The Endangered Species Act Turns 30

By Daniel R. Simmons and Randy T. Simmons

On December 28, the Endangered Species Act (ESA) turns 30. One of the biggest controversies over the ESA has been its effect on private property. Many analysts suggest that the act's restrictions on property rights actually discourage conservation, which has prompted the U.S. Fish and Wildlife Service (FWS) to promulgate new rules to address that issue. The proposed new rules attempt to give private property owners some assurance that after the FWS regulates their private property, it will not come back with more restrictive regulations.

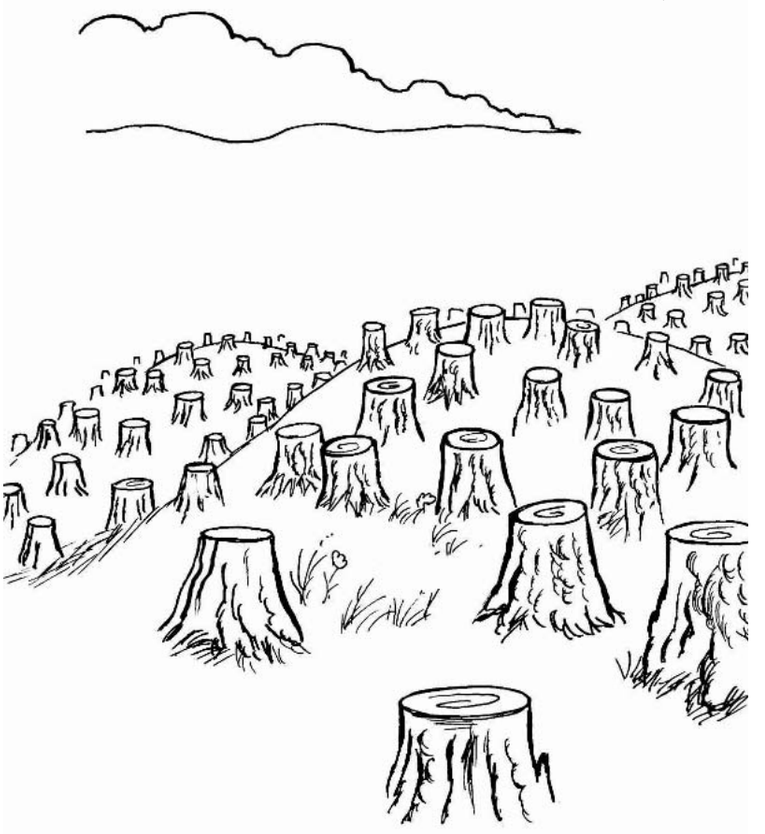
Private property There are two key sections in the ESA that give the FWS the regulatory authority to regulate private property: Sections 7 and 9. Section 9 prohibits the "taking" of an endangered or threatened species, where "taking" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct." The FWS expansively defines "harm" to include modifying an endangered or threatened species' habitat.

Regulations based on this definition of harm are controversial because they are a form of national land-use control. This controversy reached the U.S. Supreme Court in the 1995 case *Babbitt v. Sweet Home*. In that case, the Court deferred to the FWS's interpretation of "harm," holding that the definition includes habitat modification.

In dissent, Justice Antonin Scalia argued that "the Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin — not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." The *Sweet Home* decision, Environmental Defense attorney Michael Bean has explained, effectively means that "a forest landowner harvesting timber, a farmer plowing new ground, or developer clearing land for a shopping center stood in the same position as a poacher taking aim at a whooping crane."

Section 7 of the ESA provides a second basis for regulating private property in the name of species protection. It requires that other federal agencies "consult" to ensure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of [critical] habitat of such species." Thus, federal agencies must consult with the FWS about endangered species, even if an activity occurs exclusively on private land but requires a federal permit. The actions on private lands that require federal permits include filling or dredging wetlands, crossing a stream with utility lines, or bridge building. The regulations give the FWS broad regulatory powers when endangered and threatened species are on private land, or if the private land is designated as critical habitat.

Effects on landowners Nearly 80 percent of all listed species occur partially or entirely on private lands. Many analysts agree with Bean that one overall effect of enforcing the ESA has been to create "unintended negative consequences, including antagonizing many of the landowners whose actions will ultimately determine the fate of many species." Bean underscored those problems in a 1994 speech at a training and education seminar sponsored by the FWS for government employees. There is, he said, "increasing evidence that at least some private landowners are actively managing their land so as to avoid potential endangered species problems." By that, he meant the landowners are removing habitat that might attract an endangered species. He emphasized, however, that those actions are "not the result of malice toward the environ-



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ment" but are instead "fairly rational decisions motivated by a desire to avoid potentially significant economic constraints." He even said they are a "predictable response to the familiar perverse incentives that sometimes accompany regulatory programs, not just the endangered species program but others."

The National Association of Home Builders explains in its *Developer's Guide to Endangered Species Regulation,*

> Unfortunately, the highest level of assurance that a property owner will not face an ESA issue is to maintain the property in a condition such that protected species cannot occupy the property. Agricultural farming, denuding of property, and managing the vegetation in ways that prevent the presence of such species are often employed in areas where ESA conflicts are known to occur.

Making land inhospitable to endangered species is one manifestation of what is now known as "preemptive habitat destruction."

Although there are many stories of such practices, there are few studies that rely on hard data. There is, however, one systematic study of preemptive habitat destruction that examines timber-harvest practices in forests occupied by red-cockaded woodpeckers. In their 2000 paper "Preemptive Habitat Destruction under the Endangered Species Act," Dean Lueck of Montana State University and Jeffrey A. Michael of Towson University (Md.) used data from over 1,000 individual forest plots from the U.S. Forest Service's Forest Inventory and Analysis and a 1997–98 North Carolina State University survey of over 400 landowners. Red-cockaded woodpeckers provide a good test of claims that the ESA produces perverse incentives. The birds have been listed as an endangered species for 30 years. They live in colonies consisting of the breeding pair, the current year's offspring, and the sons of the breeding male. They depend on mature stands of southern pine — they only nest or roost in cavities in living pine trees that are at least 60 years old.

That provides a clearly measurable test of habitat modification. Lueck and Michael found that trees close to colonies of red-cockaded woodpeckers are logged prematurely. That is, the trees are not allowed to get old enough to provide nesting cavities for the birds. As distance from a known colony of woodpeckers increases, the chance of harvest decreases and the age at which the forest is harvested increases. The authors conclude, "This evidence from two separate micro-level data sets indicates habitat has been reduced on private land because of the ESA." In fact, enough habitat was reduced because of the ESA between 1984 and 1990 to have supported a woodpecker population sufficient to meet the FWS's recovery goals for the species, according to one set of Lueck and Michael's estimates.

It appears that the answer to how people react to standing "in the same position as a poacher taking aim at a whooping crane" is that at least some of them take legal and even illegal preemptive actions. Potential results include active habitat destruction, passive non-protection, and an unwillingness to undertake improvements. Others take direct actions against the species and "shoot, shovel, and shut up," as the saying goes. It would be surprising if other regulations did not produce similar results; Lueck and Michael note, for instance, that when stricter wetland draining rules were proposed in North Carolina, "landowners went on a drainage and ditching spree." In just a few months, 15–20 times more wetlands were developed than were normally developed in an entire year.

Property owners Property rights advocates have complained for years that the ESA's regulation of private property is a violation of the Fifth Amendment's restrictions on taking private property without just compensation. During the Clinton administration, property rights activists were successful at promoting "horror stories" about the effects of the ESA's regulation of private property. As a result, Interior Secretary Bruce Babbitt wanted to forestall what he saw as an impending "train wreck" between private property and the ESA. Babbitt started a number of initiatives to give regulators more flexibility and landowners more security. One of the initiatives he started was "safe harbor" agreements. According to the FWS, "The purpose of the Safe Harbor program is to promote voluntary management for listed species on non-federal property while giving assurances to participating landowners that no additional future regulatory restrictions will be imposed."

Safe harbor agreements have not been adopted as quickly as the FWS would like. One reason is that there are loopholes in the regulations that allow the agency to impose additional regulatory restrictions on landowners. In an effort to close the loopholes, give landowners more regulatory certainty, and make the regulations easier to understand and implement, the Bush administration is proposing to amend the safe harbor rules. The administration correctly believes that if landowners have more regulatory certainty, they will be more likely to enter into safe harbor agreements. That, in turn, will be good for endangered species on private land because the landowners would not have the incentive to make their land inhospitable to endangered species.

While regulatory certainty is beneficial for landowners, giving regulators better tools can backfire against landowners. In 1982, Congress created habitat conservation plans and incidental-take permits. Habitat Conservation Plans (HCPs) are developed by landowners together with the FWS to offset any harmful effects of activities on non-federal lands. The purpose of the HCPs is to allow landowners to use their lands and still promote the conservation of listed species. Incidental-take permits are issued by the FWS upon approving an HCP, and allow landowners to incidentally harm or "take" species.

Prior to those changes, Section 9's absolute prohibition on "taking" species was poorly enforced; the tacit understanding between regulators and landowners was "don't ask, don't tell." Landowners did not ask for approval to destroy habitat and regulators seldom told on them. But by creating HCPs, the 1982 amendments to the ESA gave government regulators their first practical tool for regulating private land: They could require that landowners develop a conservation and mitigation plan before modifying any habitat. Only then would they be allowed to legally "take" a species as they modified their lands in ways that were otherwise legal.

Given this practical tool for land-use controls, the FWS currently regulates 38 million acres of land through HCPs. If safe harbor agreements become more widespread, the FWS will regulate many millions more.

Because anything less than a virtually complete deprivation of economic value is not considered a violation of the Fifth Amendment, the FWS has strong incentive to regulate as much as possible when creating agreements with landowners. The agency will receive additional pressure from environmental activists who believe the FWS did not restrict private land enough the first time around.

Saving species? The number of endangered species listed in the United States has increased from 114 in 1973 to 1,263 today. The Fish and Wildlife Service's most recent report on the status of endangered species found that only nine percent of those listed under the ESA are improving and only 30 percent of listed species are stable. Since 1973, only 33 species have been delisted, seven because they went extinct and 12 more because they should not have been listed in the first place. Of the remaining 14 delisted species, three are kangaroo species that were delisted when the Australian government changed its management practices. Six more may be cases of data error, which is certainly the case with the gray whale and American alligator. The brown pelican's and Arctic peregrine falcon's recoveries have far more to do with the ban on the insecticide DDT than with the Endangered Species Act. There are very few justifiable claims that the ESA retrieves species from the brink of extinction and returns them to viability.

Measuring success by numbers of species delisted or by visible reintroduction programs may be the wrong measurements. After all, only seven of the species listed since the act was signed in 1973 are now extinct, and most species that have recovered were listed only after they were well on the way to extinction. But it is striking that none of the recovered species reemerged because of the regulation of private property. Private property regulations are not a primary, or even a significant, cause for those recoveries.

Conclusion Over the last 30 years, the Endangered Species Act has proved to be a powerful tool for controlling land use. Unfortunately, this not only impinges on private landowners' rights, but may actually do a disservice to the species the ESA is supposed to protect. None of the species removed from the endangered species list were removed because the FWS regulates private property. Any attempts to improve the ESA should recognize that fact.

The Bush administration's safe harbor amendments may have contradictory effects. They would give landowners increased regulatory certainty and provide better incentives to protect species habitat. Giving regulators improved tools, however, means that the Fish and Wildlife Service will regulate more land. R

Giving landowners more regulatory certainty would be a benefit, but giving regulators better tools at the same time could backfire against landowners.