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Holly Doremus

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Preserving Citizen Participation in the Era of Reinvention: The Endangered Species Act Example

Holly Doremus*

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INTRODUCTION

Strong and open citizen participation has long been a hallmark of American environmental law and has played an essential role in translating the law into environmental protection. Recent initiatives to “reinvent” government have introduced more flexible, decentralized, nonadversarial administrative processes. These changes magnify existing shortcomings in the mechanisms for ensuring citizen participation and create new ones. Environmental protection will suffer if provisions for participation do not keep pace with reinvention.

I.
BUILDING A STRONG CITIZEN ROLE

About a generation ago, federal environmental law underwent a revolution. Substantively, this revolution erected the framework for today’s pervasive command-and-control regulation. But perhaps more importantly, together with the parallel...

* Acting Professor of Law, University of California, Davis. Ph.D., Cornell University 1986; J.D., University of California, Berkeley (Boalt Hall) 1991.
expansion of open-government statutes, the environmental law revolution created a new active role for the general public in the implementation and enforcement of environmental policy. This new public role rested on three forms of access: access to information; access to the decisionmaking process; and access to the courts.

Several statutes enacted in this era provided increased access to information. The Freedom of Information Act\footnote{5 U.S.C. § 552 (1994).} gave citizens the right to obtain a wide range of government documents. The Federal Advisory Committee Act\footnote{5 U.S.C. app. 2 (1994).} (FACA) forced advisory groups to conduct their business in public. The National Environmental Policy Act (NEPA), by imposing a duty to document the environmental impacts of proposed actions, required the government to create information.\footnote{42 U.S.C. § 4332(2)(c) (1994).}

Some access to the decisionmaking process was already available under the Administrative Procedure Act (APA), which required that agencies allow the public to comment on draft rules.\footnote{5 U.S.C. § 553(c) (1994).} FACA increased this access by requiring that advisory committees include fairly balanced representation and permit public input at their meetings.\footnote{5 U.S.C. app. 2 § 10(3); § 5 (1994).} NEPA expanded the opportunity for public input to all federal decisions that might significantly affect the environment and required that agencies affirmatively solicit input.\footnote{In order to fulfill their NEPA obligations, agencies must affirmatively solicit comments from interested persons on a draft EIS and formally respond to those comments. See 40 C.F.R. §§ 1503.1, 1503.4 (1997).} Other contemporaneous environmental statutes both endorsed the concept of citizen input generally,\footnote{The Clean Water Act, for example, commanded the Environmental Protection Agency to encourage and assist public participation in the development, revision, and enforcement of its implementing regulations. See 33 U.S.C. § 1251(e) (1994).} and created specific avenues for input.\footnote{8. The Endangered Species Act, for example, required the Interior Department to consider citizen petitions to add species to or remove them from the protected list. See 16 U.S.C. § 1533(b)(3) (1994). While citizens already had the right to petition agencies for action under the APA, 5 U.S.C. § 553(e) (1994), the ESA made the petition process far more useful by requiring that the agency take action on listing or delisting petitions within a specified time and on the basis of specific factors.}

The APA had also provided some access to courts, allowing "aggrieved" citizens to obtain judicial review of federal agency actions,\footnote{5 U.S.C. § 702 (1994).} but the new federal environmental laws greatly expanded
the ability of citizens to vindicate their environmental interests in court. The federal Clean Air Act of 1970 authorized any person to sue to correct any violation of the law. A slew of similar provisions followed in rapid succession. Citizens could now force both the government and the regulated community to fulfill their duties under the environmental laws.

This revolutionary expansion of the public role was intended to improve the functioning of the democratic process, which in turn was expected to increase environmental protection. It was widely thought that the regulated community enjoyed preferential access to federal agencies and used that access to influence agency decisions to the detriment of the public interest. Arm ing the public with knowledge, opening key channels of access to agencies, and allowing citizens to enforce the law when regulators proved unable or unwilling to do so were all tactics designed to discourage back-room deals.

The citizen participation initiatives of that revolutionary era did indeed promote environmental protection, playing a key role in translating the new laws into real-world environmental gains. The Endangered Species Act (ESA) provides a vivid example. Most controversial listings have been initiated through the citizen petition process rather than by agency action; many have been finalized only as a result of citizen litigation. Litigation has also been required to compel critical habitat designations and production of recovery plans. Citizen suits have enforced the ESA's prohibitory provisions when the government would not. Without strong citizen participation, particularly in the

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11. See MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 1.02 (1995); WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 3.4 (2d ed. 1994).
12. See, e.g., Ralph Nader, Freedom From Information: The Act and the Agencies, 5 HARV. C.R.-C.L. L. REV. 1, 2-3 (1970) (arguing that regulated constituency has early entry into the decision process— the stage that decisions are actually made); JOSEPH L. SAX, DEFENDING THE ENVIRONMENT 245 (1971) (describing several examples of manipulation of agency decisions by narrow special interests).
form of access to courts, the ESA would do much less for many fewer species.

II. GOVERNMENT REINVENTION AND CITIZEN PARTICIPATION

A radical concept 30 years ago, citizen participation in the creation and implementation of environmental policy is now virtually beyond question. It is enshrined in international agreements and firmly entrenched in domestic law. At the same time, federal agencies face pressure to be more responsive to the regulated community and less rigid in their regulatory approach. A new image of government as facilitator of a search for consensus among affected interests permeates current attitudes toward regulation. Agencies have rushed to respond, introducing collaborative, localized, and flexible decision-making processes. While touted as increasing responsiveness to the public, these reinvention efforts carry the risk of limiting that responsiveness to a select group of the public, returning environmental policy to the era of back-room deals.

A. Reinventing the ESA

The ESA became a campaign issue during the 1992 presi-


17. For example, an executive order requires that federal agencies “provide the public with meaningful participation in the regulatory process.” Executive Order 12,866, § 6, 58 Fed. Reg. 51,735 (1993).


19. Executive Order 12,866, supra note 17, § 6(a), for example, directs agencies to explore the use of consensual mechanisms for developing regulations.

20. See, e.g., Bill Clinton & Al Gore, Reinventing Environmental Regulation: Clinton Administration Regulatory Reform Initiatives (March 16, 1995) (available at <http://www.epa.gov/reinvent/notebook/clinton.htm>) (declaring that new initiatives will provide inclusive decisionmaking and empower local decisionmakers); Earle Hitchner, Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector (Review), NAT'L PRODUCTIVITY REV., June 22, 1992, at 425 (reviewing OSBORNE & GAEBLER, supra note 18); Jerry L. Mashaw & Susan Rose-Ackerman, Federalism and Regulation, in THE REAGAN REGULATORY STRATEGY: AN ASSESSMENT (George C. Eads & Michael Fix eds. 1984) (quoting Reagan Administration budget director, as saying that goal of that administration's proposals to return power to state and local governments was “to make government more efficient and more responsive to its citizens”).
dential race, which was conducted in the shadow of the North-
wester forest war. While George Bush called for amending the law
to give greater weight to economic concerns, Bill Clinton pledged
to move the country beyond "the false choice between environ-
mental protection and economic growth." The new administra-
tion struggled to find sufficient flexibility in the ESA to allow it to
fulfill that promise. It found that flexibility in the habitat con-
servation planning process.

The ESA generally prohibits the "take" (that is, the harming,
harassing, or killing), of listed animals. Nevertheless, the Act
allows the Secretary of Interior to issue permits authorizing the
take of listed species under certain conditions. To obtain a
permit, the applicant must submit a habitat conservation plan
(HCP). Interior grants the permit if it finds that the proposed
take is incidental to some lawful activity, its impacts will be
minimized and mitigated to the maximum extent practicable,
and it will not appreciably reduce the likelihood of survival and
recovery of the species. Created in 1982, the HCP program lay
nearly dormant for ten years, with only fourteen permits issued
by 1992. Since the Clinton administration took office, however,
it has expanded exponentially. By September 1997 more than
225 permits had been issued and as many more were in pro-
cess.

HCPs exemplify the changes sought by government reinven-

21 Brad Knickerbocker, The U.S., Campaign '92, CHRISTIAN SCIENCE MONITOR,
22 See U.S. DEPT. OF INTERIOR, PROTECTING AMERICA'S LIVING HERITAGE: A FAIR,
COOPERATIVE AND SCIENTIFICALLY SOUND APPROACH TO IMPROVING THE ENDANGERED
SPECIES ACT (Mar. 6, 1995), reprinted in Moratorium on the Listing Provisions of the
Endangered Species Act: Senate Hearing 104-171 on S.191 and S.503 Before the Sub-
Works, 104th Cong. 88-89 (1995) ("In the last year, the Administration... has
launched a series of initiatives to improve the ESA's effectiveness while minimizing its
impact on people and their livelihoods.").
Professor Sax, who served as Counselor to Secretary Babbitt from 1994 to 1996, de-
scribes the decision to "enliven the relatively moribund" incidental take provisions of
the ESA as one prong of the response to increasing political pressures on the ESA.
by its terms only to endangered species, Interior has generally applied it by regulation
to threatened species as well. See 50 C.F.R § 17.31 (1997).
27 U.S. FISH AND WILDLIFE SERVICE AND NATIONAL MARINE FISHERIES SERVICE,
HABITAT CONSERVATION PLANNING HANDBOOK i (1996) [hereinafter "HCP HANDBOOK"]
28 See DEFENDERS OF WILDLIFE, FRAYED SAFETY NETS: CONSERVATION PLANNING
UNDER THE ENDANGERED SPECIES ACT vi (1998) [hereinafter "FRAYED SAFETY NETS"].
tion advocates. The process is decentralized.\textsuperscript{29} Permit holders, rather than the government, are responsible for implementation after a permit is granted. Permits offer a great deal of flexibility; their terms are negotiated rather than prescribed in advance.\textsuperscript{30}

In addition to their political advantages, HCPs promise substantial conservation benefits. They can increase the protection available to plants, protect species prior to listing, protect unoccupied habitat, and prescribe habitat management to benefit species.\textsuperscript{31} But the HCP program also poses serious risks to species protection. Permits not carefully drafted, monitored, and enforced may, as environmentalists fear, pave the road to extinction.\textsuperscript{32}

\textbf{B. Barriers to Citizen Participation}

History demonstrates that strong implementation of the ESA requires citizen prodding. The government cannot be counted on to enforce the ESA in the face of focused political opposition, even when enforcement is economically efficient.\textsuperscript{33} Chronic budget shortages and the threat of funding moratoria\textsuperscript{34} further

\begin{itemize}
\item \textsuperscript{29} Permits are developed through the Fish and Wildlife Service's field offices and issued by the Regional Offices. See HCP HANDBOOK, supra note 27, at 1-5, 1-11 to 1-13, 2-2 to 2-6.
\item \textsuperscript{30} See id. at i (stating that Congress "endorsed and codified" the negotiation and compromise approach to endangered species protection exemplified by the San Bruno Mountain agreement when it incorporated the HCP process into the ESA). The vagueness of the statutory standards for incidental take permits ensures that they are negotiated documents. See Albert C. Lin, Participants' Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process, 23 ECOLOGY L.Q. 369, 412 (1996).
\item \textsuperscript{31} See, e.g., HCP HANDBOOK, supra note 27, at 3-7, 3-17 to 3-18; Friends of Endangered Species v. Jantzen, 760 F.2d 976, 982 n.6 (9th Cir. 1985) (noting that the plan would "establish a permanent program to protect the grassland habitat [and] eliminate gorse and some eucalyptus that encroach on the habitat"). Efforts to reduce exotic species and restore native grassland on San Bruno Mountain, however, have been less than fully successful, in part because of limited knowledge when the plan was drafted. See FRAYED SAFETY NETS, supra note 28, at 30
\item \textsuperscript{32} See, e.g., Fraser Shilling, Do Habitat Conservation Plans Protect Endangered Species?, 276 SCI. 1662, 13 June 1997; Jon R. Luoma, Habitat Conservation Plans: Compromise or Capitulation?, AUDUBON, Jan.-Feb. 1998, at 36.
\item \textsuperscript{33} See Zygmunt J.B. Plater, The Embattled Social Utilities of the Endangered Species Act—A Noah Presumption and Caution Against Putting Gasmasks on the Canaries in the Coalmine, 27 ENVTL. L. 845, 871-72 (1997) (pointing out that a citizen suit was required to halt Tellico Dam despite the fact that economics did not justify dam construction).
\item \textsuperscript{34} In 1995, Congress prohibited the expenditure of funds on listings and critical habitat designation for the remainder of the fiscal year. See Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-06, § 117, 109 Stat. 73, 86 (1995).
\end{itemize}
reduce the likelihood that the government will press the law. Robust citizen participation is therefore essential if HCPs are to serve the goal of species conservation. Unfortunately, the present HCP process tends to stifle public participation, magnifying existing barriers to effective participation and erecting new ones.

Citizens face three major hurdles to participation in the HCP process. First, the general public is shut out of the early stages of HCP development. HCPs are negotiated between the applicant and the Fish and Wildlife Service, without any opportunity for either involvement or oversight by concerned citizens. Public input is not solicited until a draft permit has been developed. At this stage, because Fish and Wildlife Service staff are already invested in the negotiated plan, comments are not likely to change the outcome.

The decentralization of permit decisions also makes participation difficult. Large numbers of permits are under consideration at any one time, disbursed across seven regional offices and many more field offices. A permit applicant with a financial stake in a permit decision can bring substantial resources to bear on that one decision. Citizens concerned about species, however, will find it difficult to muster the necessary resources to oversee every relevant permit proceeding.

Second, too little information is made available too late in the process to allow the public to exert political pressure on decisionmakers. The HCPs themselves are dense technical documents that most citizens will not have the time or expertise to comprehend. NEPA compliance must precede the issuance of a permit, but provides little assistance to interested citizens. Interior almost always prepares brief Environmental Assessments (EA) rather than full-blown Environmental Impact Statements (EIS). The EAs often gloss over the effectiveness of mitigation efforts and ignore the potential cumulative effects of many small HCPs.

35. See FRAYED SAFETY NETS, supra note 28, at 44; Luoma, supra note 32, at 42-43. The Fish and Wildlife Service encourages applicants to involve affected parties in the negotiation process, but nothing in the ESA or implementing regulations compels them to do so.

36. See FRAYED SAFETY NETS, supra note 28, at 45.

37. See Barton H. Thompson, Jr., The Endangered Species Act: A Case Study in Takings and Incentives, 49 STAN. L. REV. 305, 380 (1997) (showing that 99% of all permits issued between June 1994 and June 1996 were accompanied only by environmental assessments).

38. Two environmental assessments prepared by the same consultant, submitted on the same day, supporting incidental take permit applications for the same species in almost precisely the same place each contain no mention of the other. See Envi-
Third, incidental take permits limit access to the courts. The administration's No Surprises policy assures landowners that the government will not impose additional financial obligations or land use restrictions if an HCP proves insufficient to protect the species. Permit holders are also protected from citizen suits so long as they comply with the permit terms. It may be that permit holders need certainty and that the government should bear the costs of correcting mistakes caused by gaps in scientific understanding. But HCPs may effectively immunize the government against suit as well, leaving citizens powerless to prevent species extinction.

A citizen suit certainly could challenge the initial issuance of a permit on the grounds that it would jeopardize the species. The situation is far less clear, though, if a permit that seemed adequate when issued later fails to protect the species. The duty not to jeopardize listed species applies specifically to "actions." If the government simply fails to act to protect a species imperiled by an inadequate HCP, that duty might not be violated.
Citizens could charge that Interior had failed to fulfill its additional statutory duty to conserve the species, but courts have so far seemed reluctant to aggressively enforce that duty.

III. PRESERVING CITIZEN PARTICIPATION IN THE ERA OF REINVENTION

Review by the Fish and Wildlife Service alone cannot ensure that HCPs serve the public interest in species protection. The Service is overburdened by the sheer number of permits being processed. It may accept the biological studies proffered by the applicant's consultants without intense scrutiny. Furthermore, the science supporting HCPs is often highly uncertain or incomplete, opening the door to politically-motivated interpretation. Interior concedes that its role in these permit proceedings is not strictly technical, but rather involves "balancing biology with economics." Ensuring a strong public role will increase the likelihood that both the science and the policy behind HCPs receive independent review.

Public participation in and oversight of the decisionmaking process should be provided at the negotiation stage. Geographically large and multi-party HCPs should be developed by advisory committees representing all affected interests. Although providing representation for environmental groups and citizens during negotiation of smaller HCPs would be unwieldy, those negotiations can and should be brought into public view. All HCP negotiations should be conducted in public, under procedural rules like those of the FACA.

Information about HCPs could be distributed earlier, more widely, and in a more useful form. HCP proposals should be made public as soon as the Fish and Wildlife Service becomes involved in negotiations. Information technology could play an important role in arming the public with information about HCPs. Draft NEPA documents, HCPs, and biological opinions

44. J.B. Ruhl describes the duty to conserve as "latent." See J.B. Ruhl, Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species, 25 ENVT. L. 1107, 1137 (1995). While several courts have remanded agency decisions for failure to adequately consider the duty to conserve, see id. at 1130-37, none has ordered an agency to take specific action under that duty. One recent decision, however, may signal an increased judicial willingness to tap the power of section 7(a)(1). See House v. United States Forest Service, 974 F. Supp. 1022, 1027-28 (E.D. Ky. 1997) (holding that agency must place conservation of listed species above any competing interests).
45. See Lin, supra note 30, at 400 (citing problems of understaffing at FWS).
46. HCP HANDBOOK, supra note 27, at ii.
should be posted on the Internet. Following permit issuance, annual monitoring reports and compliance scorecards should be distributed in the same fashion.\textsuperscript{47} Better use of NEPA could also provide more useful information to the public. Cumulative impacts, in particular, must be addressed more effectively.

In addition, Congress should give serious thought to limiting the HCP process to regional or area-wide plans. Such plans are far more likely than small-area plans to offer biological advantages.\textsuperscript{48} They also do not pose the same barriers to citizen participation as a large number of small plans. Concentrating on a few large plans would decrease the burdens of overseeing the permitting process, increase the likelihood of citizen representation on negotiating committees, and probably produce more thorough environmental impact analysis.

Access to the courts, however, is the most crucial element of citizen participation and should be the primary focus of any HCP reforms. Citizens must have the power to enforce HCPs and to ensure that they do not undermine species conservation. The implementing agreements executed with HCPs should explicitly grant citizens power to enforce permit terms.\textsuperscript{49} In addition, the No Surprises policy must be accompanied by a clear federal duty, enforceable through citizen suits, to provide for the needs of the species if an approved HCP fails to do so. Finally, the government should establish clear standards for the level of scientific information expected in an HCP, presumptive mitigation requirements, and monitoring and enforcement procedures. Even if variances are allowed for individual permits, clear baseline standards would make citizen oversight easier, limit the ability of applicants to win favorable permit terms through skilled negotiation or political pressure, and increase the effectiveness of judicial review.

\textsuperscript{47} See \textit{Frayed Safety Nets}, \textit{supra} note 28, at 81. Interior could learn from the Environmental Protection Agency’s aggressive use of the Internet to post information concerning compliance with pollution control laws, including the recent proposal to rank facilities in terms of their total pollution output. \textit{See, e.g.,} John J. Fialka, \textit{EPA Pollution-Grading Plan Provokes Opposition of Companies, State Officials, WALL ST. J.}, Feb. 17, 1998, at B8.

\textsuperscript{48} See Habitat Conservation Plan Assurances ("No Surprises") Rule, \textit{supra} note 39, at 8865 ("[L]arge-scale HCPs allow for ecosystem planning, which can provide more benefits to more species than small-scale HCPs.").

\textsuperscript{49} See Plater, \textit{supra} note 33, at 871. Permit holders can be adequately protected against harassment by awards of attorney fees if suits are found to be frivolous.
The environmental law revolution succeeded in bringing about environmental change in large part because it granted ordinary citizens a powerful role in shaping and enforcing environmental policy. The current trend toward increased regulatory flexibility, decentralization, and consensus decisionmaking threatens to quietly sap the strength of that public role. Keeping processes like habitat conservation planning subject to effective public oversight and enforcement will help ensure that reforms do not reverse the environmental gains of the last generation.