Law of Salvation

The Endangered Species Act has withstood three decades of vicious attack. But even if it survives the Bush administration and the 109th Congress, it can't achieve its potential unless the public demands enforcement.

By Ted Williams

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Few bills have been more popular and less controversial than the Endangered Species Act—when they were enacted, that is. On December 19, 1973, the ESA unanimously cleared the U.S. Senate; a day later the House approved it 355 to 4. "Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed," effused President Richard Nixon when he signed the bill. In Washington, Sierra Club head Brock Evans was focused on stopping the Trans-Alaska pipeline. For the environmental community and most everyone else, the ESA was a no-brainer. Protecting the planet's genetic wealth made sense morally and economically. It was considered, rightly enough, what decent, civilized people do.

Evans didn't even read the text until 1997, when he took over the Endangered Species Coalition (a defense group funded by environmental organizations), at which point he said to himself: "My God, this is the strongest law I ever saw, far stronger than the Clean Water and Clean Air acts. No wonder the developers hate it."

The last time the ESA was reauthorized was 1988, but with Representative Richard Pombo (R-CA) running the House Resources Committee, the environmental community has stopped pushing for reauthorization. Congress annually provides de facto reauthorization by voting ESA funding. And, notes John Kostyack, senior counsel for the National Wildlife Federation, "The fundamentals of the law are good. Everything we all want can be done through administrative processes. It would be nice to have Congress bless an ESA update and put more juice into the recovery aspect. But even if we get a decent Senate bill, how can we get anything good in a conference committee with Pombo? We don't want to unleash something that picks up a lot of momentum. After it gets to Pombo, the only tool to stop a bad bill would be a filibuster."

The public is supportive of the law and loves its more visible and spectacular successes—wolves, grizzlies, bald eagles, peregrine falcons, red-cockaded woodpeckers, Kemp's ridley sea turtles, gray whales, alligators, and greenback cutthroat trout, to mention just a few. But it is unwilling to hold elected officials accountable for undercutting and underfunding recovery. Meanwhile, the ESA's enemies—led by Pombo, Representative Dennis Cardoza (D-CA), and Senator Michael Crapo (R-ID)—keep trying to extract its teeth.

Whether the ESA can survive the Bush administration and the 109th Congress remains to be seen. But it has proved impervious to similar and ceaseless onslaughts, including Newt Gingrich's Contract With America. Since 1978—when Congress created the "God Squad," a committee that can sacrifice species if it decrees that saving them would be too inconvenient— the law has sustained only one "dent" (if it can even be called that). This was the Department of Defense exemption, a dream of ESA enemies all through the 1990s but which didn't become a reality until 2003, after the Bush administration used 9/11 to convince a reluctant Congress that the military needed the ability to destroy the habitat of listed species whenever it felt like it.

Few military leaders agreed. For one thing, the law already provided the exemption; all the Secretary of Defense had to do was ask. For another, they didn't want the bad publicity. So proud are the Marines of their

superb ESA work, which continues despite the exemption, that they're putting up posters that read: "We're looking for a few good species." And in 1996, when Audubon sent me to North Carolina to check out voluntary habitat work for red-cockaded woodpeckers, the Army's 82nd Airborne Division fell all over itself showing me the effective, innovative things it had done to help the species recover. Airborne officials assured me that for folks who can hit the ground fighting anywhere in the world within 18 hours, navigating around a few woodpecker trees is just plain easy.

How could any statute withstand so many vicious attacks for so long? Perhaps, as Evans postulates, it's because of the law's nobility and high-mindedness. "Thirty-two years ago," he says, "our lawmakers got together and said: 'We're not going to let another living thing go extinct in this nation or anywhere on this planet, if we can help it.' That's pretty impressive."

Although the ESA is under the gun as never before, what's interesting, telling, and even encouraging is the opposition's forced shift in strategy. The White House has all but given up on legislative attacks and committed itself instead to administrative circumvention. The Western Governors' Association, a traditional forum for ESA bashing, is now calling for such green-sanctioned priorities as landowner incentives and recovery goals, and trying not to sound ominous with assurances that it just wants to "fix" the law. Even Pombo—who has built a career by spewing shrill anti-ESA rhetoric, hosting irrelevant ESA hate-session hearings, and hatching failed anti-ESA legislation—is now purring about just wanting to "make the law work better." The goal of ESA enemies hasn't changed; it's just that by getting pummeled in the press, they've undergone major message training. Finally they understand what the polls have revealed all along: The American public loathes the thought of extinction.

Sometimes that loathing translates to recovery, as I was reminded on the steamy afternoon of June 14, 2005, at Garden in the Woods, the New England Wild Flower Society's living museum, in Framingham, Massachusetts. Pitcher plants, mountain laurel, rhododendrons, sundry orchids, and dozens of other native plants were in spectacular bloom. But the plant I had come to see was a tiny perennial herb with three-part, deeply toothed leaves, called Robbins' cinquefoil—visually, at least, the most unimpressive of all. Two-year-old specimens, no bigger than a quarter, were being raised in plastic pots. They wouldn't develop their yellow blossoms for another year, hopefully on a bare swath atop Mount Washington in New Hampshire's Presidential Range, where the wind has reached 231 mph and the temperature has hit minus 47 degrees Fahrenheit. In the wild, plants this size might be 12 years old. They don't compete well with other alpine vegetation, so they need snowless, wind-blasted terrain. The species possibly evolved in this alpine zone after its progenitor was stranded by retreating glaciers.

Flashier species attract more attention, but that doesn't mean Robbins' cinquefoil lacks passionate defenders, inside and outside government. When the plant was declared endangered in 1980, the only known population occurred on Mount Washington's Crawford Path, where it was being collected and trampled. Extinction seemed imminent. But under the mandate of the ESA, the U.S. Fish and Wildlife Service provided funding and wrote a recovery plan. The U.S. Forest Service, which manages the land, initiated a hiker-education program, moved the Crawford Path, and built an enclosure to protect the main cinquefoil population. The Appalachian Mountain Club assisted with this work, monitored the population, and collected seeds. The New England Wild Flower Society undertook propagation, and the St. Louis–based Center for Plant Conservation helped with seed banking.

Learning how to transplant the species from the torrid flatlands of Massachusetts to one of the harshest environments on the planet had been difficult, explained Bill Brumback, the New England Wild Flower Society's conservation director, as we stood beside the cinquefoil pots, swatting mosquitoes. When the plants were in bloom, the cold shock of their natural habitat would kill them, so he tried taking them out of their cold frames at the first thaw and placing them in a freezer until transplant time. That worked better, but mortality was unacceptably high. Finally he achieved success by transplanting them in July, after they had bloomed and when the top of Mount Washington was as warm as it was going to get. Habitat requirements are so precise that 19 transplanted colonies failed; but one, on Mount Lafayette, was successful. In 2002 Robbins' cinquefoil became the first plant to be delisted because it had recovered throughout its native range.

Success Stories

The Endangered Species Act has rescued a number of imperiled plants and animals. Some, like the bald eagle, have been high profile. Others are less prominent. Here are three successes.

Black-Footed Ferret

This ferret, once believed extinct, was rediscovered in 1981 by a Meeteetse, Wyoming, ranch mutt named Skip. Under the mandate of the Endangered Species Act, managers undertook captive breeding and, later, releases. Today about 500 of these ferrets are breeding in the wild—mostly in South Dakota but also in Montana, Wyoming, Colorado, Utah, Arizona, and Mexico.

Aleutian Cackling Goose

The Aleutian cackling goose was nearly eliminated by Arctic and red foxes unleashed by fur trappers on at least 190 of the bird's breeding islands in the Aleutian archipelago. An intense effort led by the Fish and Wildlife Service to remove these exotic predators and protect winter habitat in the Pacific Northwest permitted full recovery. The bird was delisted in 2001.

American Alligator

In the 1960s it looked as if it was all over for the American alligator. But as the Fish and Wildlife Service, operating under the mandate of the Endangered Species Act, began to interdict illegal traffic in hides, the species rebounded. It was delisted in 1987. Now managers are obliged to control alligators with seasons for sport hunting and for egg-taking by commercial alligator farmers.

As with all ESA success stories, the agencies could never have saved Robbins' cinquefoil without enthusiastic public support. But the fate of listed species is rarely decided by the public; usually it's decided by the people the species have inconvenienced. Moreover, as payback for bankrolling the Bush campaigns, these people are now dictating government policy from inside and outside the White House. For example, Craig Manson, Interior's assistant secretary for fish and wildlife and parks, reckons extinction might be okay: "If we are saying that the loss of species in and of itself is inherently bad, I don't think we know enough about how the world works to say that," he told the Los Angeles Times. And in an interview with Grist magazine, he questioned the "orthodoxy" that "every species has a place in the ecosystem and therefore the loss of any

species diminishes us in some negative way." Manson brags that the Bush administration has "reduced critical habitat in some areas by 90 percent."

When Manson's boss, Interior Secretary Gale Norton, was Colorado's attorney general, she tried to prove in court that the ESA was unconstitutional. Now she and other Bush-team players are seriously arguing that listed species don't need places to live, that destroying their habitat won't harm them. She's even tub-thumping for Dennis Cardoza's H.R. 1299, which would excuse federal agencies from protecting critical habitat and which bears the Orwellian moniker the "Critical Habitat Enhancement Act."

The administration of George H. W. Bush listed an average of 58 species per year. The Clinton administration listed an average of 65—this despite a one-year listing moratorium sponsored by Senator Kay Bailey Hutchison (R-TX). In its five years the George W. Bush administration has made 36 listings, every one of them forced by court action.

There are three main strategies in the administration's ESA end run: rigged and suppressed science; sweetheart lawsuits in which the White House encourages legal action against the act, winks at the plaintiffs, then gives up; and bizarre interpretations of the law that are inevitably struck down but delay recovery for years.

Craig Manson's machinations with the threatened marbled murrelet (a puffinlike seabird of the northern Pacific that nests on mossy, old-growth boughs 45 miles or more inland) provide as good a case study as any of the first two strategies. Inconvenienced by the listing and seeking to get the bird's status reviewed as a prerequisite for delisting, the timber industry, via its trade group, the American Forest Resource Council, brought suit against the Interior Department. The Justice Department declined to defend, and the Fish and Wildlife Service initiated closed-door negotiations with the industry. Not only did the service agree to the status review, it took the job away from its own biologists (who had inconvenienced Big Timber in the first place) and farmed it out to independent scientists. But the independent scientists proved uncooperative, coming up with all the wrong answers—i.e., the truth. They found that the marbled murrelets of California, Oregon, and Washington are indeed threatened with extinction, that they are distinct from healthier populations in British Columbia and Alaska, and that they require protection under the law.

Under Manson's direction, Interior rewrote the report, changing its conclusion and proclaiming that marbled murrelets in California, Oregon, and Washington can safely be dispensed with. When the sanitized version came out, the independent scientists warned that "loss of any of the three populations could reduce the species' genetic resources and compromise its long-term viability." At this writing, the Fish and Wildlife Service has not made a formal decision to delist.

The ESA requires federal agencies that undertake or permit a project in the habitat of a listed species to consult with the Fish and Wildlife Service or (rarely) the National Oceanic & Atmospheric Administration's fisheries section to see if the project will jeopardize the species. If Fish and Wildlife or NOAA Fisheries renders a "jeopardy opinion," it must suggest "reasonable and prudent alternatives" or advise that proceeding with the project would violate the ESA.

To circumvent this inconvenience, the Bush administration is proposing "self-consultation" by agencies that increasingly function as subsidiaries of the industries they are supposed to regulate. For example, the Forest Service—not the trained scientists of the Fish and Wildlife Service or NOAA Fisheries—gets to decide if the forest-fire plan hurts critical habitat. "Streamlining," the Bush administration calls it. Jamie Clark, a 13-year veteran of the Fish and Wildlife Service and its director from 1997 to 2001, calls it "the fox watching the chicken house." She has this to say about what's happening in her old office: "Never have I seen so many

decisions overturned, so much scientific advice ignored, and so much intrusion into the daily work of rank-and-file Fish and Wildlife Service employees."

It is precisely this pattern of behavior by the White House that prompted investigations by the Union of Concerned Scientists and Public Employees for Environmental Responsibility (see "The Big Chill," Field Notes, May-June 2005), and the concomitant and subsequent excoriation of the Bush administration by 6,000 of the nation's most distinguished scientists, who reported "a well established pattern of suppression and distortion of scientific findings." Forty-four percent of Fish and Wildlife Service biologists, ecologists, and botanists surveyed revealed they "have been directed, for nonscientific reasons, to refrain from making jeopardy or other findings that are protective of species," and 20 percent revealed they had been "directed to inappropriately exclude or alter technical information from a Fish and Wildlife Service scientific document."

The third strategy for ESA circumvention—bizarre legal interpretations—illustrates the administration's contempt for law, public opinion, and even its own scientists. On November 30, 2004, NOAA Fisheries published a biological opinion in which it made the astonishing and unprecedented assertion that because the eight main-stem dams on the Columbia and Snake rivers were in place before Congress enacted the ESA, and even though the dams eradicated most of the salmon and steelhead (more than 80 percent of the entire run in some cases), they don't count as fish killers because they are now as much a part of the natural environment as, say, waterfalls. The opinion rejected the ESA's plainly stated mission of recovery. NOAA Fisheries flack Brian Gorman went so far as to declare that paperwork—not results—is all that's required of his agency: "The Endangered Species Act does not mandate recovery; it mandates a recovery plan."

Everyone, including Bush officials, knew this biological opinion was illegal, and on May 26, 2005, it was ruled so by federal judge James A. Redden. But it succeeded at what it was designed to do—delay. "We've won it all in court," former Oregon governor and salmonid advocate John Kitzhaber told me last October just before the document was finalized. "I don't think the draft biological opinion is going to stand up to legal scrutiny, but the tragedy is that it will take NOAA Fisheries two or three years to do another one. This whole debate is not about salmon as much as it is about the Endangered Species Act."

Then, on June 16, 2005, NOAA Fisheries made official its suggested policy to count domestic salmonids raised in hatcheries as wild fish when determining whether or not a stock requires ESA protection, thus dismissing all available scientific data, including its own, and—most important from its perspective—dispensing with the need for clean, shaded, free-flowing rivers (see "Something's Fishy," Incite, May-June 2005).

But Michael Bean, of Environmental Defense's Center for Conservation Incentives, warns that blaming nonprogress in species recovery wholly or even mostly on the Bush administration is dangerous and politically naive. While voters elected Bush, they—not the White House—are responsible for the actions and inactions of Congress. In 2005 Congress gave the Fish and Wildlife Service only $143 million to protect and restore 991 listed species, thereby setting back Americans 48 cents each. That's about what we spend to build one mile of superhighway.

The law already provides means for doing virtually everything needed for imperiled species. But the agencies, as Bean puts it, "are consumed by process." As an example, he offers the application of "safe-harbor agreements," an innovation that sprang full-blown from his brain in the early 1990s and by which landowners are offered immunity from prosecution if their voluntary habitat work attracts listed species that, otherwise, would have limited the owners' land-use options. Safe-harbor agreements produced spectacular results for a while—until the Fish and Wildlife Service swaddled them in multiple layers of review. A safe-harbor agreement

can't succeed unless the government earns landowner trust, but changes are being made after these agreements are drafted. This way, notes Bean, the landowner thinks the government is trying for "a second and third bite."

And despite the fact that safe-harbor agreements are designed to recover species, the service prepares biological opinions for them, squandering time, manpower, money, and landowner patience. The reason the service does this is that its handbook, written before the safe-harbor policy was hatched, says it has to. It could fix the problem by suspending the requirement with a director's order. When the service published its safe-harbor policy, it indicated it would develop a generic safe-harbor agreement for its Partners Program (which assists landowners in restoring habitat), thereby avoiding individual agreements. That was June 17, 1999. Today landowners are still waiting for their generic agreement. "These debilitating constraints have no partisan or ideological provenance," declares Bean. "An imaginative, results-oriented administrator of the Endangered Species Act, regardless of political party, can do better—much better."

The Fish and Wildlife Service isn't committed to results, because the American public isn't committed to results. Loathing the thought of extinction isn't the same as insisting on paying for recovery. The Robbins' cinquefoil was lucky in that it happened to live on public land. What it really had going for it, however, was that it didn't inconvenience any well-connected business enterprise.

The ESA has never failed; we have. Until the public really commits to the cause of protecting and restoring earth's genetic wealth, land developers like Pombo will continue to rise to key positions in Congress; to laugh at efforts to save "silly" things with "silly" names like "fairy shrimp," "lousewort," and "suckerfish"; to demand and get the sacrifice of "inconvenient" species.

The Endangered Species Act can't achieve its potential until the public understands that species must be saved not because they are beautiful, not because they are useful, not because they are anything, only because they are. And because, to borrow the words of naturalist-explorer William Beebe, "When the last individual of a race of living things breathes no more, another heaven and another earth must pass before such a one can be again."

What You Can Do

Insist that your legislators denounce and vote against any ESA amendments introduced by Representative Richard Pombo (R-CA), Representative Dennis Cardoza (D-CA), Senator Michael D. Crapo (R-ID), or any other proven ESA enemy. Contact your local Audubon chapter to learn what you can do to help restore listed species to your area or property. To track the latest news on the ESA issue, log on to the Endangered Species Coalition's website, "www.stopextinction.org, or "www.audubon.org/campaign/index.html.