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The State of the States: An Overview of State Biodiversity Programs

by Susan George

Editors' Summary: Most popular and scholarly attention paid to biodiversity conservation has focused on federal efforts such as the ESA or international regimes like CITES. However, U.S. states have long taken action to protect biodiversity before the federal government. In this Article, Susan George discusses states' roles in biodiversity conservation, including jurisdictional issues and the authority upon which the states base their programs, new protection efforts, and what can be expected from states in the coming years.

[Editors' Note: This Article appears in the book Biodiversity Conservation Handbook*, by Robert B. McKinstry Jr., Coreen M. Ripp, and Emily Lisy, published in 2006 by ELI. The book can be ordered by either calling ELI at 800-433-5120 or logging on to the ELI website at http://www.eli.org.]*

I. Introduction

Across the United States, ecosystems and the wildlife species they sustain have declined dramatically since Europeans settled North America. From the destruction of ancient forests in the Pacific Northwest to the loss of long-leaf pine forests and savannas in the Southeast, no state is unaffected. Without an immediate and determined response, the states risk losing what remains of these ecosystems, which maintain the natural processes that make for fertile soils, breathable air, and clean water, and which are much loved by outdoor enthusiasts, hunters, fishers, and tourists. States also risk irreparably damaging the natural environment that is the rightful inheritance of future generations of Americans who will make from it the fabric of their lives.

Most popular and scholarly attention has been focused on international efforts to conserve biodiversity under the Convention on Biological Diversity[1] or the 1973 Convention on International Trade in Endangered Species

(CITES),[2] or on federal efforts under the Endangered Species Act (ESA)[3] or other federal wildlife laws. However, historically states have taken action to protect wildlife and other elements of biodiversity before the federal government. Today, states and private institutions are again taking the lead to initiate programs to conserve biodiversity broader than endangered species protection. This Article will discuss the role states play in protecting biodiversity, from their jurisdictional basis, to what states have traditionally done with this authority, what new efforts are underway, and what to look for in the coming months and years ahead.

II. The Power to Protect Biodiversity

The role of state government in halting the loss of biodiversity is crucial for several reasons. To start with, both the U.S. Constitution and common law dictate that state governments bear most of the responsibility for managing wildlife within their borders. The federal government's current role, while vital, is limited to protecting migratory waterfowl, birds of prey, and species listed as endangered or threatened under the ESA,[4] managing federally owned habitat, and complying with international treaties that the federal government has ratified, such as CITES.

Moreover, state governments own and manage large land tracts of tremendous biological value. They exert considerable influence over economic development and private land

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1. Convention on Biological Diversity of the United Nations Conference on the Environment and Development, *opened for signature* June 5, 1992, U.N. Doc. DPI/1307, *reprinted in* 31 I.L.M. 818 (1992), *available at* http://www.biodiv.org/convention/articles.asp (last visited May 25, 2005). For discussion of the convention, see John H. Knox, *The Convention on Biological Diversity*, in Biodiversity Conservation Handbook: State, Local & Private Protection of Biological Diversity 29 (Robert B. McKinstry Jr. et al. eds., 2006); David A. Brown, *Lessons on Protecting Biodiversity From Around the World: Biodiversity Conservation Programs Implemented by Other Nations Under the Biodiversity Convention*, in Biodiversity Conservation Handbook, *supra* at 39.

2. United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, *available at* http://www.cites.org (last visited May 25, 2005).

3. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.

4. *Id.*

use within their borders, both of which significantly impact wildlife and habitat. They have the authority to control the introduction and spread of "exotic" or non-native species within their borders—a serious and often overlooked threat to biodiversity.

Land use planning can also be an effective tool for preventing degradation of the natural landscape. By slowing urban sprawl, encouraging urban boundaries, and designing wildlife corridors within those borders, much habitat can be saved. Although land use regulation primarily takes place at the local level through zoning and subdivision controls, the authority for local governments to make these decisions typically comes from state enabling legislation. All states have some form of enabling legislation, and about a dozen states have actually adopted "growth management" laws aimed specifically at curbing the rapid, and often sprawling, land development that was not being fully addressed under the traditional land use laws.[5]

These three bases of authority give the states an enormous role to play in protecting the wildlife and habitat that comprise the biodiversity of their state.

A. Wildlife

Both the Constitution and common law recognize the primary responsibility of states to protect the wildlife within their borders. Under the Tenth Amendment of the Constitution, states have all powers not expressly delegated to the federal government. These federal powers, upon which most federal environmental laws are based, are the spending power,[6] the treaty power,[7] the Property Clause power,[8] and Commerce Clause power.[9]

Of all the federal powers, the Commerce Clause is the most frequently cited in support of the exercise of federal power to protect wildlife. The Commerce Clause is used as the basis for many of the strongest federal environmental laws, including the Clean Air Act,[10] the Clean Water Act,[11] the Marine Mammal Protection Act,[12] and the ESA. Under this clause, the U.S. Congress can regulate "persons or things" in interstate commerce, including wildlife.[13] Under the so-called dormant Commerce Clause, however, federal courts have frequently invalidated state attempts to regulate in a manner that "discriminates" against interstate commerce, including state environmental laws.[14]

However, the courts have repeatedly confirmed the states' primary responsibility over wildlife under the common law. Beginning with the U.S. Supreme Court's decision in *Geer v. Connecticut*[15] in 1896, the courts have specifically recognized the states' role regarding wildlife management. In *Geer*, where the state of Connecticut's ability to regulate commerce in game birds was challenged, the Court articulated a general theory of state "ownership" of wildlife, based on the state's police powers and public trust concept, and upheld the restriction on interstate commerce. Although the Court held that the state of Connecticut's ability to regulate interstate commerce in game birds violated the dormant Commerce Clause, 100 years later, in *Hughes v. Oklahoma*,[16] it reaffirmed the states' ability to protect the wildlife within their borders if otherwise consistent with the Constitution, thus confirming the states' public trust duty toward wildlife.

B. State-Owned Lands

The states also have responsibility for substantial amounts of land, including many large tracts. These lands include school trust lands, state forests, state parks, state gamelands, wildlife reserves, and recreational areas. Trust lands, for example, that were granted to states at the time of statehood, along with numerous other land holdings, comprise vast amounts of land with biodiversity resources. Arizona, for example, manages nearly 10 million acres of land; Utah manages nearly 4 million acres; and Washington manages close to 3 million acres. Other states have acquired substantial tracts of land formerly under private ownership. Pennsylvania owns and manages nearly four million acres of state forestland, gamelands, and parklands, all acquired from private owners, and New York has acquired substantial amounts of state lands, including substantial amounts of the two-million-acre Adirondacks Preserve.

Historically, state land management practices have run the gamut from conservation to commodity production. Some agencies, typically those in the West, frequently emphasized commodity production over conservation, seeking to maximize grazing, recreational opportunities, and other consumptive uses. Such practices have sometimes led to the biological deterioration of state-owned lands. Other agencies, such as the case with the preservation of the Adirondacks in New York, have emphasized preservation of native forest, and others, such as Pennsylvania, have attempted to balance efforts to preserve forests with efforts to promote multiple use.

Today, states manage these lands in a variety of ways. These range from requirements that trust lands only be managed for the maximum financial gain, such as in Idaho, to a statute in Mississippi that requires that forest lands be managed to preserve resources for future generations,[17] and to

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5. For a comprehensive summary of state growth management laws and land use planning enabling legislation, see ENVIRONMENTAL LAW INSTITUTE & DEFENDERS OF WILDLIFE, PLANNING FOR BIODIVERSITY: AUTHORITIES IN STATE LAND USE LAWS (2003).

6. The spending power originates in U.S. CONST. art. I, §8, cl. 1.

7. Under the federal treaty power, the president has the power, with the advice and consent of the U.S. Senate, "to make treaties with other nations." *Id.* art. II, §2.

8. The Property Clause, under *id*. art. IV, §3, gives the U.S. Congress the power to make all rules and regulations respecting property belonging to the United States.

9. *Id*. art. I, §8, cl. 3.

10. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

11. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

12. 16 U.S.C. §§1361-1421h, ELR STAT. MMPA §§2-409.

13. A U.S. Supreme Court decision in 1995 reaffirmed that wildlife is a "thing" subject to regulation and is a part of the stream of commerce. United States v. Lopez, 514 U.S. 549 (1995).

14. Attempts to regulate or tax the disposal of solid and hazardous wastes have been repeatedly challenged under the Commerce

Clause. *See, e.g.*, C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 24 ELR 20815 (1994); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 22 ELR 20904 (1992); Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 342, 22 ELR 20909 (1992); City of Philadelphia v. New Jersey, 437 U.S. 617, 8 ELR 20540 (1978).

15. 161 U.S. 519 (1896).

16. 441 U.S. 322, 9 ELR 20360 (1979).

17. IDAHO CONST. art. IX, §8; MISS. CODE ANN. §§49-5-141 et seq. (1978).

requirements in New York that forest preserve lands "be forever kept as wild forest lands."[18] Most management policies are construed as simply allowing multiple use management rather than stringent conservation. Yet these lands provide important habitat and a basis for progressive state action, such as the recent efforts by Pennsylvania to certify its 2.1-million-acre state forest system as sustainable under two major certification programs and establish an old growth and bioreserve system within those lands.[19]

C. Land Use Planning

The states' authority in the land use planning arena is equally important to biodiversity conservation, if not more important, than management of state-owned lands. The impacts of habitat loss through sprawl and development are widely known, frequently cited as the greatest threat to biodiversity.[20] Habitat loss and fragmentation are the result of a growing human population, increasing per capita consumption, and attention to only short-term planning needs.

States can play a primary role in directing and controlling growth through land use and growth management laws. Although most land use planning occurs at the local level, this authority comes typically from state enabling legislation. All states have some form of enabling legislation defining this authority to plan, and many require that local governments develop comprehensive plans that include biodiversity elements such as protection of open space. In addition, about a dozen states have adopted "growth management" laws, which set state goals to control and limit the impacts of growth and require either creation of a statewide plan or adherence to planning goals by local planning entities.[21]

In Florida, for example, the Local Government Comprehensive Planning and Land Development Act requires that counties and municipalities adopt comprehensive plans that are consistent with a state comprehensive plan and that contain certain biodiversity-related elements.[22] These elements include identification of areas of environmental significance and promotion of land acquisition programs for natural resource protection.[23]

III. State Efforts to Save Biodiversity

What have states done and what are they doing with this authority? In 1996, Defenders of Wildlife and the Center for Wildlife Law published a report entitled *Saving Biodiversity*, which compiled the various state laws, policies, and

programs in each of the 50 states on a wide variety of issues related to biodiversity.[24] The report looked at everything from state endangered species acts to biological assessment systems such as the Gap Analysis Program[25] and state Natural Heritage[26] programs, ranked the states, and recommended models for each of the components examined, as well as recommending an overall biodiversity policy for each state to coordinate efforts.

The report found that although most states had numerous laws and programs aimed at protecting specific species and lands, many of these programs were underfunded, and more importantly, not comprehensive. For example, provisions to control exotic species varied widely from state to state and cover only select groups of species. Only a handful of states had a state endangered species act with protections similar to the federal act. Moreover, as noted above, state-owned lands were rarely managed for biodiversity protection but rather for income production or recreation.

A few states, however, had begun to look at a more comprehensive system of protection. California, for example, had signed an Agreement on Biological Diversity in 1991 with 10 federal and state land and resource agencies and the University of California. Kentucky's governor signed an executive order in 1994 establishing a task force on biodiversity. But in general, by 1996, most states had not begun the process of developing a statewide strategy or plan to protect the full range of the state's wildlife and habitat.

Today, however, close to 20 states have some form of a biodiversity conservation strategy in place.[27] These processes vary from planning efforts within government agencies to collaborative planning efforts involving a wide range of partners. These efforts include a variety of components, from providing an inventory of state wildlife and habitat resources and identifying priority areas for protection, to analyzing laws and policies that could be used to effectuate change, and major educational campaigns.

The Oregon Biodiversity Project, for example, was initiated by two nongovernmental organizations (NGOs) and representatives from private industry who were frustrated with the contentious debates over natural resource issues. The goal of the project was to develop a pragmatic, statewide strategy to conserve the state's biodiversity, including stakeholders in the process. The strategy, which has been

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18. N.Y. Const. art. XIV, §1.

19. Bureau of Forestry, Pennsylvania Department of Conservation and Natural Resources, State Forest Resource Management Plan (2004). For a discussion on the certification of Pennsylvania's forests, see Carroll Missimer, *The Role of Forest Certification in Preserving Biodiversity in Pennsylvania—Public and Private Case Studies*, in Biodiversity Conservation Handbook, *supra* note 1, at 469.

20. Bruce A. Stein et al., Precious Heritage: The Status of Biodiversity Science in the United States (Oxford Univ. Press 2000).

21. *See supra* note 5.

22. Fla. Stat. Ann. §§163.3161 et seq. (West 1993).

23. *Id.* §186.009.

24. Defenders of Wildlife & Center for Wildlife Law, Saving Biodiversity: A Status Report on State Laws, Policies, and Programs (1996).

25. The Gap Analysis Program (GAP) was initiated by the U.S. Fish and Wildlife Service (FWS) in the late 1980s to identify habitats, species, or other elements not adequately represented within the existing system of conservation lands. For a discussion on the Pennsylvania GAP Analysis, see Wayne Myers et al., *Landscape-Level Habitat Modeling and Mapping for Conservation Planning: Use of GAP Analysis*, in Biodiversity Conservation Handbook, *supra* note 1, at 113.

26. The state Natural Heritage programs were initiated by The Nature Conservancy, though many are now managed by state resource agencies. The programs use a "fine filter" approach to focus on specific locations of rare and endangered plant communities and species. For a discussion on the program, see Nels C. Johnson, *The Nature Conservancy's Ecoregional Approach to Setting Priorities and Developing Conservation Strategies*, in Biodiversity Conservation Handbook, *supra* note 1, at 101.

27. Defenders of Wildlife, State Biodiversity Strategies: A Status Report (2000).

completed, is now in its implementation phase with support from the Biodiversity Partnership.[28]

Other states, like New Mexico, are in the early stages. In New Mexico, a project driven by several conservation organizations is underway to identify the needs of wildlife and habitat in the state. While the groups have had many discussions with state agency staff, the political climate has not been ripe for a comprehensive strategy. Nevertheless, insiders are hopeful that with a new governor in place, the momentum and political support will build.

What many efforts lack, of course, is this political support. New Hampshire is starting its efforts by having the conservation community create an initial "vision" that will be used as a tool to push for change. But the biggest roadblock, at least according to a survey conducted by Defenders of Wildlife in 2000, was the lack of funding.[29] In responding to that survey, New York, Oklahoma, and Tennessee all reported that their planning efforts were stalled due to a lack of funding.

IV. Next Steps

A. State Wildlife Grants Program

One possible solution to the funding problem for statewide planning efforts lies on the horizon. In 2001, Congress approved funding for a State Wildlife Grants Program (SWGP) under the Conservation and Reinvestment Act program nicknamed "CARA lite."[30] The SWGP provides money[31] to states for wildlife conservation projects and requires that the states complete a comprehensive wildlife conservation plan (CWCP) by October 1, 2005.[32]

Congress stated that the general requirements for these plans were a focus on "species in greatest need of conservation" while also addressing the "full array of wildlife" and wildlife-related issues. Guidance issued by the U.S. Fish and Wildlife Service (FWS) has further identified eight specific elements required for the CWCPs, including information on distribution and abundance, problems impacting

species, and proposed conservation actions.[33] A joint state/federal/NGO panel will review each state plan, subject to final acceptance by the FWS. As of May 2005, all 50 states had completed or were developing statewide plans.

The money provided to the states for the creation of these plans will hopefully serve as an impetus to states that have not begun biodiversity planning and provide additional resources to those that have. Guiding principles crafted by the International Association of Fish and Wildlife Agencies will help ensure the integrity and consistency of these plans as states confront the issues created by loss of biodiversity and the need for coordinated planning.[34]

B. The Future Importance of State Action

Significant differences between the environmental community, the Bush Administration, and Congress[35] make it most likely that new environmental initiatives will be at the state and local levels rather than the federal. Although the role of the federal government is vital in conserving biodiversity, the role of states, from their jurisdictional authority to their increasing political importance, will be more critical than ever.

Although the states may not be fully prepared for it, this shift of responsibility could spur even more useful innovation. In economic, housing, and community development issues, the states repeatedly have been the nation's principal laboratories for policy change. Often, policy innovations pioneered by one state are picked up by others and eventually work their way into federal legislation.[36] By increasing protection of native wildlife and habitat, promoting protection of state-owned lands, developing state growth management laws, and, most importantly, crafting a statewide strategy for biodiversity protection, the states can be key players in the efforts to protect our natural world.

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28. *See* Biodiveristy Partnership web page *at* http://www.biodiversity partners.org (last visited Feb. 17, 2005). For a discussion on the Oregon Biodiversity Project, see Sara Vickerman, *The Oregon Biodiversity Project*, *in* Biodiversity Conservation Handbook, *supra* note 1, at 75.

29. Defenders of Wildlife, *supra* note 27.

30. H.R. 701, 107th Cong. (2001).

31. The SWGP provided $80 million in fiscal year (FY) 2002, $60 million in FY 2003, and $64 million in FY 2004. The president's FY 2005 budget requests $80 million for the program.

32. Each state affirms this obligation when it accepts funding for projects from the SWGP.

33. International Ass'n of Fish & Wildlife Agencies, *State Wildlife Conservation Strategies: Eight Required Elements*, *at* http://www. Teaming.com/pdf/Eight%20Elements%20for%20Conservation %20Strategies.pdf. *See* Teaming With Wildlife, *State Wildlife Grants*, *at* http://www.teaming.com/state_wildlife_grants.htm (last visited Feb. 17, 2005).

34. International Ass'n of Fish & Wildlife Agencies, State Wildlife Conservation Strategies: Guiding Principles (2002).

35. Joel Connelly, *In the Northwest: Stealth Rulemaking Hides Threats to Environment*, Seattle Post-Intelligencer (Jan. 8, 2003), *available at* http://seattlepi.nwsource.com/ (last visited June 22, 2005).

36. One example from the environmental arena is the wild-caught bird import bans passed in New York and New Jersey that helped pave the way for congressional enactment of a similar national law, the Wild Bird Conservation Act of 1992, 16 U.S.C. §§4901-4916.