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ENDANGERED SPECIES ACT INNOVATIONS IN THE POST-BABBITTONIAN ERA—ARE THERE ANY?

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INTRODUCTION

There was a time when I did not have much nice to say about the Endangered Species Act (ESA).¹ It struck me as always expanding in regulatory impact without producing a corresponding improvement in the condition of imperiled species.² Indeed, in many ways it seemed a downright perverse statute, that is one that sent the wrong message to landowners about what it means to have habitat for endangered species on their property: get rid of it before the government knows it's there.³ I never went as far as the so-called "property rights" advocates, who condemned the ESA as if it were a form of communism.⁴

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1. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (2000). This Article is not intended to provide a comprehensive overview of the ESA. Rather, it focuses attention on the realized and potential innovation of key programs and features of the statute. For comprehensive treatments of the ESA, several of which are referred to frequently *infra*, see LAWRENCE R. LIEBESMAN & RAFFAEL PETERSEN, *ENDANGERED SPECIES DESKBOOK* (2003); *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* (Donald C. Baur & Wm. Robert Irvin eds., 2002); STANFORD ENVIRONMENTAL LAW SOCIETY, *THE ENDANGERED SPECIES ACT* (2001) [hereinafter "SELS"]; TONY A. SULLINS, *ENDANGERED SPECIES ACT* (2001); MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* (3d ed., 1997).

2. See, e.g., J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 SMU L. REV. 1393 (1991); J.B. Ruhl, *Phase Three of the ESA: Using Endangered Species Protection as a Natural Resource Management Tool*, 6 NAT. RESOURCES & ENV'T 38 (Winter 1992); J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 COLO. L. REV. 555 (1995).

3. J.B. Ruhl, *The Endangered Species Act and Private Property: A Matter of Timing and Location*, 8 CORNELL J.L. & PUB. POL'Y 37, 42-43 (1998).

4. And still do. My "Google" search of "'Endangered Species Act' [and] communism" turned up over 550 items, in most of which the analogy was asserted in the strongest of terms.

Rather, as a self-proclaimed member of the radical center,⁵ I simply believed there had to be a better way to get the job of species conservation done.

Well, there was. The tenure of Bruce Babbitt as Secretary of Interior during the Clinton Administration was a turning point in the ESA's history as important as any other. Babbitt put forth a concerted, long-term effort to find a better way to implement the statute and largely succeeded. The Babbitt story is well known and documented.⁶ Not everyone was pleased with what transpired under his term, but most of those who were dissatisfied occupied opposite ends of the political spectrum. In other words, those of us in the middle had our day.

But this Article is not about the Babbitt era. Rather, it concerns what has been done by the Bush Administration's Department of the Interior to continue the process of innovation. Part I provides a brief background on the ESA's statutory programs. Part II offers a summary of regulatory innovation as practiced in environmental law circles to assist in the evaluation of the ESA in the Babbitt and post-Babbitt eras. Part III summarizes the innovation themes of the Babbitt era in order to allow comparison to what has followed. Part IV examines what Gale Norton, as Secretary of the Interior under the Bush Administration, has accomplished to keep the ESA innovation movement alive.

The end result is that not much has happened. Thus far, the Bush Administration has no high-profile ESA innovation "products" it can call its own, though it has finalized or updated several polices that were initiated during the Babbitt era and thus has put its imprint on the direction of those innovations. The Bush Administration does appear to be gearing up some new approaches with respect to inter-governmental relations under the ESA and has focused more on ground-level projects aimed at partnering with landowners and other resource managers. But overall, there is no theme of ESA innovation emanating from the Department as there was under Babbitt.

It is not altogether clear what to make of this. Babbitt was a tough act to follow, and it was not immediately obvious when the Bush Administration stepped in where more innovation was needed,

5. See J.B. Ruhl, *A Manifesto for the Radical Middle*, 38 IDAHO L. REV. 385 (2002).

6. For comprehensive and thoughtful "insider" accounts of Secretary Babbitt's tenure at Interior, see John D. Leshy, *The Babbitt Legacy at the Department of Interior: A Preliminary View*, 31 ENVTL. L. 199 (2001); Joseph L. Sax, *Environmental Law At the Turn of the Century; A Reportorial Fragment of Contemporary History*, 88 CAL. L. REV. 2375 (2000).

if any was needed at all. What was left to innovate? After all, times have changed. The events of 9/11 have moved many ESA issues to the side or the background. Courts have also increased their role in ESA oversight, forcing the Bush Administration, even more than during the Babbitt era, to follow a judicially prescribed agenda rather than set its own.⁷ Thus, other than covering the topic of innovation under the ESA in the following pages and offering some opinions along the way, I would not have the audacity to issue a “report card” on the Bush Administration’s record of innovation under the ESA. Suffice it to say, though, that these times are not nearly as interesting as was life as an ESA lawyer in the Babbitt era.

I. SETTING⁸

The ESA requires the Secretary of the Interior, who acts through the Fish and Wildlife Service (FWS), and the Secretary of Commerce, who acts through the National Marine Fisheries Service (NMFS), to make various decisions about the status and protection of animal and plant species.⁹ The FWS and NMFS administer several core programs in that regard, some of which are explored in more detail later in the Article.

Section 4 of the Act authorizes FWS and NMFS to identify endangered and threatened species, a function that is known as “list-

7. The agency has testified about this problem before Congress:

Simply put, the listing and critical habitat program is now operated in a “first to the courthouse” mode, with each new court order or settlement taking its place at the end of an ever-lengthening line. We are no longer operating under a rational system that allows us to prioritize resources to address the most significant biological needs. I should note that it is a direct result of this litigation that we have had to request a critical habitat listing subcap in our appropriations request the last several fiscal years in order to protect the funding for other ESA programs.

See Testimony of Craig Manson, Assistant Secretary for Fish And Wildlife and Parks, Department of the Interior, Before the Subcommittee on Fisheries, Wildlife and Water of the Senate Committee on Environment and Public Works, Regarding the Designation of Critical Habitat Under the Endangered Species Act (April 10, 2003), *available at* <http://laws.fws.gov/TESTIMON/2003/2003april10.html>.

8. I have had the pleasure of being asked to make presentations and write commentary for publication about the ESA more than several times. Out of necessity, the materials in this “background” section of this Article are a variation, tailored for the instant purposes, of a template I have used and will continue to use. Similar treatments, in other words, appear elsewhere.

9. See 16 U.S.C. § 1532(15) (2000) (defining Secretary); 50 C.F.R. § 424.01 (2003) (establishing FWS and NMFS joint regulations). FWS generally is responsible for terrestrial and freshwater species, while NMFS is responsible for marine and anadromous species. NMFS is also known as National Oceanic and Atmospheric Administration (NOAA) Fisheries.

ing.”¹⁰ The agencies are then charged with the complicated tasks of designating “critical habitat”¹¹ and developing “recovery plans” for the listed species.¹² Section 7 requires *all* federal agencies to ensure that the actions they carry out, fund, or authorize do not jeopardize the continued existence of listed species or “adversely modify” their critical habitat.¹³ Section 9 requires that all persons, including all private and public entities subject to federal jurisdiction, avoid “taking” listed species of fish and wildlife.¹⁴ Sections 7 (for federal actions) and 10 (for actions not subject to Section 7) establish the procedure and criteria necessary for FWS and NMFS to approve “incidental takes” of listed species.¹⁵

A reader unfamiliar with the ESA may find its structure quite simple and its application straightforward. Indeed, in comparison to other federal environmental laws the ESA is streamlined, almost min-

10. 16 U.S.C. § 1533(a)(1) (2000). For a description of the listing process, see SELS, *supra* note 1, at 38-58; LIEBESMAN & PETERSEN, *supra* note 1, at 15-20; SULLINS, *supra* note 1, at 11-25; J.B. Ruhl, *Section 4 of the ESA: The Keystone of Species Protection Law*, in LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 19.

11. 16 U.S.C. § 1533(a)(3) (2000). For a description of the critical habitat designation process, see SELS, *supra* note 1, at 59-69; LIEBESMAN & PETERSEN, *supra* note 1, at 20-24; SULLINS, *supra* note 1, at 26-28; Federico Cheever, *Endangered Species Act: Critical Habitat*, in LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 47; Murray D. Feldman and Michael J. Brennan, *The Growing Importance of Critical Habitat for Species Conservation*, 16 NAT. RESOURCES & ENV'T 88 (2001).

12. 16 U.S.C. § 1533(f) (2000). For a description of the recovery plan process, see SELS, *supra* note 1, at 71-77; LIEBESMAN & PETERSEN, *supra* note 1, at 24-26; SULLINS, *supra* note 1, at 34-38; John M. Volkman, *Recovery Planning*, in LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 71.

13. 16 U.S.C. § 1536(a)(2) (2000). For a description of the consultation process, see SELS, *supra* note 1, at 83-103; LIEBESMAN & PETERSEN, *supra* note 1, at 27-39; SULLINS, *supra* note 1, at 59-86; Marilyn Averill, *Protecting Species through Interagency Cooperation*, in LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 87.

14. 16 U.S.C. § 1538(a)(1) (2000). For a description of the cases developing the legal standards for what constitutes “take,” see SELS, *supra* note 1, at 104-112; LIEBESMAN & PETERSEN, *supra* note 1, at 39-45; SULLINS, *supra* note 1, at 44-53; Gina Guy, *Take Prohibitions and Section 9*, in LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 191; Steven P. Quarles & Thomas R. Lundquist, *When Do Land Use Activities “Take” Listed Wildlife Under ESA Section 9 and the “Harm” Regulation?*, in LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 207; Alan M. Glen & Craig M. Douglas, *Taking Species: Difficult Questions of Proximity and Degree*, 16 NAT. RESOURCES & ENV'T 65 (2001).

15. 16 U.S.C. §§ 1536(b)(4), 1539(a)(1) (2000). “Incidental take,” although not the subject of a specific statutory definition provision, is described elsewhere in the statute as a take that is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). The FWS and NMFS have adopted this meaning for purposes of the regulations implementing Section 7. 50 C.F.R. § 402.02. For a description of the incidental take authorization procedures, see SELS, *supra* note 1, at 127-73; LIEBESMAN & PETERSEN, *supra* note 1, at 46-50; SULLINS, *supra* note 1, at 87-102.

iscule.¹⁶ And its core objectives seem to fit together neatly: identify problem species and their essential habitat areas; stop public and private actions from further deteriorating their condition; allow actions that kill or injure species members only under permit; figure out how to help listed species recover to sustainable populations. This is a fitting strategy for the Act's stated goals of providing "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved"¹⁷ and "to halt and reverse the trend toward species extinction, whatever the cost."¹⁸

As is often the case with seemingly uncomplicated statutes, however, the devil is in the details. Each of the administrative programs outlined above involves an intersection between complicated legal standards and a multitude of scientific determinations. The problem is not only one of uncertainty for lack of data, though that problem is surely a contributor to the difficulties of ESA administration. Rather, the fit between the legal and scientific domains is often disjointed even when the available data are robust by scientific standards. The ESA's legal standards call for determinations that scientists are typically reluctant to make, and the information and analyses science produces often lead to inconclusive outcomes under the legal standards. Consider the following inventory of some of the two-prong law and science decisions that the FWS and NMFS are required to make under the ESA:

16. See ROBERT V. PERCIVAL, ENVIRONMENTAL LAW: STATUTORY SUPPLEMENT AND INTERNET GUIDE (2002) (illustrating that in this unannotated collection of environmental statutes, the ESA takes up 44 pages compared to 181 pages for the Clean Water Act and 304 pages for the Clean Air Act.).

17. 16 U.S.C. § 1531(b) (2000).

18. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184-85 (1978).

Program	Legal Standard	Science Questions
Section 4 listing	Is the species in danger of extinction throughout all or a significant portion of its range (endangered) or likely to become so in the foreseeable future (threatened)? ¹⁹	Is it a species? ²⁰ What is its range? What are the present and threatened injuries to its habitat? ²¹ Is it being overutilized for commercial or other purposes? Is it threatened by disease or predation? Overall, are these threats enough to cause it to go extinct? When? What is the probability?
Section 4 critical habitat designation	What habitat is essential to the conservation of the species and requires special management considerations? ²²	How much space does the species need for individual and population growth? ²³ What are its food, water, air, light, mineral, shelter, and other nutritional and physiological requirements? Where does it breed, reproduce, and rear offspring? What are the constitutive elements of habitat serving these functions and needs? Where is such habitat? How much of it does the species require?

19. See 16 U.S.C. §§ 1532(6) and (20) (2000) (defining endangered species and threatened species).

20. 16 U.S.C. 1532(16) (2000) (complicating this question, the ESA defines species as including "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature").

21. This and the remaining questions posed for the listing function are taken from the statutory criteria. See 16 U.S.C. § 1533(a)(1)(A)-(E) (2000).

22. This is taken from the definition of critical habitat. See 16 U.S.C. § 1532(5)(i) (2000).

23. This and the other critical habitat designation questions are summarized in the agency regulations. See 50 C.F.R. § 424.12(b)(1)-(5)(2003).

Program	Legal Standard	Science Questions
Section 4 recovery planning	What measures are necessary to bring the species to the point at which it is no longer endangered or threatened, and by what objective, measurable criteria can that determination be made? ²⁴	What site-specific and general management actions can reduce the threats that caused the species to be listed? ²⁵ How will we measure the magnitude of those benefits? When will the benefits have reached the point that we can justify removing the species from the lists?
Section 7 jeopardy prohibitions	Will the direct and indirect effects of the federal action jeopardize the continued existence of the species ²⁶ by appreciably reducing its chances of recovery and survival in the wild? ²⁷	What are the impacts of the action on reproduction, numbers, or distribution of the species? ²⁸ How much do such impacts reduce the chances of the species surviving and recovering in the wild?

24. This is taken from the definition of "conservation," which is what recovery plans are supposed to accomplish. *See* 16 U.S.C. § 1532(3) (2000) (definition of conservation); 16 U.S.C. § 1534(f) (2000) (recovery plans are for conservation of species).

25. These questions are from the statutory procedure for recovery plan development. *See* 16 U.S.C. § 1533(f) (2000).

26. This is the statutory prohibition of jeopardy. *See* 16 U.S.C. § 1536(a)(2) (2000).

27. The agency regulations elaborate on the statute with this definition of "jeopardize the continued existence of." *See* 50 C.F.R. § 402.02 (2003).

28. These are the criteria set forth in the regulatory definition of "jeopardize the continued existence of." *See Id.*

Program	Legal Standard	Science Questions
Section 7 adverse modification prohibition	Will the direct and indirect effects of the federal action result in the destruction or adverse modification of critical habitat of the species ²⁹ by appreciably diminishing the value of the habitat for the survival and recovery of the species? ³⁰	How does the action alter any of the physical and biological features that were the basis for determining the habitat to be critical? ³¹ How much do such impacts reduce the chances of the species surviving and recovering in the wild?
Section 9 take prohibition	Will a person's action harass, harm, shoot, pursue, hunt, shoot, would, kill, trap, capture, or collect any individuals of the species? ³²	Does the action actually kill or injure wildlife? For the "harm" determination, does it modify or degrade habitat so as to impair behavioral patterns such as breeding, feeding, or sheltering, and if so, has that killed or injured individuals of the species? ³³
Section 7 incidental take permitting	What reasonable and prudent measures are necessary or appropriate to minimize the impact of the incidental taking? ³⁴	What is the nature and magnitude of the take being authorized, and by what measures and magnitude has the agency minimized such take?

29. This is the statutory prohibition of adverse modification. See 16 U.S.C. § 1536(a)(2) (2000).

30. The agency regulations elaborate on the statute with this definition of "adverse modification." See 50 C.F.R. § 402.02.

31. These are the criteria set forth in the regulatory definition. See *Id.*

32. This is the statutory definition of "take." See 16 U.S.C. § 1532(19) (2000).

33. This is the regulatory definition of "harm." See 50 C.F.R. § 17.3 (2003). For a recent summary of the history of this administrative interpretation of "harm" and the case law construing it, see Steven G. Davison, *The Aftermath of Sweet Home Chapter: Modification of Wildlife Habitat as a Prohibited Taking in Violation of the Endangered Species Act*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 541 (2003); Glen & Douglas, *supra* note 14.

34. This is the statutory standard for issuance of a Section 7 incidental take statement. See 16 U.S.C. § 1536(b)(4) (2000).

Program	Legal Standard	Science Questions
Section 10 incidental take permitting	Has the applicant minimized and mitigated the impacts of the incidental taking to the maximum extent practicable, and not appreciably reduced the likelihood of the survival and recovery of the species? ³⁵	What is the nature and magnitude of the take being authorized, and by what measures and magnitude has the applicant minimized and mitigated such take? What is the net effect of the take, as minimized and mitigated, on the ability of the species to survive and recover?

This illustration presents only a few of the problematic intersections between law and science. Any one of the scientific questions could be unpacked to reveal a wealth of additional inquiries that press even harder on the question of how to make the call under the legal standard. The prospect of “innovation” under a statute so sprawling in scope and science-dependent in focus is probably unattractive to any government official. Where, in the case of the ESA, would one even start? The next section offers some background relevant to that question in the form of a typology of regulatory innovation instruments.

II. A TYPOLOGY OF REGULATORY INNOVATION

If he wished to be known as an ESA innovator, Bruce Babbitt had the advantage of interpreting the ESA at a time when regulatory innovation in general was a dominant theme of the Clinton Administration.³⁶ A so-called “second generation” of environmental law emerged from this push for innovation, cutting across pollution control and resource conservation programs to demand more efficient and effective approaches to regulatory intervention and administration. This approach was less likely under the conventional prescriptive regulation approach, also known ubiquitously as “command-and-

35. These are the statutory criteria for issuance of a Section 10 incidental take permit. See 16 U.S.C. § 1539(a)(2) (2000).

36. See President William J. Clinton and Vice President Al Gore, *Reinventing Environmental Regulation* (Mar. 16, 1995), reprinted in *DAILY ENV'T REP.* (BNA), Mar. 17, 1995, at E-1.

control.”³⁷ The theme of emphasis on efficiency and effectiveness has only grown in intensity since then.³⁸

What, exactly, is regulatory innovation? To assist in the description and comparison of ESA innovation under different Administrations, I have created a typology of regulatory innovation approaches based on the work of some of the field’s leading minds.³⁹ In general, the primary innovation instruments fall into three categories: government-stakeholder network structures, indirect governance mechanisms, and economic incentive programs.

1. Government-Stakeholder Network Structures: These instruments emphasize collaboration, inclusiveness, and sufficient flexibility to tailor solutions to the circumstances of discrete situations. Examples include:

a. Negotiated rulemaking, wherein stakeholders in proposed regulatory initiative negotiate terms of regulation in order to avoid post-promulgation litigation.

b. Contract-based permitting, in which terms of regulatory permits, rather than relying on prescribed formulaic standards, are negotiated between the regulatory authority and permit applicant within a broader boundary of possible ingredients and outcomes.

c. Public-private “partnership” programs, in which regulators team with private entities to engage cooperatively in developing solutions that optimize benefits to both interests, such as by providing public technical expertise for improved private land management.

2. Indirect Governance Mechanisms: This approach, also known as “reflexive law,” relies on information, consumer demands, and reputation values to induce desired behavior in the regulated community. Examples include:

37. By the mid-1990s “virtually everyone...agree[d] that our historical command-and-control approach [wa]s inefficient and inadequate by itself to carry us where we still need to go.” Barton H. Thompson, *The Search for Regulatory Alternatives*, 15 STAN. ENVTL. L.J. viii, viii (1996).

38. See Dennis D. Hirsch, *Second Generation Policy and the New Economy*, 29 CAP. U. L. REV. 1 (2001).

39. In particular, I have in mind, and for the present purposes draw from, the work of law professors Richard Stewart of NYU and Dennis Hirsch of Capital University. See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 NYU L. REV. 437 (2003); Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21 (2001); Dennis Hirsch, *Lean and Green? Environmental Law and Policy for the Flexible Production Economy*, 79 INDIANA L. J. 611 (2004); Dennis Hirsch, *Second Generation Policy and the New Economy*, 29 CAP. U. L. REV. 1 (2001). The typology that follows in the text is an adaptation, primarily in the form of synthesis and condensation, from these two contributors.

a. *Information reporting programs*, in which the requirement to report prescribed actions, such as discharges of pollutants, allows greater public dissemination of information which, given public reaction to the information, may induce the reporter to alter behavior in order to control the impact of the information effects.

b. *Certification programs*, in which manufacturers meet certain standards, such as energy efficiency or forest stewardship, so as to obtain the right to “certify” their products and thereby, presumably, reap the benefits of consumer demand for more “environmentally friendly” products.

c. *Performance track programs*, which allow firms that perform at superior levels under prescribed standards to receive a reduced load of regulatory transactions, such as inspections and permit processing reviews, and an increased level of public recognition through awards and other official mention.

3. Economic Incentive Programs: These programs tap into basic economic interests, using constructed market frameworks or direct incentives, to induce desired behavior or otherwise make it more likely to occur. Examples include:

a. *Cap-and-trade programs* that impose industry-wide pollution ceilings and allocate pollution “credits” among firms in the industry based on some initial allocation formula, but then allow individual firms to trade their “credits” so as to take advantage of differential pollution control efficiencies.

b. *Banking programs*, in which some natural resource, such as wetlands or endangered species habitat, can be accumulated in a “bank” through restoration or enhancement, and then sold to third parties who require some level of mitigation as a condition to receiving a regulatory permit to engage in land development or other resource uses.

c. *Tax and subsidy programs*, which more directly induce desired behavior by providing reward subsidies for delivery of environmental goods or by imposing punitive tax or fee consequences for engaging in environmentally undesirable behavior.

There is nothing too remarkable about rattling off this typology these days—a wealth of theory and application provides the foundation for doing so. But that was not the case in the early 1990s. While many of these instruments had been discussed in theory and used in

limited applications,⁴⁰ it was not as if Babbitt could simply pull them off the shelf and plop them directly into the ESA programs. Using any of these mechanisms to supplement or supplant prescriptive regulatory programs was a gamble for any administrator, particularly if it meant tinkering with the most cherished icon of environmentalism—the ESA. The next section explores how Babbitt made the gamble pay off.

III. ESA INNOVATION IN THE BABBITT ERA

Bruce Babbitt took charge of the ESA at a time when the statute's reputation had reached a low point in the Republican-controlled Congress, where property rights advocates enjoyed a majority.⁴¹ At the same time, extreme environmental protection groups, who worship the ESA, were continuously poised to leap on any effort to muzzle the statute. How, then, could Babbitt enhance the species conservation performance of the ESA without running afoul of the property rights supporters? And how could he enhance his ability to convince landowners to come into the fold without chafing environmentalists? With Congress primed to “gut” the statute and environmental groups ready to sue over any move to weaken the law, he had to think creatively. Babbitt was forced to innovate.

And that he did. He cleverly forged a two-part agenda that addressed both issues by embracing the contract and economic incentive models of regulatory innovation through creative interpretations of ESA authorities.⁴² One side of the agenda focused on enhancing species conservation through greater emphasis on ecosystem-level management of habitat and other resources vital to the sustainability of imperiled species.⁴³ The other side focused on providing a louder

40. Cap-and-trade programs, for example, have been explored in economic literature for decades, *see, e.g.*, WILLIAM J. BAUMOL AND WALLACE E. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* 177-89 (2d ed. 1988), and were prominently implemented in the 1990 amendments to the Clean Air Act creating a sulfur dioxide emissions trading program for large coal-burning power plants. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 401, 104 Stat. 2584 (1990) (codified as amended at 42 U.S.C. § 7651(b) (2000)).

41. For a more thorough account of the political factors that set the stage, *see* Leshy, *supra* note 6, at 208-12. I begin the story of innovation under the ESA with Bruce Babbitt because, ironically, there is no story to tell before his tenure, except one of missed opportunities. *See supra* note 6.

42. Once again, an insider's account provides a thoughtful perspective on the strategic approach the Babbitt administration took. *See* Leshy, *supra* note 6, at 212-14.

43. *See, e.g.*, Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 59 Fed. Reg. 34,274 (July 1, 1994); George Frampton, *Ecosystem Management in the Clinton Ad-*

voice and more equitable solutions for landowners on whose property endangered or threatened species are found.⁴⁴ This double-barreled agenda took many forms and led to numerous regulatory innovations.⁴⁵

The most prominent example of the impact Babbitt's agenda had on the ESA is the habitat conservation plan ("HCP") program, which has been described as "a sweeping new approach to protecting endangered species."⁴⁶ As described above, landowners prepare HCPs as part of the application for incidental take permits under section 10(a)(1) of the ESA. Although Congress added the so-called "HCP permit" program to the ESA in 1982,⁴⁷ by 1990 only a handful of HCP permits had been requested and issued.⁴⁸ The program was not well

ministration, 7 DUKE ENVTL. L. & POL'Y F. 39 (1996). For a survey of the policies the Babbitt administration collected under the ecosystem management theme, see J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 NYU ENVTL. L.J. 367, 374-387 (1998).

44. See Ruhl, *Who Needs Congress?*, *supra* note 43, at 388-400 (listing survey of policies serving this purpose).

45. For a summary of the status at the time the Bush Administration took over of the various regulatory innovations attributable to the Babbitt era, see EUGENE H. BUCK ET AL., CONGRESSIONAL RESEARCH SERV. ISSUE BRIEF NO. IB10072, ENDANGERED SPECIES: DIFFICULT CHOICES 9-12 (June 19, 2002).

46. Daniel A. Farber, *A Tale of Two Cases*, 20 VA. ENVTL. L.J. 33, 38 (2001).

47. See H.R. Conf. Rep. No. 97-835, at 28-31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807 (showing how Congress intended the 1982 amendment to provide landowners incentives to participate in endangered species conservation).

Ironically, the program remained essentially dormant during the Reagan and Bush(I) Administrations, when one might reasonably have thought innovation on behalf of landowners would have been a priority. There are two plausible explanations for this lack of action. One is that the regulatory constraints of the ESA simply had not permeated a sufficient breadth and depth of land uses in the nation to rally the call for innovation. Another, more cynical, explanation is that the neither the Administration nor Congress during this time frame was especially eager to improve the performance of the ESA, lest it appear less onerous and inefficient than they wanted to portray it. Whichever explanation is more true I leave to political historians; for purposes of a history of actual innovation under the ESA, the story begins with Babbitt. Whether it ends there is my primary focus.

48. By 1992, for example, FWS had issued only 12 HCP permits, whereas it had issued 225 by October 1, 1997. See DEFENDERS OF WILDLIFE, FRAYED SAFETY NETS: CONSERVATION PLANNING UNDER THE ENDANGERED SPECIES ACT vi-xiii (1998).

For background on these developments and the HCP program in general, see Eric Fisher, *Habitat Conservation Planning Under the Endangered Species Act: No Surprises & the Quest for Certainty*, 67 U. COLO. L. REV. 371 (1996); Shi-Ling Hsu, *The Potential and the Pitfalls of Habitat Conservation Planning Under the Endangered Species Act*, 29 ENVTL. L. REP. 10,592 (1999); Albert C. Lin, Comment, *Participants' Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 ECOLOGY L.Q. 369 (1996); J. B. Ruhl, *How to Kill Endangered Species, Legally: The Nuts and Bolts of Endangered Species Act "HCP" Permits for Real Estate Development*, 5 ENVTL. LAW. 345 (1999); Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305 (1997); Robert D.

known by landowners, and the agency seemed reluctant to publicize it. Environmentalists certainly did not like the idea of a permit that authorized the taking of listed species. Babbitt saw it, however, as the perfect medium for policing the increased collisions between urban growth and the ESA's takings prohibition. Beginning primarily in Austin, Texas and southern California, the number of HCP permits began to grow in the early 1990s.⁴⁹ With experience, the agency added structure and standards to the program but kept it sufficiently flexible to accommodate the changing needs of species and landowners.⁵⁰ Landowners began to participate in HCPs as a contractual means of resolving ESA issues with lasting certainty,⁵¹ while the agency promoted the program as a means of managing species conservation across whole ecosystems.⁵² Not surprisingly, HCP permits began to prosper under Babbitt's tenure, with several hundred having been approved by the end of his term.⁵³

Many of the die-hard environmentalists found it difficult to accept this kind of regulatory innovation under the ESA,⁵⁴ but the HCP

Thornton, *Habitat Conservation Plans: Frayed Safety Nets or Creative Partnerships?*, 16 NAT. RESOURCES & ENV'T 94 (2001).

49. See Thornton, *supra* note 48, at 94-95 (describing southern California experience).

50. For example, FWS has published a lengthy handbook describing the steps required to obtain an HCP permit. See FISH AND WILDLIFE SERVICE & NATIONAL MARINE FISHERIES SERVICE, *ENDANGERED SPECIES HABITAT CONSERVATION PLANNING HANDBOOK* (1996).

51. See Farber, *supra* note 46, at 43 (stressing the negotiation-based character of the HCP program); Hsu, *supra* note 48, at 594-600 (describing the HCP negotiation process between agency and applicant); Ruhl, *supra* note 48, at 391-96 (describing the HCP mitigation negotiation process).

52. See Thornton, *supra* note 48, at 94-95.

53. See FWS, *Habitat Conservation Planning and the Incidental Take Permitting Process 1* (Nov. 2001), available at http://endangered.fws.gov/hcp/HCP_Incidental_Take.pdf (last visited November 4, 2003). For a running count, see FWS, *Endangered Species Habitat Conservation Program*, at <http://endangered.fws.gov/hcp/index.html> (last visited November 4, 2003); FWS, *General Statistics for Endangered Species*, at http://ecos.fws.gov/tess_public/TessStatReport (last visited November 4, 2003). For an excellent statistical summary of the 208 HCP permits that FWS had issued nationally by August 1997, including acreage statistics, see NATIONAL CENTER FOR ECOLOGICAL ANALYSIS AND SYNTHESIS & AMERICAN INSTITUTE OF BIOLOGICAL SCIENCES, *USING SCIENCE IN HABITAT CONSERVATION PLANS* (1999), available at <http://www.nceas.ucsb.edu/projects/hcp>.

54. See, e.g., DEFENDERS OF WILDLIFE, *FRAYED SAFETY NETS: CONSERVATION PLANNING UNDER THE ENDANGERED SPECIES ACT* vi-xiii (1998) (giving pessimistic assessment of the HCP program); John Kostyack, *Surprise!*, ENVTL. F., Mar.-Apr. 1998, at 19 (attorney for National Wildlife Federation presents extensive criticism of the Babbitt administration's HCP reforms); see generally Thornton, *supra* note 48, at 95-96 (describing other organizations' criticisms). To be sure, plenty of leading environmental advocates praised the Babbitt initiative. Oliver Houck, for example, nominated Babbitt for the Environmental Law Institute's annual environmental award in 1997, urging that "any environmentalist who doesn't recognize that this is one of the two or three greatest Interior Secretaries in our history, and easily the most effec-

program was a case study in the kind of creativity that *had* to be employed for the statute to survive. The lack of flexibility in the incidental take program coupled with a threat of liability for the taking of listed species on private property sent all the wrong messages to landowners about endangered species. Consider that when land development is a major contributing cause of a specific species' endangerment, which is true of most listed species, those landowners who developed the species' habitat *before* the listing escape regulation entirely, whereas those who maintained the species' habitat shoulder all the post-listing land use constraints.⁵⁵ That's simply unfair. Worse, it provides a perverse set of incentives under a statute designed to protect species. Under such a regime, no landowner motivated by economic rationality would: (1) conserve habitat of a species known to be a candidate for listing in the near future; (2) promote the introduction of habitat for species already listed; or (3) do anything to call attention to the presence of listed species or its habitat.⁵⁶ Yet aren't these the behaviors the ESA should seek to promote?

Recognizing this irony, Babbitt not only stuck to contract-based HCP program reforms in the face of intense opposition from preservationists,⁵⁷ he broadened them to address these policy problems through incentive-based instruments. The Department under Babbitt adopted the Candidate Conservation Agreement mechanism to provide incentives to landowners to conserve habitat of candidate species,⁵⁸ and developed the Safe Harbor mechanism to provide incentives to promote the introduction of habitat of species already listed.⁵⁹

tive environmental administrator in government today, has got a serious problem with perspective." Oliver Houck, personal communication (Michael Bean supplied the quote, which Oliver Houck confirmed; neither is able to find the original nomination letter).

55. See Ruhl, *supra* note 3, at 42-43.

56. See *id.*

57. Indeed, some environmental groups have successfully challenged certain limited aspects of the contract-based HCP reform movement. *Spirit of the Sage Council v. Norton*, 2003 WL 22927492 (D.D.C. Dec. 11, 2003) (finding that FWS did not follow proper notice and comment procedures in promulgating an integral component of the No Surprises Rule).

58. See Announcement of Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726 (June 17, 1999) (illustrating how Candidate Conservation Agreements allow a landowner to take conservation steps on behalf of species that are candidates for listing in return for an assurance that, if the species is later listed, the landowner has in place the necessary incidental take authorization to allow continuation of land uses covered under the agreement).

59. See Announcement of Final Safe Harbor Policy, 64 Fed. Reg. 32,717 (June 17, 1999) (showing how Safe Harbor agreements allow a landowner to foster conditions suitable for listed species for determined periods of time in return for an assurance that later development will be

With innovations such as these in place, the agencies could begin to reverse the species conservation disincentives the statutory structure had erected.⁶⁰

Unfortunately, after the introduction of the HCP and related innovations the Babbitt Administration had little time to actually implement them. The Bush Administration inherited them as relatively new and untested policies. All eyes turned in 2001 to the Department's new leadership to see where it would next lead the ESA. Part III of this Article summarizes Norton's leadership of the Department in that regard.

IV. ESA INNOVATION UNDER THE BUSH ADMINISTRATION

When Gale Norton took the helm at the Department of the Interior, she had two challenges with respect to the ESA—don't spoil what Babbitt started and find something to call her own. Generally, she has succeeded at the former but faltered at the latter.

A. Carryovers

One of the elegant features of Babbitt's reform initiatives is that, unless you are really far out there on one end or the other, they are politically benign. It would have been foolish, therefore, for Norton to distance herself from the programs for the sake of politics. Thankfully she did not, and in fact has accomplished much toward solidifying the reforms and defending them against challenges. For example, the agency recently proposed policies and regulations strengthening the Candidate Conservation Agreement and Safe Harbor programs.⁶¹ Also, by putting into effect an extension of Candidate Conservation Agreements that the Babbitt Administration had pursued on an ad hoc basis, Norton has developed guidelines for considering the merits

allowed on the property to a level that returns the species' to its "baseline" conditions existing on the property at the time of the agreement).

60. See Michael J. Bean, *Overcoming Unintended Consequences of Endangered Species Regulation*, 38 IDAHO L. REV. 409, 414-20 (2002) (discussing how the realigned incentives began producing positive endangered species outcomes).

61. See Draft Handbook for Candidate Conservation Agreements with Assurances and Enhancement of Survival Permitting, 68 Fed. Reg. 37,170 (June 23, 2003), available at <http://endangered.fws.gov/candidates/ccaahandbook.html>; Proposed Revisions to the Regulations Applicable to Permits Issued Under the Endangered Species Act, 68 Fed. Reg. 53,327 (Sept. 10, 2003), Proposed Revisions to Safe Harbor Agreements and Candidate Conservation Agreements with Assurances, 68 Fed. Reg. 53,320 (Sept. 10, 2003).

of candidate species conservation measures when evaluating whether to list the species.⁶²

Also, in what should be characterized as between carryover policy and new ground, the FWS recently developed a policy for “banking” of endangered species habitat.⁶³ This program, which was under development during Babbitt’s tenure, is modeled on the more mature version of banking found in the wetlands protection program under section 404 of the Clean Water Act.⁶⁴ As a logical extension of the HCP program, habitat banking uses a market-based approach to allow some landowners to assemble significant holdings of prime habitat for listed species and market “credits” in the habitat to other landowners in need of mitigation habitat to satisfy their HCP permit conditions.

Conceptually, this approach meets the “win-win” expectations of regulatory innovation by providing more efficient and effective environmental benefits. For many species the banked habitat, because it is contiguous and more deliberately managed, can offer a superior alternative to “postage stamp” mitigation blocks that may result if HCP permittees are left to search in uncoordinated fashion for suitable mitigation land. In addition, HCP permittees should find the banked credits attractive as they reduce transaction costs of finding mitigation habitat that the FWS will approve. Finally, some entrepreneurial landowners will create banks to take advantage of the premium HCP permittees will be willing to pay to avoid having to find mitigation land themselves. To be sure, the implementation of banking programs, particularly habitat-based banking programs, poses significant challenges to ensure appropriate environmental results, but if carefully constructed and monitored they are promising.⁶⁵ Although there has yet to be any substantial experience under the new program, it appears that the FWS has developed a framework for habitat banking

62. Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100 (Mar. 28, 2003).

63. See Guidance for the Establishment, Use, and Operation of Conservation Banks, 68 Fed. Reg. 24,753 (May 8, 2003), at <http://endangered.fws.gov>.

64. See Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 Fed. Reg. 58,605 (Nov. 18, 1995). For a comprehensive overview of the wetlands mitigation banking program and comparison of it to endangered species habitat banking approaches, see Michael J. Bean & Lynn E. Dwyer, *Mitigation Banking and an Endangered Species Conservation Tool*, 30 *Envtl. L. Rep. (Envtl. L. Inst.)* 10537 (2000).

65. For a thorough review of the promise and pitfalls of habitat banking programs, see James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 *STAN. L. REV.* 607 (2000).

that meets the expectations of many environmentalists and landowners.⁶⁶

B. *New Ground*

Babbitt made the HCP program and its close cousins, the Candidate Conservation and Safe Harbor Agreements, the centerpiece of his regulatory innovation initiative. His approach was to design these programs to look and feel like contractually-designed permits that altered the embedded incentive structure of the statute. The message was clear and simple—an easy sound bite for the media to digest and propagate.

By contrast, Norton's Interior Department has espoused a somewhat fuzzy partnership-based program as its central innovation theme. It has been difficult for the agency to get the message across, and it is hard to point to tangible programmatic reform. Early in the Norton tenure, the agency began referring to its partnership-based reform as involving the "4 Cs," which stand for "conservation through cooperation, communication, and consultation." The official word on the meaning of this phrase is as follows:

To foster a Nation of citizen stewards, Secretary Norton is advancing a 4 C's philosophy—conservation through cooperation, communication, and consultation. The Department is expanding the tools in the conservation "toolbox" available to private land owners and federal land managers to enhance and achieve conservation. These tools include over \$500 million in conservation grants, including \$113 million proposed in FY 04 for the Cooperative Conservation Initiative (CCI), which includes funds for our highly successful Partners for Fish and Wildlife Program, our Coastal Program, and cooperative conservation challenge cost-share grants. Our Private Stewardship Grant program and Landowner Incentive Program, founded on initiatives envisioned by President Bush when he was Governor of Texas, provide assistance to private land owners in their voluntary efforts to protect threatened, imperiled and endangered species.⁶⁷

While this goal is surely laudable, it is difficult to ascertain exactly how these buzzwords "expand" the ESA toolbox. After all, the

66. In 2000, Bean and Dwyer, both of the Environmental Defense NGO, offered many thoughtful principles for construction of an endangered species habitat banking program, even drafting a proposed policy, and the program FWS has developed incorporates many of their guidelines. Compare Bean & Dwyer, *supra* note 64, at 10546-56, with Guidance for the Establishment, Use, and Operation of Conservation Banks, *supra* note 63, at 4-14.

67. See U.S. Department of the Interior, Strengthening Citizen Stewardship and Cooperative Conservation, <http://www.doi.gov/initiatives/conservation.html>.

Babbitt tenure was not devoid of “cooperation, communication, and consultation.” What does deserve mention as “new,” however, involves the 4 Cs focus on private land management rather than federal acquisition of land and its reliance on states as a principal channel for the grants initiative, both of which are features that many environmentalists have praised.⁶⁸ Yet while the agency has put these grant programs into place,⁶⁹ grant dollars actually paid thus far have been minimal.⁷⁰ It is too soon to tell whether this manifestation of the 4 Cs will achieve the status of truly innovative reform or will languish as nothing more than a failed experiment. However they play out, the two grants programs certainly fit conceptually within the typology of regulatory innovation as a blend of incentives and partnership-building programs.

Following the partnership theme, another Norton initiative that opens new ground is the so-called “counterpart regulation” approach to jeopardy consultations under Section 7 of the ESA. Just as Babbitt discovered the dormant HCP program, so too has Norton found a forgotten page in the history of ESA implementation. When the FWS and the NMFS issued joint regulations in 1986 for administering the jeopardy/adverse modification consultations required under Section 7, the agencies allowed that the procedures could be “superseded for a particular Federal agency by joint counterpart regulations among that agency, the Fish and Wildlife Service, and the National Marine Fisheries Service.”⁷¹ One reason for doing so, the agencies explained, would be “to enhance . . . efficiency without elimination of ultimate Federal agency responsibility for compliance with section 7.”⁷² Seeing the opportunity to promote efficiency and partnership with peer

68. See Michael J. Bean, *Missed Opportunities for Incentive-Based Conservation*, ENDANGERED SPECIES & WETLANDS REP., May 2003, at 6 (“for the most part, the environmental community acknowledged the desirability of initiatives such as these”).

69. See U.S. Fish & Wildlife Service, Private Stewardship Program: Grants and Other Assistance for Private Landowners, available at http://endangered.fws.gov/grants/private_stewardship.html (last visited November 4, 2003); U.S. Fish & Wildlife Service, Cooperative Endangered Species Conservation Fund (Section 6) Grants to States and Territories, available at http://endangered.fws.gov/grants/sec6_rfp.html (last visited Nov. 4, 2003).

70. See Bean, *supra* note 68, at 6-7 (discussing the lack of actual spending in either of the grant programs as of May 2003); Dean Scott, *Bush Administration Gets Mixed Reviews On Agreements for Voluntary Conservation*, 34 Env't Rep. (BNA) 2304 (2003) (reporting that, according to Michael Bean, as of October 2003 “none of the [grant] recipients has yet to receive a check” in the private landowner program).

71. 50 C.F.R. § 402.04. Like Section 10(a) of the statute, added in 1982 to enable HCPs, this counterpart regulation provision was promulgated during the long era of Republican control of the White House, but remained unused as a source of innovation during that period.

72. 51 Fed. Reg. 19,926, 19,937 (June 3, 1986).

agencies, the FWS and the NMFS recently proposed counterpart regulations that would allow more of the consultation function to be taken “in house” by the agencies responsible for implementing the National Fire Plan⁷³ and by the Environmental Protection Agency in its administration of pesticide regulations.⁷⁴

The counterpart regulations initiative undoubtedly will find some untapped efficiencies in ESA administration, though it is difficult to see how they will find any untapped species conservation benefit. Indeed, concern that in-house consultation will degrade the conservation effectiveness of Section 7 has led some environmentalists to label the counterpart regulations initiative as “no consultation at all” and part of a bigger “attack on the Endangered Species Act.”⁷⁵ While that inflammatory assessment seems premature, it does seem unlikely that the counterpart regulation concept can hope to score the success and praise the HCP program attracted.⁷⁶

CONCLUSION

It has been said that only Nixon could go to China. Maybe only Babbitt could reform the ESA.⁷⁷ He had impeccable environmental credentials, and thus was in a perfect position to break environmentalism’s law against tinkering with the ESA. The Bush Administration doesn’t quite fit that mold. As a result, environmentalists may instantaneously brand as a “rollback” any move the Bush Administration makes to innovate ESA implementation. But the radical center doesn’t operate that way. We applauded Babbitt’s reforms not because of Babbitt’s party affiliation, but because of their substance. The reforms were well designed and effective. So wait to see what the

73. See 68 Fed. Reg. 33,806 (June 5, 2003). The National Fire Plan is a multi-agency planning document which, along with the Healthy Forests Initiative, guides federal land management agencies in ways to reduce risk to communities and natural resources from wildland fires. See *id.* The agencies had already implemented guidance streamlining consultations for actions relating to the Healthy Forests Initiative. See 68 Fed. Reg. 1628 (Jan. 13, 2003).

74. See 68 Fed. Reg. 3786 (Jan. 24, 2003).

75. See Kristen L. Boyles, *Self-Consultation under ESA Section 7: Removing Checks and Balances, ENDANGERED SPECIES & WETLANDS REP.*, July-Aug. 2003, at 6-7.

76. Moreover, given litigation that challenged several of the Babbitt reforms I expect that some environmental groups will challenge the legality of the counterpart regulations under the ESA, a question that has never been tested.

77. I am by no means the first to draw this irresistible analogy. For example, noted ESA practitioner Rob Thornton did so, with anticipation of what Babbitt might be able to accomplish, at the beginning of the Babbitt era. See Robert D. Thornton, *The Search for a Conservation Planning Paradigm: Section 10 of the ESA*, 8 NAT. RESOURCES & ENV'T 21, 22 (Summer 1993). I expect others have drawn the analogy.

Bush administration does, and judge their innovations on the merits. What I see thus far not tremendously interesting, but the Administration still has time. Exactly how much time we won't find out until Election day.

