Protecting Endangered Species in the United States:

A Historical Analysis of Reactive Environmental Law and Public Resistance

by

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Abstract

This thesis is a historical analysis of the various modes of thinking that developed in response to the Endangered Species Act of 1973. What was originally a law that received wide support from the government and the public soon became one of the most controversial environmental laws in the United States. Utilizing congressional hearings, government records, laws, legal cases, newspaper articles, photographs, and public surveys, this study rejects the common conception that economic self-interest was the sole driver of opposition to the Act. It argues, instead, that the reactive and narrow framework of the law fueled criticism. People responded negatively to the law's lack of proactive, long-term thinking and the consequent implications for short-term economic growth. This reactive approach to environmental legislation is a common trend in the United States, continuing to fuel the political partisanship and polarization of environmental movements across the nation.

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Introduction

"All who take a total view of life must realize that man's future cannot be considered separately from that of other life"

— Salim Ali

In the latter half of the nineteenth century, amidst rapid industrialization, urbanization, and economic growth, a newfound desire to protect the environment began to emerge in the United States.[1] As people continued to move and settle across the continent, once-plentiful species began to disappear. The bison population, which had previously been abundant in the American West, was brought to the brink of extinction as a result of westward expansion and overhunting. Likewise, the now-extinct passenger pigeon declined as a direct consequence of commercial exploitation and anthropogenic habitat destruction. People gradually came to realize that humans could have tangible impacts on the natural world, endangering species and even driving them to extinction.

It was also around this time that the US government began to implement environmental legislation focused on the conservation of nature, the preservation of cultural history, and the protection of wildlife.[2] The Lacey Acts of 1894 and 1900 were powerful pieces of conservation legislation which marked the beginning of federal wildlife policy. The former granted the federal government the power to preserve and restore bird populations, and imposed penalties for the illegal transport of birds across state lines, while the latter prohibited trade in illegally taken wildlife, fish, and plants. Such progressive conservation policy accelerated throughout the early

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[1] Hal K. Rothman, *Saving the Planet: The American Response to the Environment in the Twentieth Century* (Chicago: Ivan R. Dee, 2009).
[2] Hal K. Rothman.

1900s in conjunction with the conservationist movement and Theodore Roosevelt's presidency. It was not until later in the century, however, that the conservation of endangered wildlife became an official responsibility of the federal government.

The late 1960s and early 1970s marked a turning point for wildlife conservation in the US. The sudden explosion of environmentalism, most notably in the Earth Day demonstrations in 1970, had immediate effects on national policy. Democrats and Republicans alike collaborated on federal legislation to protect the environment.[3] Environmentalism arose as "a compromise position, a center from which the striving toward a new consensus in American society began."[4] It seemed, at last, that society had begun to question the longstanding American ideal of unfettered growth, boundless production, and unlimited expansion, and instead sought to revitalize the natural environment. In part with this burgeoning environmental movement, many began to lobby for legislation to protect and preserve endangered species.

The Endangered Species Act (ESA) was enacted in 1973 to protect threatened wildlife from extinction and to support their recovery when population numbers fell dangerously low. Despite initial widespread support, the ESA soon grew to become one of the most controversial environmental laws in the US. The public's responses serve as a broader symbol of the political polarization over environmental protection which persists till today.

This thesis analyzes the modes of thinking that developed around the ESA. It argues that the short-term, narrow approach of the law has fueled conflicts over its implementation. The legal framework is structured in a way that addresses issues as they arise, rather than proactively working to prevent them. This creates hardship and drives opposition among those affected by its

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[3] Richard Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy*, 1999, 228-229.
[4] Hal K. Rothman, 125.

stringent policies. The ESA ultimately encourages the ongoing trend in the US towards constant economic growth without regard for long-term well-being.

The ESA is reactive in how it addresses species conservation. Reactive law refers to laws that address an issue after it has already become a problem. Reactive policy requires sudden changes, often disrupting common practices and posing problems for those affected. Proactive law, on the other hand, refers to laws that address issues before they become a crisis. The focus of proactive law is to implement long-term, preventative measures to block issues from arising in the first place. The ESA is a reactive law, focused on delegating support and recovery plans to species that are listed as threatened or endangered. Controversy arose as a result of the reactive framework of the ESA, ultimately highlighting a deeper social issue at play, where economic growth and development stand as the measure by which people interpret the impacts of environmental legislation.

The first chapter discusses the laws that preceded the 1973 ESA, the initial responses to those laws, and the problematic framework of the modern Act. In analyzing congressional hearings, presidential remarks, and public surveys, it is clear that the passage of the ESA was met with widespread support. The chapter highlights the reactive framework of the legislation, demonstrating how this approach set the groundwork for future controversies. As mentioned, the ESA is reactive in the sense that rather than implementing proactive, precautionary measures to prevent species endangerment, the law follows a procedure in which conservation strategies are applied after a species is deemed fit for protection. This implies that activities which harm biodiversity are permitted until a species is listed as endangered. Through a critical analysis of various sections of the Act, I argue that the law addresses species preservation in a reactive and narrow way. The law requires sudden changes in the practices of private landowners and

industries upon the discovery of an endangered plant or animal species, setting the stage for resentment among those seeking to further personal economic gains.

The second chapter explores the challenges and the shifts in thinking over the Act that emerged after its passage, highlighting the problematic legal framework in action. A number of legal cases reveal a desire among private landowners and industries to defeat ESA efforts, even in instances where they were not suffering economic damage. Opponents of the Act consistently responded negatively to the reactive regulatory policy, citing worries about the law's impact on short-term economic growth. Moreover, the reauthorizations of the ESA in 1978, 1983, and 1988 reflected an increasing emphasis on growth and the burgeoning anti-environmental political climate in the US. The amendments continued to follow reactive policies, and even introduced new measures to reduce short-term economic costs. While economic considerations were not the sole force driving opposition to the Act, economic thinking played a major role in dictating how people perceived the Act's impact.

The final chapter discusses how economic growth has become the measure by which the impact of the ESA is interpreted. Studies both in favor of and against the ESA have used growth as the standard by which to assess the Act's impact. In reality, many of these studies have revealed that the ESA had mixed effects on growth. However, even seemingly beneficial green growth can have downsides, as is often the case with ecotourism, which has led to the exploitation and harm of endangered species. Growth is clearly a problematic measure for the Act's impact, as it varies depending on a given situation and species. On top of this, some studies have found that the ESA has had little to no effect on economic growth altogether. There needs to be a shift in thinking that focuses on economic well-being as opposed to growth. In fact, society would benefit if people strived for an adequate, rather than an excessive standard of

living.[5] The ESA and its reactive policy failed to promote this alternative approach to well-being, thus pointing to a need for more proactive wildlife conservation legislation in the US.

The ESA faces constant criticism, and its opponents minimize and deride concerns over species preservation in comparison to concerns over economic growth. In reality, biodiversity conservation is essential to economic well-being. The endless anthropogenic growth and development that has taken place since the Industrial Revolution has led to an assault on the planet and all its lifeforms.[6] The global conservation movement has temporarily reduced, but failed to entirely halt the extinction of species. In order to restore the Earth's biodiversity, there needs to be a fundamental shift in moral reasoning concerning the human understanding of the living environment.[7] Edward O. Wilson, a biologist, naturalist, and ecologist known for his efforts to preserve the planet's biodiversity, wrote:

> "Wildlands are our birthplace. Our civilizations were built from them. Our food and most of our dwellings and vehicles were derived from them. Our gods lived in their midst. Nature in the wildlands is the birthright of everyone on Earth. The millions of species we have allowed to survive there, but continue to threaten, are our phylogenetic kin… History without the wildlands is no history at all."[8]

Humans are not separate from other life on Earth, but rather a part of it. The future of humanity depends upon the survival of the planet and the preservation of all lifeforms which

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[5] Donella Meadows, Jorgen Randers, and Dennis Meadows, *Limits to Growth: The 30 Year Update* (White River Junction, Vermont: Chelsea Green Publishing Company, 2004).
[6] Edward O. Wilson, *Half-Earth: Our Planet's Fight for Life* (New York: Liveright Publishing Corporation, 2016), 72.
[7] Wilson, 167.
[8] Wilson, 211.

contribute to its functioning. There needs to be a shift in how people perceive species conservation, and it needs to happen soon, for the long-term well-being of humans and the wildlands alike.

Chapter 1

A Landmark Law

The laws that preceded the ESA reflected a growing demand for federal action to safeguard endangered wildlife, while also reflecting the reactive policymaking and limited perspectives which persist in the contemporary legislation. Before 1966, the United States government played a minimal role in wildlife management. Individual states, rather than the federal government, were typically granted jurisdiction over such issues.[1] As nature and wildlife harvests accelerated throughout the twentieth century, the need for public policy became increasingly evident. In the years leading up to the enactment of the ESA in 1973, a series of laws were passed, reflecting a growing desire to address endangered species preservation and conservation. These included the Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969. These legislative milestones not only established the foundation for modern wildlife protection, but also set the precedent for its reactive policy and limited scope.

The Legal Predecessors of the Modern ESA

The Endangered Species Preservation Act was undoubtedly a monumental step towards federalizing endangered species protection. This Act of 1966 marked the first legislative attempt by the federal government to actively prevent the anthropogenic extinction of endangered wildlife. Within its stipulations, this law established many important measures which were replicated in the later acts. To start, the 1966 Act established the National Wildlife Refuge

[1] Stanford Environmental Law Society, *The Endangered Species Act: A Stanford Environmental Law Society Handbook* (Stanford: Stanford University Press, 2001), 14.

System out of a consolidation of federal lands and it authorized funds for the continued maintenance and expansion of this system.[2] It also delegated the responsibility of finding and publishing endangered species to the Department of the Interior. According to this law, a species "shall be regarded as threatened with extinction whenever the Secretary of the Interior finds… that its survival requires assistance."[3] The 1966 Act thus set the precedent that a species would be granted protection once it was classified as threatened by the Department. This method of listing species would become integral to the modern 1973 Act. The 1966 Act also prohibited the "taking" of a species without a permit, a fundamental component of its modern counterpart. As defined by the Act, a "taking" means to or attempt to "pursue, hunt, shoot, capture, collect, kill" an endangered species.[4] Such federal regulation over wildlife protection was unprecedented.

The 1966 Act was clearly a major turning point in the federalization of conservation legislation, but the law nonetheless lacked a comprehensive and adequate approach to species preservation. First, the so-called "taking" of species applied only to domestic species of fish and wildlife, not to plants, and only to those animals found within the National Wildlife Refuge System.[5] Therefore, the law only ensured the protection of a limited number of endangered species whose habitats were located in a limited area. Furthermore, the law required federal agencies to conform to its standards "where practicable," and only when the standards were consistent with agency missions.[6] The language of the Act essentially implied that agency cooperation was voluntary. This was a clear weakness of the Act, allowing agencies to continue

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[2] Endangered Species Preservation Act, Pub. L. No. 89–669, § 1(c), § 4(a) (1966).
[3] Endangered Species Preservation Act, Pub. L. No. 89–669, § 1(c), § 4(a) (1966).
[4] Endangered Species Preservation Act, Pub. L. No. 89–669, § 5(b) (1966).
[5] Stanford Environmental Law Society, *The Endangered Species Act: A Stanford Environmental Law Society Handbook*., 19.
[6] Brian Czech and Paul R. Krausman, *The Endangered Species Act: History, Conservation Biology, and Public Policy*, 21.

their practices as they pleased. Due to these inadequacies, a stronger and more comprehensive law was needed.

The Endangered Species Conservation Act of 1969 followed a similar structure to its predecessor but made several crucial adjustments to broaden the scope of its coverage and strengthen its impact. The 1969 Act extended the definition of "fish and wildlife" to include "any wild mammal, fish, wild bird, amphibian, reptile, mollusk, or crustacean."[7] It also recognized the international breadth of the extinction crisis, authorizing the inclusion of threatened species worldwide in the listing process. In conjunction with this stipulation, the 1969 Act also outlawed the import of threatened species and products made from these species. This provision drastically reduced the trade in declining species. Lastly, the 1969 Act expanded upon the Lacey Act by outlawing the selling or transporting of any listed species and its product taken in breach of state, national, or foreign law.[8] The Endangered Species Conservation Act of 1969 indeed went further in its effort to protect and preserve endangered species, but public consensus still reflected a desire for a stronger piece of legislation.

Both the Act of 1966 and the Act of 1969 set the groundwork for the modern ESA and reflected the push for more stringent federal oversight on endangered species protection. These laws were insufficient in that they failed to outlaw the taking of endangered species nor mandate that all federal agencies act to protect endangered species, which led to the push for a more comprehensive law.[9] Despite the 1966 and 1969 laws' clear inadequacies, it cannot be underscored enough that they were still critical in the movement towards federalizing environmental and wildlife protection measures.

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[7] The Endangered Species Conservation Act of 1969, Pub. L. No. 91–135, § 10(d) (1969).
[8] Stanford Environmental Law Society, 19.
[9] James Salzman, "Evolution and Application of Critical Habitat under the Endangered Species Act," *Harvard Environmental Law Review*, 1990, 312.

In the interim period between the passage of these laws and the passage of the 1973 ESA, several other species protections acts were passed, reflecting the demand for stronger wildlife protection measures. In 1971, Congress passed the Wild-Free-Roaming Horses and Burros Act to protect wild horses and burros in the public lands of the US. In 1972, Congress approved the Marine Mammal Protection Act, which outlawed the taking and importation of endangered marine mammals. In the spring of 1973, before the ESA was passed, the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) established restrictions over the import and export of endangered species.[10] These measures, in conjunction with the Acts of 1966 and 1969 and a growing consensus over the extinction crisis, led many to push for a more comprehensive and stringent species protection law.

When passed in 1973, the ESA was met with overwhelming support from the American people and the federal government. Despite this, it remains one of the most controversial, contested environmental laws in the United States.[11] While the Act's economic impacts are typically cited as the main cause for backlash, the reactive and narrow framework of the law poses many problems. This framework, initially established in the preceding laws, creates a structure often perceived as overly burdensome and inflexible. Understanding the structure of the law itself is crucial in understanding the shift in public perception from widespread approval to heated opposition.

[10] Stanford Environmental Law Society, 20.

[11] Langpap, Kerkvliet, and Shogren, "The Economics of the U.S. Endangered Species Act: A Review of Recent Developments."

Initial Support

Initial responses to the ESA were overwhelmingly positive. Congressional hearings, presidential remarks, and public opinions suggest that the ESA was a well-liked and widely supported law. People generally supported the federalization of endangered species protection measures in the US.

Congress passed the 1973 ESA unanimously, thus reflecting a consensus over its principles. No special interest groups came forward to denounce the ESA; no commercial interest testified in the House or Senate hearings; and no organized lobby countered ESA supporters. Each chamber overwhelmingly passed its respective bill, and the conference committee even strengthened the Act by adding the term "harm" to the definition of what it meant to "take" a species. Moreover, the Senate debated little over the bill. Republican leaders Bob Dole of Kansas and Jesse Helms of North Carolina supported the bill. Additionally, future ESA critics Howard Baker of Tennessee, Bob Packwood of Oregon, and Mark Hatfield of Oregon, also demonstrated their support for the bill. Only four members of the House of Representatives voted against it.[12] All in all, the ESA garnered considerable support in the early years following its enactment, likely because its limitations had not yet been tested.

Several years after the Act's passage, the government was still passing bills in favor of endangered species protection. In December of 1979, the House passed a bill restricting ivory imports in an effort to save elephants from extinction. That same day, the House also approved a bill authorizing funds to administer the ESA for the next three years. All the while, environmental groups continued to push for stronger measures to protect declining elephant

[12] Stanford Environmental Law Society, *The Endangered Species Act: A Stanford Environmental Law Society Handbook*, 21.

populations.[13] That said, there was still strong support from both the government and the citizens for federal endangered species protection measures.

The government thus demonstrated a staunch commitment to creating strong legislation to safeguard endangered species. This mode of thinking that developed within the American government coincided with that of environmentalists and set the legal precedent that endangered species protection would prevail over economic motivations or conflicts of self-interest.

Presidential support for the Act continued to reflect this growing desire to federalize and strengthen endangered species protection measures. Early in 1972, 37th President of the United States, Richard Nixon, called for the adoption of a stronger law to protect endangered wildlife and claimed that the preexisting acts did not provide the management tools necessary to save these threatened species.[14] On December 28, 1973, Nixon signed the ESA into law, officially granting the federal government the power to protect threatened wildlife. In his statement, Nixon declared, "this legislation provides the federal government with the needed authority to protect an irreplaceable part of our national heritage – threatened wildlife." He further emphasized, "Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed."[15]

Nixon's response reflected broader societal sentiments surrounding the push for federal endangered species protection. By endorsing the Act, Nixon acknowledged the limitations of previous legislation and signaled his support for the shift towards stronger federal involvement in species conservation. His rhetoric emphasized the intrinsic value of wildlife and the importance of its preservation, thus reflecting his support for the environmental movement of his time. In

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[13] *New York Times*. "House Votes Bill Imposing Curb on Ivory Imports: Illegal Hunting Cited Stronger Measures Urged." December 20, 1979.
[14] Stanford Environmental Law Society., 20.
[15] Nixon, "Statement on Signing the Endangered Species Act of 1973."

many ways, Nixon's support for the Act reflected the broader public consensus on environmental protection.

A subcommittee hearing from 1975 showcases initial support for the Act among states. In a statement, Lynn Greenwalt, Director of the Fish and Wildlife Service (FWS), argued that the willingness for states to enter into cooperative agreements was essential for meeting the overarching goal of aiding the recovery of endangered species and removing them from the list. Greenwalt stated, "with few exceptions, States are cooperating and have been expending scarce financial and manpower resources in obtaining the necessary authority and in developing plans for species recovery."[16] Nearly two years after the ESA was passed, states were decisively working to implement the Act, reflecting a general acceptance of the legislation and support for its policies.

The public demonstrated widespread support for the ESA and the federalization of endangered species protection. Contemporary newspapers and surveys convey that there was little debate over the Act shortly after it was passed. A survey of 3,107 people from 1980 revealed that a majority of people favored protecting wildlife even at the expense of jobs, housing, and development projects. Moreover, this survey revealed that 55% of people opposed building an industrial plant on a marsh inhabited by a rare bird species, even if the plant would solve an unemployment problem. Another study found that 76% of those surveyed believed cutting trees for lumber and paper should be done in ways to help safeguard wildlife.[17] These findings show the price that people were willing to pay for wildlife conservation. These studies were released in the early stages of the Act, before it had made its way through the judicial

[16] "Endangered Species Oversight," 5.
[17] Kennedy, "Protecting Wildlife."

system and came into conflict with peoples' lives and economic interests. It is clear people supported the ESA initially and believed that wildlife conservation was a critical issue. This mode of thinking shifted over time as the Act was implemented, however, and this general support turned into heated opposition.

While the Act initially received widespread support from the public and the federal government, this did not last very long. The Act was supported in theory but not in practice. Overtime, the way the law was understood and implemented became problematic, as its perceived shortcomings were not evident until it made its way through the courts. Further emphasized in the next chapter, the law's journey through the court systems reflects a growing discontent with species preservation among affected individuals and commercial entities, even in the absence of economic gain. While economic interests have indeed fueled efforts to circumvent the Act, the complexity of the law's framework, rather than economic self-interest, was the primary reason for this shift in opinion.

A Problematic Structural Framework

The ESA was a comprehensive, landmark law that had further reach than all prior legislation of similar nature. It recognized the importance of protecting America's endangered wildlife and laid out detailed procedures by which a plant, animal, and their designated habitats were listed and deemed eligible for protection. Within the text of the Act, Congress declared that the legislation's purpose was:

> "To provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation

> of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth by the United States to protect endangered species."[18]

The law itself built upon the Acts of 1966 and 1969, incorporating many of their measures to halt species extinction. In a shift from these earlier bills, the 1973 Act included endangered plants in addition to animal species within its ambit and extended its application to animals that were not previously considered in the listing process.[19] Moreover, the Act provided more flexibility in considering the status of a species and assigning it proper protection.[20] Despite these additions, the law fell short of reaching its full potential and generated considerable controversy as a result.

The structural framework of the ESA was largely responsible for the controversies that emerged during its implementation. The Act had two major problems: it was reactive and narrow. In tracing these two themes throughout the legislation itself, one can better understand why support for the Act quickly turned into opposition.

Several of the law's sections can be classified as reactive, as they addressed species preservation only after it became a critical issue. This may be seen in Section 4 of the law. This section outlined the process for determining the status of an endangered or threatened species and designating a critical habitat. The Secretary was to make these determinations on the basis of scientific and commercial data and in consultation with affected states, interested people, organizations, federal agencies, and the country or countries where the species was typically

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[18] The Endangered Species Act, Pub. L. No. 93–205, § 2(b) (1973).
[19] The Endangered Species Act, Pub. L. No. 93–205, § 12 (1973).
[20] "Endangered Species Oversight."

found.[21] The Secretary of the Interior was then to publish in the Federal Register all the species determined to be either endangered or threatened.[22] This section was reactive because it stipulated that action would only be taken after a species was found to be in grave danger. Protection of broader ecosystems and habitats was only granted if an endangered species inhabited a given environment.

In addition, there was often a long delay between the time when a species was first considered for listing and the time when the listing determination was finalized. Some species even went extinct while waiting for a listing.[23] In this sense, section 4 was unable to address species preservation in an effective, proactive manner that worked to prevent endangerment and extinction from occurring in the first place. Rather than implementing rules and regulations to delegate precautionary protection to all wildlife, dangerous practices were permitted until this complicated and time-consuming process deemed a species a viable candidate for protection. This reactive focus on only protecting endangered species rather than all wildlife and ecosystems was a recurring issue throughout the legislation.

Section 7 was another section of the law which was reactive in structure. Section 7 required all federal departments and agencies to consult with the Secretary about any planned activities which may cause harm to a listed species. Such agencies had to ensure that any actions "authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of [a

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[21] The Endangered Species Act, Pub. L. No. 93–205, § 4(b) (1973).
[22] The Endangered Species Act, Pub. L. No. 93–205, § 4(c) (1973).
[23] Donald C. Baur and Ya-Wei Li, eds. *Endangered Species Act: Law, Policy, and Perspectives*. 3rd ed. Chicago: American Bar Association, 2021, 417-418.

critical] habitat."[24] In this sense, section 7 acted as a final check point before federal projects were executed.

Section 7 was reactive in how it addressed harmful federal projects. Section 7 only came into play after a federal action had already been proposed or initiated. Rather than proactively addressing threats to endangered species in the process of planning a project, agencies were to consult with the Secretary about addressing the potential impacts on a given endangered species once these projects were already largely underway. This was reactive and problematic in that it encouraged agencies to respond to, rather than consider, endangered species in the planning process. This reactive structure paved the way for conflict, as many individuals and industries resisted changing or halting a project which may have had numerous economic benefits, just for the sake of a single endangered species.

Another reactive section of the ESA was section 9, which prohibited certain activities pertaining to listed species and their designated habitats. It outlawed the import and export of endangered species and forbade any person to take, possess, deliver, carry, transport, or ship any listed species. As noted earlier, the term "take," as utilized in the legislation, means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such contact."[25] Through this language, section 9 worked to restrict direct actions that caused harm to an endangered species.

This section was reactive in the sense that it punished such crimes after they occurred and only aimed to prevent harm to species which were already at risk. The measures of enforcement were also reactive, acting only in response to specific violations rather than proactively

[24] The Endangered Species Act, Pub. L. No. 93–205, § 7 (1973).
[25] The Endangered Species Act, Pub. L. No. 93–205, § 3(14) (1973).

preventing harm. This approach may be contrasted with proactive measures that would aim to protect species from reaching a critical level of endangerment and be at risk of a so-called "taking." By focusing primarily on punishing actions after they have already harmed an endangered species, this section followed a strategy centered around mitigating existing threats rather than employing a proactive, forward-looking approach to prevent such threats from arising in the first place.

Section 10 established a permit system to exempt individual and industry activities that would typically be prohibited under section 9. The opening excerpt from this section asserted, "The Secretary may permit, under such terms and conditions as he may prescribe, any act otherwise prohibited by section 9 of this Act for scientific purposes or to enhance the propagation or survival of the affected species."[26] It also stipulated that any person facing economic hardship after entering a contract with respect to a species, before the date of publication in the Federal Register and its subsequent listing as endangered, may apply for exemption.[27] This created loopholes enabling people to circumvent the law's various regulations and delayed the process by which species were granted protections.

The section proved to be reactive in the way that it focused on managing consequences for endangered species through permits and exemptions after potentially harmful activities were already proposed or initiated. The permitting system allowed for individuals and entities to circumvent the Act's regulations and to continue activities known to be harmful to a species. Further, the permitting process required significant scientific research to be conducted over a given species to determine the impact of the proposed activity on the species. This research was

[26] The Endangered Species Act, Pub. L. No. 93–205, § 10(a) (1973).
[27] The Endangered Species Act, Pub. L. No. 93–205, § 10(b) (1973).

often delayed.[28] Delays in conducting research crucial to an endangered species' survival meant delays in the allocation of funds and the establishment of a suitable recovery plan. By creating a permitting and exemption process, the ESA allowed for potential delays in necessary protective measures for certain species and created loopholes for exemptions which could lead to further endangerment.

In addition to the above sections of the law being reactive, other facets of these sections can be classified as narrow. These sections only narrowly address and allocate support to a single endangered species as opposed to broader ecosystems.

Rather than addressing biodiversity preservation as a whole, section 4 narrowly focused on listing individual species and designating their critical habitats. This precluded the possibility of extending broader protection measures to safeguard biodiversity and the possibility to prevent the endangerment of other species which were not necessarily listed as endangered or threatened. The structural shortcomings of section 4 ultimately played a large role in the eventual downfall of support over the Act, as people responded negatively to this narrow framework, unwilling to make large and permanent adjustments for such a narrow issue, that is, the preservation of a single species.

Section 7 focused only on addressing threats that arose from specific federal actions. In reality, not all causes of species' decline were related to federal actions. While it was a positive shift that federal agencies had to ensure their projects did not harm endangered species, there should have been broader efforts to curtail all actions that contributed to species decline, not just federal projects.

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[28] Donald C. Baur and Ya-Wei Li, 426.

Section 9 was also narrow in scope; it only outlawed harmful activities committed against listed species, rather than all species. In addition, the section only addressed direct harms caused to wildlife, failing to address broader ecological concerns which contributed even more to species decline. Overarching threats such as harmful industry practices, pollution, and climate change were not being directly addressed within the definition of a "taking," even though these issues contributed even more to the endangerment of wildlife. By failing to address broader environmental concerns, this section failed to address threats to all forms of wildlife, endangered or not, and to extend long-term, proactive protection to biodiversity.

Section 10 provided flexibility for those seeking exemptions from the Act's stringent regulations, creating an even narrower impact on species preservation. This section focused on providing permits and exemptions for specific actions mentioned in section 9, which already failed to address broader ecological concerns. By creating loopholes for individuals to circumvent the Act, this section shrank the overall number of activities and the extent to which activities were deemed harmful to endangered species. This ultimately narrowed the scope of protection afforded to a given species.

In sum, there were many complex technicalities at play when it came to allocating protection to endangered species under the ESA. The law proved to be both reactive, addressing species preservation once it was already an issue, and narrow, focusing only on protecting individual species rather than entire ecosystems. A species was only given attention and provided necessary aid once it had already been listed, and there were many delays in the process of listing a species, designating its critical habitat, and developing a suitable recovery plan. Rather than taking a proactive approach to address and protect all species and mitigate the broader causes of their decline, this process made it difficult to grant all species the support they needed in a timely

manner. Moreover, it set up the potential for conflict among individuals and agencies, who struggled to grasp the significance of halting an economically beneficial project for the sake of preserving just one individual species. The ESA ultimately led to a rise in anti-regulation and anti-environmentalism, as people struggled to strike a balance between economic development and species protection.

This chapter has highlighted the legal development of the Act, the public perceptions which followed its enactment, and its structural shortcomings which will later prove controversial in implementation. The ESA was widely supported after its enactment in 1973. Congress passed the Act unanimously, President Nixon publicly declared his support for wildlife preservation, and the general public seemed pleased with the movement towards federalizing endangered species protection measures. The structural issues posed by the law's reactive and narrow framework were seemingly not realized until implementation, when public perceptions over the Act underwent a major shift. That being said, the reactive and narrow scope of the law itself would ultimately turn what was once widespread support into heated opposition.

Chapter 2

Post Passage Challenges & A Paradigm Shift in Thinking

This chapter explores the patterns of thought that emerged in response to the passage of the ESA in 1973. Although the Act initially garnered widespread public support, its implementation ignited heated controversy, even though the courts and Congress tended to uphold the Act's supremacy.

Scholars often posit that the backlash against the ESA stemmed from economic motivations and material gain. While such assertions are credible, there was a much deeper issue at play here. Through an analysis of judicial decisions and legal amendments, this chapter uncovers the issues that arose as a result of the law's reactive framework. It also explores the views that arose from the Act's passage, offering insight into this underlying, self-serving mission among the public to defeat the ESA even when proposed projects had no economic benefits. It was ultimately the Act's reactive, narrow approach that angered individuals who sought to avoid changing common practices due to the sudden emergence of an endangered species.

In many ways, the conflicts surrounding America's most controversial environmental act reflect the broader polarization over environmental issues within American society. This chapter ultimately aims to highlight the underlying complexities of environmental law and its impact on the American public. It appears the public supports environmental legislation in theory but responds negatively to its reactive and narrow approach in practice.

Legal Case Studies:

The Snail Darter and the Northern Spotted Owl

In the years following the Act's passage, several legal cases arose. The Supreme Court's early rulings of two ESA cases — concerning the endangered snail darter and the northern spotted owl — indicate how initial consensus for endangered species protection suddenly turned into opposition when conflicts of economic self-interest and environmental protection were at play.

The *Tennessee Valley Authority v. Hill* case of 1978 was the Supreme Court's first interpretation of the ESA, and it highlighted the controversy that arose as a result of the Act's implementation.[1] It began as a National Environmental Policy Act (NEPA) violation but ended as a ruling under the ESA. The cases began in 1967, when Tennessee residents filed a suit against the Tennessee Valley Authority (TVA), a public corporation of the United States working to construct the Tellico Dam and Reservoir Project on the Little Tennessee River. This regional project was aimed at stimulating shoreline development.[2] Local citizens and national conservation groups brought the suit to the District Court on the grounds that the project did not meet the requirements of NEPA. The plaintiffs, including the Environmental Defense Fund, the Association for the Preservation of the Little Tennessee River, and landowner Thomas Burel Moser whose property was being condemned, argued that the TVA must prepare an environmental impact statement under NEPA.[3] NEPA requires all major federal projects significantly affecting the quality of the human environment to publish a statement addressing these concerns. This requirement reflected an attempt to uphold environmental interests amidst

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[1] Kenneth M. Murchison, *The Snail Darter Case* (United States of America: University Press of Kansas, 2007), 1.
[2] Tennessee Valley Authority v. Hill et al, No. 76-1701 (Supreme Court of United States June 15, 1978), 2.
[3] Murchison, *The Snail Darter Case*, 50.

the height of the environmental movement. Initial rulings seemed to coincide with the environmentalists' interests. In response to the NEPA charges, the District Court agreed with the plaintiffs, issuing an injunction on the TVA's project until 1973. By 1973, however, the environmental impact statement was found to be in accordance with the law and the TVA was officially permitted to continue construction.[4]

Opponents of the project refused to give up, and soon found a new way to halt its development. In 1972, David Etiner, a staunch opponent of the Tellico Dam project, discovered the snail darter – a small fish named after its primary food source – in the Little Tennessee River. Although Etiner's finding had no impact on the NEPA case, the passage of the ESA in the latter half of 1973 gave opponents of the Tellico Dam new grounds for halting the project. A petition to list the snail darter was filed under section 4 of the ESA on January 20, 1975, and by October of 1975, the fish was listed as endangered, and the Little Tennessee River was designated as a critical habitat.[5] Etiner's discovery became critical to the famous 1978 case.[6]

While the snail darter discovery indeed protected an important endangered species and natural habitat, it also provided cover for a host of competing interests. The Tellico Project was said to have numerous economic benefits, such as providing local jobs and increasing tourism, yet residents had various reasons for not wanting this project to go forward. Opposition to the dam's construction indeed arose from conservationists who sought to protect the snail darter, but also from farmers who refused to give up their land, athletes who wanted to preserve their running path, and Cherokee Indians whose sacred sites lay along the valley.[7] The snail darter had

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[4] Environmental Defense Fund and Thomas Burel Moser v. Tennessee Valley Authority, No. Civ. A. No. 7720 (United States District Court, E. D. Tennessee, N. D. October 25, 1973).
[5] Murchison, *The Snail Darter Case*, 82, 87.
[6] Murchison, *The Snail Darter Case*, 81.
[7] Philip Shabecoff, "Behold the Tiny Snail Darter; an Ominous Legal Symbol?: The Last Blow Came Sept. 26," *New York Times*, October 7, 1979.

become the rallying cry behind a much bigger battle. With Etiner's discovery of the snail darter and the enactment of the ESA, there were grounds for new litigation to halt the project.

The case brought before the Supreme Court was muddled by controversy and conflicting interests. When analyzing the intention of the Act, the Court noted that Congress was "concerned about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet."[8] The Court ruled, in other words, that the ESA intended to preserve and protect endangered species even if their purpose or value to the broader ecosystem was not known. The Court also noted that, in its creation of the law, Congress had been specifically concerned by the fact that the greatest cause of extinction among species was the destruction of their natural habitats. The Court therefore validated the true intent of Congress when it upheld the ESA in this landmark decision.[9]

The Court's decision and the way it approached that decision ensured that the ESA would prevail. In its final ruling, the Supreme Court declared that the legislative history of section 7 of the Act revealed "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species."[10] The Court held that endangered species would be given priority over the missions of federal agencies with no exceptions and declared that the Tellico Dam Project must therefore be stopped. This reflected the widespread sentiment in the United States legislature that endangered species preservation was a serious concern. The Supreme Court made it clear that the Act would be upheld, regardless of projected economic losses. The *TVA v. Hill* ruling set judicial precedent for endangered species preservation across the nation for decades to come.

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[8] *TVA v. Hill*, 12.
[9] *TVA v. Hill*, 12.
[10] *TVA v. Hill*, 15.

While the majority opinion upheld the ESA, there was an important minority dissent that rested on the Act's reactive nature and became the foundation for future debates over the ESA. Justice Powell, backed by Justice Blackmun, dissented, arguing that the court's decision threatened the operation of even the most important projects which served the crucial needs of society and national defense.[11] The Supreme Court concluded that the intent of Congress was to prioritize endangered species preservation, yet Powell asserted that Congress could not reasonably have intended section 7 to be applied to a project that was completed or nearly completed.[12] Powell argued that it was the duty of the Supreme Court to "adopt a permissible construction that accords with some modicum of common sense and the public weal."[13] Justice Powell's dissenting opinion served as a symbol of the broader polarization surrounding environmental policy. It showcased the longstanding struggle to balance economic development and species preservation which arose over time as the law was implemented.

Many in favor of the Tellico Project were angry, leaning on the side of Justice Powell's dissent. These individuals belittled the snail darter and pushed for the project's completion. They believed that preserving the snail darter was trivial in comparison to the alleged economic fruits of the project. The environmental impact statement drafted for the Tellico Project emphasized its economic benefits, claiming it would "create an ideal living, working, and recreation environment and pave the way for the economic development of an area of east Tennessee characterized by low incomes and underutilization of human and natural resources."[14] People were eager to reap the economic benefits and did not want to forfeit them for the sudden

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[11] *TVA v. Hill*, 20.
[12] *TVA v. Hill*, 20.
[13] *TVA v. Hill*, 20.
[14] Tennessee Valley Authority: Office of Health and Environmental Science, "Tellico Project: Environmental Impact Statement Volume 1," February 10, 1972, Northwestern University, I-1-2.

emergence of an endangered fish. A movement soon grew, seeking to incorporate economic considerations into the ESA. Yet even after these considerations were taken into account and included in an assessment of the Tellico Project, it was determined that the project's benefits did not even equal the project's total costs.[15]

Regardless of the dam's projected failure, there was a continued push to restart the project. Curiously, these findings were not broadcast in the media, as former reports on the project's supposed success had been. Three weeks after it was determined that the project would fail, Tennessee Congressman John Duncan organized a protest near the river, where hundreds of locals came to mock the little fish.[16] Support for the dam persisted, and when asked for opinions on the committee's review, those in favor of the project perceived the study with uncertainty or described it as "Washington politics."[17]

The Act's reactive nature forced the public to change their economic plans and lifestyles, making it difficult to fathom the ecological significance of a seemingly unimportant fish. Ronald Reagan, then governor of California, weighed in on the debate. Like Powell, he adamantly opposed the snail darter decision. In radio addresses between 1977 and 1979, Reagan critically referenced the Supreme Court's decision on the snail darter case and questioned the importance of preserving the fish, arguing that it differed only slightly from the 77 other darters in Tennessee rivers.[18] Reagan embodied a viewpoint which many Americans seemed to adopt in the years following the environmental movement. Many individuals, like Reagan, were unable to grasp how the snail darter was more significant than the Tellico Project. In many ways, the snail darter

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[15] "The Snail Darter Is Not the Problem," *New York Times*, September 14, 1979.
[16] Zygmunt J.B. Plater, *The Snail Darter and the Dam: How Pork-Barrel Politics Endangered a Little Fish and Killed a River* (New Haven: Yale University Press, 2013), 293.
[17] Plater, 293.
[18] Murchison, *The Snail Darter Case*, 4.

controversy contributed to the growing opposition to the environmental movement in the late 1970s and early 1980s. It became a symbol of the growing polarization of opinions concerning federal environmental law.[19]

The case of the northern spotted owl sparked more contentious litigation against the ESA, reflecting the stark divide between those in favor of the Act and those against it. This owl species resided in the forests of southwestern British Columbia, western Washington and Oregon, and northwestern California.[20] The timber industry dominated these lands in the Northwest and by the mid-1980s, scientists had expressed concerns over the long-term survival of the owl species due to the continued logging in its habitat.[21] An important discovery concerning the close association between spotted owls and old-growth forests made negative implications about the owl's future, as it rested on public land subject to the harvest of timber.[22] The debate over protecting the owl soon became polarized between those in favor of protecting the owl and those in favor of protecting the timber industry.

Passionate environmentalists were eager to protect the owl and its habitat. Beginning in the 1980s, several environmental organizations pushed for the spotted owl to be listed as threatened under the ESA, but the FWS denied early petitions.[23] Like in the case of the snail darter, environmental experts projected that the economic benefits from assisting the timber industry were not worth the loss of the endangered owl species. They argued that if the logging

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[19] Stanford Environmental Law Society, *The Endangered Species Act: A Stanford Environmental Law Society Handbook* (Stanford: Stanford University Press, 2001), 24; Murchison, *The Snail Darter Case*, 3.
[20] Claire A. Montgomery, Gardner M. Brown, Jr., and Darius M. Adams, "The Marginal Cost of Species Preservation: The Northern Spotted Owl," 113.
[21] Victor M. Sher, "Travels with Strix: The Spotted Owl's Journey through the Federal Courts," *ScholarWorks University of Montana* 14 (June 1993), 44.
[22] Northern Spotted Owl v. Hodel, No. 716 F. Supp. 479 (U.S. District Court for the Western District of Washington November 17, 1988).
[23] Stanford Environmental Law Society, *The Endangered Species Act: A Stanford Environmental Law Society Handbook* (Stanford: Stanford University Press, 2001), 27.

continued at its current rate of 125,000 acres per year, the old-growth forests would be gone within thirty years and the mills would be forced to close regardless.[24] Even so, the FWS determined that a listing of the owl was not warranted, claiming there was a need for increased population trend information and other biological data to validate its listing.[25] Here, again, were efforts to prioritize economic growth over species preservation, even when the economic benefits would only be short-term.

As in the snail darter case, the courts upheld the Act, despite the conflicts that arose among the public. Numerous organizations took action against the FWS in *Northern Spotted Owl v. Hodel* in 1988, arguing that the FWS was required to list species under section 4 of the Act. In trial, the District Court found that the FWS documents lacked a solid explanation and an expert analysis to support its conclusion. In fact, none of the experts referenced had concluded that the northern spotted owl was not at risk of extinction. Like in the case of the snail darter, the court was determined to emphasize the legitimacy of the ESA and to reaffirm that the US was taking endangered species protection seriously. The FWS was therefore determined to have failed to provide evidence to support its conclusion and was ordered by the Court to prove within 90 days that listing the owl was unwarranted.[26]

The reason for the FWS's refusal to list the owl speaks to the consequences of the ESA's reactive nature. The petition study process was delayed, and the peer-reviewed study team report was significantly altered to make it more suitable for a no-list decision. Moreover, the official who made the no-list decision admitted to denying the listing petition because the ESA was "cumbersome to implement" and believed that top FWS and Interior officials would not accept a

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[24] Claire Andre and Manuel Velasquez, "The Spotted Owl Controversy," *Santa Clara University*, November 13, 2015.
[25] Northern Spotted Owl v. Hodel.
[26] Northern Spotted Owl v. Hodel.

decision to grant the petition.[27] This official argued that if the owl was listed, protection initiatives would be delayed and made more costly by legal actions initiated by interested parties. He believed that cooperative agreements with federal agencies would allow protective efforts to get underway faster at a lower cost to the government.[28] It appears that the FWS official sought to circumvent the ESA because of its reactive nature, looking to avoid potential litigation in response to the owl controversy.

The impacts of the *Hodel* ruling were curtailed when the FWS continued to avoid its duties under the ESA. By June 26, 1990, the FWS published a final rule confirming the owls' listing as a threatened species. The FWS had clearly stated in its rule that the northern spotted owl was closely associated with the old-growth forests it inhabited and that if the timber harvesting continued at its present rates, much of the owls' habitat would be gone within two to three decades. In the listing stipulations, however, the FWS deferred designation of a critical habitat for the spotted owl, claiming it to be indeterminable.[29] Again, the FWS was trying to avoid allocating proper assistance to the species and its habitat, seeking to circumvent the costly reactive regulations of the ESA. Environmental groups were angry at the FWS and by February of 1991, new litigation concerning the owl's habitat designation was brought to the courts.

In the 1991 case of *Northern Spotted Owl v Lujan*, the court again upheld the ESA, ruling that the FWS's failure to designate critical habitat had violated the Act.[30] The court ordered the

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[27] "Endangered Species: Spotted Owl Petition Evaluation Beset by Problems," Report to the Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment, Committee on Merchant Marine and Fisheries, House of Representatives (Washington D.C.: United States General Accounting Office, February 21, 1989), 12.

[28] "Endangered Species: Spotted Owl Petition Evaluation Beset by Problems," Report to the Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment, Committee on Merchant Marine and Fisheries, House of Representatives (Washington D.C.: United States General Accounting Office, February 21, 1989), 12.

[29] Northern Spotted Owl v. Lujan, No. 758 F. Supp. 621 (United States District Court, W.D. Washington, N.D February 26, 1991).

[30] Sher, "Travels with Strix," 47.

FWS to provide a written plan for completing review of the critical habitat of the northern spotted owl by March 15, 1991, and to publish its proposed critical habitat plan within 45 days.[31] Both judicial decisions over the spotted owl reflected a desire to uphold the ESA and to prioritize species preservation over economic development. The responses to these decisions, however, highlighted public disagreement over implementation as well as complex industry motives seeking to undercut the Act's authority.

These initial legal victories over the FWS failed to establish nationwide support for the Act. On May 14, 1992, the Interior Department released the draft recovery plan for the northern spotted owl, ensuring a high probability of the owl's survival in the eleven regions it inhabited. That same day, a Cabinet level committee convened under the George H. W. Bush administration, voting to grant the Bureau of Land Management (BLM) an exemption from the Act. Environmental lawyers targeted the BLM, arguing the institution had violated section 7 by failing to consult with the FWS on certain timber sales likely to damage critical owl habitat.[32] The courts, again, rejected this effort to weaken the ESA, but the controversy over the spotted owl continued.

Although Congress put forth new efforts to protect the owl from continued logging, these efforts proved futile. In August of 1992, Congress issued a hearing before the subcommittee on environmental protection to discuss a bill to ensure the preservation of the northern spotted owl as well as the stability of communities dependent on the resources of the public lands where the owl lived. The recovery plan in the 1992 hearing was promising, ensuring sufficient area and habitat continuity. The strategy established a system of 50 reserved and deferred owl habitat

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[31] Northern Spotted Owl v. Lujan.

[32] Stanford Environmental Law Society, *The Endangered Species Act: A Stanford Environmental Law Society Handbook*, 28.

areas in addition to research programs to facilitate sustainable forest management measures to protect the owl.[33] These resolutions symbolized another attempt within Congress to uphold the ESA, though these resolutions have proven inadequate.

Although there was this desire to protect the owl species while supporting the timber industry and human populations, the current status of the owl is not promising. The spotted owl is still listed on the ESA as threatened and its population is continuing to decline. While other factors indeed contribute to this decline, experts say the owl is in a significantly more dire situation than it was when first listed. A recent analysis in Washington, Oregon, and Northern California found that, between 1995 and 2018, spotted owl populations in many areas shrank by at least 65%. Moreover, the US Forest Service estimates that only between 3,000 to 5,000 northern spotted owls remain on federal lands.[34] Despite government efforts to uphold the ESA and to implement measures to protect the northern spotted owl, something is missing in the ability to fight off species endangerment and extinction entirely.

As demonstrated by the spotted owl case, people tended not to support species preservation once it impacted their livelihoods, and the US government held partial responsibility, as it failed to establish proactive conservation legislation. The ESA lists species once they are already threatened or endangered and then attempts to halt actions which have already wreaked havoc on these species and their habitats. Implementing such regulations has been very difficult and points to why owl populations are still declining. An interesting line of thinking regarding the approach to endangered species preservation was articulated by Senator Baucus from Montana in his opening statement in a congressional hearing in 1992. He criticized

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[33] "Northern Spotted Owl Preservation Act," August 12, 1992," 108-109.

[34] Ashley Braun, "It's the Moment of Truth for Saving the Northern Spotted Owl," *Audubon Magazine*, Fall 2022.

the way in which the US handles endangered species preservation, stating "we put off doing things to protect species and ecosystems under other laws until we get to the point where there's a crisis. Then we list a species under the ESA and pull out all the stops to try and prevent it from being extinct."[35] Theoretical support for the ESA was widespread, but people responded negatively to its reactive policy which has imposed sudden changes and halted desired projects.

The ESA does not focus on long term, proactive change. Instead, it allows destructive behavior to continue until certain species are listed as endangered or threatened. Past cases have demonstrated that once a species was listed, institutions and individuals would often utilize legislative loopholes to avoid facing the sudden, reactive regulations of the ESA. As conveyed in the snail darter case, there seems to be this underlying motive to diminish environmental goals as a means of avoiding the strict and reactive legislation of the ESA, as it imposes rigid policies on landowners and corporations.

The spotted owl controversy, like the snail darter case, undoubtedly fueled backlash against the ESA. There exists a clear desire to uphold species preservation until it conflicts with personal interests. The spotted owl case contributed to the rise of an organized property rights movement closely associated with the anti-environmental "wise-use" movement.[36] These movements have sought to weaken environmental legislation, most notably the ESA. This is a clear reflection of how legal implementation of the Act has developed a new, controversial mode of thinking that contradicts prior support for the legislation. In addition to prioritizing short-term economic gains, is this negative reaction among individuals and institutions that arose from the Act's reactive approach to species endangerment.

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[35] "Northern Spotted Owl Preservation Act," 3.

[36] Stanford Environmental Law Society, *The Endangered Species Act: A Stanford Environmental Law Society Handbook*, 29.

Even though courts have upheld the ESA, these decisions have been met with a bitter backlash from the public. There seems to have been a general shift in public attitudes concerning species preservation as a result of the Act's implementation. The legal case studies on the snail darter and the northern spotted owl reflected a new mode of thinking about species preservation in the US. While economic interests indeed fueled controversy, there was a continued desire among the public to suppress the law even in the absence of economic gain. The Act's reactive approach to species preservation required immediate changes when a species was listed as threatened or endangered. This ignited fervent contention among the public. Over time, as implementation continued to spark debate and controversial litigation, the government worked to reform the law to satisfy growing demands for economic considerations and to further reaffirm the Act's legitimacy.

Legal Amendments

As a result of the controversy surrounding the implementation of the ESA, some changes have been made to the law to appease its most adamant critics, while other changes ignited further contention. The most notable amendments made in 1978, 1983, and 1988 capture the evolution of the Act over time. Although Congress was pressured to weaken the Act to appease those seeking economic relief from its stipulations, Congress also reaffirmed the legitimacy of the Act through these amendments. The amendments ultimately reveal the complex interplay between economic considerations and species preservation.

The 1978 amendments reflected the growing desire to incorporate economic criteria into the Act in response to the snail darter decision. Most noteworthy of these amendments were the

provisions added to section 7, seeking to appease those enraged by the Tellico Dam's forced shut-down. Following the Supreme Court ruling in 1978, Senator Howard H. Baker of Tennessee compromised on a revised ESA.[37] This amendment established a Cabinet-level committee to review disputed projects, taking into account both environmental and economic concerns. This committee, soon dubbed the "God Squad," was granted the ability to allocate exemptions to federal projects halted by the Act if the project's proposed economic benefits outweighed the benefits of preserving the endangered species.[38] The fate of an endangered species now rested in the hands of this committee. The persistent effort to prioritize economic development in this amendment indeed reflected the growing desire to prioritize economic gain over wildlife and environmental protection. It highlighted the shift in thinking that occurred, wherein humans placed themselves above other species and justified their right to economic gain even at the cost of environmental destruction. Many supported endangered species preservation until it impacted them, and this amendment provided such individuals and institutions with a loophole to avoid economic losses.

The 1978 amendments also established new measures which decreased species listings. Congress made the listing procedure more complicated by requiring the designation of a species' critical habitat as part of the listing and by allowing the Secretary to delay or withdraw a proposed listing if the critical habitat was not determinable. These changes alleviated fears that critical habitat designations would impose land use restrictions on both private and public lands.[39] This new critical habitat designation requirement significantly slowed new listings. Approximately 2,000 species proposed for listing were withdrawn from consideration in 1978

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[37] "The Snail Darter Is Not the Problem."
[38] Stanford Environmental Law Society, *The Endangered Species Act: A Stanford Environmental Law Society Handbook*., 22.
[39] Stanford Environmental Law Society., 23.

alone.[40] These initial amendments of 1978 reflected an attempt by Congress to weaken the Act. The snail darter controversy played a pivotal role in sparking these changes, and Congress attempted to satisfy these demands accordingly. Nonetheless, these loopholes allowed for further disregard of the Act and so Congress reasserted the Act's authority in succeeding amendments.

The 1982 amendments reflected support for the Act. Congress asserted that the determination of the status of a species under section 4 was to be based solely on biological and trade information, without consideration of possible economic or other effects.[41] Other changes were designed to speed up the listing process.[42] These adjustments were crucial in reinforcing the original intent of the Act. By prioritizing biological factors over economic effects and speeding up the listing process, it was clear that Congress sought to uphold its initial goal to ensure species preservation without succumbing to the pressures of short-term economic interests.

The 1988 amendments reaffirmed congressional intent to protect all species. These changes addressed the issue concerning species who were left unprotected as they awaited listing. The Secretary was granted the ability to enact emergency listings for species facing significant risks.[43] This amendment also addressed recovery plans, prohibiting the Secretary from considering a species' taxonomic classification when prioritizing recovery plans. All animals were to be granted equal protection.[44] Again, this amendment reflected a turn back to the initial intent of the Act, strengthening the law to ensure protection for all species.

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[40] Stanford Environmental Law Society., 23.
[41] "History of the Endangered Species Act: Principal Amendments," *U.S. Fish & Wildlife Service*, n.d..
[42] Stanford Environmental Law Society, *The Endangered Species Act: A Stanford Environmental Law Society Handbook*., 25.
[43] "History of the Endangered Species Act: Principal Amendments."
[44] Stanford Environmental Law Society, *The Endangered Species Act: A Stanford Environmental Law Society Handbook*., 26.

Through these amendments, the government tended to uphold the supremacy of its ESA. Legal case studies have demonstrated how the courts have tended to favor endangered species preservation and subsequent amendments to the Act convey how Congress has tightened the law to ensure species and habitat protection. While many institutions continued to support the Act's integrity, the shift in opinion from widespread support to heated contention is too important to ignore.

A New Mode of Thought Established

The ESA is without a doubt a controversial law. What began as initial consensus over protecting endangered species soon changed into desperate attempts to find loopholes in the Act's stringent legislation and to defeat environmental protection and species preservation efforts altogether. Through legal case studies and an analysis of the Act's amendments, it became clear that Congress as well as the courts worked to uphold the Act. It was individuals and institutions, however, that responded negatively to the implementation of the legislation. The ESA approached species preservation reactively, only aiding a species once it was already endangered or petitioned for listing. That said, when individuals realized that they needed to change their practices or halt their projects for an endangered species on their land, a stubborn resistance arose. Even when the economic benefits were proven to be low, opposition persisted, reflecting the flawed approach of reactive environmental law. The general population seemed to support endangered species preservation in theory, but not in practice. People downplayed issues concerning endangered species when they were forced to undergo sudden changes or forfeit supposed economic benefits.

In many ways, this mode of thought that arose reflects the broader polarization over environmental law and policy in America today. Rather than creating laws that proactively address biodiversity, the US boasts its ESA which focuses on already endangered species and forces individuals to make sudden changes and sacrifices. The post-passage challenges of the ESA reveal that it is not only economic interests that hinder support for this widely controversial law, but also the lack of proactive stipulations to address biodiversity and species preservation before major threats arise.

Chapter 3

Economic Growth: A Poor Judge of ESA Impacts

Since the passage of the ESA, Americans have struggled to strike a balance between economic development and economic well-being. Many seem to believe this notion that, "as species protection is weakened, we move toward satisfying development interests at the expense of environmental interests. As species protection is strengthened, we move toward satisfying environmental interests at the expense of development interests."[1] In the years following its enactment, critics of the ESA often argued that economic development and endangered species preservation could not reasonably coexist, that moving towards one of these goals would deter from the other. Further fueling this mode of thinking about species preservation, economists have continuously associated growth and development with overall well-being.

Economic interests have indeed fueled a backlash to the Act, but, as the previous chapters have highlighted, there is a deeper issue at play here. Economic perspectives tend to disregard the positive effects that species conservation has on economic well-being in the long run. The short-term thinking about the economy that continuously dominates discussions highlights the issues posed by the absence of proactive and broad-ranging principles within the law. Many private landowners and industries face economic setbacks and losses in the short-term and use these economic shortcomings as a means of discrediting the importance of species protection in general. Opponents of the Act continuously equate a lack of short-term economic growth with a lack of overall well-being.

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[1] Andrew Hoffman, Max H. Bazerman, and Steven L. Yaffee, "Balancing Business Interests and Endangered Species Protection," *Massachusetts Institute of Technology* 39, no. 1 (1997).

It is important to understand the impacts of economics on public perceptions surrounding the ESA. Even so, the economic consequences of the Act are not all the same. In some situations, individuals have experienced economic losses as a result of the Act. In others, the ESA has fueled economic growth. In acknowledging the diverse economic impacts of the ESA, one can begin to grasp that not all growth is the same, and that growth is therefore not a fair measure of the Act's overall impact. With that said, economic growth should no longer be the measure by which the success or failure of such a multifaceted Act is measured.

An Unwavering Commitment to Growth

It was not long into the implementation of the ESA that economic issues began to polarize opinions over the Act and threaten efforts to protect and preserve endangered species from extinction. The ESA has, at times, imposed economic costs on private property owners and industries, which has fueled opposition to the Act. Such situations have highlighted the flaws of the law's reactive and narrow-sighted framework. Public resistance to the ESA has been strongest among private landowners who struggled to grapple with the sudden changes required of them when an endangered species was listed, or a critical habitat was designated on their property. These individuals began to oppose such regulation as a result.[2] The economic arguments against the Act's restrictions focused primarily on short-term impacts, allowing for economic growth to dominate the discourse over the Act.

The costs associated with protecting endangered species are indeed real, sometimes resulting in significant economic losses at the local and regional level. These expenses took the

[2] Mark W. Schwartz, "The Performance of the Endangered Species Act," *Annual Review of Ecology, Evolution, and Systematics* 39 (2008): 279–99.

form of both lost profits and foregone opportunity costs. Lost profits included costs for permits and licenses, redesigning plans, and legal fees. Opportunity costs, on the other hand, were profitable opportunities that property owners lost due to ESA restrictions. Often, the ESA limited the use of private property due to the listing of species, critical habitat designation, and recovery plans.[3] When a private landowner was forced to change their practices to accommodate a single endangered plant, animal, or critical habitat, they lost the potential for growth. Delays in providing permits and petitioning, alterations to development plans, and job loss were also direct consequences of restrictive ESA policy.[4] In such situations, it became difficult for an individual to grasp the benefits of protecting an endangered species. Economic growth soon became the main point of contention, and those who underwent such economic losses sought to undermine the Act entirely for blocking economic growth.

ESA-related discourse on growth consisted of both lost profits and foregone opportunity costs. Sustainable practices and restrictions on habitat destruction should be enacted even in the absence of an endangered species. Allowing landowners and industrial entities unrestricted authority in land use, only to intervene suddenly upon the discovery of an endangered species or critical habitat, manifests a reactive regulatory approach. As the previous chapter highlighted, such policy elicits negative reactions from stakeholders, who may overlook the long-term economic benefits of species protection due to economic loss in the short-term.

The ESA has indeed placed economic burdens on industries in the wake of its passage, setting the tone for opponents' focus on growth and development. For instance, in 1994, the

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[3] Jason F. Shogren and Patricia Hayward, "Biological Effectiveness and Economic Impacts of the Endangered Species Act," *Land and Water Law Review* 32, no. 2 (1997): 531–50.
[4] Hoffman, Bazerman, and Yaffee, "Balancing Business Interests and Endangered Species Protection," 60.

Bonneville Power Administration estimated that its expenditures on salmon conservation in the Columbia River basin amounted to approximately $350 million, of which about $300 million accounted for lost power revenues.[5] In this case, ESA-related expenditures aimed at implementing salmon conservation measures resulted in a significant loss of profits. Enormous funds were spent on mitigating the impact of the company's activities on the endangered salmon population. This case highlights the consequences of the reactive, narrow policy of the ESA, wherein an industry was forced to undergo significant economic losses for the sake of one endangered species. Following the years after the ESA was passed, numerous industries and individuals have attempted to oppose or seek exemptions from the ESA to avoid similar sorts of short-term economic costs.

The controversy involving California's delta smelt was one instance where an industry sought exemption from the ESA on the grounds that it damaged economic growth. The delta smelt was a small translucent fish endemic to the California Bay-Delta.[6] The FWS first listed the smelt as threatened in 1993, which led to considerable legal wrangling for years, largely headed by concerns within the agricultural industry.[7] In 1992, Congress enacted the Central Valley Project Improvement Act requiring the government to perform an environmental impact statement before it could execute renewal contracts. In 1988, the plaintiffs – consisting of environmental groups including the Natural Resources Defense Council – sued the Bureau of Reclamation, alleging that its water management practices in the Sacramento-San Joaquin Delta

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[5] Committee on Scientific Issues in the Endangered Species Act et al., *Science and the Endangered Species Act* (Washington D.C.: National Academy of Sciences, 1995).
[6] Peter S Alagona, "The Delta Smelt: Water Politics by Another Name," in *After the Grizzly: Endangered Species and the Politics of Place in California*, 1st ed. (University of California Press, 2013), 198–224.
[7] Heather Welles, "What's a Smelt Worth?: The Endangered Species Act and the Commerce Clause in the Bay-Delta," *Ecology Law Quarterly* 39, no. 2 (2012): 683.

were violating the ESA by renewing water contracts before completing required endangered species consultations, and thus causing harm to the endangered delta smelt. The protection of the delta smelt sometimes limited diversion of water for human use, especially for irrigated agriculture, thus limiting agricultural output and profits. As a result, the agricultural industry, worried about economic growth, opposed the delta smelt listing and sought exemption from these policies which were having significant impacts on water policy in California. Nonetheless, the Court affirmed the district court's ruling that the ESA was violated. The case resulted in a settlement agreement which required changes in water operations aimed at protecting the delta smelt and other endangered species in the ecosystem. The government upheld species protection at the expense of the agricultural industry, giving further rise to public discontentment surrounding the economic implications of the Act. This case is a clear example of how economic growth became the primary grounds upon which industries began to seek exemption from the Act.

This conflict continued into the early 2000s. In the case of *Natural Resources Defense Council et al. v. Kempthorne et al* in December of 2007, the district court judge issued an interim remedial order which temporarily closed the delta's pumping plants to protect the endangered delta smelt. The pumping restrictions led to additional water supply reductions for downstream users in what was an already dry year.[8] Various studies later found, for instance, that about 75% of the 2009 water delivery reductions were due to a lack of precipitation, not endangered species regulations.[9] Even then, these restrictions disrupted agricultural irrigators and litigation continued throughout the early 2000s.[10] The concern over ESA regulations posing limitations on

[8] Alagona, "The Delta Smelt: Water Politics by Another Name," 199.
[9] Alagona, 200.
[10] Welles, "What's a Smelt Worth?: The Endangered Species Act and the Commerce Clause in the Bay-Delta," 684.

agricultural output and profits demonstrates the rise of economic self-interest and concerns over growth in response to endangered species protection. Economic growth was clearly becoming the main point of contention over the Act even though it was often not significantly affecting growth.

Despite the many controversies surrounding the implementation of the ESA, its impact on economic growth has varied. Several studies have demonstrated that endangered species protection did not harm and, in some instances, actually benefited economic development, especially since the amendments of 1978, 1983, and 1988. As the previous chapter demonstrated, high profile cases tended to grab the public's attention and influence perceptions of the Act, but the ESA has actually protected economic health and saved jobs on numerous occasions.[11] It is important to note that not all economic growth is the same, and yet, it is constantly used as a tool for discussions over the implications of the ESA.

In the years following the ESA's passage, various studies were conducted to assess the impacts of the Act. These studies were primarily focused on the impact the Act had on economic growth, which soon became the framework of analysis for most studies. The underlying motive was to better understand whether wildlife protection and economic growth could coexist. Opponents to the ESA began to argue that the law had had a devastating effect on local economies since it was first passed, even though there had been no empirical analysis implying this. Economic growth grew to be the common point of contention over the Act and remains the reason why many still oppose its regulations today.

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[11] "The Endangered Species Act: How Litigation Is Costing Jobs and Impeding True Recovery Efforts," December 6, 2011.

A study from 1997 analyzed the economic impact of the ESA in the non-metropolitan West, gathering data from a sample of 333 counties in the area. The paper found no relationship between the density of federally listed threatened and endangered species and employment growth. The study was therefore unable to support the hypothesis that endangered species listings had a negative effect on the non-metropolitan county economies of the US West.[12] This highlights the lack of evidence to support the argument that the Act resulted in negative economic growth in the years following its enactment. Instead, it demonstrates how diverse the economic effects of the Act were, showcasing the flawed nature of using economic growth to judge the Act's overall impact.

Another study conducted in 1995 used growth as a measure of the ESA's economic impact. This study explored the connection between the ESA and economic growth in all fifty states from 1975 to 1990 and concluded that the ESA had not been detrimental to economic development. There was no negative relationship found between ESA listings and either construction employment or gross state product.[13] It was thus deemed implausible to associate the ESA with negative economic growth. For instance, Alabama, a state with seventy listed species, had a booming economy, while Louisiana, with only twenty-one listed species, was doing poorly economically. The study concluded that, if anything, there was a potential positive association between economic growth and species listings. Even though the study failed to consider the opportunity costs associated with the ESA, it nonetheless demonstrated the varied economic impacts of the ESA in the years following its enactment.[14] Species preservation and

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[12] Kevin T. Duffy-Deno, "Economic Effect of Endangered Species Preservation in the Non-Metropolitan West," *Growth and Change* 28, no. 3 (1997).
[13] Shogren and Hayward, "Biological Effectiveness and Economic Impacts of the Endangered Species Act," 539.
[14] Shogren and Hayward, "Biological Effectiveness and Economic Impacts of the Endangered Species Act," 539.

economic development were not necessarily mutually exclusive, as they were typically made out to be. ESA policies did not seem to have a direct impact on economic growth but were constantly assessed in terms of economic growth.

Growth became the main focus of economic discourse surrounding the ESA, even though the Act had very little effect on growth. In 1990, the FWS examined a total of 28,000 projects, of which less than 700 required a formal review. Of these 700, less than 1% were found to have a significant impact on an endangered plant or animal. Only two projects were stopped altogether. The focus on the short-term economic costs among the few stakeholders whose projects were halted inaccurately reflected the Act's overall impact on economic development. Moreover, from 1987 through 1991, the FWS consulted with other federal agencies on approximately 96,800 projects and vetoed only 54.[15] In the grand scheme of things, very few projects encountered issues with the ESA in the years following its enactment. The media overstated the few cases that did undergo issues and face economic costs, thus fueling backlash towards the Act. In reality, economic growth was not majorly affected by the passing of the ESA, despite the fact that it was constantly addressed in discourse. In instances where the ESA did indeed spur growth, however, there were sometimes negative implications for the endangered species, thus defeating the intention of the Act.

The Downsides of Green Growth

The ESA provided numerous, tangible economic benefits after its passage. Much of this seemingly 'green growth' can be attributed to the increase in ecotourism. Ecotourism refers to

[15] John R. E. Bliese, "The Great 'Environment Versus Economy' Myth," *Brownstone Policy Institute*, 1999.

tourism directed toward threatened natural environments in an attempt to support conservation efforts. The ESA fueled wildlife-related tourism, as people eagerly sought out opportunities to observe endangered species firsthand. ESA-induced spikes in ecotourism not only showcased the potential for economic growth in response to the Act, but also the negative impacts of such growth. It ultimately highlighted the consequences – both positive and negative – of the reactive nature of preserving a singular species rather than entire ecosystems and of the potential consequences of economic growth on long-term economic well-being.

The reintroduction of the gray wolf to Yellowstone National Park, facilitated by the ESA, proved to be a major economic success. The gray wolf was present in Yellowstone when the park was first established in 1872, but a survey in the 1970s found no evidence of wolves in Yellowstone, apart from the occasional animal that wandered into the area.[16] Wolves were among the original species on the list when the ESA was enacted in the 1970s.[17] The decline in wolf numbers was due to hunting by ranchers and the loss of prey as a result of agricultural growth.[18] By 1985, the Northern Rocky Mountain Wolf Recovery Team advised the reintroduction of an experimental population of gray wolves into Yellowstone National Park.[19] Congress appropriated funds for an environmental impact statement for wolf recovery and by the mid-1990s, wolves were relocated to Yellowstone National Park.[20] The attempt to restore the

[16] "Wolf Restoration," National Park Service.
[17] Cassidy Randall, "A Rewilding Triumph: Wolves Help to Reverse Yellowstone Degradation," *The Guardian*, January 25, 2020.
[18] "Wolf Restoration."
[19] David A. McNaught, "Wolves in Yellowstone?: Park Visitors Respond," *Wiley*, Wildlife Society Bulletin (1973-2006), 15, no. 4 (Winter 1987): 518.
[20] "Wolf Restoration."

endangered wolves to their natural habitat was a direct consequence of ESA policy and its attempt to safeguard listed species.

The revival of the gray wolf in Yellowstone led to a surge in ecotourism while simultaneously improving biodiversity in the region. Since then, surveys have shown a 3.5 to 4% increase in tourism associated with this effort. From 1995 to 2002, thousands of visitors per year came to the park specifically to see the wolves.[21] Moreover, preliminary data from recent studies suggest that wolf recovery will likely improve the biodiversity of the Greater Yellowstone Ecosystem.[22] In this case, the wolf relocation effort was an instance of green growth, having had a positive impact on both economic well-being as well as the natural environment. The thriving wolf population in Yellowstone illustrates a major success of the ESA, as an Act able to conserve wildlife and biodiversity while simultaneously promoting economic development and well-being. This is not always the case with ecotourism, however, as it affects species and economies differently.

The ESA-facilitated conservation of the sea turtle also delivered economic benefits to several states, eventually raising concerns over species exploitation. Marine turtle populations had been largely depleted due to human overexploitation, fisheries by-catch, and habitat destruction.[23] Fortunately, many populations increased since the passage of the ESA in 1973.[24] Loggerhead turtles were deemed an excellent species for ecotourism, as they can be easily observed on shores where they come to nest. As a result, these turtles became an important

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[21] "Gray Wolves Increase Tourism in Yellowstone National Park," *Outside Interactive, Inc*, June 21, 2011.
[22] "Wolf Restoration."
[23] Sebastian Troëng and Carlos Drews, "Money Talks: Economic Aspects of Marine Turtle Use and Conservation," *World Wildlife Fund*, 2004, 7.
[24] "Green Turtle Conservation Successes and Continuing Challenges," *NOAA Fisheries*, June 16, 2023.

economic resource to the state of Florida following their listing. Thousands of tourists from around the world flocked to the Florida coast every year to attend organized turtle watches. According to the Florida Department of Environmental Protection, approximately 10,000 tourists participated in the 1993 nesting season.[25] The state of Hawaii witnessed a similar trend. The Pacific Green Sea Turtle was listed as threatened in July of 1978 and in the following years, an increasing number of visitors came to observe the turtles.[26] Similar to the wolf conservation efforts in Yellowstone, restoring sea turtles promoted economic growth in the regions they inhabited, including Florida and Hawaii.

Although ecotourism reaped significant benefits for coastal economies, it has also posed challenges for the endangered turtles. Studies have revealed that turtles in both Florida and Hawaii were affected by the large number of tourists, suggesting the increase in economic activity may have had negative effects on turtle nesting. Attempts to capitalize on endangered wildlife through tourism was, at times, taken too far. The ESA lacked guidance on wildlife viewing, making it difficult to distinguish whether being in such close proximity constituted a "taking," which is defined as harassing, harming, pursuing, hunting, wounding, killing, trapping, capturing, or collecting a listed species.[27] A 1996 study in Florida found that organized turtle watches, even when conducted under the guidelines of the Florida Department of Environmental Protection, affected loggerhead nesting behavior. It concluded that nesting females were aware

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[25] Steve A. Johnson, Karen A. Bjorndal, and Alan B. Bolten, "Effects of Organized Turtle Watches on Loggerhead (Caretta Caretta) Nesting Behavior and Hatchling Production in Florida," Archie Carr Center for Turtle Research, University of Florida 10, no. 2 (April 1996): 570–77.
[26] Kamaile A. Nichols, "Turtles and Tourism: Where the Endangered Species Act Ends and Community Activism Begins," *UCLA Journal of Environmental Law and Policy*, 2007. 414.
[27] Nichols, 433.

of and disturbed by the presence of tourists.[28] In this case, the ecotourism associated with endangered sea turtles brought in too much economic activity and thus threatened the turtles themselves. It seems economic growth in the present could undermine future economic and environmental well-being.

Economic growth from the ESA has been experienced in different ways. The ESA's reactive method of protecting a single species over entire ecosystems enabled the exploitation of endangered species which, in turn, created limits to growth. If the focus were on entire ecosystems, there would be potential opportunities to create long-term, lasting economic well-being. In the cases of the turtles in Florida and Hawaii, ecotourism resulting from ESA initiatives ended up exploiting the animals, thus defeating the purpose of the Act. The lack of holistic biodiversity conservation measures not only led ESA opponents to discredit efforts to protect species, but also led to mixed economic impacts. That said, it is incorrect to use economic growth as the determining factor of whether the Act is successful. Short-term growth from the ESA is situationally distinct. There were still downsides even in instances where the ESA seemed to elicit positive economic growth. Overall, the ESA has been found to have little to no impact on economic growth, so growth should therefore not be used as a measure for the Act's impact and success.

[28] Johnson, Bjorndal, and Bolten, "Effects of Organized Turtle Watches on Loggerhead (Caretta Caretta) Nesting Behavior and Hatchling Production in Florida." 575.

The Limits to Growth

Economic growth is a problematic way to assess the impact of the ESA as well as economic success in general. In 1972, the first edition of *The Limits to Growth* reported that ecological constraints would have a significant impact on global developments in the twenty-first century. The third edition, a thirty-year update, reemphasized this message. As stated in the book, the human economy cannot be maintained at its current rate for much longer. People are focused on nonstop economic growth, when, in reality, it is unsustainable in the long run. The authors argue that the current high rates of throughput are not needed to support a decent standard of living for all of the people in the world.[29] There has been such a focus on economic growth as a measure of success that sustainability has become "a concept so foreign to our present growth-obsessed culture."[30] With that said, society must let go of its never-ending desire for growth and understand that more growth is not necessary for or synonymous with economic well-being.

The unrelenting focus among economists on the ESA's impact on growth illustrates this push in American society for continuous growth. There needs to be a change in the structure of the systems in place, wherein people strive for an adequate, rather than excessive standard of living. To achieve this change, people around the world would need to derive satisfaction and set goals unrelated to the never-ending expansion of production and greater material wealth.[31] The ESA lacks proactive principles and has thus failed to inspire an alternative perspective on economic well-being. People continue to set short-term economic goals and strive for material

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[29] Donella Meadows, Jorgen Randers, and Dennis Meadows, *Limits to Growth: The 30 Year Update* (White River Junction, Vermont: Chelsea Green Publishing Company, 2004), 9.
[30] Meadows, Randers, and Meadows, 11.
[31] Meadows, Randers, and Meadows, 240.

gain, thus failing to recognize the long-term economic benefits of environmental and wildlife protection.

Economic Conclusions

In sum, concerns over economic growth have fueled much of the controversies surrounding endangered species protection in the US. As this chapter has argued, the ESA's reactive and narrow method of focusing on protecting a single species and its designated habitat fuels conflict among private landowners and industries who fear the short-term economic costs at stake when implementing such measures. The economic backlash to the ESA is reflective of the prioritization of present growth over future well-being. It fails to address the inherent benefits of protecting natural environments as a means of achieving long-term economic benefits. While there have indeed been negative economic consequences to the Act in the short-term, studies have placed far too much attention on growth as a measure of the Act's success.

There needs to be a shift in focus to more precautionary measures to protect and preserve biodiversity as a whole in order to push back against the controversial, short-term economic effects of the ESA. After all, individuals respond negatively to short-term economic costs. The protection of endangered species should be more rooted in general habitat and environmental protection. Identifying habitats to protect, as opposed to individual species and their habitats, would shift the attention from narrowly focused, restrictive measures to broad goals aimed at promoting environmental protection and economic well-being in the long run. Industries tend not to think about the long-term implications of their business, leading to discontent with the Act. This then highlights the common disconnect between environmental conservation and economic

interest. The narrow and reactive measure of addressing a single species and imposing strict regulations to protect it has continued to spark public outcry. It is true that "the benefits derived from nature can, under certain circumstances, create mutual gain solutions for both economic and environmental interests."[32] Environmental protection and sustainability can have long-term, positive impacts on economic well-being. People simply need to adopt an alternative way of thinking about economic well-being that is not centered around short-term economic growth.

[32] Hoffman, Bazerman, and Yaffee, "Balancing Business Interests and Endangered Species Protection," 60.

Conclusion

This thesis has highlighted the clear contention that arose shortly after the Act's passage, analyzing how the reactive, narrow framework of the law has fueled controversies in its implementation. The law is set up in such a way that allows harmful practices to continue until they are found to endanger a singular species, and then imposes harsh restrictions. People have responded negatively in instances where large scale projects are halted for the sake of a single endangered species, and, as a result, many begin to deride the Act. In this way, the law inadvertently encourages this societal push for economic growth without regard for long-term well-being.

The conflicts that ensued because of the Act were not limited to the years immediately following its passage. The ESA has remained a highly contested law in the modern day, especially in recent years. Since the law was first enacted in 1973, more than 1,650 species have been listed as threatened or endangered, and, of those, only 54 have been delisted.[1] At the same time, however, there exists clear evidence that more species improve in status, rather than decline, because of ESA protections.[2] Conflicting evidence leads to conflicting views. Despite initial bipartisan support, the law has become increasingly politicized because of its varied impacts on economic growth.

The ESA has undergone major changes over the years which are largely reflective of the contemporary presidential administration. The Act was severely weakened under the Trump Administration in 2019, which introduced provisions that stripped threatened species of their

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[1] Friedman and Einhorn, "Biden Administration Restores Wildlife Protections Weakened Under Trump."
[2] Mark W. Schwartz, "The Performance of the Endangered Species Act," *Annual Review of Ecology, Evolution, and Systematics* 39 (2008): 279–99.

previously held protections and created loopholes to assist economic growth. The latter provisions allowed regulators to factor in economic measures in determining whether a given species was to be granted protection under the Act. Many of the Trump-era changes to the ESA were recently reversed in June of 2023 under the Biden Administration, including the provision that strengthened protections for threatened species. Three additional regulations were also introduced, making it more difficult to remove a species from the endangered list.[3] The ESA has thus become an increasingly partisan law, continuously undergoing changes and facing backlash depending on the administration in power.

In addition to fueling controversies within the federal government, the ESA has sustained its highly contested status among the public in conjunction with the increased polarization of environmental policy in the US. Democrats typically value species conservation more highly than Republicans and are more likely to support the ESA, though both parties maintain that economic growth holds equal value to wildlife conservation.[4] As emphasized throughout the text, although the ESA has had little impact on overall economic growth, its occasional short-term economic costs continue to diminish support. Republicans and Democrats are in continuous disagreement over the Act, and constant legislative amendments reflect efforts to uphold divergent political interests depending on the administration in power. Protecting wildlife has become a very politically polarized topic even though it is in humanity's best interest to do so.

The constant struggle between economic growth and species preservation thus persists. In reality, these two goals can coexist, there simply needs to be a shift in conventional societal

[3] Lisa Friedman and Catrin Einhorn, "Biden Administration Restores Wildlife Protections Weakened Under Trump," *The New York Times*, June 21, 2023.
[4] Brian Czech and Rena Borkhataria, "The Relationship of Political Party Affiliation to Wildlife Conservation Attitudes," *Cambridge University Press*, March 2001.

perceptions surrounding species preservation. Society must shift its focus from short-term growth to overall well-being, which could be achieved through the implementation of proactive, rather than reactive, measures to protect wildlife.

Other nations have demonstrated a more proactive approach to species conservation. Through the European Union (EU), for instance, member states are bound by broader, international directives which demonstrate a more proactive conservation approach at the international level. Rather than listing species one by one based on imminent threats, this sort of approach encourages protecting designated natural ecosystems, proactively trying to prevent species endangerment in the first place. The EU Habitats and Birds Directives include a variety of species protection requirements as part of a broader effort to manage Natura 2000 sites. Natura 2000 is a network of protected areas within the EU, which already encompasses many of the habitats of threatened species. Each EU member state decides how to best manage the sites, implement solutions, and set site-specific conservation objectives reflecting the needs of the ecosystems. This nature-first approach is more holistic and future-oriented. Rather than confining protection to only listed species and their habitats, this promotes the idea of maintaining healthy ecosystems as a part of rather than a means to protecting endangered wildlife.

The US needs to turn away from its focus on economic growth and understand that growth does not denote well-being. As the previous chapter highlighted, the current rate of economic growth in the US is not sustainable in the long run. More proactive conservation policy would ensure the survival of the planet's resources, promoting long-term economic well-being as opposed to excessive short-term growth. Such a system would benefit both endangered species and humans alike and is growing increasingly important now more than ever before in the face of

the ongoing climate crisis. Well-being can no longer be defined by growth; an alternative, more holistic view is needed in order to achieve both economic and environmental well-being, and to ensure the long-term sustainability of planet Earth.

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