

EEB 2208: TOPIC 24

CONSERVATION AND THE LAW

Background for this topic

Primack: Chapters 20, 21

Sodhi and Ehrlich: Chapter 12

1. Legal approaches to biodiversity protection

A) VARIOUS ALTERNATIVES

- i) Land purchase/permanent protection – setting aside land in reserves is generally the best long-term option, but often it is not possible (e.g., because land is not available or is too expensive), so various other approaches have been developed.
- ii) **Conservation easements** are agreements whereby the landowner gives up the right to develop a piece of land in return for something of value to them (e.g., direct payments, tax breaks, etc.).
- iii) **Conservation banking** requires landowners to provide protection for protected species or habitats (e.g., by paying organizations that run “conservation banks” in which they buy land on which protected species occur, restoring habitat, etc.) in return for the right to destroy/develop equivalent habitat elsewhere. This habitat **mitigation** ensures that some protection will come out of development activities. The creation of a conservation bank is better than each landowner conducting mitigation activities separately because it allows them to pool resources, and thus do more efficient (and hopefully more effective) conservation – e.g., by protecting larger areas of habitat.

B) EXAMPLE: THE CONSERVATION RESERVE PROGRAM (CRP)

- i) The CRP is a voluntary program that encourages landowners to take actions that protect a variety of natural resources on their land by planting permanent vegetation cover rather than crops.
- ii) The main goals of the program are to provide long-term protection of soil and water because of the importance of these resources for agriculture and society at large, but the program also has a secondary goal of providing wildlife habitat.
- iii) Farmers who choose to enroll their land in the program get paid annual rental fees by the government. In addition, they can receive financial help in creating suitable vegetation cover on the land they have enrolled, up to a maximum of half the cost of the habitat creation. In cases where the conversion of land to the CRP is considered especially important, signing bonuses are also paid.
- iv) In return, they must sign a 10- to 15-year contract and agree to manage the land by planting prescribed vegetation cover types, rather than using it as cropland.
- v) The CRP only includes land that is considered environmentally sensitive and would otherwise be farmed. Various factors determine whether land qualifies for the program, for example, the risk of soil erosion.
- vi) In 2013, the program included ~27 million acres spread across >500,000 farms, at a cost of \$1.8 billion. Not surprisingly, CRP lands tend to be concentrated in major farming regions – especially in the Great Plains.

C) TYPES OF LEGISLATION

- i) Many different forms of legislation influence biodiversity protection. These are just a few examples.
- ii) Pollution control. Many “environmental laws” are not really designed with biodiversity conservation in mind. For example, the Clean Water Act and much air pollution legislation were designed with human health as a key focus. Nonetheless, these laws do result in the conservation of natural resources in ways that benefit biodiversity immensely.
- iii) Import/export. All laws that deal with the movement of species across borders affect biodiversity issues, even though many are designed for purposes that have little to do with conservation. For example, laws designed to limit the movement of agricultural pests are important in restricting the spread of invasive species. Similarly, import restrictions can reduce the trade in endangered species (more on this later).
- iv) Indirect protection. Various other laws also have the effect of creating and protecting wildlife habitat. For example the CRP program described above is part of the U.S. Farm Bill, which is designed to maintain a productive agricultural industry.
- v) Direct species/habitat protection. Finally, there are laws that are specifically designed to protect species. Probably the most important of these in the United States is the Endangered Species Act. Others include the Marine Mammal Protection Act and the Magnuson-Stevens Fishery Conservation and Management Act. In addition to the Federal statutes, many states also have endangered species legislation and other relevant laws.

2. The Endangered Species Act

A) BACKGROUND

- i) The ESA was first passed in 1973 (under Nixon and with strong bi-partisan support), and subsequently amended in both 1978 and 1982.
- ii) Its main function is to identify and protect species that are threatened with extinction. The endangered species list categorizes species into two groups:
 - **Endangered species** are those considered likely to become extinct in all or a major portion of their range in the near future.
 - **Threatened species** are those that are likely to become Endangered in the near future.
- iii) The law is implemented by the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NMFS).

B) WHAT IS LISTED?

- i) Currently, >2300 species are listed. Of these, ~1660 occur in the United States.
- ii) In addition to US species, there are several hundred foreign species listed under the Act. These species are included to provide them with protection because they might be imported into the US and are protected under international treaties (e.g., CITES – see notes on international law).
- iii) The list includes a wide variety of species, from elephants to lichens. But, there are clear biases towards charismatic species. For example, there are many more vertebrates and flowering plants listed than invertebrates.
- iv) The list of foreign species is almost all vertebrates, partly because of what is likely to be imported (although there is also plenty of trade in rare plants, such as orchids).

- v) Check out this site <https://ecos.fws.gov/ecp0/reports/box-score-report> to see how things break down for yourself (note that the list is updated regularly so numbers may vary from those given in my lecture).
- vi) These numbers do not include “**candidate species**” (i.e., those that have been proposed for listing, but for which an evaluation has not been completed) or those that are considered “**warranted, but precluded**” (i.e., the evidence suggests that they deserve to be listed, but they are not a high enough priority to expend limited resources on). They also do not include many species that have been identified as “imperiled” by non-government organizations such as NatureServe.
- vii) Many have pointed out that there are taxonomic biases in what gets listed. Early on, plants were not even covered by the ESA. That has changed, but plants and invertebrates, especially, are often not listed when there is perhaps a good case that they should be.

C) WHAT DOES THE ACT DO?

- i) The ESA requires that government agencies consult with the USFWS or NOAA on any activity that might affect listed species.
- ii) The Act also prevents “take” of listed species on private land, trade in listed species, and damage to their habitats.
- iii) Another key component of the Act is that it requires the agencies to develop recovery plans for listed species. These **recovery plans** need to include explicit recovery goals (e.g., the population size at which the species can be removed from the list), as well as devising a strategy for achieving recovery.

D) ARGUMENTS AGAINST THE ACT

- i) The ESA has been an extremely controversial piece of legislation, pitting environmentalists against business in many, many battles. Listed below are some of the main arguments that have been used in attempts to weaken or repeal the Act.
- ii) It costs too much. Costs come in two forms. First, the loss of income that could be made from land that is protected. For example, the listing of the northern spotted owl in the Pacific Northwest has resulted in forestry restrictions on 2.8 million hectares of land, with the loss of billions of dollars in lumber revenue. (Though remember that there are many ecosystem services that that land provides in its forested state, and these probably also amount to billions of dollars.) Second, there is the direct cost of recovering species, which can be in the millions of dollars.
- iii) It limits growth.
- iv) It interferes with private land-owner rights.
- v) It doesn't work. (see (G) below)

F) MAKING COMPROMISES

- i) Various compromises have been introduced to overcome some of the problems described above, especially those that impose extremely stringent restrictions on business activities.
- ii) One of the most important compromises has been the advent of Habitat Conservation Plans (HCPs). These were introduced in the 1982 amendment to the Act and were designed to preempt some of the difficulties that arise when species are listed.
- iii) The basic idea is that plans are created that allow for development in certain areas, but that also ensure that protection occurs elsewhere (frequently these plans are made at a fairly large regional scale – e.g., the scale of entire counties – which makes it easier to balance these competing goals). These plans apply both to listed species and sometimes also to species that could be listed in the future. This second group of species is important because one

potential benefit of these plans is to protect these species before they become listed (and prevent the need for listing), so as to avoid all the restrictions that come into play after listing.

- iv) The development of HCPs involves input from business and political interests as well as biologists. One important benefit to business is that, in return for their cooperation in ensuring that there are sufficient protected areas, they may receive assurances that limit their liability (both legal and financial) in future actions concerning listed species.
- v) Since they were introduced, 100s of HCPs have been approved, covering tens of millions of ha of land and providing protection for 100s of species.

G) WHY HAVE SO FEW SPECIES RECOVERED?

- i) One of the most common arguments against the Act is that since very few species have ever been removed from the list, the Act (and the recovery process) simply doesn't work.
- ii) For example, by 2012 only 54 endangered populations had been de-listed, and only 26 of these were de-listed because the species had recovered (another 10 had gone extinct, 7 had their taxonomy revised, others were removed because of errors in the listing process or the discovery of new populations).
- iii) This criticism, however, reveals a very poor understanding of the circumstances under which the Act works. First, most species are not listed until they are already in very dire straits. Listed animals average a population size of ~1000, listed plants average <120 individuals, and at least 39 species had <10 individuals when listed. Add to this the fact that most listed species have suffered widespread habitat loss and it is not surprising that few recover quickly, and that some go extinct despite the Act's protection.
- iv) In addition, endangered species recovery and protection is very expensive and the number of listed species is rapidly increasing, which spreads the limited funds much more thinly.
- v) But, it is extremely important to evaluate the success of the Act and those who question its effectiveness are right to ask how well it is performing. Think about what would be a more reasonable test of the Act's effectiveness – we will talk about this in class.