

**The Endangered Species Act of 1973:  
Piecemeal Protection or Comprehensive Conservation?**

by

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Thesis

Submitted in partial fulfillment of the requirements for the  
Degree of B.A. in the Department of Environmental Studies  
at Brown University

May, 1991

## Abstract

With over a thousand species listed federally as endangered and threatened and four thousand more as candidates for listing, it is clear that the loss of biodiversity is a problem within the United States. Protection for endangered species began with the Lacey Act in 1900, and continued with the Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969. Each failed to properly address the problem of extinction. In 1973 the Endangered Species Act was passed and was considered the most comprehensive wildlife legislation existing.

Complaints have arisen that the ESA's single species approach is piecemeal and reactive and is not sufficient to preserve biological diversity. This thesis argues, however, that the Act, in its essence, does provide for the proactive conservation of ecosystems. Support for this argument is found in the purpose of the Act which is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" (section 2(b)). Chapters 3, 4, and 5 discuss the three mechanisms provided by the Act to achieve this goal, the protection of "critical habitats," the prohibition of "taking" listed species, and the creation of habitat conservation plans.

The protection of a listed species' critical habitat was mandated from the inception of the Act, but critical habitat itself was not defined until 1978. Despite the obligation on the Secretary of the Interior to designate such habitats, there has been a tradition of non-designation. The Fish and Wildlife Service and other opponents of critical habitat argue that designation may actually harm the species for a variety of reasons. However, the additional judicial protection that is offered to a species having an officially designated critical habitat makes any harm insignificant.

The prohibition against "taking" a listed species within section 9 includes habitat modification that may harm the species. In a landmark case the taking prohibitions were merged with critical habitat protection. This decision expanded habitat protection to private land. While not yet addressed by the Supreme Court, Fish and Wildlife Service regulations imply that the interpretation was appropriate. While the taking prohibitions, in addition to critical habitat protection, may help reach the goal of preserving ecosystems, it is inevitable that the tradeoffs will be made. Section 10 creates an infrastructure for such tradeoffs.

Under section 10, the Secretary may issue a permit allowing the incidental taking of species if a habitat conservation plan is created which shows the mitigation for taking and that the likelihood of survival

of the species will not be decreased. Only eight habitat conservation have been constructed and most have been approved recently. For this reason it is difficult to assess their success. However, the plans offer a unique approach to conservation by connecting developers and conservationists. Furthermore, the planning process allows a more proactive protection. Regardless of the potential benefits offered by habitat conservation plans, they will only be successful with proper enforcement.

After discussing the provisions for habitat protection, this thesis goes on to discuss the provisions for citizen suits in Chapter 6. Section 11 of the ESA provides citizens standing for filing suit for violation of the Act or regulations. Citizen suits have been and will continue to be integral to the success of the ESA. To provide incentives for action, courts may award attorney fees along with upward adjustments.

This thesis concludes that the ESA can succeed at holistic conservation through refocussing on its various provisions for habitat protection. While the emphasis in the past has been piecemeal, the essence of the Act provides for a more connected effort towards conservation.