WHO NEEDS CONGRESS? AN AGENDA FOR ADMINISTRATIVE REFORM OF THE ENDANGERED SPECIES ACT

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INTRODUCTION

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INTRODUCTION

In 1991, the Board of Editors of Natural Resources & Environment[1] (NR&E) met to determine the themes to be published in the next volume and considered an entire issue devoted to a survey of the Endangered Species Act (ESA).[2] However, many editors raised the concern that Congress might complicate the logistics of publishing such an issue by enacting legislative reform measures in the middle of the publishing process. After all,

[1] Natural Resources & Environment is the quarterly journal of the American Bar Association's Section of Natural Resources, Energy and Environmental Law.

[2] 16 U.S.C. §§ 1531-1544 (1994 & Supp. I 1995).

reauthorization of the ESA was not only overdue, but a very hot topic of debate—congressional action had to be imminent, which would moot the entire ESA issue.

As it turned out, this was a naïve assumption. Congress enacted no ESA reform that year, or the next, or the next, or the next, or the next, or the next, and the idea that Congress would actually take the bull by the horns and make tough decisions about one of environmental law's toughest statutes was ingenuous. Fortunately, the proponents of the issue actually won the debate, and the issue was published in the summer of 1993.[3]

The ESA issue's proponents believed that the issue could make a difference in the legislative debate over the nation's premier biological resources protection law. However, this too proved to be naïve. Anyone who has followed the ESA debate knows that the flurries of bills introduced from all sides of the issue in the last few sessions of Congress haven't amounted to much more than political posturing and rhetoric.[4] On only a few occasions has a proposal been introduced to Congress that approached comprehensive, balanced reform attracting the approval of a wide cross-section of interest holders. Rather, most bills have contained wish lists for either preservationists or property rights lobbies, or have purported to offer a balanced approach by simply addressing the non-controversial provisions of the statute. This is why today, four years after NR&E published its ESA issue and fifteen years after the ESA was last significantly amended,[5] I believe that Congress will not meaningfully reform the statute any time soon.

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[3] *See* Symposium, *Endangered Species Protection*, NAT. RESOURCES & ENV'T, Summer 1993.

[4] For a review of some of the ESA reform bills introduced in the 103d and 104th Congresses, see Douglas L. Huth, *Endangered Species Act Reauthorization: Congress Proposes a Rewrite With Private Landowners In Mind*, 48 OKLA. L. REV. 383 (1995) (discussing bills in 103rd Congress.); Nancy Kubasek et al., *The Endangered Species Act: Time for a New Approach?*, 24 ENVTL. L. 329 (1994) (same); J.B. Ruhl, *Section 7(a)(1) of the Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1153-60 (1995) (discussing bills in 104th Congress) [hereinafter Ruhl, Section 7(a)(1)]; Eva Tompkins, *Reauthorization of the Endangered Species Act—A Comparison of Two Bills that Seek to Reform the Endangered Species Act: Senate Bill 768 and House Bill 2275*, 6 DICK. J. ENVTL. L. & POL'Y 119 (1997) (same).

[5] *See* RICHARD LITTELL, ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION 10-13 (1992) (describing the amendments to the ESA and characterizing the extensive 1982 amendments as containing

Specifically, there is virtually no hope that Congress will do what it should—that is, scrap the ESA entirely and start over by designing a law that protects both ecosystems and economic interests in an effective, balanced manner. Instead, rhetorical, picky, and amorphous statutory reform has been proposed which operates largely at the periphery of the matter and leaves the most difficult decisions to the agencies that implement the law. Under this incremental reform, we will not even begin to approach a statutorily-mandated, ecosystem-based method of protecting biological resources and economic interests for many decades.

So what purpose is served by a law journal article devoted entirely to the ESA reform process? The answer lies in the fact that ESA reform no longer is limited to the legislative arena. Indeed, the brightest glimmer of hope for legislative activity rests with the law's principal implementing agency, the United States Fish and Wildlife Service (FWS)[6] which, under the direction of Secretary of the Interior Bruce Babbitt, has embarked on an innovative and insightful overhaul of the ESA at the administrative level. Given that the agency has been pursuing a deliberate administrative reform policy for the past four years, any reasonable observer would have to confess that FWS is genuinely and aggressively trying to achieve what Congress has thus far been unable or unwilling to achieve—that is, make the ESA work.

In 1994, FWS used the amorphous nature of ESA statutory script to its advantage and initiated a process that is moving the ESA towards an ecosystem-based focus with an eye towards a genuine balance of preservationist and economic interests. Thus, FWS appears to finally understand that the essence of ESA policy and implementation requires a balance between strong and

"something for everyone" and the limited 1988 amendments as "fairly technical").

[6] The ESA delegates implementation authority to the Secretaries of the Interior (for terrestrial and most freshwater species) and Commerce (for marine species), *see* 16 U.S.C. § 1532(15) (1994), who in turn have delegated that authority to the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), respectively. *See* 50 C.F.R. § 402.01(b). Although FWS and NMFS often jointly issue rules or guidance pertaining to the ESA, references in this Article are principally to FWS as it is the predominant agency in terms of the number of species under its jurisdiction and its impact on economic interests, and because it has been the most aggressive in pursuing administrative reform of the program. NMFS's involvement in particular reform measures is noted.

effective ecosystem protection with a genuine respect for economic interests and those of the regulated community. Of course, the proper balance point is in the eyes of the beholder, and to many interested persons joining in the debate, "balance" is a four letter word. Clearly, FWS has not escaped criticism for its efforts from both preservationist and economic interests at their extremes.

However, to those observers in the "radical center," FWS's critics are considered to be short-sighted and narrow-minded. No matter what pops out of the congressional black box, no matter when it emerges, and no matter how much praise and criticism are heaped upon Congress's carefully drafted words, the reality is that legislative reform most likely will leave all of the tough decisions to FWS. These centrists believe that, since the Act gives the agency discretion to follow this course (as this Article argues), the FWS should do so.

This is not to say that the legislative arena should be ignored. Rather, legislative reform should still be pursued with the objective of facilitating FWS's efforts. However, since this Article focuses chiefly on the administrative side of the reform process, except as it pertains directly to FWS's reform agenda, others are left with the task of elaborating on the legislative dimension.[7] In Part I of the Article, the efforts that FWS has already undertaken to overhaul ESA policy and implementation are discussed. Specifically, FWS's attempts to reorient central ESA functions towards an ecosystem-based focus, and to adopt innovative policies designed to integrate property owners and other economic interests into the ecosystem protection process, are analyzed. These efforts are significant since they forged a policy nucleus around which true ESA reform can be molded.

It would be a mistake, however, for FWS to stop here. The momentum that FWS has gained in the past two years could propel ESA reform forward exponentially. Thus, in Part II of this Article, an agenda for additional ESA reforms that could be implemented at the administrative level is outlined. These reforms

[7] For comprehensive discussions of the core ESA programs, see DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION (1992); 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); James C. Kilbourne, *The Endangered Species Act Under a Microscope: A Closeup Look From a Litigator's Perspective*, 21 ENVTL. L. 499 (1991); LITTELL, *supra* note 5.

could advance ecosystem and economic interests further than those advanced by FWS so far, without sacrificing balance and effectiveness, by demonstrating that there is a substantial middle ground for reform and that the current focus on rhetoric and incrementalism must be eliminated. FWS's aggressiveness in this regard is very important because the sooner FWS pursues these additional reforms, the more likely the agency will be able to shape legislative outcomes.

In recognition that Congress recently appears to have noticed what FWS has done and has provided an early indication of what it thinks in the form of a legislative ESA reform proposal, Part III of the Article discusses how successful FWS might be in turning its administrative reform agenda into legislative reform. Although it is too soon to tell what, if anything, Congress will produce in the way of ESA reform, it is at least clear that several of FWS's major reform measures are serving as the starting points for current legislative efforts. Therefore, it may turn out that the most important accomplishment of FWS's administrative reform agenda is that it breaks the congressional logjam that has stalled ESA reform for so long—and that alone would be quite an accomplishment.

I
THE RECORD OF ESA ADMINISTRATIVE REFORM

The opening salvo in FWS's administrative reform effort came in March 1994 with the agency's publication of *An Ecosystem Approach to Fish and Wildlife Conservation (Ecosystem Approach)*.[8] The agency portrayed the Ecosystem Approach as its blueprint for "managing and protecting ecosystems."[9] The document did not directly implement or propose substantive changes to ESA implementation policy. Rather, it (i) outlined common principles of the ecosystem approach[10] and guidelines for de-

[8] U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, AN ECOSYSTEM APPROACH TO FISH AND WILDLIFE CONSERVATION: AN APPROACH TO MORE EFFECTIVELY CONSERVE THE NATION'S BIODIVERSITY (1994) [hereinafter ECOSYSTEM APPROACH].

[9] *Id.* at 5.

[10] *See id.* (focusing on biodiversity conservation; goal definition on ecosystem-wide bases; integration of socioeconomic factors; quality of science; flexibility of approach; and partnerships with other federal, state, local, tribal, public, and private interests).

lineation of ecosystem boundaries;[11] (ii) provided an evaluation of identified ecosystem units in terms of resources, threats, and management options;[12] and (iii) illustrated the agency's approach to planning and action frameworks.[13] However, specific ESA policy changes were to follow eventually.

Twelve months later, FWS added the second prong to its reform effort with the publication of *Protecting America's Living Heritage: A Fair, Cooperative and Scientifically Sound Approach to Improving the Endangered Species Act (Fair Approach)*.[14] This document outlined the agency's plan to provide "effective conservation of endangered and threatened species and fairness to people through innovative, cooperative, and comprehensive approaches."[15] Ten principles for federal ESA policy were outlined, each of which detailed the administrative reforms that the agency had recently implemented, or would soon propose, as well as the legislative reforms the agency would support.[16]

These two publications unmistakably signaled FWS's initiation of an administrative reform designed to move the agency and the ESA into the ecosystem era consistent with (or at least not entirely inconsistent with) property rights and economic interests. Whereas *Ecosystem Approach* has served as the agency's basis for ecosystem policy changes,[17] *Fair Approach* has served as

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[11] *See id.* at 6 (adopting a delineation system based on fifty-two watershed units identified in the U.S. Geological Survey Hydrologic Unit Map).

[12] *See id.* at 7 (identifying resource significance, risks to the resource, administrative response resources, and partnership opportunities as its principal ecosystem evaluation criteria).

[13] *See id.* at 8-9 (outlining FWS's approach for moving from identifying natural resource needs to setting resource goals and objectives, implementing solutions, monitoring, and reporting).

[14] U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, PROTECTING AMERICA'S LIVING HERITAGE: A FAIR, COOPERATIVE AND SCIENTIFICALLY SOUND APPROACH TO IMPROVING THE ENDANGERED SPECIES ACT (1995) (issued jointly with NMFS) [hereinafter FAIR APPROACH].

[15] *Id.* at 1.

[16] *See id.* at 3-4 (focusing on FWS's principles of increasing the quality of science; minimizing social and economic impacts; improving communication with landowners; treating of landowners fairly; providing conservation incentives to landowners; making more effective use of federal resources; preventing species from needing to be listed; recovering those species that are listed; adopting more efficient and consistent polices between FWS and NMFS; and including state, tribal, and local entities in ESA policy).

[17] FWS revised its ECOSYSTEM APPROACH document in April 1996 in the form of an updated internal policy guidance manual. *See* U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, FWM RELEASE NO. 251, ECOSYSTEM APPROACH TO FISH AND WILDLIFE CONSERVATION (1996). The agency has also

the blueprint for policies directed at property rights and economic interests.[18] The policies that have emanated from these two efforts are continuing to evolve, and at times, the two reform paths seem to be more independent than coordinated. But after several years of following such policies, FWS has fundamentally changed the look and feel of the ESA without Congress altering a single word in the statute.[19]

A. *Ecosystem Approach Policies*

Ecosystem Approach initiated a reorientation of ESA implementation towards the ecosystem unit (i.e., the building block of conservation policy according to emerging principles of conservation biology[20]) and biodiversity (i.e., the basic measure of ecosys-

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provided a plain-English explanation of its basic ECOSYSTEM APPROACH policy objective. *See* Denise Henne, *Taking an Ecosystem Approach, U.S. Fish and Wildlife Serv.*, U.S. DEP'T OF INTERIOR, ENDANGERED SPECIES BULL., Jan.-Feb. 1995, at 22.

[18] FWS recently confirmed its commitment to the Fair Approach philosophy in a document that explains the agency's current thinking on each element of the agenda and provides implementation examples from the field. *See* U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, MAKING THE ESA WORK BETTER: IMPLEMENTATION OF THE 10 POINT PLAN AND BEYOND (1997) (issued jointly with NMFS) [hereinafter MAKING THE ESA WORK BETTER].

[19] The purpose of this Article is to describe the breadth and central objectives of FWS's administrative reform effort. Although the body of literature pertaining to most of the policy initiatives is sparse, references are provided to the more detailed commentaries.

[20] The discipline of conservation biology has emerged as a biological sciences discipline largely in the past decade, as traced by its chief literature and research outlet called *Conservation Biology*. A focal point of discipline has been to demonstrate the often pernicious effects of habitat fragmentation and loss on species. It appears to be indisputable, for example, that a circular preserve of 1,000 contiguous acres offers more ecological value to many species than would ten unconnected amoeba-shaped preserves of 100 acres each. Smaller preserve structures increase the total linear "edge" of preserve boundaries, which can present opportunities to predators, and many species have been demonstrated to depend on a minimum "patch size" of habitat in order to carry out essential breeding, feeding, and sheltering functions. *See* Denis A. Saunders et al., *Biological Consequences of Ecosystem Fragmentation: A Review*, 5 CONSERVATION BIOLOGY 18 (1991). Often the adverse effects of habitat fragmentation and loss exhibit themselves not incrementally, but with a nonlinear threshold effect that appears seemingly without warning and thereafter is difficult to reverse. *See* Kimberly A. With & Thomas O. Crist, *Critical Thresholds In Species' Responses to Landscape Structure*, 76 ECOLOGY 2446 (1995) (arguing that while these factors may be difficult to measure in specific species contexts, it seems widely agreed in the scientific community that they exist in general and pose significant challenges for preserve design and management for many species, thus having important implications for the ESA program).

tem health[21]). The new policy model that has emerged from the combination of those concepts is known as "ecosystem management."[22] Although the ESA expresses its primary purpose as the conservation of ecosystems upon which endangered species depend,[23] the statute has been roundly criticized for not following through with coherent ecosystem management measures.[24] In-

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21 Biodiversity is "[t]he variety of organisms considered at all levels, from genetic variants belonging to the same species through arrays of species to arrays of genera, families, and still higher taxonomic levels . . . ." EDWARD O. WILSON, THE DIVERSITY OF LIFE 393 (1992); *see also* U.S. ENVIRONMENTAL PROTECTION AGENCY, THREATS TO BIOLOGICAL DIVERSITY IN THE UNITED STATES 10 (1990) (stating that biological diversity "is the variety of life on all levels of organization, represented by the number and relative frequencies of items"). The focus of scientific research geared towards ecosystem-level dynamics has revealed the dramatic impacts habitat loss has had on biodiversity generally. *See, e.g.*, U.S. DEP'T OF INTERIOR, OUR LIVING RESOURCES (1995); Nat'l Biological Serv., U.S. Dep't of Interior, Biological Rep. 28, Endangered Ecosystems of the United States: A Preliminary Assessment of Loss and Degradation (1995). For a summary of the biodiversity conservation policy formulation initiatives of eighteen federal agencies, see CONGRESSIONAL RESEARCH SERVICE, ECOSYSTEM MANAGEMENT: FEDERAL AGENCY ACTIVITIES, CRS Rep No. 94-339 (1994).

22 *See* THE KEYSTONE CENTER, THE KEYSTONE CENTER NATIONAL POLICY DIALOGUE ON ECOSYSTEM MANAGEMENT (1996) [hereinafter KEYSTONE DIALOGUE ON ECOSYSTEM MANAGEMENT]; STEVEN YAFFEE ET AL., THE WILDERNESS SOCIETY, ECOSYSTEM *Management in the United States* (1996); Symposium, *The Ecosystem Approach: New Departures for Land and Water*, 24 ECOLOGY L.Q. 619 (1997). Considerable debate remains over the practical implications of the ecosystem management policies. *Compare* R. Edward Grumbine, *What Is Ecosystem Management?*, 8 CONSERVATION BIOLOGY 27 (1994) (advocating movement towards this approach) *and* R. Edward Grumbine, *Reflections on "What is Ecosystem Management?"*, 11 CONSERVATION BIOLOGY 41 (1997) (same), *with* Rebecca W. Thomson, *"Ecosystem Management" Great Idea, But What Is It, Will It Work, and Who Will Pay?*, NAT. RESOURCES & ENV'T, Winter 1995, at 42 (pointing out difficulties of the approach).

23 16 U.S.C. § 1531(c) (1994).

24 *See* Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L. Q. 265, 304-17 (1991); James Drodzdowski, *Saving an Endangered Act: The Case for a Biodiversity Approach to ESA Conservation Efforts*, 45 CASE W. RES. L. REV. 553, 567-85 (1995); Andrew A. Smith et al., *The Endangered Species Act at Twenty: An Analytical Survey of Federal Endangered Species Protection*, 33 NAT. RESOURCES J. 1027, 1069-72 (1993). Several commentators contend, however, that the species-oriented approach of the ESA is both essential and working. *See* Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 959 (1997) ("Those who contend that the ESA is deficient because it fails to address biological diversity and ecosystem management on a broad enough scale . . . simply have not opened their eyes"); Jeffrey J. Rachlinski, *Noah By the Numbers: An Empirical Evaluation of the Endangered Species Act*, 82 CORNELL L.

stead, the ESA relies on identification and protection of individual endangered species.

Unfortunately, FWS does not have the discretion to replace the species-by-species approach with an ecosystem protection program that protects ecosystems independent of the existence of endangered species. However, nothing in the ESA forbids the agency from considering ecosystem factors when taking actions relevant to the species-by-species statutory framework. Thus, for example, to determine whether a species is endangered, FWS may delineate and evaluate the relevant ecosystem. Further, to determine how to promote conservation of endangered species, the agency might consider how to protect the species' entire ecosystem possibly providing protections to other species as well. As the agency declared in *Ecosystem Approach,* all aspects of FWS's ESA program can integrate some measure of ecosystem-based orientation, even though the ultimate actions under the present ESA framework must be directed towards species-based outcomes.

Indeed, this is precisely the direction in which FWS headed with its set of policy changes that it set forth after articulating its *Ecosystem Approach* philosophy. Advocates of extreme property rights' protections who ignore these biological and political realities are, to borrow a phrase, in danger of extinction.

1. *An Ecosystem Approach Policy for the ESA*

FWS's first ecosystem-based reform effort came in July 1994 with the agency's publication of a policy document translating the broad *Ecosystem Approach* philosophy into the relevant ESA language.[25] The policy focuses on three core ESA programs that FWS implements: (i) recovery planning;[26] (ii) inter-

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REV. 356 (1997) (using statistical analysis to demonstrate some successes of the ESA program).

[25] Notice of Interagency Cooperative Policy for the Ecosystem Approach to the Endangered Species Act, 59 Fed. Reg. 34,273 (1994) (issued jointly with NMFS). The stated purpose of the policy is to "promote healthy ecosystems through activities undertaken by the Service under the authority of the Endangered Species Act." *Id.* at 34,274

[26] *See* 16 U.S.C. § 1533(f) (1994) (requiring that FWS and NMFS "develop and implement plans . . . for the conservation and survival of endangered species and threatened species"). For an overview of the history and potential of the recovery planning process under section 4(f) of the ESA, see Rohlf, *supra* note 7, at 87-92; Frederico M. Cheever, *The Road to Recovery: A New Way of*

agency cooperation;[27] and (iii) species listings.[28] FWS stated that its policy would be to incorporate ecosystem considerations into actions taken under each of these programs.[29] Thus, FWS will (i) "develop and implement recovery plans for communities or ecosystems where multiple listed and candidate species occur;"[30] (ii) develop interagency conservation efforts "in a manner that restores, reconstructs, or rehabilitates the structure, distribution, connectivity and function upon which those listed species depend;"[31] and (iii) group species listing actions based on a "geographic, taxonomic, or ecosystem basis."[32] FWS proclaimed that these approaches would apply agency-wide for all listed species, as broadly under the ESA as possible.[33]

2. *An Ecosystem Approach to Recovery Plans*

Nothing in the relevant recovery planning provisions of the ESA suggests an ecosystem orientation to the recovery planning and implementation process. However, FWS gave its general ESA ecosystem approach policy more specific meaning in a simultaneously published policy covering recovery plans for listed

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Thinking About the Endangered Species Act, 23 ECOLOGY L.Q. 1 (1996); Houck, *supra* note 7, at 344-51.

[27] *See* 16 U.S.C. § 1536(a)(2) (1994) (setting forth a complicated set of provisions flowing from the duty of federal agencies to consult with FWS and NMFS to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical"). For an overview of the interagency consultation procedure under section 7 of the ESA, see Rohlf, *supra* note 7, at 105-36; Houck, *supra* note 7, at 315-29; Kilbourne, *supra* note 7, at 530-64.

[28] *See* 16 U.S.C. § 1533(a) (1994) (requiring FWS and NMFS to designate any species of plant or animal the continued existence of which is "endangered" or "threatened"). As of June 30, 1997, FWS and NMFS had classified 449 animal species found in the United States as endangered or threatened and 641 plant species found in the United States as endangered or threatened. U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, ENDANGERED SPECIES BULL., July-Aug., 1997, at 28. For an overview of the definitions and procedures used for listing species under section 4 of the ESA, see Rohlf, *supra* note 7, at 37-49; Houck, *supra* note 7, at 280-96; J.B. Ruhl, *Section 4 of the ESA—The Cornerstone of Species Protection Law*, NAT. RESOURCES & ENV'T, Summer 1993, at 26 [hereinafter Ruhl, Section 4].

[29] *See* Notice of Interagency Cooperative Policy for the Ecosystem Approach to the Endangered Species Act, 59 Fed. Reg. at 34,274.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

species.[34] FWS's policy statement explicitly incorporated the ecosystem factor into recovery planning by (i) requiring "the range or ecosystem of the species"[35] to be one of the factors considered in developing methods for recovery plan preparation and (ii) mandating the qualifications for recovery planning team membership to include an individual's expertise with respect to the species or the ecosystem of which the species is a part (or may become a part).[36] Hence, although the FWS must focus recovery planning on individual species, the policy recognizes that a species' recovery generally is closely related to its relationship with the ecosystems on which it depends. This new focus has already left its mark on recovery planning.[37]

3. *Implementing Federal Agency Conservation Duties Under Section 7(a)(1)*

Section 7(a)(1) of the ESA directs that all federal agencies "shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species . . . ."[38] To give that duty more concrete meaning, twelve federal agencies united with the FWS and the NMFS on September 27, 1994 in a Memorandum of Understanding (MOU) to confirm the agencies' "common goal of conserving species listed as threatened or endangered under the [ESA] by protecting and managing their populations and the ecosystems upon which those populations depend."[39]

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[34] *See id.* The recovery planning policy also contains elements responding to the Fair Approach effort. *See infra* notes 98-101 and accompanying text.

[35] Notice of Interagency Cooperative Policy for the Ecosystem Approach to the Endangered Species Act, 59 Fed. Reg. at 34,273.

[36] *See id.*

[37] FWS reports that it currently is working on a recovery plan for the South Florida Ecosystem that would encompass 68 federally-listed species and another 300 species. *See* MAKING THE ESA WORK BETTER, *supra* note 18, at 20; *see also* 62 Fed. Reg. 51,128 (1997) (draft recovery plan addressing 34 species of which 11 are listed under the ESA); 62 Fed. Reg. 51,126 (1997) (draft recovery plan for seven plants and a butterfly).

[38] 16 U.S.C. § 1536(a)(1) (1994).

[39] *Memorandum of Understanding Between Federal Agencies on Implementation of the Endangered Species Act, signed Sept. 28, 1994*, DAILY ENV'T REP., Sept. 30, 1994, at E-1, *available in* WESTLAW, 1994 DEN 188d36 [hereinafter MOU]. The signatory agencies, besides FWS and NMFS, are the Forest Service, Department of Defense, United States Army Corps of Engineers, Bureau

The import of that agreement should not be underestimated. These fourteen MOU agencies are responsible for the management of almost 600 million surface acres of the United States, hundreds of reservoir areas, and thousands of miles of river and stream corridors.[40] They implement dozens of federal environmental laws applicable to public and private entities on federal and nonfederal lands.[41] Consequently, their administrative programs form no less than the core of federal environmental law and policy.

The MOU clearly enhances the role of section 7(a)(1) in ESA policy by solidifying the link between section 7(a)(1) and the agencies' new ecosystem management theme. For example, the operative terms of the MOU commit each party to working towards the conservation of species *and their ecosystems*.[42] Fur-

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of Land Management, Bureau of Mines, Bureau of Reclamation, Minerals Management Service, National Park Service, Coast Guard, Federal Aviation Administration, Federal Highway Administration, and Environmental Protection Agency.

[40] Several of the signatory agencies have substantial public land and water resource management responsibilities, including the Bureau of Land Management (270 million surface acres in 29 states); Bureau of Reclamation (300 reservoirs and several thousand miles of river and stream corridors); Department of Defense (25 million surface acres); Forest Service (191 million acres in 43 states); and National Park Service (80 million acres in 367 units of the National Park System). *See id.* at 2-4, *available in* WESTLAW, 1994 DEN 188d36, at *4-8.

[41] For example, the United States Environmental Protection Agency administers laws regulating water pollution (Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. I 1995)), air pollution (Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994 & Supp. I 1995)), solid waste management (Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1994 & Supp. I 1995)), and remediation of contaminated properties (Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1994 & Supp. I 1995)); the Corps of Engineers administers the program for permitting discharges of fill material in wetlands (Clean Water Act, 33 U.S.C. § 1344 (1994)); and the Coast Guard administers coastal pollution response authorities (Oil Pollution Act, 33 U.S.C. §§ 2701-2761 (1994 & Supp. I 1995)).

[42] The MOU prescribes that each party to the MOU will, among other things:

> 1. "Identify opportunities to conserve Federally listed *species and the ecosystems upon which those species depend* within its existing programs or authorities."
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> 2. "Determine whether its respective planning processes effectively help conserve threatened and endangered species *and the ecosystems upon which those species depend*."
>
> 3. "Use existing programs, or establish a program if one does not currently exist, to evaluate, recognize, and reward the performance and achievements of personnel who are responsible for planning or imple-

ther, the MOU defines specific tasks that the agencies (called the "Cooperators") will implement and sets forth two interagency working group structures through which such tasks shall be implemented. First, the agencies will establish regional interagency working groups in identified geographical areas to coordinate agency actions, create opportunities, and overcome barriers such that listed species *and the ecosystems upon which they depend are conserved.*[43] Second, the agencies will create a national interagency ESA working group to "identify and coordinate improvements in Federal implementation of the ESA."[44] This effort shall include the requirement that each agency "[i]dentify ways to improve conservation of [listed] species . . . including protection of the ecosystems upon which they depend, in agency planning processes and other agency programs."[45] Hence, although it remains to be seen whether the MOU will transform Section 7(a)(1) from a dormant clause to a potent force in the movement towards an ecosystem-based approach to the ESA,[46] the MOU has at least cemented FWS's commitment to permeating all ESA programs with the *Ecosystem Approach* philosophy.

4. *Testing the Limits of the ESA Ecosystem Approach in the Policy on Distinct Populations*

One of the most controversial features of the ESA is the degree to which its legal definition of "species" departs from the concept as commonly used in the scientific community (which itself is a matter of debate).[47] The ESA defines species to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which

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menting programs to conserve or recover listed species *or the eco-systems [sic] upon which they depend."*

MOU, *supra* note 39, at 5, *available in* WESTLAW, 1994 DEN 188d36, at *10-11 (emphasis added).

[43] *See id., available in* WESTLAW, 1994 DEN 188d36, at *11.

[44] *Id., available in* WESTLAW, 1994 DEN 188d36, at *13.

[45] *Id.* (emphasis added).

[46] *See, e.g.,* Ruhl, Section 7(a)(1), *supra* note 4, at 1144-52.

[47] *See, e.g.,* Endangered Species Comm. v. Babbitt, 852 F. Supp. 32 (D.D.C. 1994) (ordering public release of copy of scientist's controversial research study defining taxonomy of species and temporarily continuing the listing of species as threatened pending review of data); Patrick H. Zaepfel, *Legislating for Scientific Uncertainty: Preserving Administrative Flexibility to Interpret "Species" Under the Endangered Species Act*, 4 DICK. J. ENVTL. L. & POL'Y 152 (1995).

interbreeds when mature,"[48] but Congress instructed FWS to use the "distinct population" element "sparingly."[49]

In February 1996, FWS published a policy regarding the definition of distinct populations that also illustrates the *Ecosystem Approach* philosophy at work, as well as its limits.[50] FWS declared that once a distinct population is identified according to specified biological and spatial conditions, listings will be based on several factors, including the "[p]ersistence of the discrete population segment in an ecological setting unusual or unique for the taxon."[51] The agency's rationale was that "occurrence in an unusual ecological setting is potentially an indication that a population segment represents a significant resource of the kind sought to be conserved by the Act."[52] Although the emphasis of that approach is on the status of population, the "unusual setting" factor broadens the reach of the ESA as an incidental means of protecting ecosystems.

Some commenters invited FWS to take the *Ecosystem Approach* philosophy further, but the agency refused. For example, one comment argued that FWS should decide the status of a distinct population based on its importance to the environment in which it occurs.[53] FWS responded that "[d]espite its orientation towards conservation of ecosystems, the Services do not believe that the Act provides authority to recognize a potential [population] as significant on the basis of the importance of its role in the ecosystem in which it occurs."[54] Similarly, FWS rejected a proposal that it stress uniqueness and irreplaceability of ecological functions in recognizing distinct populations, because the ESA "is not intended to establish a comprehensive biodiversity conservation program, and it would be improper for the Services to recognize a potential [population] and afford it the Act's substantive protections solely or primarily on these grounds."[55]

FWS's decisions on these points, both legally accurate, illustrate the boundaries that the ESA currently places on the

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[48] 16 U.S.C. § 1532(16) (1994).

[49] S. Rep. No. 96-151, at 7 (1979). However, FWS can still list such populations when they are endangered or threatened. *See id.*

[50] *See* Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (1996).

[51] *Id.* at 4725.

[52] *Id.* at 4724.

[53] *See id.* at 4723 (publishing recommendations to draft form of policy).

[54] *Id.*

[55] *Id.* at 4724.

Ecosystem Approach philosophy. Indeed, FWS cannot completely transform the ESA into the "Endangered Ecosystem Act." Nevertheless, the care and effort exerted by FWS in integrating ecosystem factors into the analysis of a "distinct population" comes as close to the boundary as legally permitted and demonstrates that FWS is committed to infusing the ESA with the *Ecosystem Approach* philosophy to the maximum extent permitted by the statute.

5. *Promoting Geographical and Species Breadth Through the Habitat Conservation Planning Handbook*

One of the most sweeping movements in ESA administrative policy is FWS's promotion of habitat conservation planning processes under section 10(a)(1) of the ESA,[56] particularly at regional scales. Specifically, section 10(a)(1) allows FWS to authorize actions that would otherwise cause a prohibited take of listed species, provided the person seeking permission submits a habitat conservation plan (HCP) detailing the measures the person will employ to avoid, minimize, and mitigate the impacts of the action on the species. Although the provision was added to the ESA in 1982,[57] the HCP process did not hit its stride until the 1990s.[58] Since 1990, hundreds of HCPs have been approved, many of which encompass large planning areas that include valuable ecosystem features.[59]

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[56] *See* 16 U.S.C. § 1540(a)(1) (1994) (illustrating civil penalties for otherwise prohibited acts).

[57] *See* Albert C. Lin, *Comment, Participants' Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 ECOLOGY L.Q. 369, 375 (1996). Congress was addressing "the concerns of private landowners who are faced with having otherwise lawful actions not requiring Federal permits prevented by section 9 prohibitions against taking." H.R. REP. No. 97-835, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2870.

[58] *See* MAKING THE ESA WORK BETTER, *supra* note 18, at 7. From 1983 through 1992, only 14 HCP permits were issued; whereas by the end of January 1997 over 210 HCP permits had been issued and about 200 HCPs were under development. The total preserved and developed acreage covered in the HCPs issued and under development exceeds 18 million acres. *See id.* For an overview of the emergence of the section 10(a) permitting process during the late 1980s and early 1990s, see J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Practical and Legal Limits of Species Protection*, 44 Sw. L.J. 1393 (1991); Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605 (1991).

[59] For comprehensive overviews of the current state of the HCP program, see Lin, *supra* note 57, at 381-88 and Barton H. Thompson, Jr., *The Endangered*

One problem with the HCP experience has been that no established procedures or guidelines existed for preparing and evaluating HCPs.[60] However, FWS has rectified this deficiency largely through its publication in November 1996 of the *Habitat Conservation Planning Handbook (HCP Handbook).*[61] Although the HCP Handbook is primarily a process oriented tool that FWS portrays chiefly as a component of its *Fair Approach* philosophy (as evidenced by the process streamlining measures that are included),[62] the document is also an ingredient of the *Ecosystem Approach* philosophy. Clearly, the *HCP Handbook* does not scream out ecosystem-based criteria as loudly as does the section 7(a)(1) MOU, but the intent is unmistakable.

For example, the *HCP Handbook* encourages HCP applicants to "consider as large and comprehensive a plan area as is feasible and consistent with their land or natural resource use authorities."[63] This regional approach allows the HCP to serve as an umbrella for a variety of ESA issues and to maximize mitigation options.[64] Similarly, just as FWS encourages geographical breadth, the HCP Handbook also encourages species breadth by inviting HCP applicants to "include as many proposed and candidate species as can be adequately addressed and covered by the permit."[65] One advantage of doing so, besides protecting the HCP applicant from additional planning and mitigation burdens if the unlisted species later becomes listed, is to increase the biological value of an HCP "through comprehensive multi-species or ecosystem planning that provides early, proactive considera-

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Species Act: A Case Study in Takings and Incentives, 49 STAN. L. REV. 305 (1997).

[60] FWS's regulations covering the HCP process do not substantively expand upon the statutory text. *Compare* 50 C.F.R. § 17.22(b) (1985) *and* 50 C.F.R. § 17.32(b) (1985) *with* 16 U.S.C. § 1540(a)(1) (1994).

[61] *See* U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, ENDANGERED SPECIES HABITAT CONSERVATION PLANNING HANDBOOK (1996) (issued jointly with NMFS) [hereinafter HCP HANDBOOK]; *see also* 61 Fed. Reg. 63,854 (1996) (announcing availability of HCP Handbook and responding to comments on Draft HCP Handbook).

[62] *See* discussion *infra* notes 119-21 and accompanying text.

[63] HCP HANDBOOK, *supra* note 61, at 3-11. Some conservation biologists believe the important focus should be on the species' "core area"—the portion of the species' home range that receives disproportionate use by the species. *See* Bruce B. Bingham & Barry R. Noon, *Mitigation of Habitat "Take": Application to Habitat Conservation Planning*, 11 CONSERVATION BIOLOGY 127 (1997).

[64] *See* HCP HANDBOOK, *supra* note 61, at 3-11.

[65] *Id.* at 4-1.

tion of the needs of unlisted species."[66] Because of the ESA's species-based orientation, FWS wisely falls short of describing HCPs as an ecosystem planning tool in these respects. Indeed, some critics charge that HCPs in general do not go far enough towards protection of species, much less ecosystems.[67] But the agency's encouragement of regional plans and HCPs that cover unlisted species cannot be mistaken for anything other than *Ecosystem Approach* taking hold.

6. *Promoting Proactive Measures Through Candidate Species Conservation Agreements*

One of the tremendous shortcomings of the ESA is that it leaves unlisted "species of concern" or "candidate species" unprotected until FWS lists them as endangered or threatened.[68] Once a species becomes listed and thereby protected, however, the ESA turns into the pitbull of environmental laws. This toggle-switch approach to species protection embeds perverse incentives to neglect species until they are in need of emergency care. In particular, as long as protecting an unlisted species does not benefit a landowner, or makes the landowner's situation worse by increasing the regulatory impact of a subsequent listing, we

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[66] *Id.* There is no "formula" to use to achieve that goal in all contexts. Rather, planning for multi-species and ecosystem protection depends upon the complexities of particular settings. *See* Ronald D. Brunner & Tim W. Clark, *A Practice-Based Approach to Ecosystem Management*, 11 CONSERVATION BIOLOGY 48 (1997); Michael A. O'Connell & Stephen P. Johnson, *Improving Habitat Conservation Planning: The California Natural Community Conservation Model*, ENDANGERED SPECIES UPDATE, Jan.-Feb. 1997, at 1.

[67] *See, e.g.*, Harlan Savage, *The Private-Land Gamble*, DEFENDERS, Summer 1997, at 22; Fraser Shilling, *Do Habitat Conservation Plans Protect Endangered Species?*, 276 SCI. 1662 (1997); *When Habitat Is Not a Home*, 276 SCI. 1636 (1997). For a spectrum of views on this issue, *see* Symposium, *Habitat Conservation Planning*, ENDANGERED SPECIES UPDATE, July-Aug. 1997.

[68] FWS recently revised its policy for formal designation of candidate status for species, limiting it to those species that the agency has deemed warranted for listing as endangered or threatened, but which have not yet been listed by promulgated regulation. Previously, candidate species were stratified into several categories, the largest of which, now discontinued, included species that FWS had concluded might be warranted for listing but for which further information would be needed before a final decision could be reached. *See* Notice of Final Decision on Identification of Candidates for Listing as Endangered or Threatened, 61 Fed. Reg. 64,481 (1996) (to be codified at 50 C.F.R. pt. 17). The agency's decision to discontinue its list of those "Category 2" species has been unpopular with preservationists. *See, e.g.*, Howard M. Crystal, *The Elimination of the Category 2 Candidate Species List: A Prescription for Environmental Train Wrecks*, ENDANGERED SPECIES UPDATE, Jan.-Feb. 1997, at 7.

can hardly expect landowners to go out of their way to promote such species and the health of their ecosystems.

Through its November 1994 draft guidance on *Candidate Conservation Agreements (CCA),* however, FWS began to change that distorted state of affairs—to the extent that it legally and reasonably could.[69] Although FWS has wrestled with its approach for unlisted species for many years, the agency appeared to fully grasp the potential ecosystem enhancing powers of unlisted species after *Ecosystem Approach* was issued. The stumbling block had been whether and how to use CCAs as a means of avoiding species listings. Whereas the agency's early policies had been rather miserly in that respect, suggesting that CCAs should not be used for that purpose,[70] the agency shifted its approach in the 1994 draft guidance and solidified CCAs as an important ingredient of the ESA *Ecosystem Approach* philosophy.

The 1994 CCA draft guidance encouraged the use of CCAs as a means of negating the threats to a species, thus reducing or eliminating the prospect that the species will be listed.[71] Provided that the chances of listing without CCA measures are real, and that the affected landowning and business communities appreciate the rather unpalatable regulatory consequences of such a listing, it will often behoove economic interests to promote ecological protection through a CCA—that is, to act precisely opposite of the incentives created by the toggle-switch approach of the statute. The obvious ecological benefits of this new CCA approach did not escape FWS as "[a]n emphasis on early conservation efforts for candidate species allows the Services to seek

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[69] *See* U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, ENDANGERED SPECIES PROGRAM: CANDIDATE SPECIES GUIDANCE (Draft 1994) [hereinafter DRAFT CCA GUIDANCE]; *see also* Notice of Availability of Draft Guidance for Candidate Species Under the Endangered Species Act for Review and Comment, 59 Fed. Reg. 65,780 (1994) (announcing availability of Draft CCA Guidance) [hereinafter *Notice of Availability of Draft Guidance*].

[70] *See* Memorandum from FWS Associate Director to Regional Directors Regarding Conservation Agreements (May 20, 1985). During the 1980s, FWS took a narrow view of CCAs, advising its regional offices that the agency does "not consider it appropriate to pursue them in lieu of listings." *Id.*

[71] Eliminating the need for listing of a species is included as one of the principal purposes of CCAs, the strategy for which is discussed in detail in the body of the draft policy. *See* DRAFT CCA GUIDANCE, *supra* note 69, at 3 (purposes), 14-16 (strategy). As of April 1997, FWS has put its new approach into action by basing several withdrawals of proposals to list species on the existence of a CCA that was consummated after the proposed listing rule was published. *See* MAKING THE ESA WORK BETTER, *supra* note 18, at 6-7.

opportunities for Federal and non-Federal entities to stabilize and recover these species and their ecosystems before listing becomes a high priority."[72]

FWS moved these policy approaches into high gear in 1997 with its announcement of a new draft CCA policy[73] and a proposed rule-making to formalize the policy as law.[74] In this new draft policy, the FWS recognized more explicitly than ever before that "by deferring implementation of conservation activities for . . . species until they are listed, the ecological integrity of their habitats is compromised thereby severely limiting recovery options."[75] Thus, the draft policy completes the agency's turnaround on the question of using CCAs to avoid listing, stating in no uncertain terms that "the ultimate goal of Candidate Conservation Agreements developed under this policy is to . . . nullify the need to list [species] as endangered or threatened."[76] Furthermore, the proposed rules that implement the new ESA permitting options are designed to provide landowners meaningful incentives to enter into CCAs that are consistent with the policy.[77] Therefore, the new CCA draft policy, in conjunction with the proposed rules, provides an example of the melding of *Ecosystem Approach* and *Fair Approach* policies—a potential win-win outcome for species and landowners.

Despite their potential ecological advantages, however, the practical requirements of making CCAs work have led to dissension among preservationists. Currently, the status quo for the regulated community is that unlisted species are without protection, and therefore no regulatory consequences flow from "managing" land to reduce their presence. A principal advantage the regulated community stands to gain from CCAs, and the reason for making the financial and other conservation commitments necessary to prompt FWS to enter into a CCA, is the prospect that FWS will decline to list the candidate species based on the

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[72] *Notice of Availability of Draft Guidance, supra* note 69, at 65,780.

[73] *See* Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. 32,183 (1997) (issued jointly with NMFS).

[74] *See* Safe Harbor Agreements and Candidate Conservation Agreements, 62 Fed. Reg. 32,189 (1997) (FWS only).

[75] Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. at 32,184.

[76] *Id.* at 32,185. The draft policy goes further than the agency's prior guidances to define key terms for CCAs and establish a framework for evaluating CCAs in light of the goal of avoiding listings. *Id.* at 32,186-87.

[77] *See* discussion *infra* notes 132-36 and accompanying text.

conservation benefits established in the CCA. By contrast, the status quo for preservationists is that a listed species provides a powerful source of leverage over local and regional land use, thereby motivating preservationists to list species as surrogates for broader environmental policy agendas. Yet, the advantage that preservationists stand to gain from CCAs by foregoing the species listing is conservation practices by the regulated community that are earlier and more proactive than before—something that they have proclaimed to want dearly.[78] Therefore, to be effective, the CCA policy depends on mutual risk-sharing and sacrifice of the status quo by both sides of that equation.

Thus far, however, preservationists have not taken that plunge, choosing instead to aggressively challenge CCAs when the agency uses them as a basis for declining to list a species.[79] Although the cases remain few in number, the courts have for the most part joined the preservationists, construing the ESA to preclude FWS from considering the conservation benefits of any prospective measures in a CCA when deciding the listing status of a species.[80] In doing so, the principal advantage to the regulated community is gutted, and these decisions stand to eliminate both their ecological and economic benefits. Although FWS has professed to being undaunted by the adverse court decisions in its commitment to CCAs,[81] it is too early to determine whether the courts' harsh treatments of CCAs will be an anomaly or a harbinger of more to come for FWS's reform agenda. As of this writing, FWS has not finalized the CCA rule, and the future of CCAs in general seems precarious.

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[78] *See* Heather Weiner, *Endangered Natural Heritage Act: Strengthening Amendments to the Current ESA*, ENDANGERED SPECIES UPDATE, June 1996, at 4.

[79] *See, e.g.*, Letter from Defenders of Wildlife to FWS Re: Draft Policy for Candidate Conservation Agreements (Aug. 11, 1997) (contending the policy "will not contribute to the conservation of our nation's declining biological resources").

[80] *See* Save Our Springs Alliance, Inc. v. Babbitt, No. MO-96-CA-168 (W.D. Tex. Mar. 12, 1997); Friends of the Wild Swan v. Fish and Wildlife Serv., 945 F. Supp. 1388 (D. Or. 1996); Biodiversity Legal Found. v. Babbitt, 943 F. Supp. 23 (D.D.C. 1996); Southwest Ctr. v. Babbitt, 939 F. Supp. 49 (D.D.C. 1996). *But see* American Fisheries Soc'y v. Verity, No. 88-0174 RAR-JFM (E.D. Cal. Feb. 24, 1989) (concluding FWS must consider prospective benefits of conservation activities of other federal and state agencies).

[81] *See Clark Says FWS Stands Behind Conservation Agreement Program*, ENDANGERED SPECIES & WETLANDS REP., Apr. 1997, at 16 (interview of then FWS Director of Ecological Services, now FWS Director).

B. *Economic Interest Policies*

The Supreme Court recently confirmed that "economic consequences are an explicit concern of the [ESA]."[82] Indeed, although much criticism as has been leveled against the ESA and FWS's implementation of the statute on the basis of ecological insensitivities, tenfold that amount has been directed in the past several years at alleged economic insensitivities.[83] Hence, FWS would have been negligent and politically misguided had it pursued the *Ecosystem Approach* philosophy independent of the statute's explicit concern for economic impacts. The *Fair Approach* effort thus represents a necessary component of administrative reform.

Implementing the *Fair Approach* philosophy required an alternative approach, however. The principal difference between *Ecosystem Approach* and *Fair Approach,* besides their different perspectives, is the limitation that the ESA structurally imposes on how the two philosophies are translated into concrete policies. For *Ecosystem Approach,* we have seen that ecosystem factors can be broadly infused into the ESA under the umbrella of the avowed ecosystem protection purpose of the statute as a whole that is found in section 2(c), bounded only by the species-based approach of the implementing provisions of the law. By contrast, economic interests are not as broadly expressed in the ESA, but rather are sprinkled through the statutory text in specific provisions, using different words to declare the importance of economic consequences in administrative decision-making.[84] Therefore, FWS must be more careful about how it implements *Fair Approach,* ensuring that it can point to specific authorities that support the infusion of economic factors as a decision-making criterion. The result is that the *Fair Approach* agenda consists of a larger number of measures than the *Ecosystem Approach* effort, but each measure assumes a more limited scope and role than most *Ecosystem Approach* measures.

Approaches that FWS has downplayed in responding to economic interests, and wisely so, are those that rely significantly on

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[82] Bennett v. Spear, 117 S. Ct. 1154, 1168 (1997).

[83] *See* Ruhl, *Section 7(a)(1), supra* note 4, at 1137-42 (summarizing this body of criticism).

[84] For example, when designating a listed species' critical habitat, the agency must consider the economic impacts of such action. *See* 16 U.S.C. § 1533(b)(2) (1994).

increased funding for land acquisition or conservation even though the universe of possibilities for promoting landowner involvement in endangered species regulation expands exponentially when massive funding levels are hypothesized.[85] Indeed, even most preservationist groups that have proclaimed an interest in incorporating economic interests in the ESA actually only intend measures that could come into being through significant funding boosts.[86] However, this grounding of ESA reform on potential funding increases pays no more than lip service to the purported goal and therefore is unrealistic. FWS and the few visionary preservationist and economic interests are to be commended for moving towards regulatory reforms that actually merge ecological and economic interests together without the need for unrealistic funding requests.[87]

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[85] *See, e.g.*, DEFENDERS OF WILDLIFE, BUILDING ECONOMIC INCENTIVES INTO THE ENDANGERED SPECIES ACT (1993) (discussing numerous proposals, including tax incentives and conservation subsidies, all of which require either added ESA funding or reduced tax revenues); NATIONAL WILDLIFE FEDERATION, INVOLVING COMMUNITIES IN CONSERVATION: A POLICY POSITION PAPER ON THE ENDANGERED SPECIES ACT 22-26 (1995) (discussing tax credits, tax deferrals, and conservation subsidies).

[86] *See, e.g.*, DEFENDERS OF WILDLIFE, BUILDING ECONOMIC INCENTIVES INTO THE ENDANGERED SPECIES ACT (1993); NATIONAL WILDLIFE FEDERATION, INVOLVING COMMUNITIES IN CONSERVATION: A POLICY POSITION PAPER ON THE ENDANGERED SPECIES ACT 22-26 (1995).

[87] There is a small but growing number of leaders of environmental and economic interest groups that have stuck their necks out, possibly risking alienation within their respective "camps," to seek a middle ground. *See, e.g.*, Michael J. Bean & David S. Wilcove, *The Private Land Problem*, 11 CONSERVATION BIOLOGY 1 (1997) (officers of the Environmental Defense Fund advocate several of the programs discussed in this Section of the Article); Jason F. Shogrun, *Economics and the Endangered Species Act*, ENDANGERED SPECIES UPDATE, Jan.-Feb. 1997, at 4 (economist advocates more economic research to assist in balancing property rights and species protection). An excellent background study of many of the policies discussed in the following Section of the Article, and which reveals the policy reforms over which preservationist and economic interests disagreed or formed consensus, is the product of a multiparty dialogue convened in June 1995 by the Keystone Center. *See* THE KEYSTONE CENTER, THE KEYSTONE CENTER DIALOGUE ON INCENTIVES FOR PRIVATE LANDOWNERS TO PROTECT ENDANGERED SPECIES (1995) [hereinafter KEYSTONE DIALOGUE TO PROTECT ENDANGERED SPECIES]. Although the report covers many of the tax and funding based reforms that will not be possible without federal financial commitment, *see id.* at 26-41, it also outlines the genesis and potential for many of the regulatory reforms that FWS has embraced. *See id* at 1-25.

1. *Take Criteria Notice*

FWS explained in *Fair Approach* that some of its measures had already been put in place. One such measure was a policy statement adopted in July 1994 that required the agency to identify specific activities that would be considered likely, as well as those that would not be considered likely, to result in violation of section 9.[88] In addition, the agency agreed to identify contact personnel to assist persons who are engaged in borderline activities not clearly falling under either category.[89] While these measures will improve awareness of endangered species for the entire public, they will also help to allay criticisms that FWS lists species without providing sufficient guidance to the regulated community concerning permitted and prohibited activities.[90]

2. *"Best Data" Criteria*

Another July 1994 policy FWS swept within the *Fair Approach* philosophy addresses the statutory requirements that the agency make listing, recovery planning, interagency consultation, and HCP permitting decisions based on the best scientific and commercial data available.[91] The Supreme Court recently noted

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[88] *See* Notice of Interagency Cooperative Policy for Endangered Species Act Section 9 Prohibitions, 59 Fed. Reg. 34,272 (1994) (issued jointly with NMFS). The most powerful regulatory consequence to flow from species listing, and perhaps the most powerful regulatory provision in all of environmental law, is found in the section 9(a) prohibition of "take" of listed animal species, making it unlawful for "any person subject to the jurisdiction of the United States to . . . (B) take any such species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(i) (1994). For an overview of the take prohibition as implemented, see Rohlf, *supra* note 7, at 59-71; Federico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live With A Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109 (1991); Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419 (1994); Kilbourne, *supra* note 7, at 572-84; Steven P. Quarles et al., *Sweet Home and the Narrowing of Wildlife "Take" Under Section 9 of the Endangered Species Act*, 26 ENVTL. L. REP. 1003 (1996).

[89] *See* Notice of Interagency Cooperative Policy for Endangered Species Act Section 9 Prohibitions, 59 Fed. Reg. at 34,272.

[90] *See, e.g.*, Final Rule to List the Barton Springs Salamander as Endangered, 62 Fed. Reg. 23,377, 23,391 (1997) (describing actions which likely would or would not cause the taking of a listed species).

[91] *See* Notice of Interagency Cooperative Policy on Information Standards Under the Endangered Species Act, 59 Fed. Reg. 34,271 (1994) (issued jointly with NMFS). The ESA requires that many of the factual determinations relevant to listing and protecting species be made based on the "best available" scientific evidence, a factor which is itself subject to intense debate within the

that the primary objective of this requirement was "to avoid needless economic dislocation produced by agency officials [who] zealously but unintelligently [pursue] their environmental objectives."[92] To serve that goal, the agency has committed itself to the policy that any information it uses to implement the ESA will be reliable and credible, derived principally from primary and original sources, and evaluated impartially.[93] Certainly, these are only minimum standards—but they are a good beginning towards ensuring that the spirit of the ESA is satisfied.

3. *Peer Review Process*

Consistent with its best available information policy, FWS adopted another "better science" policy statement in July 1994 that required the agency "to incorporate independent peer review in listing and recovery activities, during the public comment period . . . ."[94] To be sure, neutral peer review should not inherently favor either economic or preservationist interests. However, FWS presented this policy in its *Fair Approach* agenda as an adjunct of the best available evidence requirement, a standard that many critics have suggested implies peer review based on accepted scientific methods.[95] Since peer review has generally been a reform point advanced by proponents of economic interests based on their perception that too many unwarranted listings were slipping through the process due to lax scientific standards,[96] it is not surprising that FWS included the peer review policy as one of its *Fair Approach* measures.[97]

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scientific community. *See* Laurence Michael Bogert, *That's My Story and I'm Stickin' to It: Is the "Best Available" Science any Available Science Under the Endangered Species Act?*, 31 IDAHO L. REV. 85 (1994). For an overview of the roles that science and the quality of science play under the ESA, see COMM. ON SCIENTIFIC ISSUES IN THE ENDANGERED SPECIES ACT, NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT (1995).

92 Bennett v. Spear, 117 S. Ct. 1154, 1168 (1997).

93 *See* Notice of Interagency Cooperative Policy on Information Standards Under the Endangered Species Act, 59 Fed. Reg. at 34,271.

94 Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities, 59 Fed. Reg. 34,270 (1994) (issued jointly with NMFS).

95 *See generally* Ruhl, *Section 4, supra* note 28, at 71 (arguing that independent peer review may be useful to screen out errors and gaps in the agency's information base).

96 *See id.*

97 As of April 1997, FWS had subjected 41 final listing determinations and 68 recovery plans to peer review. *See* MAKING THE ESA WORK BETTER, *supra* note 18, at 3.

4. *Minimizing Social and Economic Impacts of Recovery Programs*

Another final agency policy that preceded *Fair Approach,* but later fit within the *Fair Approach* agenda, requires FWS "to develop and implement recovery plans in a timely manner that will minimize the social and economic consequences of plan implementation."[98] Estimates indicate that full implementation of all recovery plans would cost billions of dollars,[99] and FWS has been perceived as conducting recovery planning with no real expectation of full implementation and no attention to economic reality.[100] Thus, FWS has now promised to (i) assemble social and economic expertise on recovery planning teams; (ii) solicit input from entities potentially affected by the recovery plan measures; and (iii) ensure that recovery plans are feasible and realistic from social and economic perspectives.[101]

5. *Enlisting Landowner Support for Conservation Through "Safe Harbor" Permits*

Fair Approach took full advantage of the four July 1994 policies that contained elements of reform consistent with economic interests. But the agenda did not stop there. Several additional policy reforms were proposed or under consideration at the time *Fair Approach* was issued, and FWS has generally followed through on each of them.

The first to result in a full-fledged policy reform addresses the perverse system of disincentives created with respect to private landowners. These disincentives are established under the

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98 Notice of Interagency Cooperative Policy on Recovery Plan Participation and Implementation Under the Endangered Species Act, 59 Fed. Reg. 34,272, 34,273 (1994) (issued jointly with NMFS).

99 FWS estimates it would cost over $4.6 billion to recover all currently listed species. *See* COUNCIL ON ENVTL. QUALITY, LINKING ECOSYSTEMS AND BIODIVERSITY 156 (1992). Studies have estimated that it would cost almost $1 billion simply to implement the specific line-item dollar estimates made in the 306 recovery plans approved by 1993, but FWS requested only about $81 million for that purpose for FY 1995. *See* ROBERT GORDON AND JIM STREETER, NAT'L WILDERNESS INST., GOING BROKE?: COSTS OF THE ENDANGERED SPECIES ACT AS REVEALED IN ENDANGERED SPECIES RECOVERY PLANS 1 (1994).

100 *See* Ruhl, *Section 7(a)(1), supra* note 4, at 1152.

101 *See* Notice of Interagency Cooperative Policy for the Ecosystem Approach to the Endangered Species Act, 59 Fed. Reg. 34,273. *See also* MAKING THE ESA WORK BETTER, *supra* note 18, at 18-20 (discussing efforts on several recovery plans to staff recovery planning teams to reflect diverse stakeholder representation).

ESA provisions that essentially "punish" a landowner who allows land to become endangered species habitat. For example, a landowner who senses that suburban growth may make the property highly valuable in twenty years may be perfectly happy to let the property stand idle for the interim. However, vegetative cover that is suitable for an endangered species and found generally in the area may establish itself on the property during the interim. In such a case, the landowner would be a fool to allow the vegetation to grow as it would greatly complicate any future sale of the property. The landowner's solution would be to "manage" the vegetation—perhaps through goats, controlled fire, or periodic clearing—such that the endangered species is denied any chance of using the property, even if only temporarily.[102]

FWS addressed this problem through an approach known as "Safe Harbors." Under this approach, FWS can agree to allow a landowner to take all listed species found on the property at a future date beyond those present at the date of the agreement.[103] In this manner, sound land conservation measures do not come back later to sting landowners in the form of increased ESA regulatory burdens. As FWS described in its *HCP Handbook*, the purpose of the approach is "to reduce the disincentives (e.g., fear of regulatory restrictions) that often cause landowners to avoid or prevent land use practices that would otherwise benefit endangered species."[104] Thus, these agreements allow the agency to reap the benefits of a temporarily-enhanced endangered species habitat and further allow the landowner to derive the future economic potential of the property without added regulatory hang-ups.[105]

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[102] As evidence of this problem, see Ted Williams, *Finding Safe Harbor*, AUDUBON, Jan.-Feb. 1996, at 26 (describing one landowner's choice to clear 600 acres of forest rather than risk the proliferation of endangered red-cockaded woodpeckers).

[103] *See* U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, ENDANGERED SPECIES ACT: PRIVATE LAND STRATEGIES FOR WORKING TOGETHER 3-4 (1996) (providing summary of conference proceedings).

[104] HCP HANDBOOK, *supra* note 61, at 3-41.

[105] One of the earliest published official references to Safe Harbors as a policy reform appears in connection with an HCP permit issued early in 1995 to the Pinehurst Resort and Country Club in North Carolina with respect to the habitat of the red-cockaded woodpecker. *See* U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, NEWS RELEASE: WOODPECKERS, PRIVATE LANDOWNERS SHARE HOMES UNDER NEW "SAFE HARBOR" CONSERVATION PLAN (1995). The main thrust of Safe Harbors has thus far been in response to red-cockaded woodpecker habitat issues in states from Virginia through the south-

Based on its early successes with the informal Safe Harbor approach, FWS fully committed the agency down the road of reform in June 1997 with its issuance of a draft policy on Safe Harbors[106] and a proposed rule-making to implement novel new ESA permitting approaches to facilitate the policy.[107] The policy's central thesis is that "long-term recovery of certain species can benefit from short-term and mid-term enhancement, restoration, or maintenance of terrestrial and aquatic habitats on non-Federal property."[108] When landowners produce such short- and mid-term net benefits to species from voluntary conservation measures, the proposed Safe Harbor policy will authorize subsequent take of the species back to "baseline" numbers under agreed upon conditions.[109] To provide the landowner assurances that the deal will stick, FWS will embody the agreement in an "enhancement of survival" permit issued pursuant to ESA section 10(a)(1).[110] Thus, the Safe Harbor policy allows landowners to view good land stewardship for species in a manner not inconsistent with their economic interests. Although FWS has not finalized the Safe Harbor rule as of this writing, the obvious win-win advantages offered by the policy suggest that it may be the least precarious of the agency's permitting innovations.[111]

6. *Proposed Exemptions for Small Landowners and Low-Impact Activities*

Unlike many other federal environmental laws, the ESA does not prescribe exemptions from its proscriptive and permit-

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east and west to Texas. *See* MAKING THE ESA WORK BETTER, *supra* note 18, at 18.

106 *See* Announcement of Draft Safe Harbor Policy, 62 Fed. Reg. 32,178 (1997) (issued jointly with NMFS).

107 *See* Safe Harbor Agreements and Candidate Conservation Agreements, 62 Fed. Reg. 32,189 (1997) (issued only by FWS).

108 Announcement of Draft Safe Harbor Policy, 62 Fed. Reg. at 32,178.

109 *See id.* at 32,178-80.

110 *Id.; see also* Safe Harbor Agreements and Candidate Conservation Agreements, 62 Fed. Reg. at 32,191-94 (proposed regulations defining Safe Harbor permit authority and criteria).

111 Perhaps because of its obvious advantages, the Safe Harbor proposed rule has been received relatively favorably by environmental groups as contrasted with their opposition to the CCA proposed rule. *See, e.g.,* Letter from Defenders of Wildlife to E. Laverne Smith, U.S. Chief, Division of Endangered Species, FWS, Re: Draft Safe Harbor Policy (Aug. 11, 1997) (supporting "proper implementation of the safe harbor concept"); *see generally Safe Harbor Commenters Address "Baseline," Other Issues*, ENDANGERED SPECIES & WETLANDS REP., Sept. 1997, at 8.

ting measures, nor vest in FWS discretionary authority to provide such relief through regulatory exemptions or general permits.[112] Indeed, FWS proposed to exercise the full extent of its authority in this respect with its July 1995 proposed rule. This rule only exempts certain small landowners and low-impact activities from specified ESA requirements.[113] The proposal was issued with great fanfare as part of the *Fair Approach* agenda;[114] however, it was really more symbolic of the boundaries that the present ESA structure places on the *Fair Approach* philosophy, rather than a substantive submission.

The agency's proposal would establish an exemption from the interagency consultation and take prohibition provisions of the ESA for "small landowners and low impact activities that are presumed to individually or cumulatively have little or no lasting effect on the likelihood of survival and recovery of *threatened* species."[115] FWS is authorized to fashion exemptions only for threatened species because these species do not automatically receive the take prohibition protection extended to endangered species.[116] Moreover, since no authority for deviating from the take prohibition and incidental take permitting structure of the

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112 Contrast, for example, the wetlands protection program administered under section 404 of the Clean Water Act which specifically exempts certain activities and provides the implementing agency the authority to issue general permits relieving additional activities from permitting requirements where certain conditions are met. *See* 33 U.S.C. § 1344(f) (1994) (exemptions); 33 U.S.C. § 1344(e) (1994) (general permits).

113 Proposed Rule Exempting Certain Small Landowners and Low-Impact Activities From Endangered Species Act Requirements for Threatened Species, 60 Fed. Reg. 37,419 (1995).

114 *See* U.S. Dep't of Interior, News Release: Administration Proposes Endangered Species Act Exemptions for Small Landowners (1995).

115 *Id.* (emphasis added).

116 Section 4(d) of the ESA provides that "[t]he Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species. . . ." 16 U.S.C. § 1533(d) (1994). In practice, FWS and NMFS have extended the full level of endangered species protection to all threatened species as the default position in the absence of a specific rule curtailing that level of protection for a particular threatened species. *See* 50 C.F.R. § 17.31(a) (1996). The proposed small landowner/low-impact rule thus reverses the effect of the existing general rule for the specified types of projects. For an overview of the use of section 4(d) to protect threatened species, see Rohlf, *supra* note 7, at 73-77; Keith Saxe, Note, *Regulated Taking of Threatened Species Under the Endangered Species Act*, 39 HASTINGS L.J. 399 (1988).

statute exists, FWS can not extend the exemption to listed endangered species.

Only about one-fifth of all listed species fall in the threatened category.[117] Consequently, the effect of the proposed exemptions will be limited. FWS has stated that it would support legislative reform that vests the agency with the discretion to promulgate similar exemptions for endangered species. For now, however, FWS has gone as far as it reasonably can under the ESA to provide the sort of low-impact activity exemptions that are commonly and more broadly provided under many other federal environmental laws.

7. *Streamlining Permitting Through the HCP Handbook*

One of the key *Fair Approach* measures was the *HCP Handbook* that, in addition to fostering the multi-species HCP focus of the *Ecosystem Approach,*[118] seeks primarily to streamline, simplify, and clarify the section 10(a)(1) permitting program.[119] The agency went beyond merely providing a comprehensive, step-by-step procedures applicable under section 10(a)(1) and instead implemented additional measures in the *HCP Handbook* designed to ease regulatory red tape without sacrificing species protection. For example, FWS has stated that it will differentiate between permit projects by degree of impact (i.e., low, medium, or high), and specifically extended meaningful regulatory simplification and relief to low-impact projects.[120] Such regulatory relief includes a categorical exclusion to low-impact projects from environmental impact review under the National Environmental Policy Act.[121]

Thus, the *HCP Handbook* delivers two unmistakable messages: (i) an Ecosystem Approach message that the agency will use HCPs to fulfill the species protection mandate of the law, and (ii) a Fair Approach message that the agency will do so through clear, sensible procedures that avoid unnecessary over-regulation and will be administered with professional respect for the regulated community. If the agency can put this latter

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117 U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, XII ENDANGERED SPECIES BULL. 4, July-Aug. 1997, at 28.

118 *See* discussion *supra* notes 56-67 and accompanying text.

119 *See generally* Lin, *supra* note 57, at 387.

120 *See* HCP HANDBOOK, *supra* note 61, at 1-8 to 1-14.

121 *See id.* at 5-2.

message into action, it will have gone far towards making *Fair Approach* a reality.

8. *Increasing Certainty With "No Surprises"*

One of the most vexing qualities of the ESA for proponents of economic interests is that the future is difficult to plan with certainty. This is because species listings that could not reasonably have been anticipated at the time of project planning can nonetheless result in regulatory burdens later in a project's financing and development time line.[122] Moreover, even when measures are taken to plan around known listed species (possibly culminating in a section 10(a)(1) HCP permit), new information about species may evolve and the condition of the species can change in ways not anticipated at the time of the initial planning measures. Thus, FWS was perceptive in making a policy, known as the "No Surprises" policy, a central feature of the *Fair Approach* agenda.[123]

After its initial unveiling in 1994, the No Surprises policy appeared prominently in the *HCP Handbook*[124] and was recently elevated to rule status.[125] The policy actually dates back to the 1982 amendments adding section 10(a)(1) to the ESA and is designed to provide greater certainty to HCP permittees. In those amendments, Congress intended for the HCPs to "provide long-term commitments regarding the conservation of listed . . . species and long-term assurances to the proponent of the conservation plan [such] that the terms of the plan will be adhered to

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122 *See* HOME BUILDERS PRESS, NAT'L ASS'N OF HOME BUILDERS, DEVELOPER'S GUIDE TO ENDANGERED SPECIES REGULATION 10-11 (1996).

123 *See* U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, NO SURPRISES: ASSURING CERTAINTY FOR LANDOWNERS IN ENDANGERED SPECIES ACT HABITAT CONSERVATION PLANNING (1994) (issued jointly with NMFS).

124 *See* HCP HANDBOOK, *supra* note 61, at 3-29 to 3-32; *see also* Notice of Availability of Final Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 61 Fed. Reg. 63,854 (1996) (issued jointly with NMFS) (discussing No Surprises in connection with release of the HCP Handbook). *See generally* Eric Fisher, *Habitat Conservation Planning Under the Endangered Species Act: No Surprises and the Quest for Certainty*, 67 U. COLO. L. REV. 371 (1996); Lin, *supra* note 57, at 386.

125 *See* Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. 8859, 8870-73 (1998) (amending 50 C.F.R. parts 17 and 222) (issued jointly with NMFS). FWS agreed to promulgate the No Surprises policy as it appeared in the *HCP Handbook*, or some version of it, as a regulation in settlement of a lawsuit challenging FWS's use of the informal guidance approach for the policy. *See* Spirit of the Sage v. Babbitt, No. 96-CV-2503 (D.D.C. filed Oct. 31, 1996) (settlement agreement and stipulated dismissal dated Mar. 18, 1997).

and that further mitigation requirements will only be imposed in accordance with the terms of the plan."[126]

No Surprises is the long-term assurance side of that equation. It is designed to assure non-federal landowners participating in individual or regional HCPs that no additional land restrictions or financial compensation will be required from an HCP permittee for species adequately covered by a properly functioning HCP. This assurance remains even if unforeseen or extraordinary circumstances arise after the HCP is approved.[127] If such circumstances require additional lands or financial resources, the No Surprises policy authorizes the federal government to provide those additional resources.[128] Although some preservationist groups have criticized the policy,[129] it is difficult to envision how the *Fair Approach* agenda could be more than an empty promise to persons who have committed to HCP measures unless a strong No Surprises policy is enforced.[130] FWS acknowledged that reality by declaring that the driving force for the adoption of a No Surprises final rule "was the absence of adequate incentives for non-Federal landowners to factor endangered species conservation into their day-to-day land management activities."[131]

9. *Providing Even More Certainty Through "Assurances" Under the Candidate Species Conservation Agreements*

A logical outgrowth of the No Surprises policy is an "assurances" policy for candidate conservation agreements (CCA)—

126 H.R. REP. No. 97-835, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2871.

127 *See* Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. at 8871 (adding new 50 C.F.R. § 17.22(b)(5)); *see also* HCP HANDBOOK, *supra* note 61, at 3-29.

128 *See* Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. at 8871 (adding new 50 C.F.R. § 17.22(b)(6)); *see also* HCP HANDBOOK, *supra* note 61, at 3-29 to -30.

129 *See, e.g.*, Kimberley K. Walley, *Surprises Inherent in the No Surprises Policy*, ENDANGERED SPECIES UPDATE, Oct.-Nov. 1996, at 8 (criticizing No Surprises policy); Letter from Spirit of Sage Council et al. to FWS Re: Comments on Proposed "No Surprises" Rule (July 24, 1997) (describing the policy as "legally untenable and biologically insupportable"); *see generally 'No Surprises' Comments Seek Changes in Proposal*, ENDANGERED SPECIES & WETLANDS REP., Oct. 1997, at 10.

130 *See, e.g.*, Letter from National Association of Home Builders to FWS Re: No Surprises Rule (July 21, 1997) (supporting the policy as "crucial to provide certainty").

131 *See* Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. at 8860.

another of FWS's recently announced *Fair Approach* agenda items. FWS has promoted CCAs and the use of HCPs to cover unlisted species of concern as part of its *Ecosystem Approach.*[132] Since the No Surprises policy only applies to HCPs, however, some form of complementary long-term assurance was needed to promote landowner use of CCAs. Thus, given the uncertainties and risks that impeded HCP participation before FWS adopted No Surprises, FWS announced in November 1996 that it would propose a CCA "Assurances" policy to promote candidate conservation.[133] Indeed, when FWS announced its draft CCA policy and proposed rule in June 1997,[134] the assurances feature played a prominent role.

FWS recognized that while a species is unlisted, a landowner is under no obligation to avoid taking the species. Furthermore, costly CCA measures would be difficult to sell to a landowner if there were a significant chance that the species could later be listed and the landowner would face the full force of ESA take prohibitions. Therefore, using an approach similar to Safe Harbors, FWS determined that it will commit to issuing an incidental take permit to landowners who enter into CCAs, provided that (i) the CCA created net benefits to the candidate species, and (ii) the incidental take extends only to those species resources (individuals or habitat) found on the property in excess of the baseline conditions the landowner agreed to maintain in the CCA.[135] Under those conditions, the permit will protect the landowner should the species subsequently become listed, notwithstanding the conservation measures provided in the CCA.[136]

In this respect, the CCA assurances policy mirrors the HCP No Surprises policy as each secures long-term commitments from landowners on behalf of species conservation by capping landowners' long-term commitment regardless of future contingen-

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132 *See* discussion *supra* notes 56-81 and accompanying text.

133 *See* Laverne Smith, U.S. Fish and Wildlife Serv., Candidate Species & Candidate Conservation Agreements for Private Landowners 3, prepared for the National Education and Training Center/Conservation Fund, *The Endangered Species Act: Private Land Strategies for Working Together* (Nov. 13-14, 1996).

134 *See* discussion *supra* notes 73-78 and accompanying text.

135 *See* Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. at 32,185-86.

136 *See id.*

cies. Together, these policies form an essential part of the *Fair Approach* agenda.

II

AN AGENDA FOR ADDITIONAL (AND BROADER) ADMINISTRATIVE REFORMS

Both the *Ecosystem Approach* and *Fair Approach* agendas have had a significant effect on the ESA program as a whole, but neither appears to be more dominant than the other. Perhaps the best sign that FWS has been on target thus far with its administrative reform agenda is that few of its measures have garnered consensus approval from either the preservationist or economic interest camps and several reforms have been subjected to intense criticism from both camps. Since neither camp appears willing to voluntarily share the risk that is necessary to shape a balanced approach to ESA implementation on a programmatic basis for the long term, FWS has forced risk-sharing upon them.

FWS should not only continue this trend, but should also broaden its scope. Many of the measures FWS has adopted are baby steps compared to what could be undertaken. Although FWS had to move cautiously at first in both translating the underlying philosophies into real implementation measures and invoking reactions by Congress and interest groups to those measures, sufficient momentum is present for FWS to broaden its attack. Indeed, measures such as the *HCP Handbook* and the CCA initiative suggest that opportunities exist for melding *Ecosystem Approach* and *Fair Approach* measures into unified policy reforms. Such measures plainly illustrate how ecosystem and economic interests can be mutually reinforcing and thereby more resistant to sniping.

In this Section, several measures that may be consistent with this strategy are briefly described. These measures are by no means exhaustive,[137] but FWS would be imprudent to leave any of the following items out of its future administrative reform of

[137] For other reform proposals that have touched to some degree on the opportunities for administrative reforms without congressional action, see KEYSTONE DIALOGUE TO PROTECT ENDANGERED SPECIES, *supra* note 87; Michael J. Bean & David S. Wilcove, *Ending the Impasse*, ENVTL. F., July-Aug. 1996, at 22; Edward C. Beedy, *Ten Ways to Fix the Endangered Species Act*, ENDANGERED SPECIES UPDATE, June 1995, at 12.

the ESA. These measures may also lay the groundwork for a start to meaningful legislative reform.

A. *Ecosystem Interests*

FWS's *Ecosystem Approach* gives life to the ESA's purported ecosystem protection purpose largely through the species-based provisions of the statute. There are two provisions of the ESA, however, that offer FWS a broader front for integrating ecosystem-based measures into the *Ecosystem Approach* philosophy.

1. *Section 7(a)(1): Issue Regulations Implementing Federal Agencies' Duty to Conserve Species*

The MOU on section 7(a)(1) was a significant step towards unleashing the potential usefulness of the conservation duty as an ecosystem protection tool.[138] Unlike the powerful, but narrowly-focused take prohibition and permitting requirements found elsewhere in the statute, the affirmative duty to conserve species permeates federal programs without establishing overt proscriptions and coercive requirements.[139] Thus, section 7(a)(1) offers the planning flexibility that is necessary for successful ecosystem protection efforts. Before the MOU, the federal agencies' duty to conserve species sat as a largely untapped source of energy for the *Ecosystem Approach* agenda.

Although the MOU is neither self-executing nor enforceable, the plain language of section 7(a)(1) demands both. Section 7(a)(1) requires federal agencies to carry out their conservation duty "in consultation with and with the assistance of [FWS]."[140] Furthermore, precisely the same language in section 7(a)(2) has spawned over ten pages of regulatory text,[141] over one-hundred pages of proposed formal guidance,[142] and tens of thousands of consultation contacts between FWS and other federal agen-

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138 *See* discussion *supra* notes 38-46 and accompanying text.

139 *See* Ruhl, *Section 7(a)(1), supra* note 4, at 1122.

140 16 U.S.C. § 1536(a)(1) (1994).

141 *See* 50 C.F.R. pt. 402 (1996).

142 *See* U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, ENDANGERED SPECIES CONSULTATION HANDBOOK (Draft 1994) [hereinafter CONSULTATION HANDBOOK].

cies.[143] By contrast, FWS's regulations mention the conservation duty in one short paragraph in which, contrary to the statute's plain intent, the duty is described as optional,[144] and absolutely no other formal guidance beyond the MOU is available.[145]

Clearly, if the conservation duty is to be given any chance of breathing life into the *Ecosystem Approach* agenda, FWS must give life to it first. Other federal agencies can hardly be blamed for ignoring their conservation duty if FWS ignores it as well.[146] Only by promulgating meaningful regulations detailing how federal agencies should consult on their conservation duties and the standards by which their actions will be measured, as well as by actively assisting the other agencies in carrying out that effort, can FWS fulfill the potential of section 7(a)(1) as an important contribution to the *Ecosystem Approach* philosophy.

2. *Section 5: Reorient Habitat Acquisition Efforts to Ecosystem-Wide Protection of Endangered Species "Hot Spots"*

Although there is considerable debate over how far the principle should be carried, the unmistakable message emerging from conservation biology literature is that ecosystem protection and habitat preservation go hand in hand.[147] The ESA's species-

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143 *See* U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, REPORT TO CONGRESS: RECOVERY PROGRAM 22 (1994) (noting that FWS conducted over 70,000 consultation contacts from 1987 through 1991).

144 *See* 50 C.F.R. § 402.14(g)(6) (1996).

145 *See* CONSULTATION HANDBOOK, *supra* note 142, at 4-60 (stating in 1994 that FWS is developing "comprehensive guidance" for section 7(a)(1), though no mention of any regulations was made).

146 One federal court recently ordered a federal agency to consult with FWS "to develop . . . the implementation of an organized program utilizing [the agency's] authorities for the conservation of . . . endangered and threatened species as contemplated by ESA § 7(a)(1)." Sierra Club v. Glickman, No. MO-95-CA-91, slip op. at 4 (W.D. Tex. July 2, 1996).

147 The typical policy prescription in conservation biology circles is to simply say that "maintaining as much wild land as possible is the most viable option." Michael J. Samways, *The Art of Unintelligent Tinkering*, 10 CONSERVATION BIOLOGY 1307 (1996). Some conservation biologists concede, however, that this is not a very helpful policy guideline as it suggests no end boundary to preservation. *See* John M. Hagan, *Environmentalism and the Science of Conservation Biology*, 9 CONSERVATION BIOLOGY 975 (1995). The central problem in defining such a boundary is that "the relationship between socioeconomic factors and biodiversity loss is not well understood." Deborah J. Forester & Gary E. Machlis, *Modeling Human Factors That Affect the Loss of Biodiversity*, 10 CONSERVATION BIOLOGY 1253, 1253 (1996). Hence, "[p]resently there is no method to determine how much land should be protected to preserve an

based focus has made it difficult for FWS to implement that policy through direct regulation, a political reality that is unlikely to change in the foreseeable future. However, one provision of the ESA frees FWS from its species-based handcuffs without forcing the political rumble that comes with coercive regulatory options. Section 5 directs FWS to "establish a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species,"[148] and authorizes FWS to acquire land to carry out such programs.[149] Therefore, for purposes of species conservation, land acquisition is not limited to the protection of listed species, nor is it limited to a species-by-species approach. Rather, FWS could focus its land acquisition efforts under the ESA entirely on ecosystem protection purposes that would maximize conservation for all species as a whole.

Indeed, a recent scientific study demonstrates that "hot spots" of listed species occur in certain parts of the nation, such that "a large proportion of endangered species can be protected on a small proportion of land. If conservation efforts and funds can be expanded in a few key areas, it should be possible to conserve endangered species with great efficiency."[150] However, FWS's land acquisition and recovery spending has been anything but efficient or targeted. A high proportion of the agency's recovery expenditures is devoted to a relatively small number of species,[151] and the agency has spent over 200 million dollars on land acquisition efforts that correspond only loosely with the identified hot spots.[152] Therefore, FWS should make every effort in the future to expend its recovery and land acquisition funds

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ecosystem's integrity." Steven R. Beissinger et al., *Null Models for Assessing Ecosystem Conservation Priorities*, 10 CONSERVATION BIOLOGY 1343, 1344 (1996).

148 16 U.S.C. § 1534(a) (1994).

149 *See id.* § 1534(a)(2).

150 A.P. Dobson et al., *Geographic Distribution of Endangered Species in the United States*, 275 SCI. 550, 550 (1997).

151 *See* U.S. FISH AND WILDLIFE SERV, U.S. DEP'T OF INTERIOR, REPORT TO CONGRESS: RECOVERY PROGRAM, *supra* note 143, at 29. FWS has been criticized for spending the vast majority of its recovery planning and implementation budget on ten popular "calendar species." *See, e.g.*, Robert J. Barro, *Federal Protection—Only Cute Critters Need Apply*, WALL ST. J., Aug. 4, 1994, at A12 (during the period from 1989 through 1991, FWS distributed $171 million on recovery efforts for just ten species).

152 *See* U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, LAND AND WATER CONSERVATION FUND, LAND PURCHASE OBLIGATIONS FY 1967 Through 1993 (1994).

such that ecosystem protection value in hot spot areas is secured. Where those hot spots overlay areas of booming land markets and economic development, FWS's ecosystem conservation funding support will be even more usefully targeted.

B. *Economic Interests*

1. *Section 10(a)(1): Issue Regulations Implementing HCP Permit Program*

Incidental take permitting through section 7(a)(2) interagency consultations and section 10(a)(1) HCPs should proceed using roughly the same procedures and standards of evaluation. The interagency consultation process, guided by detailed regulations, has been used extensively. Indeed, that process is now so regularized that FWS can process thousands of consultations each year and issue formal proposed guidance covering virtually every question and contingency.[153] By contrast, HCP experience is relatively thin, and is only guided by the *HCP Handbook* issued by FWS before promulgating meaningful implementing regulations. Many of the streamlining measures outlined in the *HCP Handbook* sound promising to economic interests. However, in practice, such measures may be unfulfilled to the extent that they remain unenforceable.

Hence, to place the HCP process on a par with interagency consultations, thereby priming the HCP process experience to match the breadth and depth of the interagency consultation process, FWS needs to fill the regulatory gap. The core of the new FWS regulations should consist of the most important of the *HCP Handbook* streamlining measures, including application processing times, categorical exclusions from other statutory review procedures, and permit evaluation standards. When economic interests see FWS commit to its streamlining measures with enforceable regulations, they will be more likely to perceive the *Fair Approach* agenda as an integral part of the ESA program.

2. *Sections 7(a)(2) and 10(a)(1): Endorse and Establish Protocols for Habitat Mitigation Banking*

With the CCA Assurances, Safe Harbors, and HCP No Surprises policies, FWS has taken great strides at reversing the illog-

153 *See* Houck, *supra* note 7, at 318.

ical, counterproductive incentives landowners face under the ESA. The next step will be to endorse and establish a habitat mitigation banking program that allows landowners to create and market ecosystem protection values more widely than will be possible even under the recent administrative reforms.

Habitat mitigation banking is not a new idea. It has enjoyed a long, although often controversial, tradition under the wetlands program administered under section 404 of the Clean Water Act.[154] In its most basic form, banking simply allows a landowner to provide habitat conservation values today in one location and then later "consume" or "sell" that banked value by habitat destruction actions taken by that person or others elsewhere. The advantage of the banking approach is that it divorces decisions about the size of a habitat conservation area from the specific project-by-project impact evaluation required by the permitting program, and therefore larger and more contiguous preserves than might otherwise be possible are allowed.[155] Given this potential, mitigation banking under section 404 has many

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154 33 U.S.C. § 1344 (1994). Impacts that cannot be avoided or further reduced in intensity require that the project applicant provide compensatory mitigation for wetlands degradation and losses. *See* 40 C.F.R. §233.23(c)(9) (1996). The Army Corps of Engineers ("the Corps") and EPA in 1990 developed a memorandum of agreement defining wetlands mitigation policies consistent with the section 404(b)(1) guidelines. *See* 55 Fed. Reg. 9210 (1990); *see generally* Margot Zallen, *The Mitigation Agreement—A Major Development in Wetland Regulation*, 7 NAT. RESOURCES & ENV'T, Summer 1992, at 19. Recognizing the importance of mitigation to the section 404 program, in 1993, the Corps and EPA issued a joint internal guidance document to establish general guidelines for the establishment and use of wetlands mitigation banks under section 404. *See* U.S. E.P.A. AND U.S. DEP'T OF ARMY, MEMORANDUM TO THE FIELD: ESTABLISHMENT AND USE OF WETLAND MITIGATION BANKS IN THE CLEAN WATER ACT SECTION 404 REGULATORY PROGRAM (Aug. 23, 1993). In 1995, the agencies joined with FWS and other federal conservation agencies to issue yet another wetlands mitigation banking guidance policy. *See* Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 Fed. Reg. 58,605 (1995). For a detailed discussion of the wetland mitigation banking program and other wetland restoration and creation initiatives, see Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, 81 IOWA L. REV. 527 (1996); William W. Sapp, *Mitigation Banking: Panacea or Poison for Wetlands Protection*, 1 ENVTL. LAW. 99 (1994); Jonathan Silverstein, *Taking Wetlands to the Bank: The Role of Wetland Mitigation Banking in a Comprehensive Approach to Wetlands Protection*, 22 B.C. ENVTL. AFF. L. REV. 129 (1994); Robert D. Sokolove & Pamela D. Huang, *Privatization of Wetland Mitigation Banking*, 7 NAT. RESOURCES & ENV'T, Summer 1992, at 36.

155 *See* Gardner, *supra* note 154, at 558-59.

supporters from both the biological and administrative perspectives.

Particularly since recent scientific research suggests the presence of endangered species hot spots in the nation,[156] FWS should give serious thought to adopting mitigation banking approaches for the ESA. At present, the ESA creates no incentive to establish such habitat preserves banks, but nothing in the ESA would prevent FWS from recognizing mitigation banks and incorporating them into the section 7(a)(2) and section 10(a)(1) incidental take permitting programs. As long as habitat mitigation already is allowed under both of those programs, and FWS must thereby develop standards for measuring mitigation requirements for individual projects, it is difficult to foresee the disadvantages to ecosystem or economic interests that mitigation banking could pose.

The advantages of mitigation banking include easing the burden to project applicants of locating and purchasing suitable mitigation properties, simplifying the negotiation of mitigation requirements, and securing the benefits of larger habitat preserves on behalf of the *Ecosystem Approach* agenda in advance of the habitat losses associated with subsequent development. Therefore, mitigation banking presents the potential for the kind of win-win policy outcome that has made FWS's Safe Harbor policy so resoundingly popular thus far.

III

SCORECARD FOR THE 105TH CONGRESS

On September 15, 1997, with great fanfare and purportedly after much political negotiation, an ESA reform bill with bipartisan sponsorship was introduced in the Senate.[157] The bill, S. 1180, covers many areas of ESA programs not addressed in the FWS reform agenda, but it clearly was shaped by that agenda in many respects. Since a long road with many changes potentially

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156 *See* Dobson et al., *supra* note 150.

157 *See* Endangered Species Recovery Act of 1997, S. 1180, 105th Cong. (1997). The bill was sponsored by Senators Kempthorne (R. Idaho.), Chafee (R. Rhode Island), Baucus (D. Montana), and Reid (D. Nevada), who appeared jointly at a press conference to emphasize the bipartisan process that led to the bill. *See* Endangered Species Recovery Act of 1997 (visited Sept. 24, 1997) <http://www.senate.gov/~Kempthorne/esca.html>; Press Conference, (visited Sept. 24, 1997) <http://www.senate.gov/~epw/pres_916.htm>. The bill was reported out of the Senate Committee on Environment and Public Works

lies ahead, a summary "scorecard" of how the bill relates to the FWS agenda as of this writing is necessary:

Ecosystem Approach Scorecard

FWS Administrative Reform	S. 1180 Legislative Response
Ecosystem approach for the ESA	The words ecosystem, biodiversity, and ecology do not appear in S. 1180
Ecosystem orientation for recovery plans	New ESA section 5(b)(2) would require recovery plans to address multiple species "dependent on the same habitat" (*see* S. 1180 § 3(b))
Implementing ESA section 7(a)(1)	New ESA section 5(l)(2) would require federal agencies to enter into recovery plan "implementing agreements" with FWS at least two years from adoption of a plan, though the terms of the agreements would be in the "sole discretion" of FWS and the agencies (*see* S. 1180 § 3(b))
Consider ecological setting in listing of distinct populations	S. 1180 contains no provisions relevant to this policy
Promote regional, multi-species Habitat Conservation Plans	New ESA section 10(a)(3) would authorize "multiple species conservation plans" that could cover listed and unlisted species (*see* S. 1180 § 5(c))
Adopt proactive Candidate Conservation Agreements	New ESA section 10(k) would substantially adopt FWS's policy framework (*see* S. 1180 § 5(d))

Fair Approach Scorecard

FWS Administrative Reform	S. 1180 Legislative Response
Take criteria notice in listing rules	New ESA section 9(h) would require FWS to respond to individual inquiries regarding whether an action would cause a take (*see* S. 1180 § 9(c)), but no general guidance would be required in listing rules
"Best data" criteria	New ESA section 3(b)(1) would require FWS to "give greater weight to data that is empirical, field tested, or peer reviewed" (*see* S. 1180 § 2(a)(3))
Peer reviews for listings	New ESA section 4(b)(10) would require peer review of listings by three-member panels selected from a list compiled by the National Science Foundation (*see* S. 1180 § 2(c)(9))
Minimize social and economic impacts of recovery plans	New ESA section 5(e)(2)(B) would require that recovery plans contain a description of economic impacts and that they be designed and implemented with an "appropriate balance" between recovery goals and the socio-economic impact (*see* S. 1180 § 3(b))

Fair Approach Scorecard (continued)

FWS ADMINISTRATIVE REFORM	S. 1180 LEGISLATIVE RESPONSE
Safe Harbors	New ESA section 10(l) would substantially adopt FWS's policy framework (*see* S. 1180 § 5(f))
Develop general permits for low-impact projects	New ESA section 10(a)(4) would authorize FWS to develop general permits for categories of "low effect" actions (*see* S. 1180 § 5(c))
Streamline HCP permitting	S. 1180 contains no provisions relevant to this policy
No Surprises	New ESA section 10(a)(5) would substantially adopt FWS's policy framework (*see* S. 1180 § 5(c))
Candidate Conservation Agreement assurances	New ESA section 10(k) would substantially adopt FWS's policy framework (*see* S. 1180 § 5(d))

In general, the scorecards show that FWS's *Ecosystem Approach* and *Fair Approach* administrative reform agendas have made many advances toward shaping legislative reform of the ESA. It is noteworthy that the FWS agenda, which thus far has balanced the *Ecosystem Approach* and *Fair Approach* themes, surfaced in many provisions of the first bipartisan ESA reform effort that has been initiated in Congress in many years. The challenge, of course, will be in holding the center together and keeping the measures intact. Through FWS's expression of support for S. 1180 with only minor amendments,[158] FWS has demonstrated that it is ready to continue to fight that fight in the legislative as well as in the administrative arena.

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on October 31, 1997. *See* S. Rep. No. 105-128, at 121 (1997). As of this writing, no further action has been taken in the Senate. Another ESA reform bill, written by and introduced on behalf of preservationist groups, was introduced in the House in July 1997, where it stands little chance of moving substantially or of influencing the final language of any ESA reform measure that passes in the 105th Congress. *See* Endangered Species Recovery Act of 1997, H.R. 2351, 105th Cong. (1997). *See generally Enviros Cheer Miller ESA Bill*, ENDANGERED SPECIES & WETLANDS REP., Aug. 1997, at 1. As of this writing, the House has taken no further action on comprehensive ESA reform.

158 *See* The Endangered Species Recovery Act of 1997: Hearings on S. 1180 Before the Senate Comm. on Env't and Pub. Works, 105th Cong. 1 (1997) (statement of Jamie Rappaport Clark, Director of the U. S. Fish and Wildlife Serv.). None of FWS's suggested amendments relate to the provisions of the bill that involve FWS's reforms. *See ESA Bill Clears Senate Environment Panel Easily*, ENDANGERED SPECIES AND WETLANDS REP., Oct. 1997 (describing amendments).

CONCLUSION

The radical center is pleased! In the face of congressional paralysis, hostile constituents from all sides, and an unpredictable and often uncooperative federal judiciary, FWS has managed to muster the political will to forge a balanced ESA reform agenda. Unfortunately, the deck is stacked against FWS's administrative reform effort: (i) the agency has insufficient funding to develop strong ecological and economic programs; (ii) many of its administrative reforms are supported by ambiguous statutory text at best; (iii) landowners will be skeptical of FWS's efforts after many years of animosity; (iv) partisan politics have delayed the opportunity for legislative guidance; and (v) extreme preservationists and property rights groups make strange bedfellows in trying to block almost every move FWS makes. It is a wonder the agency even bothers since it would be much easier to simply hide behind the status quo and blame the stalemate on Congress.

Despite these obstacles, FWS has managed to put an impressive administrative reform agenda in place. However, the longer Congress hangs the agency out to dry without offering an endorsement or alternative approach, the more chance the entire effort has of unraveling. The string of litigation losses that FWS's Candidate Conservation Agreement policy has suffered demonstrates how close the agency is to that precipice. The real question is not whether FWS is willing to come close to the edge (it already has), but rather whether Congress will let the agency fall over the edge without a rope.

Indeed, the ESA situation may provide students with a laboratory of broader issues of constitutional and administrative law for observing the pitfalls of Congress's addiction to delegation of legislative authority to administrative agencies. The ESA is representative of the common story in which Congress hands enormous responsibilities to an administrative agency and then hides its head in the sand for well over a decade. Although critics from both the preservationist and property rights camps accuse FWS of sleeping with the enemy, perhaps the agency is doing the best job one reasonably can expect as long as neither side is completely happy.

In a perfect world, Congress would make the tough decisions, agencies would know and do just what was expected of them, and courts would need to stick their necks in matters only when one of the other two institutions went haywire. Congress

reneged on that covenant long ago and one should not hold one's breath for Congress to change its act. However, as long as FWS continues to fly in the face of convention and seek balanced ESA reform at the administrative level, its efforts should be applauded.