Applying the Park City Principles to the Endangered Species Act

Mark Squillace

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FOREWORD

*Tom Bahr**

In May 1991, the Western Governors' Association (WGA) and Western States Water Council (WSWC) organized the first in a series of three workshops, held in Park City, Utah, to address changing needs in water management in the West. Attendees included a broad, representative mix of water managers (federal, state, Indian, local and private), water interest groups, and academics. The outcome of this effort was agreement on a set of six principles which should be considered in western water resources management and policy development. These have come to be known as the "Park City Principles" among the water resources community. These principles and the process leading to their development is the subject of the first paper in this series.

Following the three Park City workshops, the WGA at their June 23, 1992 conference passed a resolution endorsing the Park City Principles, and issued a document entitled *Pioneering New Solutions: Directing our Destiny*. This report contained several recommendations, one of

* Tom Bahr is a past president of the Powell Consortium and was an active participant in each of the Park City Workshops. He is currently the director of the New Mexico Water Resources Research Institute.

which asked cooperation with the university-based water research institutes to analyze federal statutes and clarify public interest requirements as they related to the Park City Principles.

The university-based water research institutes were authorized by Congress under the Water Resources Research Act of 1964 and comprise a nationwide network of institutes in each state, usually located at the land grant institution. Seven western institutes from the states of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming formed a consortium in the early 1970s to work on water resources problems of the Colorado River/Great Basin region and other areas of the west. This group, named the Powell Consortium, has an important research focus: to analyze water law and policy as vehicles for finding creative solutions to water planning and management in the region.

The Powell Consortium, as a participant in the Park City workshops, followed up on the WGA recommendation and began further discussions with staff of the WGA and WSWC to plan a study to examine federal statutes and their relationship to the Park City Principles. The project, titled the "Park City Federal Water Law Project," began in the fall of 1992 and was designed to prepare concise overviews of selected federal water policies and display their impact on the ability of states to manage and resolve conflicts by and between themselves.

The Powell Consortium project examined selected federal statutes, regulations and court decisions that impact the ability of non-federal entities (state and local government, interstate organizations, etc.) to manage water resources and resolve water conflicts involving competing interests. During the Park City workshops some participants observed that solutions to water conflicts which might make sense at the local, state, or regional level sometimes conflict with federal policy. Identifying these conflicts was an important task for the project. The project was not designed as a comprehensive analysis of all relevant water programs, but rather as a diverse sampling which might produce provocative talking points for focusing future discussion and debate in a workshop setting similar to those held in Park City.

The Powell Consortium selected a group of five legal scholars to prepare separate "White Papers" examining the following: 1) interstate issues; 2) water supply issues; 3) water quality; 4) hydropower; and 5) species protection. The study team included: Charles DuMars, University of New Mexico; Brian Gray, University of California; Lawrence MacDonnell, University of Colorado; George William Sherk, former Justice Department trial lawyer; and Mark Squillace, University of Wyoming. Frank Gregg of the University of Arizona provided valuable assis-

tance in the design of the overall study. Funding for the Powell Consortium "Park City Water Law Project" was provided by member institutes of the Consortium.

The five papers were presented by their authors at a WGA-sponsored workshop held in Newport Beach, California on February 18 and 19, 1993. Chuck DuMars presented three semi-hypothetical scenarios concerning interstate allocation of water specifically highlighting how present conflict resolution stacks up against the Park City Principles. Brian Gray put forth a provocative case study on the implications of transferring the Bureau of Reclamation's Central Valley Project to the State of California. Larry MacDonnell discussed the Clean Water Act and suggested ways for states to pursue their own objectives without the need to change federal law. George Sherk discussed conflicts between states and the Federal Energy Regulatory Commission. Finally, Mark Squillace covered the Endangered Species Act and suggested areas where states might become more involved. The papers and presentations sparked lively discussion and several participants were gratified to see the Park City Principles moving from "motherhood and apple pie" statements to something that could find application to the real world. This series includes four of the papers, updated to reflect developments in law and policy since the presentations.

These articles and the issues that they address are perhaps even more relevant today than when originally developed and discussed in 1993. Of course, recognizing the value of the Park City Principles to water resource management does not assure that these principles will be honored on the ground. But it is a necessary precondition. Recently, the Western Water Policy Review Advisory Commission began an analysis of federal water policy in the West, and this should offer an important opportunity for carrying the Park City Principles to a logical next step—the development of specific regulatory and legislative proposals that reflect those principles.

As the debate over the devolution of authority and responsibility to states continues, the Park City Principles offer a solid base upon which new approaches can be built. We hope that they help lead to constructive solutions to western water policy problems.

Applying the Park City Principles to the Endangered Species Act

*Mark Squillace**

Historically, the protection of endangered and threatened species has been the province of the federal government.[1] In recent years, however, many states have enacted endangered species protection laws, and expanded the mandate of state fish and wildlife management agencies to encompass non-game species, including endangered species.[2] Nonetheless, the federal Endangered Species Act[3] ("ESA" or "Act") remains the focus of endangered species protection in the United States, and since such protection frequently implicates water resource management, it is appropriate to ask how well the current federal regime for managing endangered species comports with the Park City Principles.

I. BACKGROUND

The ESA establishes four key requirements: (1) the Secretary of the Interior (Secretary)[4] must *list* species if they meet the criteria set out in the statute;[5] (2) all federal agencies must *conserve* listed species;[6] (3) all federal agencies must *consult* with the U.S. Fish and Wildlife Service (FWS) on actions which may adversely affect listed species[7]; and (4) no

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* The author is the Winston S. Howard Professor of Law at the University of Wyoming College of Law. He holds a B.S. degree from Michigan State University and a J.D. degree from the University of Utah College of Law.

1. The history of federal wildlife regulation is reviewed in DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 19-35 (1989); *see also* MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 10-12 (2d ed. 1983).

2. For example, California prohibits the importation, taking, possession or sale of any species determined by the Fish and Game Commission to be endangered or rare, except under specified circumstances. CAL. FISH & GAME CODE § 2052 (West 1984). For a review of state wildlife laws see RUTH S. MUSGRAVE & MARY ANNE STEIN, STATE WILDLIFE LAWS HANDBOOK (1993).

3. 16 U.S.C. §§ 1531-1544 (1994).

4. While the ESA vests the listing responsibility in the Secretary of the Interior, the Secretary is required to list marine species on the request of the Secretary of Commerce. Decisions to de-list marine species, or downgrade their status from "endangered" to "threatened," are made on the recommendation of the Secretary of Commerce with the concurrence of the Secretary of the Interior. 16 U.S.C. § 1533(a)(2).

5. 16 U.S.C. § 1533.

6. *Id.* § 1536(a)(1); *see also id.* § 1533(f).

7. *Id.* § 1536(a)(2). In the case of marine species, consultation occurs with the National Marine Fisheries Service.

person may *take* a listed species without the prior approval of the FWS.[8] Each of these processes is described in detail below as a prelude to considering how well the Endangered Species Act reflects the management framework suggested by the Park City Principles.

A. Listing of Endangered or Threatened Species

The process for listing species as "endangered"[9] or "threatened"[10] is set out at section 4 of the ESA. The listing process is critical to each of the others, since the ESA generally affords protection only to those species which are formally listed.[11]

In deciding whether to list a species, the Secretary must consider threats to the species habitat, over-utilization of a species for commercial or other purposes, the inadequacy of existing regulatory mechanisms for protecting the species, and other factors affecting its survival.[12] The decision must be made "solely on the basis of best scientific and commercial data available."[13] Importantly, however, the ESA requires that the Secretary take into account the efforts that are being made by any state, foreign nation or political subdivision of a state or foreign nation.[14] Thus, a state or local governmental agency may substantially reduce the possibility of having a species listed if it has established its own effective plan for reducing threats to the species.

Generally, *critical habitat* must be designated for all listed species on the basis of the best scientific data available.[15] "Critical habitat" is defined in the ESA as that habitat which is "essential to the conservation of [a threatened or endangered] species."[16] Unlike the decision to list; designation of critical habitat must also take into account economic and

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8. *Id.* § 1538.

9. An "endangered species" is one that is "in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man." 16 U.S.C. § 1532(6).

10. A "threatened species" is one that "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

11. The Act also affords limited protection for species which are proposed for listing, 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10 (1995). and for certain cases where species are eligible for listing, but which the U.S. Fish and Wildlife Service has decided not to list because of other priorities. 16 U.S.C. § 1533(b)(3)(B)(iii).

12. 16 U.S.C. § 1533(a)(1).

13. *Id.* § 1533(b)(1)(A).

14. *Id.*

15. *Id.* § 1533(b)(2).

16. *Id.* § 1532(5)(A)(i)(I).

other relevant impacts of the designation.[17] Moreover, by regulation, the Secretary has determined that critical habitat need only be designated "to the maximum extent prudent and determinable."[18] Unless extinction is likely to result, the Secretary may exclude any area from critical habitat if the benefits of exclusion outweigh the benefits of designation.[19]

As of February 29, 1996, the Secretary had listed 959 domestic species and 564 foreign species.[20] The rate at which species were being added to the list had been accelerating from an average of thirty-five to forty each year to more than one hundred each year, as a result of a settlement agreement signed at the end of the Bush Administration in December of 1992.[21] The listing process came to an abrupt halt, however, in 1995 when Congress imposed a moratorium on the listing of new species.[22] A recent decision of the Court of Appeals for the Ninth Circuit held that this moratorium did not suspend the obligation of the Secretary to list species which meet the criteria of the ESA.[23] Nonetheless, the Court recognized that listing may be impractical to the extent funding may have been eliminated.[24]

Currently, proposed rules are pending to list an additional 196 plants and forty-two animal species as endangered or threatened. Eighty-four plant and ninety-eight animal "candidate species" await preparation of proposed rules.[25]

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17. *Id.* § 1533(b)(2).

18. 50 C.F.R. § 424.12(a) (1995). In Fund for Animals v. Babbitt, 903 F. Supp. 96, 117 (D.D.C. 1995), the court relied on this language to sustain the decision of the Secretary not to designate critical habitat for the grizzly bear.

19. 16 U.S.C. § 1533(b)(2).

20. Of the 959 domestic species, 320 domestic animals and 433 domestic plants are listed as endangered, and 114 domestic animals and 92 domestic plants listed as threatened. A complete "boxscore" of listed species can be found on the World-Wide-Web Home Page for the Fish and Wildlife Service at http://www.fws.gov.

21. Fund for Animals v. Lujan, Civ. No. 92-800 (D.D.C.), *cited at* 61 Fed. Reg. 7457 (1996).

22. Pub. L. 104-06, 109 Stat. 73, 86 (1995).

23. Environmental Defense Ctr. v. Babbitt, 73 F.3d 867, 871 (9th Cir. 1995).

24. *Id.* at 872. The court held that while the appropriations rider did not repeal the Secretary's listing duties under the ESA, "the lack of available appropriated funds prevents the Secretary from complying with the Act." *Id.*

25. 61 Fed. Reg. 7596, 7598 (1996). Until recently, the FWS had divided candidate species into three categories. *Id.* Category I species were those for which sufficient information supports listing but for which listing is precluded by other priorities. These are now what the FWS calls candidate species. Category II species were those about which the FWS was concerned but for which the agency lacked adequate information to list. The agency expects to draw future candidate species from this pool. *Id.* at 7597. Category III species were not actively under listing consideration either because they were thought to be extinct, they were found not to qualify as distinct species, or they did not qualify as threatened or endangered. These species are no longer considered candidates for listing. *Id.*

Species (or critical habitat) may be proposed for listing or de-listing at the initiative of the Secretary or by petition from any interested person.[26] Generally, the Secretary must respond to a petition within ninety days. One of three responses can be made: (1) that the petitioned action is not warranted; (2) that the action is warranted in which case the Secretary must promptly initiate the listing process by publishing a proposed rule; or (3) that the action is warranted but precluded by other pending listing actions.[27]

B. Consultation

Federal agencies are generally precluded by law from taking any action that might jeopardize the continued existence of a listed species or adversely modify habitat designated as critical to the survival of the species.[28] Although an exemption process was established by Congress in 1982, exemptions are rarely granted.[29] In order to implement this provision, the ESA establishes a process for "consultation" between the action agency and the FWS.[30]

Whenever a federal agency proposes to take an action, it must request information from the FWS as to whether listed species, or species proposed for listing may be present within the action area.[31] If such species are not present, the action is allowed to proceed.[32] If, however, a listed species is or may be present, the action agency must prepare a *biological assessment* to ascertain whether the species or its critical habitat are likely to be adversely affected by the proposed action.[33]

If adverse impacts are likely, consultation with the FWS is required. This results in preparation of a *biological opinion* in which the FWS determines whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse

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26. 16 U.S.C. § 1533(b)(3)(A).

27. 16 U.S.C. § 1533(b)(3)(B). Professor Houck has argued that the "warranted but precluded" category has become a "black hole for unlisted endangered species," citing evidence that it is used with increasing frequency and that species frequently languish in this category for many years. Oliver A. Houck, *The Endangered Species Act and Its Implementation By the U.S. Department of Interior and Commerce*, 64 U. COLO. L. REV. 277, 286 (1993).

28. 16 U.S.C. § 1536(a)(2).

29. JACKSON B. BATTLE ET AL., ENVIRONMENTAL DECISIONMAKING: NEPA AND THE ENDANGERED SPECIES ACT 206-07 (2d ed. 1994).

30. 16 U.S.C. § 1536(a)(2).

31. *Id.* § 1536(c).

32. *Id.* § 1536(a)(3).

33. *Id.* § 1536(c)(1). For species proposed for listing, a separate "conference" process is established by regulation for such species. 50 C.F.R. § 402.10 (1995).

modification of its critical habitat.[34] If no jeopardy or adverse habitat modification will result, the action may proceed. If no jeopardy will result but species may be "taken" within the meaning of section 9 of the ESA, then FWS may issue an *incidental take statement* which allows the incidental "taking" of a specified number of species without running afoul of section 9.[35]

If FWS determines that jeopardy will result then it must suggest *reasonable and prudent alternatives* that will not jeopardize the species.[36] Generally, actions which may jeopardize a listed species, or which will result in the destruction or adverse modification of their critical habitat may not go forward unless an exemption is received. As suggested above, the exemption process is cumbersome, and exemptions are difficult to obtain. In particular, an exemption may not be granted unless five members of a high level, seven-person committee[37] find that: (1) there are no reasonable and prudent alternatives to the proposed action; (2) the benefits of the action clearly outweigh the benefits of alternative courses of action which would not jeopardize the species; (3) the action is of regional or national significance; and (4) neither the federal agency involved nor the exemption applicant made any irreversible or irretrievable commitment of resources with respect to the proposed action.[38]

Generally, a biological assessment must be completed within 180 days from its inception.[39] Formal consultation must generally be completed within ninety days from its initiation.[40]

Despite its importance, public involvement in the ESA consultation process is generally limited because of the strict timetables established by federal regulation for preparing the various reports required by the ESA. Public involvement, however, on issues concerning endangered species

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34. An applicant may also request *early consultation*, "to reduce the likelihood of conflicts between listed species . . . and proposed actions . . . ." 50 C.F.R. § 402.11 (1995). *Informal consultation* is an optional process to assist the action agency in deciding whether formal consultation is necessary. *Id.* § 402.13(a). During informal consultation, the FWS may be able to suggest modifications to a proposed project that will avoid adverse impacts to protected species, and thus the need to engage in formal consultation. *Id.* § 402.13(b).

35. 16 U.S.C. § 1538. *See infra* notes 47-53 and accompanying text.

36. 16 U.S.C. § 1536(b)(3)(A).

37. *Id.* § 1536(e)(5). The committee includes the Secretary of Agriculture; the Secretary of the Army; the Chairman of the Council of Economic Advisors; the Administrator of the EPA; the Secretary of the Interior; and the Administrator of the National Oceanic and Atmospheric Administration. *Id.* § 1536(e)(3). The committee is sometimes called the "God Squad" because its essential role is to decide the fate of a listed species.

38. 16 U.S.C. § 1536(e)-(h).

39. 50 C.F.R. § 402.12(i) (1995).

40. *Id.* § 402.14(e).

can usually be accommodated through the process established under the National Environmental Policy Act (NEPA), which invariably occurs concomitantly with consultation. Typically, the action agency's biological assessment is incorporated into the relevant NEPA document. Indeed, the Council on Environmental Quality (CEQ) regulations, which implement NEPA, specifically require agencies "[t]o the fullest extent possible, [to] prepare draft environmental impact statements concurrently with environmental impact analyses and related surveys and studies required by . . . the Endangered Species Act . . . and other environmental review laws."[41]

C. Conservation

The ESA defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species back to the point at which the measures provided [under the ESA] are no longer necessary."[42] Conservation obligations are specifically imposed under three separate provisions of the statute. First, the Act requires the Secretary to "issue such regulations as he deems necessary and advisable to provide for the conservation of [listed] species."[43] Second, the Act imposes an affirmative duty on all federal agencies "to conserve [all] endangered species and threatened species"[44] and to "utilize their authorities [in consultation with . . . the Secretary] by carrying our programs for the conservation of [listed] species."[45] Finally, and most concretely, the Act requires the Secretary to "develop and implement" recovery plans for all listed species "unless he finds that such a plan will not promote the conservation of the species."[46]

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41. 40 C.F.R. § 1502.25 (1995).

42. 16 U.S.C. § 1532(3).

43. *Id.* § 1533(d).

44. *Id.* § 1531(c)(1). Although this provision has been held to impose "substantial and continuing obligations," Defenders of Wildlife v. EPA, 882 F.2d 1294, 1299 (8th Cir. 1989), the precise scope of these obligations has never been clearly defined. *See also* Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy, 898 F.2d 1410, 1416-17 (9th Cir. 1990); Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 261 (9th Cir 1984), *cert. denied*, 470 U.S. 1083 (1985); Conner v. Andrus, 453 F. Supp. 1037, 1041 (W.D. Tex. 1978).

45. 16 U.S.C. § 1536(a)(1).

46. 16 U.S.C. § 1533(f)(1). Among other things, these plans must include "objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list." *Id.* § 1533(f)(1)(B)(ii). *See also Babbitt*, 903 F. Supp. at 117, wherein the court affirmed in part and rejected in part the grizzly bear recovery plan.

D. Takings

Section 9 of the ESA makes it unlawful to import, export, possess, sell, deliver, transport or ship in interstate commerce any *endangered* species of fish or wildlife.[47] In addition, no person may "take" such species. The ESA defines the word "take" broadly to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[48] The Secretary may impose similar restrictions against "takings" of threatened species by regulation, and the Secretary has generally done so, although the rules relating to particular species must generally be consulted to understand the full scope of such takings prohibitions.[49]

Listed plant species are not generally subject to the takings prohibitions under the ESA, although other restrictions on harming listed plant species may apply. For example, the ESA makes it unlawful for any person to import into or export from the United States a listed plant species.[50] Further, the Act prohibits removal and possession of listed plant species from federal lands, and the malicious damage or destruction of such species on federal lands.[51]

Although the "takings" prohibitions can be onerous, the ESA incorporates provisions that allow limited takings of listed species without risk of violating the law. Under section 10 of the ESA, any person who proposes an activity which may "incidentally" result in the "taking" of a listed species may prepare and seek approval of a habitat conservation plan (HCP).[52] The HCP must describe the impact that will likely result from the taking, the steps that will be taken to minimize and mitigate that impact, the funding that will be available to carry out the mitigation, and the alternatives to the proposed plan that were considered. The Secretary

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47. 16 U.S.C. § 1538(a)(1).

48. 16 U.S.C. § 1532(19). In Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 115 S. Ct. 2407, 2418 (1995), the Supreme Court sustained the Secretary of the Interior's definition of "harm" as used in the definition of "take" to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (1994).

49. 50 C.F.R. § 17.31(a) (1994). For example, the rules on American alligators allow the taking of such animals in accordance with the law and regulations of the appropriate state, subject to certain conditions. *Id.* § 17.42(a)(2).

50. 16 U.S.C. § 1538(a)(2)(A).

51. *Id.* § 1538(a)(2)(B).

52. The World Wildlife Fund has published a detailed account of the HCP process and the experience with the process through 1991. MICHAEL J. BEAN ET AL., RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT (1991).

must approve a permit that authorizes the incidental taking of a listed species if he finds that the applicant will minimize and mitigate the impacts to the maximum extent practical, that adequate funding is available to carry out the mitigation, and that the taking will not appreciably reduce the likelihood of survival of the species.[53]

II. APPLICATION OF PARK CITY PRINCIPLES TO THE ENDANGERED SPECIES ACT

Although the Park City Principles propose a policy framework for water resource management, they seem readily adaptable to other aspects of natural resource administration. The Endangered Species Act offers a useful model for testing this thesis, because while the management of listed species frequently impacts water resources, such management commonly affects other natural resources as well. The materials set forth below seek to apply the Park City Principles to various relevant aspects of the ESA, to describe how well the ESA, as currently construed, fits into the policy framework established by those Principles, and to consider how modest administrative or statutory changes to the ESA might better accommodate those Principles.

A. Meaningful Legal and Administrative Recognition of Diverse Interests in Water Resource Values

The ESA reflects a congressional intent that endangered species protection should take precedence over all other values.[54] Thus, at first blush, one might assume that the ESA is poorly suited to recognizing the diverse interests in water resource values. On closer scrutiny, however, the ESA appears to accommodate this principle rather well.

First, the Act affords important procedural rights to all of the diverse water resource interests that are affected by endangered species management. For example, the listing decision is made through informal rulemaking in accordance with the Administrative Procedure Act.[55] This process assures interested parties prior notice and the opportunity to comment upon proposed listing decisions. Further, a decision to list a species must include a basis and purpose statement, which generally must

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53. 16 U.S.C. § 1539(a)(2)(B).

54. As the Supreme Court noted in Tennessee Valley Authority v. Hill, 437 U.S. 153, 174 (1978), "the language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."

55. *See* 16 U.S.C. § 1533(a)(1), (b)(4).

respond to significant comments raised by members of the public.[56] Moreover, such listing or de-listing proceedings can be initiated by the Secretary, on his own motion, or by any interested person.[57]

Similar procedural rights are afforded during the consultation process. While neither the Act nor the implementing regulations specifically allow public participation during consultation, the NEPA process, which typically tracks consultation, assures that such opportunities are generally available.[58]

The FWS regulations also work to accommodate the interests of persons who will need federal approval for a proposed action, and who wish to know in advance of filing a federal permit application whether the proposed action raises conflicts with listed species. This is accomplished through a process called "early consultation." Early consultation is carried out at the initiative of a prospective applicant for federal action.[59] The procedure is essentially the same as for formal consultation, except that the FWS issues only a preliminary biological opinion. This opinion may later be affirmed as the final biological opinion if no significant changes occur when the action is officially proposed.[60]

Agency actions for conserving listed species lend themselves less well to procedural protections. Nonetheless, the preparation of recovery plans, which is the most specific and important conservation action described in the ESA, must be carried out in accordance with notice and comment procedures.[61] Thus, the interested public is assured an opportunity to make their views known before the recovery plan is approved. For example, when the FWS recently revised the 1982 Grizzly Bear Recovery Plan, a draft revision was released for public comment, and eleven public meetings were held throughout the Rocky Mountain Region and in Washington, D.C.[62]

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56. *Id.*; *see* St. James Hosp. v. Heckler, 760 F.2d 1460, 1470 (7th Cir. 1985); United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519, 536 (D.C. Cir. 1978); Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

57. *Id.* § 1533(b)(3). Subsection (D) of this section of the Act also allows interested persons to petition to revise a critical habitat designation.

58. Under the CEQ rules, agencies are required to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2(d) (1995); *see also id.* § 1506.6.

59. 50 C.F.R. § 402.11(b) (1995).

60. *Id.* § 402.11(f).

61. 16 U.S.C. § 1533(f)(4).

62. *See* U.S. FISH & WILDLIFE SERV., GRIZZLY BEAR RECOVERY PLAN, 175 app. G (1993). In *Babbitt*, 903 F. Supp. at 117, however, a federal district court affirmed in part and rejected in part the 1993 Grizzly Bear Recovery Plan.

The prohibition against "takings" of listed species is among the most criticized in the ESA, especially as it applies to private land;[63] but as noted previously, persons who risk running afoul of this provision may seek approval of a habitat conservation plan as a way to avoid sanctions.[64] Moreover, any person who is charged with a "taking" is entitled to an administrative hearing,[65] and can contest that decision in federal court on the grounds that the enforcement action exceeds the government's authority under the ESA, or on the grounds that the exercise of that authority violates constitutional rights.[66] Thus, the Act affords specific procedural protections to diverse interests in all important aspects.

The Act accommodates the substantive interests of diverse parties less well than it protects their procedural interests. Indeed, as a general proposition, the ESA prohibits activities which may jeopardize or result in a "taking" of a listed species.[67] Thus, for example, a person who wants to develop property in a manner which would coincidentally "take" one or more members of a listed species may not generally do so. Even here, however, substantial flexibility exists to accommodate the reasonable needs of private persons and public agencies. That flexibility is described in detail below under subsection C. of this section.

The notion in the Park City Principles that diverse interests be given "meaningful" recognition might be read to ask that the ESA go beyond affording procedural rights and flexibility—that it allow or perhaps even require the FWS to balance the value of preserving a listed species against the other interests at stake. The ESA does not currently allow such a balancing of interests. But the essential goal of the ESA—preserving species at risk of extinction—could not be achieved if this requirement were imposed. Moreover, experience with the ESA suggests that diverse interests can be accommodated in almost all circumstances where such interests may conflict with endangered species protection.[68] In those rare circumstances where diverse interests cannot be accommodated, those interests might have to give way. But future conflicts between the ESA

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63. *See, e.g.*, S. 768, 104 Cong., 1st Sess. §§ 402, 403 (1995), which propose to substantially narrow the scope of the takings provision in the ESA.

64. 16 U.S.C. § 1539. *See also* BEAN ET AL., *supra* note 52, at 4-6.

65. *See* 16 U.S.C. § 1540(a)(1).

66. In Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989), Richard Christy challenged an Interior Department ruling which found Christy liable for taking a grizzly bear. *Id.* at 1327. Christy raised due process, equal protection, and fifth amendment takings defenses to the charge. *Id.* at 1327-28. Although the Court of Appeals for the Ninth Circuit rejected each of Christy's constitutional claims on the facts presented, the Court did not close the door to such challenges in a different factual context. *Id.* at 1329 n.4.

67. *See supra* text accompanying notes 47-53.

68. Houck, *supra* note 27, at 279.

and the Park City Principles can largely be avoided by working within the framework of the ESA to promote conservation of listed species, and to encourage state responsibility for other species at risk so that future federal listings will not be necessary.

B. Holistic, "Problemshed" Approaches to Problem Solving

The ESA counts among its purposes "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[69] Despite this language, however, only the conservation requirement and the habitat conservation planning process established under section 10 of the Act appear to offer any significant opportunity for holistic management. Indeed, federal actions may not jeopardize listed species nor may any person "take" a listed species of wildlife, even if such actions might offer a more holistic approach toward resource management.

Even the conservation requirement and the HCP provision can mandate policies that are inconsistent with holistic management. For example, the Act may actually require alteration of a natural ecosystem where such alteration is best suited for conservation of a listed species—that is, bringing the species back to the point where the protections of the Act are no longer needed. Still, most experts agree that the biggest threat facing most endangered species is loss of habitat,[70] and thus, protection of natural ecosystems through recovery plans, HCPs and the general conservation requirement is often the single most important thing that can be done to conserve a listed species.[71]

C. Flexible, Adaptable, and Predictable Policy Framework

The ESA is often criticized for being inflexible. As Professor Oliver Houck has forcefully argued, however, this criticism is not well-founded.[72] While the law gives top priority to listed species protection, and may preclude actions which interfere with that objective, the available evidence suggests that few projects which may affect endangered species are termi-

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69. 16 U.S.C. § 1531(b).

70. Paul R. Ehrlich, *The Loss of Diversity: Causes and Consequences*, *in* BIODIVERSITY 21 (E.D. Wilson ed., 1988); NAS REPORT, SCIENCE AND THE ESA (1995); Houck, *supra* note 27, at 296.

71. Case studies of the HCP process demonstrate the importance of planning and ecosystem protection to the survival of listed species. BEAN ET AL., *supra* note 52, app.

72. "The Endangered Species Act, America's most controversial environmental law, may also be its most misunderstood. It will be reviewed, once again, for re-authorization in 1993, on the widespread reputation that its provisions are inflexible and stringently applied. The facts are otherwise." Houck, *supra* note 27, at 278 (citation omitted).

nated because of those effects.[73] These results are not surprising given the flexibility that is built into the Act. For example, while federal actions may not jeopardize listed species, the law authorizes the Fish and Wildlife Service to approve the incidental taking of individual members of those species if such takings can be accomplished without jeopardizing the prospects for the species' ultimate survival.[74] Moreover, even where jeopardy will occur, the FWS is usually able to recommend "reasonable and prudent alternatives" to the proposed action which will not cause jeopardy.[75] Furthermore, exemptions from the Act are available. While the process for obtaining an exemption is cumbersome, and the standards for granting one strict,[76] exemptions may be granted where the perceived benefits of a proposed action clearly outweigh the costs associated with the possible loss of a species.

Similar flexibility is built into the "takings" provisions. While it is generally unlawful to take a listed species, the Fish and Wildlife Service can authorize a limited taking by private persons if such takings are made in accordance with an approved habitat conservation plan.[77] Furthermore, persons who enter contracts which may adversely impact a species which was not listed at the time of the contract, but which is subsequently listed, may qualify for an exemption from the takings prohibitions of section 9.[78]

D. *Decentralized Authority and Accountability Within National Policy Parameters*

The Endangered Species Act establishes a national program that is, by and large, implemented and enforced by the federal government. States are encouraged to play a substantial role in the conservation of listed species, however, under section 6 of the Act. Under this provision, the Secretary is authorized to enter into cooperative agreements with states that have developed state programs for the conservation of listed species. Some funding is available to encourage state participation in this program.

Generally, however, the states are not involved in other aspects of the ESA. The listing process cannot practically be given to the states, since individual state listing decisions would likely cause confusion and

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73. Professor Houck puts the figure at less than 0.02% or one of every 5,000 projects. *Id.* at 318.

74. 16 U.S.C. § 1536(b)(4).

75. *See* Houck, *supra* note 27, at 319-21. Houck surveyed 99 "jeopardy" opinions and noted that "[i]n nearly all of these opinions, the Service found a "reasonable and prudent alternative that allowed the project to proceed." *Id.* at 319-20.

76. 16 U.S.C. § 1536(e)-(p).

77. *Id.* § 1539(a).

78. *Id.* § 1539(b).

inconsistency. In this sense, listing serves the function of setting "national policy parameters" as outlined in the Park City Principles. Consultation, enforcement against takings, and approval of HCPs, however, would appear more amenable to state participation, assuming that the relevant state agencies wish to assume this responsibility, and that they have the necessary funding and expertise to do so. Although the ESA does not expressly authorize the delegation of these responsibilities, neither does it specifically preclude it, at least so long as the Secretary retains final approval authority. Thus, it might be worthwhile for the Secretary of the Interior to experiment with the delegation of one or more of these responsibilities to the states in appropriate circumstances. By promoting greater state involvement, the FWS can help instill a sense of ownership in the ESA program, and can help to insure that the states are better educated as to the flexibility built into the Act. As state agencies become better educated, affected parties will find a larger pool of experts who can assist them in designing their actions to avoid conflicts with listed species.

Even though the states do not currently have a formal role to play in consultation, enforcement and HCP approval, the FWS frequently involves the relevant state agencies informally in these processes.[79] Moreover, the ESA expressly authorizes the Secretary to enter into agreements with states for the management and conservation of listed species.[80] In accordance with this authority, for example, the development of guidelines for grizzly bear management has been coordinated for many years by the Interagency Grizzly Bear Committee, which includes representatives from various federal agencies and the States of Idaho, Montana, Washington and Wyoming.[81]

E. Emphasis on Negotiation, Market Approaches, and Performance Standards Over Command and Control

Since the Endangered Species Act does not establish a traditional regulatory program, the policy expressed in this principle is not entirely relevant to this program. Nonetheless, the ESA's goal of endangered species protection can be achieved either by seeking cooperation with affected parties and states, by imposing inflexible and mandatory standards on them, or by employing some combination of these two models. To be sure, the Act does impose fairly rigid standards as the ultimate assurance that listed species will be protected. But application of those

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79. Many HCPs, for example, are regional in scope and thus involve important planning issues which must be addressed at the county or municipal government level. Indeed, local government agencies are frequently responsible for initiating the HCP proceeding. *See* BEAN ET AL., *supra* note 52, app.

80. 16 U.S.C. § 1535(b).

81. See 50 Fed. Reg. 21,696 (1985) which briefly describes the establishment of the Committee.

rigid standards can usually be avoided with careful planning and a willingness on the part of all affected parties to address ESA issues in good faith. For example, while consultation can be a cumbersome, expensive and time-consuming process, the FWS regulations provide for "informal consultation" as a means to avoid the more formal and cumbersome process.[82] More than ninety-seven percent of the consultations that occur under the ESA are of this informal variety.[83] Moreover, as noted previously, even where jeopardy may occur, the FWS must suggest reasonable and prudent alternatives which will not cause jeopardy. Often such alternatives will be suggested by interested parties themselves during the NEPA review process. Likewise, persons can avoid running afoul of the "takings" prohibitions, by seeking approval of an HCP, and assuring adherence to it once it is approved.

The history of the ESA suggests that cooperation among affected parties resolves virtually all of the conflicts that might otherwise arise. While the ESA's mandatory standards do serve as a backstop for avoiding species extinction, it has only rarely proved necessary for the FWS to invoke these standards. Recognition of this fact could go a long way toward assuring the continued success of the law.

F. Encouragement for State and Basin Participation in Federal Policy Development

As noted previously, section 6(c) of the ESA authorizes the Secretary to enter into cooperative agreements with states which establish and maintain an adequate and active program for the conservation of listed species.[84] Cooperative agreements offer the opportunity for the state and federal governments to work together towards meeting the goals of the ESA. Moreover, the ultimate ability of states and local agencies to participate in the ESA occurs at the pre-listing stage. Such entities can effectively avoid the listing decision, and thus all of the protections of the Act, by simply establishing their own program that will assure the conservation of a candidate species.[85] Where states and local agencies are unwilling to take on these responsibilities, federal control seems imperative if the fundamental goals of the ESA are to be achieved.

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82. 50 CFR § 402.13 (1995). During informal consultation, the FWS "may suggest modifications to the action" that are likely to avoid adverse impacts to a listed species or its critical habitat, this obviating the need for formal consultation. *Id.* § 402.13(b).

83. WORLD WILDLIFE FUND, FOR CONSERVING LISTED SPECIES, TALK IS CHEAPER THAN WE THINK: THE CONSULTATION PROCESS UNDER THE ENDANGERED SPECIES ACT at i, n.11 (1992).

84. 16 U.S.C. § 1535(c).

85. 16 U.S.C. § 1533(b)(1)(A).

CONCLUSION

Because of its reputation as an inflexible law, and because of the limited margin for error in achieving the ESA's goals of conserving species at risk of extinction, implementation of the ESA has sometimes been controversial. Much of that controversy, however, seems to arise from a misunderstanding of the law, and from the failure of affected parties to avail themselves of the many opportunities for its flexible application. If and when these problems are overcome, the ESA, perhaps with some modest changes, might be seen as a model for adherence to the Park City Principles.