Reforming the Endangered Species Act: Industry Groups Seek to Dismantle Our Country's Most Purposeful Conservation Tool

Vanessa Puig-Williams July 22, 2015

Recognizing that, as a "consequence of economic growth and development," many "species of fish wildlife and plants" in the United States are on the brink of extinction, Congress passed the Endangered Species Act (ESA or the Act) in 1973 with overwhelming bipartisan support.[1] Today, the Endangered Species Act is supported by the majority of Americans, yet it is facing unprecedented attempts by industry groups and Congressional Republicans to undermine the law's protections and reform its procedure.

Environmentalists' recent efforts to protect numerous species and large swaths of habitat could be partly to blame. Over the past several years, environmental groups have inundated the U.S. Fish and Wildlife Service (the Service) with petitions to list multiple species under the Act and sued the Service for its failure to comply with statutory deadlines related to the listing process. The result, a 2011 settlement agreement between environmental groups and the Service, referred to as the "Listing Workplan," prescribes specific deadlines for the Service to list over 700 species by 2018. An attempt by environmental groups and the Service to improve implementation of the Endangered Species Act, the Workplan has instead ignited industry antagonism toward environmental groups and fierce criticism over the Act itself.

Most recently, industry-backed groups have petitioned the Fish and Wildlife Service to delist the Golden Cheeked Warbler, a small song bird listed as endangered by the Service in 1990. The petitioners argue that the Service's decision was erroneous and was based on inaccurate science that grossly underestimated the number of birds and extent of their habitat in Central Texas. Groups opposed to the delisting of the Golden Cheeked Warbler claim that the petitioners are relying on flawed studies and point out that as a result of the Warbler's status as endangered, thousands of acres of Central Texas lands have been spared from development.

In addition to petitioning the Service to delist the Golden Cheeked Warbler, industry groups have successfully lobbied Congressional Republicans to wage unparalleled attempts to reform the Endangered Species Act. Over forty bills aimed at reforming the law have been introduced in the current Congressional session. There are legislative proposals that would reign in federal control and address industry group's concerns that the Endangered Species Act hampers economic development. S. 855 by Rand Paul would allow the governor of a state to regulate "intrastate" species —species found entirely within a state's borders, essentially overriding federal protection of those species. S. 112 by Senator Heller requires the Service, when making a critical habitat determination for a species, to examine the incremental and cumulative economic impacts of all actions to protect the species, including effects on each state and locality, property values, water and power services, and employment, and requires the Service to assess those effects on a quantitative and qualitative basis. Environmental groups are concerned that this requirement "will increase the opportunity for economic considerations to be injected inappropriately" into listing decisions,[2] which is contrary to the purpose of the Act.

Another proposal by Senator Cornyn, S. 293, is aimed at curbing the "sue and settle" strategy that has been successfully employed by environmental groups seeking to protect additional species. The bill prohibits a court from awarding legal fees to plaintiffs in settlement agreements reached under Section 11 of the Endangered Species Act.

And then, there are the alarming legislative proposals aimed at dismantling the Endangered Species Act's protections. S. 655 by Senator Thune would block funding for a listing decision on the northern long-eared bat. House Republicans have included a rider on a bill to fund the Interior Department that would delist Gray Wolves in Wyoming and western Great Lakes states. S. 1036 by Senator Gardner prohibits the Service from listing the greater sage grouse for at least six years and requires federal wildlife agencies to work with western states to develop state-wide sage grouse conservation plans. Additionally, Republican members of Congress are attempting to tack on amendments to the National Defense Authorization Act that would delist the lesser prairie chicken and prohibit the Service from listing the sage grouse.

In response to the flurry of efforts to reform the Act, the Department of Interior (DOI) is taking steps to address criticism related to multi species petitions. In May, the DOI proposed new rules governing the process for submitting petitions to list species. One significant change from the current rules is the requirement that new petitions only address one species. In addition, under the proposed rules petitioners must provide a copy of the petition to the state agency responsible for the management and conservation of fish, plant or wildlife resources in each state where the species occurs. If the state agency provides the petitioner with comments, the petitioner must submit these comments to the Service.

Another major change to the current rules is the proposal to change the "substantial information" standard used by the Service in determining whether a petitioned action is warranted. Under the current rules, when the Service receives a petition, it has ninety days to determine whether the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted."[3] "Substantial information" is defined as "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted."[4] The proposed rules change this standard, defining it as "*credible scientific and commercial information* that would lead a reasonable person conducting an impartial scientific review to conclude that the action proposed in the petition may be warranted."[5] This is a much higher threshold for a petitioner to meet, as according to the Service, "a petition that states only that a species is rare and thus should be listed, without other credible information regarding its status, does not provide substantial information."[6]

The Endangered Species Act has long been a source of contention. Groups opposed to the ESA's expansive regulatory authority have consistently maintained that the Act thwarts economic development by blocking needed infrastructure and industry, such as transportation, water supply projects, and energy development. Industry groups also frequently denounce the Act's reliance on the "best scientific and commercial data available," claiming that the ESA's lack of a minimum standard of quality for science has resulted in the Service issuing listing decisions made with incomplete or unreliable data.

Industry groups are outspoken about their concern that states and local governments are often not involved in the listing decision process, even though these local governments have important knowledge and resources regarding species protection and can implement successful voluntary species conservation plans without the ball and chains that come with Endangered Species Act protection. A success story frequently cited by ESA critics is the Service's decision in 2012 to withdraw its proposal to list the Dune Sage Brush Lizard as endangered after the oil and gas industry and the States of Texas and New Mexico worked with the Service to develop voluntary candidate conservation plans with landowners in the lizard's habitat, with the goal of protecting the lizard and allowing oil and gas activity to continue.

Recently, anti-ESA rhetoric appears to also be directed toward environmental groups. Assailants are quick to blame the "mega petitions" and the "sue and settle" strategy employed by environmental groups for the Service's failure to recover and delist species, for the lack of transparency and public input that has resulted from the Service making listing decisions under short timeframes, and for what critics believe are capricious listing decisions made by the Service pursuant to arbitrary deadlines rather than science.

Finally, industry groups are increasingly accusing environmental groups of furthering an anti-growth agenda by using the Act as a conservation tool to restrict development on private lands rather than to specifically protect species as Congress intended. This argument assumes that the conservation of habitat is not integral to the protection of species, when in fact, conservation is the foundation of the Endangered Species Act. Congress passed the Endangered Species Act in 1973 because "economic growth and development untempered by adequate concern and conservation" was destroying habitat, and consequently, decimating "various species of fish, wildlife, and plants."[7] Congress designed the Endangered Species Act as a conservation tool to protect "the ecosystems upon which endangered and threatened species depend."[8] This means that at times development must be restricted so that we do not pave over sensitive ecosystems or pump away habitat. Critics of the ESA are quick to highlight what is lost from an economic perspective by limiting development rather than what society gains by conserving habitat. Species are protected, but so is water quality, clean air, natural landscapes, flowing springs and rivers, open space, trees, and scenic views. Without the Endangered Species Act as a conservation tool, many springs and rivers would not be flowing and many acres of pristine, natural land would be replaced with asphalt and sheet rock.

Those who argue that the Endangered Species Act creates economic burdens for industry are not incorrect, but they are missing the point. The purpose of the Act is to temper "economic growth and development" by placing the "conservation" of and a "concern" for the natural world before our own.

While there is merit to the argument that effective implementation of the Endangered Species Act could benefit from thoughtful reform and that states should be more involved in the process of protecting species, the problem is that efforts to reform the law are usually aimed at diminishing the law's protections rather than strengthening them. Rather than undermining the Act, critics of the ESA would be better served by examining the reasons why environmental groups must resort to the Act in the first place. It is currently one of the only ways to ensure the conservation of land and water, and therefore, the protection of imperiled species. If policy makers made conservation a requirement of land use planning and energy development, required development to be restricted over ecologically sensitive areas, and increased funding for conservation programs, then perhaps the Endangered Species Act would be the last resort rather than the only one.

Endnotes

[1] 16 U.S.C. § 1531(a)(1) and (2).

[2] *See Testimony of Donald Barry, Senior Vice President for Conservation Programs, Defenders of Wildlife, Hearing on S. 112, S. 292, S. 293, S. 468, S. 655, S. 736, S. 855, S. 1036, S. 1081 Before the Senate Committee on Environment and Public Works*, 114th Cong. (May 6, 2015) *available at* http://www.epw.senate.gov/public/_cache/files/dbcc816a-e456-4625-9e6e-2f6581cc2e22/2015-05-06barrytestimony.pdf

[3] 50 CFR § 424.14(b)(1).

[4] 50 CFR § 424.14(b)(1).

[5] 80 Fed. Reg. 29,286 at 29,289 (proposed rule May 21, 2015).

[6] 80 Fed. Reg. at 29,290.

[7] 16 U.S.C. § 1531(a)(1) and (2).

[8] 16 U.S.C. § 1531(b).

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