

# Wildlife Tracks®

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## Citizens and the Endangered Species Act

**H**ow will we explain to our children the disappearance of the American Serengeti, a landscape made possible by prairie dogs, bison, and wolves, which once stretched across over one hundred million acres on the Great Plains? To what degree will we impoverish human cognition and socialization when the world is sterile and bereft of wildlife, yet over 90% of the objects in children's books are animals or natural objects and the wild figures prominently in folktales and myths across the globe?<sup>1</sup> Why is it that 66 million Americans enjoy non-consumptive wildlife-related recreation such as bird-watching and wildlife photography, yet our government agencies at the state and federal levels allow broad-scale destruction of natural habitats and permit, or themselves engage in, unsustainable hunting, trapping, and fishing of the wildlife we enjoy?<sup>2</sup>

The Endangered Species Act provides us with tools to craft effective protections against human activities that are driving species and ecosystems to extinction. The stakes couldn't be higher.

### Overview of the Law

Congress passed the Endangered Species Act (ESA) in 1973, and then-President Richard Nixon signed it into law, out of concern for the native plants and animals imperiled "as a consequence of economic growth and development untempered by



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adequate concern and conservation."<sup>3</sup> In passing the ESA, Congress enacted one of the strongest environmental protection statutes in the world.

The ESA's purpose is to conserve imperiled species and the ecosystems upon which they depend.<sup>4</sup> To achieve this end, the statute directs the federal government to classify ("list") species as "endangered" or "threatened," to designate critical habitat for listed species, and to develop recovery plans that actively conserve and restore listed species. The ESA obligates federal agencies to proactively conserve endangered and threatened species, to

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*ENDANGERED SPECIES, cont. from front page* avoid jeopardizing them or adversely modifying their critical habitat, and to protect listed species from “take” (for example, killing, harassment, degradation of habitat) by private individuals and public agencies.<sup>5</sup>

The ESA is a precautionary statute. It errs on the side of protecting wild flora and fauna in the face of scientific uncertainty. Under the law, a wide variety of life forms are eligible for protection, including species, subspecies, and distinct population segments. The ESA not only protects wildlife on the brink of extinction – “endangered” species, but also those on the road to becoming endangered – “threatened” species. Moreover, the law provides for species to be listed based on the best scientific or commercial data available, rather than mandating a higher threshold of scientific certainty.<sup>6</sup> The choice of the drafters to act on the best available data is key, as it makes addressing suspected risks to species the priority rather than allowing species to languish during an often unachievable quest for perfect knowledge.

Congress had the foresight to authorize citizen enforcement of the ESA in the event that the federal government violated the law or failed to enforce it against non-governmental violators. Under the statute, citizens can petition for the listing or delisting of a species, and for the revision of a species’ critical habitat. In addition, citizens can sue the Secretaries of Interior

or Commerce, who share responsibility for the ESA’s enforcement, or any other party alleged to be in violation of the ESA. Citizens can also compel these Secretaries to enforce the ESA against other parties who are violating the law, after providing 60-days’ notice.<sup>7</sup>

Government foot-dragging on the ESA, under the current administration and, in fact, under every administration after Jimmy Carter’s, makes citizen enforcement of the ESA crucial. We must act on behalf of species on the brink when our elected officials and agency decision-makers fail to deliver.

### ESA Controversies

Although Congress passed the law almost unanimously in 1973, it has been enshrouded in controversy since the late 1970s. Supreme Court Justice Antonin Scalia described the ESA as capable of imposing “unfairness to the point of financial ruin...upon the simplest farmer who finds his land conscripted to national zoological use.”<sup>8</sup> Former president George H.W. Bush similarly characterized it as a “sword aimed at the jobs, families, and communities of entire regions.”<sup>9</sup> A federal court judge wrote in a 2003 dissenting opinion that, “Under the court’s reasoning the ESA, like Frankenstein, despite the good intentions of its cre-



*In 2000, the USDA’s Wildlife Services killed over three million animals, including gray wolves, which are listed under the ESA.*

ators, has become a monster.”<sup>10</sup> In contrast, in 1999, university researchers documented that 84% of the American public supports the current or even a stronger ESA.<sup>11</sup>

Controversies span private and public lands. Private property rights groups have continually complained that the law erodes property rights by restricting actions that harm wild animals on private land.<sup>12</sup> However, the ESA’s reach to private lands is part of its wisdom. An estimated 75% of listed species find the majority of their habitat on private land, and some 90% find a significant portion of their habitat on private land.<sup>13</sup> Therefore, if we are going to prevent the extinction of imperiled species, we must protect them where they live, on private or public land. In addition, the ESA can curtail destructive management activities (of land and wildlife) being permitted on federal land or by federal agencies, through its provision that federal agencies not permit actions that result in the jeopardy of a listed species or the adverse modification of its critical habitat.<sup>14</sup> Moreover, federal agencies cannot themselves commit actions that would result in these harms.

By assertively defending imperiled species, the ESA has generated more than a few enemies. Extractive industry interests (e.g., mining, oil and gas, logging, ranching, water developers, commercial builders), state wildlife agencies, federal

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*In the northern Great Plains, where oil and gas wells are planned, citizens are fighting to protect the integrity of habitat that listed species—as well as candidates awaiting listing, such as the black-tailed prairie dog—need for survival.*

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agencies, and pro-industry administrators and politicians have all sought to weaken the ESA, given its potential for curbing short-sighted economic activities.

Industrial interests have long been hostile to the ESA's purpose of tempering economic growth with "adequate concern and conservation." Within a few years after the law's passage almost three decades ago, various industries began to complain that the ESA was harming economic growth and was therefore a threat to the U.S. economy. Over the past three decades, the ESA, although enduring many sets of amendments, some motivated by complaints from industries, has emerged fairly intact. Meanwhile, the U.S. economy has experienced strong periods of economic growth.

The amended ESA now contains an exemption process for federal agencies (conducted by a committee nicknamed the "God Squad" for its ability to actually condemn a species to extinction) and a provision that allows private parties to secure incidental take permits by developing habitat conservation plans.<sup>15</sup> Despite these and other exemptions, the law provides a vital bottom line for species protection and provides citizens with the tools to make sure species do not disappear forever.

State wildlife agencies often criticize the ESA, as listed species are primarily managed by federal authority, thus preempting state authority. The "states' rights" movement—often a thin window dressing for an anti-conservation agenda and generally allied with traditional extractive industries—picked up steam under the Reagan Administration. Especially in the West, state legislatures and agencies tend to be dominated by representatives of industries that damage or exploit the wild, and the ESA's potential to limit harmful land uses to benefit native species has not been welcome.



*In the Pacific Northwest, after multiple citizen petitions and dogged litigation had secured ESA listing and critical habitat designation for the northern spotted owl, a stealthy legislative maneuver cleared the way to resume logging of old-growth forests on USFWS land.*

In addition, state wildlife agencies are generally beholden to hunting, fishing, and trapping interests, as they are in large part funded through license fees paid by these groups. Because of this artificially skewed constituency, state wildlife agencies often engage in damaging practices such as the stocking of non-native sportfish that often compete with, prey upon, or hybridize with native fish species. Native fish are increasingly imperiled in the U.S. For example, some 85.7% of Arizona's native fish are at risk.<sup>16</sup> Non-native inva-

sive species in general are considered a leading cause of species endangerment across the U.S., contributing to the decline of 57% of endangered plants and 39% of endangered animals.<sup>17</sup>

Because citizens can and have used the ESA to combat mischief by public and private parties, federal agencies and their administrators often seek to weaken the law. Front and center at present is Interior Secretary Gale Norton. Secretary Norton has primary authority over the enforcement of the ESA, yet she is a long-time adherent to states' rights and is un-

wavering in her support of propertied and moneyed interests over the biological needs of imperiled species. For example, Norton's term of office has seen the lowest number of listings per year since the early 1980s, and all listings have been in response to citizen petitions and litigation.<sup>18</sup> Some 285 additional species desperately await listing as candidates and proposed species.<sup>19</sup> Moreover, as of 1999, 6,460 U.S. species were identified as imperiled or vulnerable, the majority of which are not even listing candidates.<sup>20</sup>

The abysmal bottleneck on listings under Norton is second only to that under Reagan,<sup>21</sup> whose Interior Secretary, James Watt, was deeply antagonistic to imperiled species conservation. Not coincidentally, Watt was Norton's mentor. Administrative hostility was also evident in the administrations of Bill Clinton and Bush Senior. George H.W. Bush's Interior Secretary, Manuel Lujan Jr. – the primary official responsible for implementing the ESA at the time – quipped, in reference to the critically imperiled Mount Graham red squirrel in Arizona, "Nobody's told me the difference between a red squirrel, a black one, or brown one. Do we have to save every subspecies?"<sup>22</sup>

Under the law, the answer is an unequivocal "yes." Chillingly, antagonism endures among the very federal officials responsible for the ESA's enforcement. The current Bush administration is trying very hard to weaken the ESA via broad ex-



*Citizens continue to challenge logging and ski resorts in the Rocky Mountains, because of the negative impacts upon the lynx and other forest animals.*

**Federal agencies are not just guilty of allowing land uses and actions by private parties that jeopardize imperiled species and harm their habitat; these agencies also often need to be curtailed from committing actions themselves that are harmful to species on the brink.**

emptions from the law, particularly for the Department of Defense, and is trying equally hard to administratively repeal the critical habitat provision and to erode citizens' power to enforce the law. The outlook would be bleak indeed if we had to rely solely on government enforcement of the ESA.

### A Brief History of Citizen Enforcement of the ESA

There has long been an important role for citizens to play in ESA enforcement, including petitioning for species to be listed, for their critical habitat designations to be revised, and to sue any party that violates any section of the ESA. An early high watermark for controversy over the ESA was the Tellico Dam issue in the late 1970s. The Tennessee Valley Authority, a federal agency, planned the construction of a \$100 million dam on the Little Tennessee River. The completion of the dam was challenged by citizens as likely to jeopardize the survival and harm

the critical habitat of the snail darter, a type of perch inhabiting the Little Tennessee.

A citizen lawsuit stopped the dam from being completed. In the 1978 landmark opinion by the U.S. Supreme Court in *Tennessee Valley Authority v. Hiram Hill*, Chief Justice Burger declared that, "the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.'" The majority found that, given this incalculable worth of endangered species, it would be difficult and inappropriate for the court to weigh the economic costs of protection against the value of protecting a species. Consequently, the Supreme Court affirmed the injunction of the Tellico dam, a \$100 million dollar project that was 90% complete, because its completion would jeopardize the snail darter.<sup>23</sup>

As a result, many in Congress were up in arms about the ESA. While the statute itself remained essentially intact, the Tellico Dam was ultimately completed, via an appropriations rider heard for a mere 42 seconds on the House floor.<sup>24</sup> In fact, Tennessee Republican Congressman John Duncan, who introduced the amendment, waived the clerk's reading of the measure before the word "Tellico" was uttered. Many observers suggested that House members appeared not to realize that they were voting for the completion of the dam despite its predicted effect on an endangered species.<sup>25</sup>

The Tennessee delegation's undemocratic manner of obtaining the comple-



*In the southwest, citizens fight to address the impact that livestock on federal lands have upon listed species, such as the Mojave Desert tortoise.*

tion of the Tellico Dam proved a harbinger of future tactics employed by those antagonistic to endangered species protection. In the 1990s, in another high profile case, that of the northern spotted owl threatened by logging in the Pacific Northwest, multiple citizen petitions and dogged litigation resulted in ESA listing and critical habitat designation for the spotted owl.<sup>26</sup> However, a non-descript rider called Section 318 was attached to a Senate general appropriations bill. It briskly passed through both houses and overrode a court injunction that had stopped the logging of old-growth forests on U.S. Forest Service land in the Pacific Northwest on behalf of the northern spotted owl. Edward Grumbine, author of *Ghost Bears: Exploring the Biodiversity Crisis*, described this as "a sleight of hand that made a mockery of both the law and the democratic process."<sup>27</sup> Section 318 was one of several riders used by the Pacific Northwest delegation to avoid logging prohibitions that were intended to minimize threats to the owl.<sup>28</sup>

Throughout the ESA's history, citizens have fought for species on the brink. More recent examples include efforts to address the impact of livestock grazing on

### Endangered vs. Threatened

A species designated as Endangered automatically receives all protections provided by the law from "take", which includes killing, harassment, collection, and major habitat modification.

A species designated as Threatened does not automatically receive these protections. By regulation, the Interior Secretary (or Commerce, if it is a marine species) extends prohibitions on take to threatened species but also retains the authority to issue a "special 4(d)" rule for threatened species, allowing some take to be allowed, including killing.

The dangers of 4(d) rules become clear by example of the Utah prairie dog, a critically imperiled species numbering less than 10,000. Because this prairie dog was downlisted to Threatened status, the Fish and Wildlife Service allows up to 6,000 of them to be shot every year. The Utah prairie dog is declining and in danger of extinction.

It pays to be listed as Endangered. Where scientifically defensible, citizens should lobby for proposed species to be listed as Endangered or petition for reclassification of Threatened species to Endangered status.

There are many roles citizens can play, including taking administrative and legal actions under the statute and expanding the public's awareness of the ESA's importance.

listed species inhabiting federal lands in the southwest, such as the Mojave Desert tortoise, Mexican wolf, southwestern willow flycatcher, Mexican spotted owl, and northern aplomado falcon. In the Rocky Mountains, citizens continue to challenge logging and ski resorts because of their impacts on the lynx and other forest wildlife. In the intermountain west, citizens fight for the sage grouse's habitat in the Sagebrush Sea. In the northern Great Plains, activities of oil and gas companies – particularly the Bush administration's plans for 77,000 coal-bed methane wells in the Powder River Basin – are being fought by citizens concerned for the imperiled mountain plover (whose listing proposal was recently withdrawn by Norton and Bush), the black-tailed prairie dog (a candidate for listing), and other grassland species whose habitat would be fragmented and degraded by these activities. From the east coast to the west, urban sprawl is taking its toll, and citizens struggle to protect endangered species on some of their last outposts on private and public land.

Federal agencies are not just guilty of *allowing* land uses and actions by private parties that jeopardize imperiled species and harm their habitat. These agencies themselves also often need to be curtailed – again through civic vigilance – from *committing* actions that are harmful to species on the brink. For instance, one division within the U.S. Department of Agriculture, little-known to the public and misleadingly named “Wildlife Services” (WS), kills millions of animals, both wild and feral, every year. In 2000, WS killed over three million animals, including gray wolves, which are listed under the ESA.<sup>29</sup>

In a perverse twist, WS is playing an active role in “conserving” species listed under the ESA. Increasingly, the U.S. Fish and Wildlife Service (USFWS) appears to be substituting much-needed habitat protection with WS killing operations. Killing of native predators such as coyotes and bad-

gers is being employed in endangered species programs, for example, that of the black-footed ferret, while vital policy changes are unaddressed, such as the poisoning and shooting of prairie dogs, on whom ferrets depend for their survival. Gray wolves in the Northern Rocky Mountains and reintroduced Mexican wolves in the southwest are being mercilessly hunted down when they leave arbitrary boundaries that federal and state governments establish to please a handful of public lands ranchers whose livestock losses are compensated by Defenders of Wildlife. In the face of irrational governmental actions, citizen oversight is imperative.

### A Continued Role for Citizens

Citizens and conservation groups must remain actively involved in ESA enforcement. There are many roles citizens can play, including taking administrative and legal actions under the statute and expanding the public's awareness of the ESA's importance. An overview of citizen roles in ESA enforcement and advocacy follows.

***Petitioning for species to be listed or upgraded from threatened to endangered status.*** Under the ESA's Section 4, citizens can petition for a species to be added to the list of species protected under the ESA, or to be upgraded from threatened to endangered status. A previous issue of *Wildlife Tracks* [Fall 1995], provided a detailed outline for preparing a status review and conservation assessment. See Sidebar on Citizen Petitions, p.7.

Once a species is petitioned for listing under the ESA, or for reclassification from threatened to endangered status, the USFWS must meet certain deadlines to review the petition. From the date the petition was filed, the USFWS is required to issue a finding within 90 days “to the extent practicable” on whether the petition presents substantial scientific in-

formation indicating that the petitioned listing may be warranted.<sup>30</sup> If the 90-day finding is positive, the USFWS proceeds with a 12-month status review. Under the law, this process must be completed and a finding issued within 12 months of the date the petition was filed.<sup>31</sup>

At the 12-month finding stage, there are three possible determinations: that the species warrants listing, that the species does not warrant listing, or that the species warrants listing but that the listing is precluded by higher priority actions.<sup>32</sup> If the species warrants listing, the USFWS is required under the law to propose the species for listing and then must publish a final listing rule within one year.<sup>33</sup> If listing of the species is deemed warranted but precluded, the species is placed on a list of candidate species and is assigned a listing priority number based on whether it is the only member of its genus, a full species, or a subspecies or distinct population; and based on the magnitude and imminence of the threats it faces.<sup>34</sup> As of early May 2003, there were 249 candidate and 36 proposed species, some of which have been mired in a state of bureaucratic purgatory as candidates for over 25 years.<sup>35</sup>

Administration budget requests for listing have been so low in recent years that they have ensured a listing bottleneck. While the USFWS estimates that it requires \$153 million to redress the backlog of candidates and critical habitat designations,<sup>36</sup> budget requests for these items have been well under 10% of what is required. Such low requests ensure that the USFWS can use the under funding excuse to dodge species listings. Citizens must counter this systemic pathology by continuously applying pressure for listing of imperiled species and exposing USFWS's flawed excuses at every turn.

***Petitioning for critical habitat designations for listed species.*** The USFWS has an abysmal record of designating critical habitat for listed species. The Bush Administration recently declared that “the ESA is broken,” spotlighted critical habitat as the

**Citizens can sue any party for any violation of the ESA that harms an endangered species.**

**Habitat destruction is the primary cause of imperilment for 85% of endangered species in the U.S., yet only one out of three listed species have critical habitat designations.**



culprit, and declared that it considers critical habitat to be a low priority.<sup>37</sup> Past administrations have similarly ducked this vital provision. As a result, only one out of three listed species have critical habitat designations.<sup>38</sup> The lack of critical habitat designation is problematic, as habitat destruction is the primary cause of imperilment for 85% of endangered species in the U.S.<sup>39</sup> The current Bush Administration is the only presidency not to have designated any critical habitats except under court order. Of the critical habitat proposals under the current administration, 92% were reduced in size between the proposed and final rules, costing imperiled species some 42 million acres.<sup>40</sup> Citizens can contest flawed administrative refusals to designate critical habitat and challenge the content (e.g., area protected) of proposed critical habitat designations.

Critical habitat designations escalate federal agencies' species protective obligations from merely preventing extinction to enabling recovery. Critical habitat designations provide protection for unoccupied areas essential to recovery of a species.<sup>41</sup> In addition, federal agencies are barred from adversely modifying critical habitat, rather than the less restrictive standard of not jeopardizing a species' survival.<sup>42</sup> The USFWS admits that species with critical habitat designations are twice as likely to be recovering as those lacking designations.<sup>43</sup> The listing petition timelines described above are the same as the timelines governing citizen petitions to revise critical habitat.<sup>44</sup>

**Challenging federal activities (including the permitting of private parties) that imperil listed species.** Under the ESA's Section 11, citizens can sue *any* party for *any* violation of the ESA.<sup>45</sup> This includes challenging activities being permitted on federal land (e.g., livestock grazing, logging, and oil and gas extraction) that are harming endangered species. A vital beginning step is to provide the alleged violator with a 60-day notice via certified mail (return receipt requested), which is a letter laying out your claims. This starts the clock for when you can litigate.<sup>46</sup> The recipient of a 60-day notice may respond to you about

## Citizen Listing Petitions

**§ Preliminary research.** Conduct a comprehensive scientific literature review, including academic journals, books, population surveys, and wildlife agency reports. Also, send formal open records requests to state and federal agencies involved in the species' management.

**§ Petition-writing.** Describe the historic and current distribution and population status of the species that is the subject of the petition. Discuss the threats to the species, as laid out by the ESA:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) over-utilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms;
- (E) other natural or manmade factors affecting its continued existence.

**§ Working with experts.** Contact the leading scientific authorities for the species or subspecies you're petitioning. Ask them for as much assistance as they can give, including ensuring you are using the best available data and requesting they review drafts of your petition.

**§ Legal concerns.** Make sure that you can establish legal standing of the petitioners. Work collaboratively with citizens, scientists, and conservation groups that observe, study, or work to protect the species you're petitioning. Ask them to sign on to your petition. Send your final petition, which must be clearly marked as a petition to list/uplist a species, to the Interior Secretary and USFWS Director via certified mail, return receipt requested. Include a cover letter indicating that you are submitting a formal ESA listing petition.

**§ Follow-up.** If the agency fails to meet the law's petition deadlines, consult an attorney well versed in the ESA before moving forward. Earthjustice (<http://www.earthjustice.org/>) and the Western Environmental Law Center (<http://www.welc.org/>) have attorneys on staff who litigate ESA petitions and may be able to assist you. Many private attorneys, available for consultations, are also working to ensure species protection.

**§ Outreach.** Coordinate your petition work with the Endangered Species Coalition ([www.stopextinction.org](http://www.stopextinction.org)) to ensure the word gets out to the public and the media about the need to protect the species you're petitioning for listing, and to align your efforts with national work to improve endangered species policy.

your claims and may articulate plans to bring their behavior in line with the ESA. If that response is not satisfactory, 60 days after they received the notice (which you'll know from the date on the certified mail return receipt), you can take the case to court.

**Enforcing prohibitions on take against private parties.** As mentioned above, the ESA prohibits take of endangered animals.<sup>47</sup> Regulations have extended this protection

to threatened species, with some exceptions (see Endangered v. Threatened sidebar, p. 5). The law does not provide the same protection for listed plants, but does prohibit maliciously damaging or destroying listed plants on federal lands or on other lands if the destruction is in violation of state laws.<sup>48</sup> For listed animals, "take" is defined broadly as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to



engage in any such conduct.”<sup>49</sup> By regulation, “harm” includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”<sup>50</sup>

Section 9 of the ESA is a potentially powerful tool for protecting individual animals of a listed species from direct harm by humans or indirect harm through habitat destruction by private parties. However, it is lightly applied by the USFWS. The U.S. General Accounting Office found in a 1994 report that only 126 takings violations were adjudicated between 1988 and 1993. In only four cases was injunctive relief obtained to delay or stop activities on non-federal lands. The defendant in one of the four cases was a state wildlife agency. Therefore, in the years 1988-1993, the actions of only three private parties on private lands were delayed or enjoined via Section 9 prohibitions.<sup>51</sup> It is vital that citizens use the power given them through the ESA to bring lawsuits to enjoin private parties from taking listed species.<sup>52</sup>

**Contesting flawed species reintroduction programs.** Given the long delays in listing, by the time species are added to the threatened or endangered list, they have often been extirpated from vast areas within their historic range. One review of the status of ESA-listed species revealed that the median population sizes and numbers of plant and animal populations at time of listing are so low as to “suggest a high risk of extinction and a low probability of recovery.”<sup>53</sup> These authors indicated that the sizes and numbers of vertebrate populations at time of listing are low enough to recommend establishing captive populations to avoid total extinction. According to this study, the median population size of plants at time of listing is a mere 119.5 individuals.

Consequently, reintroduction of species to areas within their former range is increasingly a part of species recovery programs. Unfortunately, reintroduced animals are usually designated as “experimental, non-essential” populations, which

strips them of many of the ESA’s protections.<sup>54</sup> Citizens can challenge these designations by commenting on proposed experimental, non-essential rules when they are published in the Federal Register and can litigate if their objections are ignored by the USFWS.

**Increasing awareness about the need for a strong federal ESA.** Whether talking to your neighbors, your co-workers, friends and families, or writing letters to elected officials or agency managers, it is essential that you increase awareness about the ESA’s importance. In today’s political climate, the media and public officials are criticizing this law as too harsh and potentially crippling for the U.S. economy. This is hyperbolic and inaccurate. The ESA is a crucial last-string defense against extinction, and it helps rein in unsustainable economic activities, many of which are heavily subsidized by government agencies.<sup>55</sup> As discussed below, the ESA should encourage us to look farther down the road, beyond the next quarter’s earnings, to the needs and well-being of people and the natural world for decades and generations to come.

### The ESA in perspective

The ESA was visionary when it was passed by Congress almost unanimously thirty years ago and it remains at the vanguard today. The law’s architects and supporters argued for a strong biodiversity statute based on moral, ecological, and utilitarian reasons, and from the perspective that imperiled species represent (unwilling) canaries in a coal mine. We ignore the onward march of species extinction at our own peril, agreed most of Congress in 1973.<sup>56</sup>

That warning still rings true. Two-time Pulitzer Prize winner E.O. Wilson argued in *The Future of Life* that we are literally mortgaging the Earth by continuing down the path of unsustainable economies.<sup>57</sup>

Non-governmental researchers have established that humans are currently exceeding the Earth’s biological capacity by at least 20%. In other words, “the human economy is liquidating the Earth’s natural capital.”<sup>58</sup> Rather than merely living off the interest that the Earth’s natural capital provides, we are drawing down the capital, and our bank account will soon be empty.<sup>59</sup>

On the way to eventual economic collapse (if policies aren’t changed), ecosystems will crumble and native flora and fauna will disappear. Economists estimate that intact natural systems provide us with \$33 trillion annually in “ecosystem services.” Whether the maintenance of the atmosphere, creation of clean air, and recycling of rainfall by forests; filtering of water by forests and healthy watersheds; nourishing of agricultural plants and trees by microorganisms; decomposition of organic matter; waste disposal; nitrogen fixation and nutrient cycling; bioremediation of chemicals; biocontrol of species that attack crops, forests, and domesticated animals; or pollination by birds, bees, butterflies, bats, and others, components and processes of nature make the Earth livable, and we must therefore defend them more vigilantly.<sup>60</sup>

Yet, we should regard estimates of the monetary value of a living planet as grossly underestimated. We generally cannot replace ecosystems once they are in tatters.<sup>61</sup> In addition, monetary measurements do not consider the intangible spiritual, moral, and aesthetic values discussed at the outset of this article.

With a government unwilling to do so, citizens must grasp the tools provided by the ESA and hold government and industry accountable to moral, spiritual, aesthetic, ecological, and utilitarian reasons to prevent species from disappearing forever. That is what a wiser, more compassionate Congress intended. It is our duty to turn this vision of a better, wilder, more peaceful world into reality.

FOR CITIZEN ACTIVISTS, THE ENDANGERED SPECIES COALITION IS AN INVALUABLE SOURCE OF BACKGROUND INFORMATION ON THE ESA AND PROVIDES ON-LINE TOOLKITS FOR TAKING ACTION AT [WWW.STOPEXTINCTION.ORG](http://WWW.STOPEXTINCTION.ORG).

By Nicole Rosmarino, Ph.D., *Endangered Species Director, Forest Guardians*. Adapted from a longer report entitled, "Enforcing the ESA," available from *Forest Guardians*, [www.fguardians.org](http://www.fguardians.org).

### Additional Reading

§ Defenders of Wildlife's and Center for Biological Diversity's report on *Conservation in Action: Safeguarding Citizen Rights Under the Endangered Species Act*. Available on-line: at <http://www.biologicaldiversity.org/swcbd/Programs/science/ESAreport.pdf>.

§ Stanford Environmental Law Society. (2000). *The Endangered Species Act Handbook*. Stanford, CA: Stanford University Press.

§ Schubert, D.J. and Carlton, J. (1995). How to protect your species under federal, state or local statutes and regulations. *Wildlife Tracks*, 1(2): 1, 3 – 5. Request a copy from Bette Stallman, 301-258-2147; [bstallman@hsus.org](mailto:bstallman@hsus.org)

### (Endnotes)

<sup>1</sup>Kellert, Stephen R. (1996). *The Value of Life: Biological Diversity and Human Society*. Washington, DC: Island Press.

<sup>2</sup>U.S. Department of the Interior, Fish and Wildlife Service and U.S. Department of Commerce, U.S. Census Bureau (2002). "2001 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, Fish and Wildlife Service." This report indicates that, in 2001, 66 million Americans over the age of 16 engaged in feeding, observing, and/or photographing wildlife, spending \$38.4 billion.

<sup>3</sup>16 U.S.C. § 1531(a)(1).

<sup>4</sup>16 U.S.C. § 1531(b).

<sup>5</sup>16 U.S.C. § 1531 et seq.

<sup>6</sup>16 U.S.C. § 1533(b).

<sup>7</sup>16 U.S.C. § 1540(g).

<sup>8</sup>See Scalia's dissenting opinion in *Babbitt v. Sweet Home Communities for a Greater Oregon* (515 U.S. 687 (1995)).

<sup>9</sup>President Bush stated this in 1992, in reference to the northern spotted owl controversy. See Houck, Oliver A. 1993. "The Endangered Species Act and its implementation by the US Departments of Interior and Commerce." *University of Colorado Law Review* 64(2):277.

<sup>10</sup>See dissenting opinion of Judge Paul Kelly in *Rio Grande Silvery Minnow et al. v. John W. Keys, III, et al.* (10<sup>th</sup> Cir. 2003) at p. 35.

<sup>11</sup>Czech, Brian, and Paul R. Krausman (1999). "Public Opinion on Endangered Species Conservation and Policy." *Society and Natural Resources* 12(5): 469-479.

<sup>12</sup>The prohibition on taking listed species only applies to animals, not plants. 16 U.S.C. § 1538(a).

<sup>13</sup>See U.S. General Accounting Office (1994).

"Endangered Species Act: information on species protection on nonfederal lands." Report No GAO/RCED-95-16.

<sup>14</sup>16 U.S.C. § 1536(a)(2).

<sup>15</sup>16 U.S.C. §§ 1536(e) and 1539(a)(1)(B).

<sup>16</sup>Stein, Bruce A. (2002). "States of the Union: Ranking America's Biodiversity." Arlington, VA: NatureServe.

<sup>17</sup>Wilcove, David S., David Rothstein, Jason Dubow, Ali Phillips, and Elizabeth Losos (1998). "Quantifying threats to imperiled species in the United States." *BioScience* 48(8):607-615.

<sup>18</sup>See Center for Biological Diversity (2003). "Critical habitat works for endangered species." Unpublished manuscript. 5 pp.

<sup>19</sup>The list of candidate species numbered 249 and the list of proposed species numbered 36 as of May 9, 2003. See <http://endangered.fws.gov/wildlife.html#Species>, visited 9 May 2003. This URL provides links to list of candidate, proposed, and listed species.

<sup>20</sup>Stein, B.A., L.S., Kutner, and J.S. Adams (Eds.) (2000). *Precious Heritage: The Status of Biodiversity in the United States*. Oxford University Press. See Table 4.4 at p. 104.

<sup>21</sup>Center for Biological Diversity (2003).

<sup>22</sup>Yaffee, Steven L. (1994). *The Wisdom of the Spotted Owl: Policy Lessons for a New Century*. Washington, DC: Island Press. See p. 128.

<sup>23</sup>437 U.S. 153 (1978).

<sup>24</sup>Plater, Zygmunt J.B. (1982). "Reflected in a river: agency accountability and the TVA Tellico Dam case." *Tennessee Law Review* 49(4):772-783; Tilt, Whitney (1989). "The biopolitics of endangered species." *Endangered Species Update* 6(1): 35-39.

<sup>25</sup>Foley, Elizabeth A. (1992). "The tarnishing of an environmental jewel: the Endangered Species Act and the Northern spotted owl." *Journal of Land Use and Environmental Law* 8: 253.

<sup>26</sup>For overviews on the northern spotted owl controversy and litigation, See Blumm, Michael (1991). "Ancient forests, spotted owls, and modern public land law." *Boston College Environmental Affairs Law Review* 18: 605; Bonnett, Mark and Kurt Zimmerman (1991). "Politics and preservation: the Endangered Species Act and the Northern spotted owl." *Ecology Law Quarterly* 18: 105; Foley 1992; Flournoy, Alyson C. (1993). "Beyond the "Spotted Owl Problem": learning from the old-growth controversy." *Harvard Environmental Law Review* 17: 261; Yaffee (1994).

<sup>27</sup>Grumbine, R. Edward (1992). *Ghost Bears: Exploring the Biodiversity Crisis*. Washington, DC: Island Press. See p. 147.

<sup>28</sup>Foley 1992.

<sup>29</sup>Wildlife Services (2001). "Number of Animals Taken and Methods Used by the WS Program, FY 2000 (Table 10)." All quantified data of animals killed by Wildlife Services in 2000 derives from this source. Available at <http://www.aphis.usda.gov/us/tables/00table10t.rtf>.

<sup>30</sup>16 U.S.C. § 1533(b)(3)(A).

<sup>31</sup>16 U.S.C. § 1533(b)(3)(B).

<sup>32</sup>*Ibid.*

<sup>33</sup>16 U.S.C. § 1533(b)(6). At this stage, FWS can also withdraw the listing proposal or extend the one-year period by six months if there is "substantial disagreement regarding the sufficiency or accuracy of the available data." 16 U.S.C. § 1533(b)(6)(B)(i).

<sup>34</sup>FWS developed this listing priority number

system in 1983 (48 Federal Register 43098). It is supposedly in the process of being replaced with a new listing priority guidance.

<sup>35</sup>See <http://endangered.fws.gov/wildlife.html#Species>, visited 9 May 2003.

<sup>36</sup>Declaration of Gary Frazer, Assistant Director for Endangered Species, U.S. Fish and Wildlife Service, in *Defenders of Wildlife et al. v. Gale Norton and Steve Williams* (CIV 02-00165-M-DWM), April 26, 2003 at p. 4.

<sup>37</sup>See U.S. Dept. of Interior press release, dated May 28, 2003.

<sup>38</sup>See <http://endangered.fws.gov/wildlife.html#Species>, visited 12 May 2003. Of the 1,263 species listed under the ESA, 426 had critical habitat designations as of May 12, 2003.

<sup>39</sup>Wilcove et al. (1998).

<sup>40</sup>See Center for Biological Diversity memo dated May 28, 2003. Available at: <http://www.biologicaldiversity.org/>.

<sup>41</sup>16 U.S.C. § 1532(5).

<sup>42</sup>16 U.S.C. § 1536(a)(2).

<sup>43</sup>See Center for Biological Diversity (2003); U.S. Fish and Wildlife Service 1996 *Biennial Report to Congress*; and the National Marine Fisheries Service 2002 *Biennial Report to Congress*.

<sup>44</sup>16 U.S.C. § 1533(b)(3)(D).

<sup>45</sup>16 U.S.C. § 1540(g)(1).

<sup>46</sup>16 U.S.C. § 1540(g)(2).

<sup>47</sup>16 U.S.C. § 1538(a)(1).

<sup>48</sup>16 U.S.C. § 1538(a)(2).

<sup>49</sup>16 U.S.C. § 1532(19).

<sup>50</sup>50 C.F.R. § 17.3.

<sup>51</sup>U.S. General Accounting Office (1994).

<sup>52</sup>For an overview of the requirements for making such a case, see Goldman, Patti (2003). "Section 9 enforcement: the Oregon forestry take case." Unpublished manuscript. 14 pp.

<sup>53</sup>Wilcove, David S., M. McMillan, and K.C. Winston (1993). "What exactly is an endangered species? An analysis of the US Endangered Species List: 1985-1991." *Conservation Biology* 7(1):87-93. See p. 92.

<sup>54</sup>16 U.S.C. § 1539(j).

<sup>55</sup>For an overview on government subsidization of environmentally destructive economic sectors, visit <http://www.greenscissors.org/>.

<sup>56</sup>Rosmarino, Nicole J. (2002). "Endangered Species Act: Controversies, Science, Values, and the Law." Ph.D. Dissertation, University of Colorado at Boulder.

<sup>57</sup>Wilson, E.O. (2002). *The Future of Life*. New York: Alfred A. Knopf.

<sup>58</sup>Wackernagel, Mathis, Chad Monfreda, and Diana Deumling (2002). "Ecological Footprint of Nations: November 2002 Update." Published by Redefining Progress.

<sup>59</sup>*Ibid.* Also see Brown, Lester R. 2001. *Eco-Economy: Building an Economy for the Earth*. New York: W.W. Norton & Co. Brown offers a book-length treatment of the need to restructure the global economy to fall within the parameters of the Earth's carrying capacity and recommendations for accomplishing this goal.

<sup>60</sup>Ehrlich, Paul R., and E.O. Wilson (1991). "Biodiversity studies: science and policy." *Science* 253:758-62; Costanza, R., R. d'Arge, R. de Groot, S. Farber, M. Grasso, B. Hannon, K. Limburg, S. Naeem, R. V. O'Neill, J. Paruelo, R.G. Gaskin, P. Sutton, and M. van den Belt (1997). "The value of the world's ecosystem services and natural capital." *Nature* 387:253-260.

<sup>61</sup>Ehrlich and Wilson (1991).

