species approach that is the focus. The careful coordination of all the powers given to the FWS could raise the ESA to a higher level. Coordinating the powers to designate critical habitat, to require the FWS to develop recovery plans, to enter into cooperative agreements with states, to purchase title to land, to acquire conservation easements, to negotiate habitat conservation plans, and to require all federal agencies to use their authority to conserve listed species, would result in a mutually reinforcing, synergistic process.

Endnotes

[1]Unless otherwise noted, all quotations in this overview are from the ESA.
[2]The ESA authorizes the secretary of commerce to perform these tasks for marine species. This overview considers only terrestrial and freshwater species; for marine species, National Marine Fisheries Service (NMFS) has been authorized to act for the secretary of commerce. For marine species, the NMFS performs functions analogous to those performed by the FWS for terrestrial and freshwater species.