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Wyman's *Rethinking the ESA*: Right Diagnosis, Wrong Remedies

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Katrina Wyman[1] has penned a bold, provocative, and innovative critique of the capability of the Endangered Species Act (ESA or Act)[2] to meet the challenges of an increasingly human-dominated world. Bold because the ESA, perhaps more than any other environmental law, has impassioned champions who disfavor dissent. It is no easy task to critique a law with the truly noble mission to preserve life other than our own, particularly when the law's basic premise is that the mission's success is critically dependent on abundant and altruistic actions by us. Provocative because the author asks us to acknowledge that we cannot achieve that lofty mission through the ESA in its present form. Innovative because the author asks us to consider recasting that mission in terms both more modest (reduce automatic goal of recovery for each listed species) and more ample (protect biodiversity, not just specific species) and explore novel ways to contribute to the mission's success both within and beyond the confines of the ESA.

Anyone who assumes such a difficult task will surely draw doubts from kibitzers. Here is one such kibitzer and a few such doubts.

To summarize this Comment, I believe that Wyman has provided the right diagnosis, but not necessarily the right remedies. Our expectations for the ESA must be reduced even as we pursue biodiversity protection, but once reduced may be accommodated in large measure without the radical surgery on, and search for new legal authority beyond, the ESA suggested by the author. Indeed, certain remedies drawn largely from the existing text of the ESA may be more politically palatable and less costly, and therefore more achievable, even if they do not accomplish the degree of biodiversity protection most desired.

I. The Diagnosis

Despite a few quibbles over the author's description of the ESA—mistakes attributable I am sure to the desire for brevity in introductory material[3]—I believe the underlying message about the constraints on the ESA's capacity to fully serve

1. Katrina Miriam Wyman, *Rethinking the ESA to Reflect Human Dominion Over Nature*, 40 ELR (Envtl. L. & Pol'y Ann. Rev.) 10803 (Aug. 2010) [hereinafter Wyman ELPAR]. A longer version of this Article was originally published at 17 N.Y.U. Envtl. L.J. 490 (2008)) [hereinafter Wyman full-length].
2. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.

3. (i) The Article states that the "ESA was set up to protect imperiled biodiversity." Wyman full-length, *supra* note 1, at 493. Were that so! Instead, species and habitats are considered virtually in isolation under specific statutory listing or designation standards and in separate rulemakings. Had the law focused on biodiversity instead of individual species and their particular habitats, it might be more vital and viable today. There is little to nothing in the law's legislative history to suggest that Congress understood the concept of biodiversity when it adopted this species-by-species and habitat-by-habitat approach. In fact, Wyman notes that "[t]he term biodiversity postdates the passage of ESA." *Id.* at 493 n.11.

(ii) The Act may encourage designation of critical habitat "upon [species] listing." *Id.* at 494. However, it allows delays of either up to one year if the critical habitat "is not then determinable" or of an unspecified period if it is "essential to the conservation of [the] species" that the listing decision be "promptly published," and no designation whatsoever if designation would not be "prudent." 16 U.S.C. §1533(b)(6)(C).

(iii) Particularly problematic—without further explanation (which admittedly is partially given later, on p. 503)—is the statement that ESA §9(a)(1)(B) prohibits "taking the species' habitat." Wyman full-length, *supra* note 1, at 494. The most common misperception I find in my practice is that the ESA prohibits "take of habitat." To the contrary, the U.S. Fish and Wildlife Service (FWS) regulation that defines one form of "take" to include habitat alteration still requires that the species itself must be taken by that habitat impact before "take" can be established ("habitat modification or degradation where it actually kills or injures…" a listed species). 50 C.F.R. §17.3, definition of "harm"; *see* Babbitt v. Sweet Home Chapt. of Comtys. for a Great Oregon, 515 U.S. 687, 692 n.2, 25 ELR 21194 (1995).

(iv) The Article asserts that a "species that is listed as threatened gets the benefit of all [of the Act's] protections except for §9 [including its "take" prohibition], but the FWS can apply §9 or develop more finely grained prohibitions to protect the species." Wyman full-length, *supra* note 1, at 498. This statement is at best misleading, as FWS (unlike the National Marine Fisheries Service) has promulgated a rule that automatically applies all §9 prohibitions to each threatened species—previously or subsequently listed—*unless* a species-specific rule is adopted that removes or reduces the "take" or other prohibition. 50 C.F.R. §17.31(a).

(v) Of particular relevance to this Article is the description of the recovery plan. The Article states that "the ESA requires the FWS to develop and implement recovery plans. . . ." Wyman ELPAR, *supra* note 1, at ### n.17 (citing 16 U.S.C. §1533(f). "[D]evelop"—yes, unless the plans are found to "not promote the conservation of the species." 16 U.S.C. §1533(f). But not "implement"—abundant case law, legislative history, and administrative rulings make clear that recovery plans have virtually no force and effect of law and certainly may not be enforced by FWS against other federal agencies or other

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its mission to avoid extinctions and ensure recovery of species in peril is unimpeachable.

A number of articles, including an article previously selected for ELPAR[4] and an article by this commenter,[5] have questioned the future viability of the ESA in the face of climate change. That position was based on two fundamental concerns: (i) the ESA cannot keep pace with the alarming number of climate change-related extinctions forecast by many scientists, and (ii) the provisions of the ESA may not be capable of providing meaningful protection for listed species and designated critical habitat against the particular threats posed by climate change. What Wyman so ably does is to remind us that the ESA and its mission are under siege from a wide panoply of threats arising from humans' increasing dominion over nature, not just the threats posed by global warming due to anthropogenic emissions of greenhouse gases. Her thesis holds true even were there no climate change, as our population and technology expand to crowd out or render inhospitable species' habitats. Wyman states that humans' dominion over nature was not only less severe at the time of ESA's enactment but also "unacknowledged in the Act."[6] This dominion "is endangering species, increasing the cost of protecting species, and in turn generating opposition to the ESA from regulated communities such as property developers who have to bear the costs of species protection."[7] Moreover, the ESA is particularly ill-equipped to address the "dominion" phenomenon because it is "entangled in a morass" of maladministration, poor enforcement, and ill-advised litigation.[8] From these premises, Wyman sets as her "main objective . . . to begin sketching new ways of protecting biodiversity that reflect the reality of our human-dominated world."[9]

Others have commented on this "dominion" phenomenon, noting that many of the species listed in the ESA's infancy—grizzly bear, gray wolf, bald eagle—occupied habitats in which human presence was modest, but today human enterprise has spread so wide that we and listed species live side-by-side. In that vein, I have suggested that the ESA today "impos[es] on us broader interspecies fair housing obligations."[10] Wyman appropriately cautions that the ESA presently is not equipped to perform those obligations.

II. Recently Suggested Remedies

Wyman proceeds from her diagnosis to a discussion of two recently prescribed remedies—"paradigms" or "approaches"[11]—to address the increasing fragility of the ESA and pursue protection of biodiversity: identifying and marketing ecosystem services and identifying and protecting "biological hotspots." Her descriptions of these two strategies, their origins, and initial efforts to apply them are instructive. I share her concern (at least in the short term) about the availability of the ecosystem services concept, particularly to secure biodiversity protection. The concept faces daunting challenges to measure the services (monetizing them for purchase or developing metrics for government programs) in a consistent and credible manner, to define them as tradable property rights, to establish markets for them, to develop a broad base of sellers and buyers (taking markets to scale), and to ensure they are employed for the purpose of biodiversity protection.[12]

More questionable is the basis for Wyman's optimistic view of the biological hotspots approach, despite its admirable ability to "squarely address . . . the need to prioritize the protection of some biodiversity if we are to meaningfully protect much of it."[13] The hotspots paradigm is of greater importance in the Article than the ecosystem services paradigm; Wyman basically discards the latter, but integrates the former into her recommended remedies. Hotspots produce conspicuous economic and political winners and losers, typically inexpedient for any policy. How will the congressional delegations of other states feel if the Appropriations Committees attempt to steer all or most federal wildlife and habitat protection funds to the handful of States generally acknowledged to host the hotspots? How far would those appropriated funds go if, as in most cases, the very reason the hotspots exist is because they are experiencing dynamic development, with accompanying high land prices and costly protective buy-out prospects? Wyman mentions the importance of states and local land trusts in funding for biodiversity protection,[14] but how are those geopolitically diverse funding sources to be applied to the geographically discrete hotspots? How will landowners, who already feel they bear disproportionately the costs of species/habitat protection, react to the inequity of imposing the vast majority of costs on those hapless properties located within the hotspots? Unfortunately, the Article does not identify or address these infirmities in the hotspots strategy.

III. The Author's Remedies

The presentation of remedies would have benefited from an assessment of political impediments. Wyman astutely notes the political constraints on the ESA in presenting her diagnosis (discussion of the present state of the ESA and biodiver-

public or private parties. *See* Fund for Animals v. Rice, 85 F.3d 535, 547-48, 26 ELR 21433 (11th Cir. 1996).

4. J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. Rev. 1 (2008).
5. Steven P. Quarles & Thomas R. Lundquist, *The Endangered Species Act and Greenhouse Gas Emissions: Species, Projects, and Statute at Risk*, Proceedings of the 55th Annual Rocky Mountain Mineral Law Institute (2009).
6. Wyman full-length, *supra* note 1, at 507.
7. *Id.*
8. *Id.* at 494-507.
9. *Id.* at 492.
10. Steven. P. Quarles, *Why the ESA Is Different: Eight Reasons*, 21 Envtl. F. 50-51 (July 2004).
11. Wyman ELPAR, *supra* note 1, at 10803.
12. As one report found, "[e]cosystem services programs do not necessarily lead to biodiversity conservation and may negatively affect full, native biodiversity." Bob Searle & Serita Cox, *The State of Ecosystem Services*, The Bridgestone Group (Dec. 2009) (citing *Global Mapping of Ecosystem Services and Conservation Priorities*, 105 Proceedings of the Nat'l Acad. of Sci. 9495-500 (2008) (for the finding that "locations selected for conservation of ecosystem services would conserve only 22 to 35 percent as many species as locations selected for preservation of biodiversity")).
13. Wyman ELPAR, *supra* note 1, at 10804.
14. *Id.* at 10807-08.

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sity protection), but then, unfortunately, seems to abandon most political considerations in devising and discussing the remedies. Certainly this is true for a number of the extra-ESA remedies. One example—the biological hotspots—is discussed above. A second example is the suggested large new set asides of land and water into "biological reserves" to enhance existing habitat and provide migratory routes for climate change-adapting species.[15] Volumes could be written about the political hurdles for this remedy. The need to reverse the discouraging trend of shrinking and degrading habitat is clear. However, any witness to the decade-long, and still unresolved, administrative and judicial battles over the fate of Forest Service roadless areas, and the notably few and highly contentious recent legislative contests over wilderness area designations, will have scant confidence that the need can be met by an aggressive set-aside program. The text of the Article is unclear as to whether these biological reserves are to be carved from existing federal lands or are to encompass private lands as well. Obviously, the political problems magnify if private lands are included. Moreover, earlier in the Article, Wyman acknowledges that, "efforts to protect ecosystems… have encountered the same difficulties resulting from human domination of nature that undermine efforts to safeguard individual species."[16]

Let's turn here to Wyman's remedies within the ESA. She proposes three principal changes to current ESA procedures, each of which would require substantial amendments to the Act. First, she would "decoupl[e] the decision to list a species from decisions about how to protect the species."[17] Decoupling would be initiated by removal of the "one-size fits-all protect[ive]" mechanisms (principally the §7 consultation procedure for federal agency actions and the §9 "take" prohibition for actions that do not require federal permits or have any other federal nexus) from immediate (or possibly any future) application to species upon listing.[18] Second, the decoupling would be achieved by engaging in post-listing crafting of cost-effective mechanisms "tailored to the need of each species and its circumstances," including "promulgat[ing] any regulations to implement" them.[19] And, third, "temporary protections" would be imposed until those species-specific mechanisms are in place.[20]

Not surprisingly, the initial decoupling and temporary protection portions of this approach—albeit more modest versions—have received flitting attention before. In 1995, the National Research Council, in its report entitled *Science and the Endangered Species Act*, proposed designation of "survival habitat" as an "emergency, stop-gap measure" upon listing of a species and postponement of designation of critical habitat until publication of a recovery plan.[21] Similarly, the U.S. Senate Committee on the Environment and Public Works twice reported bills, in 1997 (S. 1180) and 1999 (S. 1100), that would have postponed any consideration of designating critical habitats until the preparation of recovery plans, without any new interim habitat protection mechanism. These proposals did not survive political scrutiny—the report quickly disappeared from any ESA discourse and neither bill received even a Senate vote.[22]

The premises for this approach are that the existing ESA protective mechanisms produce one-size-fits-all protections, and that refraining from the imposition of these existing statutory mechanisms and instead shaping protective mechanisms unique to each listed species will "reduce the contentiousness of listing decisions by reducing the momentousness of listing,"[23] "reduce the incentive to litigate the FWS' listing determinations,"[24] and provide protections that "actually could be enforced."[25] These premises may be flawed for multiple reasons.

First, generally the only standardized aspects of the existing protective mechanisms are the procedures. However, contrary to the "one-size-fits all" characterization, those procedures produce quite heterogeneous substantive protections tailored to the needs of each species. Indeed, all of the protective measures suggested by Wyman have been or could be included in "the old stand-by" procedures.[26] Second, perhaps the most common mantra of the regulated community in addressing environmental law issues is that it seeks certainty in order to plan and conduct its activities. Not knowing what the particularized protective mechanisms for each species undergoing the listing process may be and to whom they may be applied will make the listing decisions more momentous, not less. Unknown policy and regulatory outcomes induce fear, not ease, and intensify, not diminish, political opposition. Third, this approach is not likely to reduce listing litigation. Whether the protective mechanisms are known at the time of listing or devised later, in either case the indispensable step toward providing those protections is the listing decision. The zeal to litigate to ensure that this prerequisite listing action does or does not occur should not change on the basis of whether the species in question is ultimately to be protected by one-size-fits-all, or particularized, mechanisms.

Fourth, shaping from scratch individualized protective mechanisms, particularly if they are to be implemented through additional rulemaking for each species, would be sufficiently time-consuming and costly so as to rapidly exhaust the funds and personnel of the FWS and National Marine Fisheries Service (Services). This additional stressor on the Services' resources would almost certainly impede the pace of listing and protecting imperiled species at a time both of these processes, according to the author, need to accelerate. Fifth, this approach—which does not advocate a reduction

15. *Id.*
16. Wyman full-length, *supra* note 1, at 508.
17. Wyman ELPAR, *supra* note 1, at 10808.
18. *Id.* at 10805.
19. *Id.*
20. *Id.*
21. *Science and the Endangered Species Act*, Nat'l Acad. Press 7-8, 76-77 (1995).
22. Steven P. Quarles & Thomas R. Lundquist, *Critical Habitat: Current Centerpiece of Endangered Species Act Litigation and Policymaking: Critical for Whom? The Species or the Landowner*, Proceedings of the 48th Annual Rocky Mountain Mineral Law Institute (2002).
23. Wyman full-length, *supra* note 1, at 516.
24. *Id.* at 519.
25. *Id.* at 523.
26. Wyman ELPAR, *supra* note 1, at 10805.

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in listings and applies its protections post-listing—fails to overcome the listing quandary Wyman identified: "When added to the current number of imperiled but unlisted species, the number threatened by climate change calls into question the practicability of the ESA's approach of protecting species by extending regulatory safeguards contingent on listing."[27] Sixth, Wyman provides no basis for the claim that these "tailored protections… stand a better chance of being enforced."[28]

Wyman argues that the recovery plans should be "supplant[ed]" in favor of "identifying the most cost-effective ways of protecting a species."[29] She also raises the "fundamental question about whether we still should be aiming to recover listed species or whether it would be preferable to set a more realistic and precise, but less inspiring, objective."[30] I fully agree with the author's goals to secure for each listed species (i) individually tailored protections that (ii) are cost-effective and that, (iii) if necessary or appropriate, may seek to achieve a more modest objective than full recovery.

More problematic is the expressed need to "supplant'" the recovery planning process. To the contrary, recovery plans may be the best possible vehicle to achieve the author's goals. When done correctly (an admittedly infrequent occurrence), these plans do shape protective measures to the particular plight of each species. And nothing in the recovery plan provisions of ESA §4(f) prevents the planning teams from seeking and selecting cost-effective measures. Those provisions do not require that recovery plan decisions be made "solely on the basis of the best scientific… information" as does §4(b)(1)(A) for listing decisions. Instead, they require disclosure of "the cost to carry out [the protective] measures."[31] Indeed, recovery plans could provide the "more structured decision-making process [that would] make the trade-offs inherent in species recovery more transparent and allow policymakers to be held accountable for these trade-offs."[32] Admittedly, legislative surgery would be required, but it would be much less intrusive and likely have a better prognosis than the removal of existing statutory protective mechanisms.

As noted above, recovery plans currently have no force and effect of law. The ESA would have to be amended to accord them that authority. This idea has not gained currency in previous ESA reauthorization efforts, primarily because the result would be to interpose the most stringent ESA standard—recovery—in the existing protective mechanisms, which currently apply less rigorous standards.[33] However, legislative interest might be piqued if the trade-off for making recovery plans enforceable was to be the ability to plan protections tailored to a more achievable standard. Perhaps most important from the standpoint of this Article is that, once the plans are so configured, the need to remove the present protective mechanisms diminishes. Instead, the relevant species-specific protections chosen in the recovery plans, and no longer automatically labeled recovery measures, would likely be incorporated into those mechanisms (e.g., §7 biological opinions and reasonable and prudent measures and §10 incidental take permits, safe harbor agreements, candidate conservation agreements, etc.).

Finally, many of the remedies suggested in the Article require a "reformed ESA,"[34] but the fate of S. 1180 should be instructive as to political consequences. The bill was authored by bi-partisan Senate and Committee leadership and had enjoyed the support of the Clinton Administration, organized labor, virtually the entire regulated community, and many environmental organizations. Yet, it never experienced a moment of floor debate in either congressional chamber. A conservative bill—H.R. 3824—survived a close vote in the House of Representatives in 2005 but was not even considered by a Senate Committee. These experiences strongly suggest that any call for an ESA "reform" effort would meet gale force resistance from members of Congress of all political stripes.

In short, Wyman displays a wide-ranging, provocative vision in raising critical questions not just about a particular environmental law but also about our fundamental capability to protect the environmental values the law addresses. That same vision, however, may have done her a disservice in proposing answers to those questions. The changes proposed in the legal regime are unnecessarily abrupt. Less severe changes may provide less elegant answers, but the proposed changes may engender political dissent that would fully frustrate any effort to pursue answers. That said, an admission: please take note that this Comment lacks any alternative vision to provide a comprehensive answer to sustain broad-scale, persistent biodiversity.

27. Wyman full-length, *supra* note 1, at 498-99.
28. *Id.* at 523.
29. Wyman ELPAR, *supra* note 1, at 10806.
30. *Id.* This question was raised and partially answered in the pioneering work of Michael Scott, Michael Bean and others in their proposal to recognize "conservation-reliant species." Michael Scott, Michael Bean, et al., *Recovery of Imperiled Species Under the Endangered Species Act: The Need for a New Approach*, 3 Frontiers in Ecology and the Env't 383 (2005).
31. 16 U.S.C. §1533(f)(1)(B)(iii).
32. Wyman ELPAR, *supra* note 1, at 10806.
33. The Services are not authorized to require the adoption by federal agencies of recovery measures in §7 consultations (where the standard is "not likely to jeopardize the [species'] continued existence") or by applicants in §10 incidental take permitting (where the standard is "to the maximum extent practicable, minimize and mitigate the impacts" of incidental takes). 16 U.S.C. §§1536(a)(2), 1539(a)(2)(B)(ii). The Services have acknowledged that recovery actions may not be imposed in either process. *See* 50 C.F.R. §402.14(j); United States Fish and Wildlife Service, Endangered Species Habitat Conservation Planning Handbook 3-20 (1995); Spirit of the Sage Council v. Kempthorne, 511 F. Supp. 2d 31, 42-44, 37 ELR 20235 (D.D.C. 2007) (acknowledging that recovery actions may not be imposed when dealing with either process).
34. Wyman ELPAR, *supra* note 1, at 10808.