January 11, 2010

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INTRODUCTION

The Endangered Species Act (ESA)\(^1\) of 1973 is well-known among environmentalists for its ability to halt development projects that threaten a creature with extinction, and equally well-known among anti-environmentalists for the same reason. While the ESA can deliver potentially powerful environmental protection, it is dependent upon a deceptively simple item of government-held information – the official endangered species list.

This list, mandated by the ESA and under the management of the U.S. Fish & Wildlife Service,\(^2\) includes thousands of animals and plants that have been deemed “threatened” or “endangered” by scientists. The ESA mandates habitat protection for any species on this list for the benefit of the public interest and for those creatures’ own rights of existence.\(^3\) While most court disputes and public controversies surrounding the Endangered Species Act concern actual habitat protection efforts (or the lack thereof), much less attention has been paid to the accuracy, accountability, and transparency of the official endangered species list. This is an item of government-held information that

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\(^2\) 16 U.S.C. § 1533(c)(1).
should be subjected to the disclosure requirements of the Freedom of Information Act, the information management provisions of the National Environmental Policy Act, and the substantive goals of the Endangered Species Act itself.

However, the process of adding an animal or plant to this list (thus making it eligible for protection) is heavily politicized with many under-reported transparency issues. Political controversy can result in the arbitrary listing or, more often, delisting of particular species regardless of population levels and with no recourse for concerned citizens. Scientific uncertainty prevents many deserving creatures from being listed, and previously listed species can be removed from the list regardless of whether their populations have actually recovered. Meanwhile, the vagaries of American administrative jurisprudence have a history of stifling citizen oversight of the accuracy of the list and the accountability of the government officials who manage it. Thus, the official endangered species list has become an unheralded example of governmental non-transparency, damaging the list’s utility for citizens who are concerned about the state of the natural world and government watchdogs who wish to shed light on incidents of statutory noncompliance at federal agencies.

This article reconstructs the Endangered Species Act as an informational statute with unresolved problems of transparency and disclosure. The next section introduces the informational requirements of modern American environmental legislation, including the ESA. The following section examines the conflict between the substantive goals of the ESA and the procedural focus of American administrative jurisprudence. This is followed by a case history of the informational requirements of the ESA in general and the official

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endangered species list in particular, with coverage of political manipulation of the list and whether or not it is a truly transparent item of government-held information. The article then concludes with a discussion of whether the official endangered species list is truly useful for concerned citizens and government watchdogs, and the impact of its problems with accountability and transparency.

GOVERNMENT-MANAGED INFORMATION IN AMERICAN ENVIRONMENTAL LAW

The passage of the Freedom of Information Act (FOIA)\(^6\) in 1966, providing statutory access for citizens wishing to obtain government-held documents, was a crucial influence on not just the transparency of the American government at large, but also the far-reaching environmental laws that arose in the early 1970s. The watershed in government transparency in the 1950s and 1960s\(^7\) inspired revolutions in many specific areas of public policy, with the management and availability of government-held information leading to new trends in lawmaking that emphasized the reporting of information to the government, and consequently, an increase in the knowledge levels of concerned citizens. Environmental law was among the first areas of public policy to experience an information-intensive overhaul,\(^8\) inspiring a new type of federal lawmaking

\(^8\) Federal environmental law was certainly not new in the early 1970s, reaching back as far as the creation of the Department of the Interior (which was then focused more on acquisition and management of lands for national expansion) in 1849. According to environmental historians, the first actual federal environmental protection statute was the River and Harbors Act of 1899, 33 U.S.C. §§ 407-414 (1899),
in which politicians collaborated with public interest groups (i.e. environmentalists and conservationists), via new types of aspirational statutes that attempted to overhaul agency decision-making processes through increased public participation and management of information.\(^9\)

Most notably, the National Environmental Policy Act (NEPA)\(^{10}\) of 1970 broke new ground in both environmental protection and management of the information accumulated during protection efforts, with the transparency of government-held documentation playing a more and more important role in the ability of citizens to review how well their government protects the natural world.\(^{11}\) Title I of the act announced a “Congressional Declaration of Environmental Policy,”\(^{12}\) which was a first in American statutory law. Most importantly, the NEPA is a procedure-oriented statute that regulates the activities of all federal government entities and is not enforced by any one agency, not even the Environmental Protection Agency which itself is structured for compliance with the NEPA.\(^{13}\)

Environmental problems are difficult to assess with the degree of scientific certainty typically demanded by elected officials, and usually require long-term treatment and precautionary (or proactive) steps that make the quick results demanded by the


\(^{10}\) 42 U.S.C. §§ 4321-4375 (1970). The National Environmental Policy Act officially went into effect on January 1, 1970, though it has “1969” in its official name because it was passed by Congress in that year.


\(^{12}\) 42 U.S.C. § 4331.

\(^{13}\) Unlike some large federal agencies that have been allowed to independently interpret and enforce their relevant statutes, like the Federal Communications Commission, the Environmental Protection Agency is responsible for the enforcement of so many environmental laws and regulations that the agency is subjected to considerable and continuous congressional oversight. \textit{See} RICHARD J. LAZARUS, \textit{THE MAKING OF ENVIRONMENTAL LAW} 80 (2004).
American political process all but impossible and increase the political controversy surrounding any environmental debate. This makes the collection and management of accurate and useful environmental information all the more important during the regulatory process.\textsuperscript{14}

Hence, public participation and the transparency of government-held information are crucial to the philosophy of the NEPA. The act was one of the first civil rights era statutes to clearly delineate public participation, with requirements for federal agencies to interact with the public, not just adding the citizen’s voice to environmental decision-making but altering the very way that agencies make those decisions. The NEPA also requires federal agencies to inform each other and the public about their environmental decision-making processes, which reduces bureaucratic secrecy and increases public accountability.\textsuperscript{15}

The public participation and transparency philosophy of the NEPA, as well as its focus on government-wide processes and the actions of all federal agencies toward the natural world, have been incorporated into most subsequent federal environmental legislation. In the following years, Congress passed several more far-reaching statutes aimed at pollution control that were inspired by, modeled after, and placed under the rubric of the National Environmental Policy Act.\textsuperscript{16} Also like the NEPA, these statutes, including well-known pollution-control laws like the Clean Air Act\textsuperscript{17} and the Clean Water Act,\textsuperscript{18} mandate the collection and management of information for use by citizens.\textsuperscript{19}

\begin{footnotesize}
\textsuperscript{14} See Id. at 19-28.
\textsuperscript{15} NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING 37-38 (2008).
\textsuperscript{16} See LAZARUS, supra note 13, at 49.
\textsuperscript{17} 42 U.S.C. §§ 7401-7671 (1970).
\textsuperscript{18} 33 U.S.C. §§ 1251-1387 (1972).
\textsuperscript{19} The informational aspects of these statutes will discussed at infra notes 22-35 and accompanying text.
\end{footnotesize}
Three years after the passage of the NEPA, Congress passed another far-reaching environmental statute in a spirit of stewardship of the natural world. But this statute, the Endangered Species Act, would soon become one of the most divisive laws in American history, attracting bitter opposition from conservative economic interests while being passionately defended by ardent nature lovers. While this statute is well-known as an effort to save animals and plants from extinction, the act is predicated on an official list of species that have been deemed worthy of protection. This list is a crucial piece of government-held information, and the federal government's management of this list and its subsequent actions based on that list raise important questions of transparency and accountability.

Types of Government-Held Environmental Information

For the purposes of this article, government-held environmental information falls into three major categories. The first is the information generated during the environmental impact statement (EIS) process under the requirements of National Environmental Policy Act, which must be completed for any environmentally-relevant activity by any federal government agency or any private party that it regulates. The act requires government agencies and regulated parties to consider the environmental impacts of their activities and to report on them – often and in great detail. Per the NEPA, this voluminous information must be collected and managed by the agency in question,

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compiled by the Environmental Protection Agency, and made available to citizens upon request.\textsuperscript{22} The creation of an EIS by a federal agency or a regulated party has evolved into a multi-stage process with public participation required throughout.\textsuperscript{23} The final EIS and all of the documents used during its creation must be disclosed to all American citizens,\textsuperscript{24} making the NEPA a groundbreaker in subject matter-oriented government transparency.\textsuperscript{25}

The second type of government-managed environmental information is permits, particularly those required under pollution-control statutes like the Clean Air Act\textsuperscript{26} and the Clean Water Act.\textsuperscript{27} These permits and their supporting documents are available for citizen review and include information on industrial operations, their processes, and their records of statutory compliance.\textsuperscript{28} The Clean Air Act requires two different kinds of permits for sources of air pollution (typically industrial or commercial operations) depending on the air quality of the surrounding area and the levels of particular

\begin{footnotesize}
\textsuperscript{22} 42 U.S.C. §§ 4332(C)(i)-4332(C)(v).
\textsuperscript{23} Shortly after the enactment of the NEPA, President Richard Nixon issued an Executive Order encouraging public participation in the EIS process, noting that “The results will be both more environmentally sensitive and less subject to disruptive conflicts and delays,” and “Real opportunities exist for those skilled in facilitating consensus to aid diverse participants in exploring the issues and agreeing on those to be studied.” EXECUTIVE ORDER No. 11,514, 35 C.F.R. 4247 (1970). The EIS process is now much more detailed than originally delineated in the text of the NEPA, and has been enhanced by regulations issued by the Council of Environmental Quality (CEQ), which itself was created by the NEPA for that purpose. The majority of relevant regulations can be found at 40 C.F.R. §§ 1500-1508 (1978). The creation of the CEQ was mandated by the NEPA at 42 U.S.C. §§ 4341-4347.
\textsuperscript{24} 42 U.S.C. § 4332(C).
\textsuperscript{25} Subsequent non-environmental federal statutes have added special transparency requirements for government-held documents in other subject areas, such as security and finance. See e.g. ALASDAIR ROBERTS, BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE 150-170 (2006); Cynthia A. Williams, The Securities and Exchange Commission and Corporate Transparency, 112 HARV. L. REV. 1197, 1276-1289 (1999).
\textsuperscript{28} Under both statutes, the resulting information and documents are managed by the Environmental Protection Agency. 42 U.S.C. § 7661; 33 U.S.C. § 1341.
\end{footnotesize}
pollutants. Sources in areas that have attained acceptable air quality levels are subjected to a permit that prohibits additional pollution that could place that area’s air quality outside of acceptable levels. This is also known as the Prevention of Significant Deterioration permitting program. Sources in areas that have not attained acceptable air quality levels are subjected to the Nonattainment permit program. Both of these permit programs require significant amounts of information to be delivered by the operator to the government. When the EPA grants a permit to an operator, even more information is created concerning the operator’s pollution patterns and compliance plans. The permit document must contain descriptions of how the operator can stay within compliance, planned inspection schedules and strategies, and provisions for regular compliance reports to be submitted to administrators.

Meanwhile, under the Clean Water Act permits are required for any source of effluent or discharge into bodies of water. A great amount of information must be provided by the operator about the facility (municipal, industrial, or otherwise) and the nature of the discharges. The Clean Water Act also requires that all forms associated with the permit be signed by a “responsible corporate officer” for private companies or either a “principal executive officer” or “ranking elected official” for municipalities. Permit holders must regularly monitor their compliance with the requirements of their permit and of the Clean Water Act in general. Periodic information must be provided (usually once per year) on the nature of the operator’s effluents and discharge, and

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31 42 U.S.C. § 7661(c)(f). Note that possession of a permit makes the operator legally compliant with the terms of the Clean Air Act, if not necessarily air quality standards.
33 40 C.F.R. § 122.22(a) (1983).
whenever practical, the water quality levels of the body of water that receives the discharge.\textsuperscript{34} Special reports and notifications must be delivered to the EPA immediately in the event of an accidental discharge of hazardous substances into navigable waters and their adjacent shorelines, where people and wildlife are most likely to be affected.\textsuperscript{35}

Overall, the National Environmental Policy Act, Clean Air Act, Clean Water Act, and various other federal environmental statutes generate vast amounts of information in the form of environmental impact statements, permits, and reports, and this information is managed by the federal government (usually by the EPA) and must be made available to any citizen upon request. Finally, some other federal environmental statutes mandate a third type of government-managed information: official lists that are intended to spur government funding, enforcement efforts, and judicial review of agency action in the event of a citizen suit over noncompliance. The most prevalent of these are the Comprehensive Environmental Response, Compensation, and Liability Act (known informally as CERCLA or the “Superfund” Act),\textsuperscript{36} which mandates extensive and expensive federal clean-up efforts at toxic dump sites that appear on an official government-managed list;\textsuperscript{37} and the Endangered Species Act,\textsuperscript{38} which mandates federal habitat protection efforts for any plant or animal that appears on an official list of

\begin{footnotes}
\item[34] 40 C.F.R. §§ 122.44(i)(2), 122.45(b), 122.48 (1983).
\item[35] 33 U.S.C. § 1321(a)(2). An accidental discharge is defined as including, but not limited to, “any spilling, leaking, pumping, pouring, emitting, emptying or dumping.”
\item[37] While outside of the scope of this article, the official list of federally significant toxic dump sites under CERCLA is especially prone to politicization and non-transparency, due to the vast amounts of time and taxpayer money required for cleaning up such sites. See generally Dashiell Shapiro, Superdumb Discrimination in Superfund: CERCLA Section 107 Violates Equal Protection, 2002 U. CHI. LEGAL. F. 331 (2002); Martina E. Cartwright, Superfund: It's No Longer Super and It Isn't Much of a Fund, 18 TUL. ENVTL. L.J. 299 (2005).
\item[38] 16 U.S.C. §§ 1531-1544 (1973).
\end{footnotes}
“endangered” or “threatened” species.  

The Road to the Official Endangered Species List

The need to protect rare species, and the resulting benefits to humanity as well as commerce, first came up in the U.S. Senate during the environmental policy debates of 1969 (the debates that led ultimately to the passage of the National Environmental Policy Act in 1970). In the opinion of the Senate, rare species should be preserved to “permit the regeneration of species to a level where controlled exploitation of that species can be resumed” because “with each species we eliminate, we reduce the [gene] pool… which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminants.” Species preservation was left out of the National Environmental Policy Act, but the issue remained current because in the early 1970s environmental legislation and ambitious public interest debates were particularly fashionable in Washington.

While debating the newly introduced Endangered Species Act in 1973, the House of Representatives was inspired by the latest scientific research showing that the preservation of habitat was essential for a creature’s survival, and that the habitats of many creatures were being destroyed by unchecked construction and development. In the words of one Congressman, “as we homogenize the habitats in which these plants and

40 See Lazarus, supra note 13, at 70-73.
42 See Mary Graham, Democracy by Disclosure: The Rise of Technopolulism 77-90 (2002). The most important environmentally-relevant statutes debated during this period were the Clean Air Act and Clean Water Act. Wide-ranging public interest statutes were passed in other subject areas during this period as well, such as the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (1970). See also Lazarus, supra note 13, at 70-73.
animals evolved... we threaten their – and our own – genetic heritage.”\(^{43}\) It should be noted that Congressional debate during the passage of the Endangered Species Act was almost entirely based on commerce and the profitability of natural resources. In fact, the Congressional record indicates a rationale for protecting rare species that is quite different from that of environmentalists who are concerned about ecosystem health or the philosophical and ethical issues surrounding human-caused extinctions.\(^{44}\) For example, the House of Representatives noted the need to ensure the survival of rare plant and animal species for the “continuing availability of a wide variety of species to interstate commerce.”\(^{45}\) The lawmakers who passed the Endangered Species Act also had no idea how controversial the act would become, with no member of the Senate and only four members of the House of Representatives voting against its passage, after a relatively tame debate that tended to focus on the need to save glamorous animals like grizzly bears from extinction. There was also little media coverage of the act’s passage.\(^{46}\)

Nonetheless, the text of the Endangered Species Act begins with an environmentally ethical proclamation of the need to save the Earth’s creatures from disappearing forever: “the United States has pledged itself as a sovereign state in the

\(^{44}\) This distinction exemplifies a running philosophical dilemma in environmental law and popular conservation: should the natural world be preserved for the benefit of humans, or should it preserved for its own sake? This conundrum is rarely noted by lawmakers but appears regularly in the writings of environmental ethicists and activists, who consider most American environmental law to be weakened by an \textit{anthropocentric} focus on the comfort and leisure of humans. Some activists have called for a \textit{biocentric} legal focus on the rights of existence and protection for plants and animals. The most noteworthy example of this ethic in American environmental law is the Endangered Species Act. A more expansive type of environmental jurisprudence, inspired by the early conservationist and ethicist Aldo Leopold, would embody an \textit{ecocentric} focus in which all natural processes are allowed to function without human interference. The ecocentric ethic has not yet appeared in American environmental law. For a general discussion of these various schools of thought \textit{see} SALZMAN & THOMPSON, supra note 11, at 27-30. The ecocentric ethic, though not yet known by that name, was introduced in ALDO LEOPOLD, A SAND COUNTY ALMANAC (1949).
\(^{46}\) \textit{See} SALZMAN & THOMPSON, supra note 11, at 255.
international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction.”\(^\text{47}\) The act prohibits any agency of the federal government or the parties it regulates from damaging the habitat of a species falling under very precise definitions of “endangered species,”\(^\text{48}\) “threatened species,”\(^\text{49}\) and their “critical habitat[s],”\(^\text{50}\) under the rationale that it is in the public interest to save such species from extinction.\(^\text{51}\)

The act was placed under the administration of the U.S. Fish & Wildlife Service (FWS), which has been granted expert authority over wildlife management issues.\(^\text{52}\) The ESA applies to all federal agencies and mandates FWS investigation into any action by those agencies that may damage the habitat of any animal or plant that has been placed on the official government-managed list of endangered or threatened species.\(^\text{53}\) The FWS is also tasked with managing this official list, which includes species deemed worthy of protection by teams of scientists that work for and with that agency. Citizens may also petition for the inclusion of a particular species on the list.\(^\text{54}\) The first version of this list was published by the FWS in 1967, six years before the enactment of habitat protection

\textsuperscript{47} 16 U.S.C. § 1531(a)(4).
\textsuperscript{48} An endangered species is defined as “any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter [of the statute] would present an overwhelming and overriding risk to man.” 16 U.S.C. § 1532(6). The “Secretary” is the Secretary of the Interior, who has ultimate authority over the U.S. Fish & Wildlife Service, the agency assigned to wildlife management.
\textsuperscript{49} A threatened species is defined as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. §§ 1532(20).
\textsuperscript{50} Critical habitat is defined as “the specific areas within the geographical area occupied by the species,” “essential to the conservation of the species,” and “which may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A).
\textsuperscript{51} 16 U.S.C. § 1531(b)-1531(c).
\textsuperscript{52} The U.S. Fish & Wildlife Service is a unit of the Department of the Interior that is assigned to manage and preserve wildlife. The FWS manages the endangered species protection program as well as national wildlife refuges and national fish hatcheries, among other endeavors. The FWS has law enforcement authority. See U.S. Fish & Wildlife Service, Conserving the Nature of America, available at http://www.fws.gov/ (last visited Sept. 6, 2009).
\textsuperscript{53} 16 U.S.C. § 1533.
\textsuperscript{54} 16 U.S.C. § 1537(a).
under the ESA, illustrating the rising public and political concern over extinctions during that period.\textsuperscript{55}

Whenever warranted, federal agencies are also required by the ESA to call upon the FWS for expert guidance on species population levels and the necessity of habitat protection prior to taking action.\textsuperscript{56} These requirements for inter-agency cooperation are a particular point of controversy. Another source of opposition to the ESA is the use of independent scientists in the formulation of the official list of endangered and threatened species, information on those species’ critical habitats, and how and to what extent to protect those habitats during the planning of government projects.\textsuperscript{57}

Most importantly for the present discussion, the contents and management of the official endangered species list are delineated quite clearly in the act’s text:

The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions.\textsuperscript{58}

This list is the catalyst for enforcement of the Endangered Species Act, in that the actions of federal agencies or the parties they regulate must not infringe on the habitats of any species on the list.\textsuperscript{59} Therefore, the official endangered species list is an item of

\textsuperscript{55} See McKibben, supra note 8, at 993.
\textsuperscript{57} The use of independent scientists often inspires ESA opponents and those disadvantaged by project alterations or cancellations to accuse scientists of poor methodology or, ironically for the present discussion, a lack of transparency. See Id. at 25.
\textsuperscript{58} 16 U.S.C. § 1533(c)(1).
\textsuperscript{59} Violations are usually determined via judicial review of citizen suits against agencies or parties suspected of damaging habitat without proper investigation into alternative courses of action. 16 U.S.C. §§ 1540(c), 1540(g). For more information on this process and its ramifications, see the next section of this article.
government-managed information that must be made transparent and available to citizens, not just under the mandate of the Endangered Species Act itself but also under the Freedom of Information Act\(^60\) and the Administrative Procedure Act.\(^61\) Thus, the Endangered Species Act can be considered an informational statute. However, disputes over natural protection under the ESA and the accountability and transparency of the endangered species list fall under the rubric of American administrative jurisprudence, in which the observance of procedure can trump the substantive goals of the public interest statutes in question.

**ADMINISTRATIVE AND SUBSTANTIVE SPECIES PROTECTION**

Given the fact that environmental protection in America is performed by federal agencies housed within the executive branch of the government, the activities of those agencies fall under the realm of administrative law. This creates a fundamental dilemma for environmental protection because administrative law is by nature retroactive, while federal environmental protection statutes strive to be proactive.\(^62\) Government actors are required by law to follow certain procedures, but citizens are only offered the opportunity to counter government decisions by arguing over improperly-observed procedures after the fact. Per standard American administrative procedure, a successful citizen suit against government malfeasance, while appearing to be a victory in court, often results merely in the same agency decision after minor procedural adjustments; or the ruling comes too late

\(^{infra}\). The Department of the Interior can also impose criminal penalties for violations of the act. 16 U.S.C. §§ 1540(a), 1540(b), 1540(e).
\(^{62}\) See LAZARUS, supra note 13, at 185.
to prevent the problem that resulted from a regulatory decision that was already made, even if that decision was made while following procedures incorrectly.\textsuperscript{63} This phenomenon is particularly acute in environmental law, in which the effect of a procedurally inappropriate agency action is often irreversible damage to the natural world.\textsuperscript{64}

Modern environmental statutes, including the Endangered Species Act, are modeled after the procedural requirements of the National Environmental Policy Act,\textsuperscript{65} and therefore courts are much more likely to review the minutiae of procedural compliance by federal agencies rather than the public interest-oriented environmental goals of these statutes. The substantive goals of post-1970 environmental legislation actually enjoyed brief support from the federal courts, exemplified by the first NEPA-related case to reach the circuit court level. In the 1971 \textit{Calvert Cliffs} ruling,\textsuperscript{66} involving a citizen dispute with an under-informative environmental impact statement (EIS) compiled by the Atomic Energy Commission, Judge Skelly Wright proclaimed that “NEPA requires agencies [to] consider the environmental impact of their actions ‘to the fullest extent possible’,” and “at every stage where an overall balancing of environmental

\begin{thebibliography}{9}
\bibitem{} See \textit{Id.} at 1718.
\bibitem{} See supra notes 13-16 and accompanying text.
\bibitem{} Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971). This dispute involved a permit for the construction of a nuclear power plant near Calvert Cliffs State Park on the shore of Chesapeake Bay in Maryland. The circuit court ultimately ordered the Atomic Energy Commission to correct some procedural errors in the compilation of the environmental impact statement, after which the facility was built. After opening in 1975, the Calvert Cliffs Nuclear Power Plant is still in operation with a permit that has been extended to 2020. See Constellation Energy, Calvert Cliffs Nuclear Power Plant, available at http://www.constellation.com/portal/site/constellation/menultem.0275303d670d51908d84ff10025166a0/ (last visited Sept. 5, 2009).
\end{thebibliography}
and nonenvironmental factors is appropriate.\textsuperscript{67}

But this judicial deference to substantive environmental protection would not last much longer. Since \textit{Calvert Cliffs} the courts have tended to appreciate federal environmental protection at the philosophical level, but emphasize more mundane procedural requirements when handing down rulings. A crucial precedent came in 1980 with another citizen dispute over an agency’s environmental impact statement, in which the Supreme Court ruled that the NEPA is primarily procedural, rather than substantive. In the \textit{Strycker’s Bay} case,\textsuperscript{68} concerning an allegedly faulty EIS submitted by the Department of Housing and Urban Development, the high court noted that if an agency has followed proper procedures while formulating an EIS, and the ultimate decision has not been made arbitrarily and capriciously, then the procedural requirements of the NEPA are satisfied.\textsuperscript{69} In the opinion of the high court, the NEPA does not give judges the authority to overrule any substantive decisions made by an agency, and an agency can make decisions based on its own expertise as long as the information that forms the basis of a decision has been collected satisfactorily. Thus, the NEPA allows procedural review but not substantive review.\textsuperscript{70}

In other words, the NEPA (and by extension, the subsequent environmental statutes it inspired, including the Endangered Species Act) allows poor environmental decision-making that is based on properly-followed procedures. The fundamentally

\textsuperscript{67} 449 F.2d 1118. Here Wright was referencing the NEPA at 42 U.S.C. § 4332(2)(C), which delineates the environmental impact statement process.


\textsuperscript{69} 444 U.S. 227. “Arbitrary and capricious” decision-making by government agencies is prohibited under the Administrative Procedure Act, 5 U.S.C. § 706 (2)(A). This case offers an intriguing example of how all government agencies, even those that many people would think had no impact on the environment, do indeed have impacts that are regulated by federal environmental legislation. Here, the Department of Housing and Urban Development was required to submit an EIS for a proposed low-income housing development in New York City that was opposed by local residents.

\textsuperscript{70} See \textsc{Salzman} & \textsc{Thompson}, \textit{supra} note 11, at 277.
administrative and reactive characteristics of American administrative law have perhaps unintentionally sapped the integrity of information-intensive environmental statutes by focusing more on the way information is collected and compiled, with less concern for whether that information is accurate or useful to citizens and government watchdogs, or whether the ultimate agency decision reflects the substantive goals of the statute in question. And for the Endangered Species Act, the official list of creatures that is supposed to be the catalyst for federal habitat protection is prone to not just administrative obfuscation but also political interference, as can be seen throughout the act’s judicial history. The ESA’s rocky voyage through the American court system raises serious questions about the informational integrity of the official endangered species list.

The Tennessee Valley Authority Case

While public interest environmental legislation enjoyed much political capital in the early 1970s, by mid-decade the honeymoon came to an end as the regulatory ramifications and seemingly unattainable goals of the new statutes began to be argued in court. A few years after its passage the ESA became the basis of a bitter legal feud that instigated a still-ongoing conflict over the public interest in natural preservation and the public interest in economic development, sharpening further the now politicized role of

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72 President Richard M. Nixon began his first term in 1969 as a strong supporter of environmental protection, though he was probably influenced more by public opinion and political expediency rather than personal belief. Regardless, he signed the NEPA and several other environmental statutes into law and created the Environmental Protection Agency. But Nixon soon began to question the increase in government power facilitated by the NEPA and related statutes. By the time of his 1972 reelection, he had abandoned environmentalism and re-aligned himself with industrial interests that had reacted negatively to the increased regulations, for which he had played an instrumental role just a few years before. This political about-face symbolized the end of civil rights-inspired bipartisanship, which had run out of steam by around 1972. *See J. BROOKS FLIPPEN, NIXON AND THE ENVIRONMENT* 199-214 (2000). For a discussion of critiques aimed at the seemingly unattainable goals of environmental legislation, *see* LAZARUS, supra note 13, at 190.
environmental law in America. Opponents of the new environmental legislative regime were able to make their voices heard during this particularly intense controversy.

American environmental law hereby became unexpectedly contentious as economic development interests and politicians with anti-regulatory philosophies learned what the ESA could do, and environmental law (as well as environmentalism in general) has never recovered its popularity with this segment of the body politic.73

The catalyst for environmental law’s loss of political capital was a Supreme Court case involving a tiny fish called the snail darter, an endangered species inhabiting streams in eastern Tennessee.74 A federal agency, the Tennessee Valley Authority, announced plans to build Tellico Dam on the Little Tennessee River in 1966, several years before the enactment of the ESA. Environmentalists had long opposed the project, but with little statutory recourse until the snail darter was listed as endangered (under the ESA) in 1975. This finally gave dam opponents a statutory basis for court action in their efforts to derail the construction process, and in *Tennessee Valley Authority v. Hill*75 the Supreme Court ruled that the project was in violation of the Endangered Species Act.76 This ruling shut down the dam project until a less destructive alternative was found that ameliorated the risks to the snail darter and its habitat.77

While this was a temporary victory for environmentalists and other opponents of

74 The snail darter (*Percina tanasi*) is a small fish that can be up to three inches long and is only known to inhabit the upper tributaries of the Tennessee River. As of 1984, it has been classified as “threatened” under the Endangered Species Act, and as of 1996 as “vulnerable” by the International Union for Conservation of Nature. See IUCN Red List of Threatened Species: *Percina tanasi*, available at http://www.iucnredlist.org/details/16595/0 (last visited Sept. 6, 2009).
76 437 U.S. 172-174.
77 437 U.S. 167-168. Here the Supreme Court upheld an injunction issued by the Sixth Circuit Court of Appeals in Hill v. Tennessee Valley Authority, 549 F.2d 1064, 1069 (6th Cir. 1977).
Tellico Dam, the structure was eventually built anyway, because in 1978 Congress reacted to the controversial *Tennessee Valley Authority* decision by adding an amendment to the Endangered Species Act that allowed particular government development projects to be exempted from the act’s requirements by vote of a special committee.\(^7^8\) Known colloquially as the “God Squad,”\(^7^9\) this committee voted to arbitrarily exempt the Tellico Dam project from the requirements of the ESA. Interestingly, biologists later found more snail darter habitats, so the creature’s existence was not threatened by Tellico Dam after all, at least not to the point of possible extinction.\(^8^0\) Regardless, the *Tennessee Valley Authority* decision places serious doubt on whether the Endangered Species Act can be enforced the way Congress intended – through actions to preserve the habitat of a creature that appears on the official endangered species list.

**Environmental Protection and Private Property Rights**

Starting in the 1980s a newly conservative Supreme Court began to roll back public interest-oriented environmental protections in favor of a new focus on private property rights – a transition inspired not only by broad changes in American political philosophy, but which can also be traced back to the controversial *Tennessee Valley Authority* decision.

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\(^7^8\) Pub. L. 93-632, 92 Stat. 3751 (1978). This amendment authorized the special cabinet-level committee, officially known as the Endangered Species Committee, and added that authorization to the ESA at 16 U.S.C. § 1536(a)(2), with the procedures for finding an exemption codified at § 1536(h). Supreme Court Justice Lewis F. Powell predicted exactly this type of reaction from Congress in a dissent to the *Tennessee Valley Authority* decision at 437 U.S. 210.

\(^7^9\) The source of the nickname “God Squad” is difficult to determine, but environmentalists generally decry this committee’s ability to decide the fate of endangered creatures as if it has no higher authority. See Ted Gup, *Down with the God Squad*, TIME, Nov. 5, 1990, available at http://www.time.com/time/magazine/article/0,9171,971548,00.html (last visited Sept. 5, 2009). The existence of the God Squad raises serious issues of accountability and transparency. See infra notes 140-147 and accompanying text.

\(^8^0\) See Patrick A. Parenteau, *The Exemption Process and the “God Squad,”* DONALD C. BAUR & WILLIAM ROBERT IRVIN, ED S. EN DANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 131-133 (2002). As a result, the snail darter was later reclassified from “endangered” to “threatened” under the ESA. See supra note 49.
Authority case.\textsuperscript{81} The key change in the high court’s philosophy involved a new conception of standing, or the ability of general-interest environmental groups to sue federal agencies for statutory violations in which those activists did not have a direct personal economic interest.\textsuperscript{82}

In the early 1990s standing for environmental activists was reconstructed by the Supreme Court as a requirement to prove direct personal harm as defined in the Administrative Procedure Act (APA).\textsuperscript{83} Two initially unrelated cases known as \textit{Lujan I}\textsuperscript{84} and \textit{Lujan II}\textsuperscript{85} were brought by citizens’ environmental groups contesting the suspected disregard for environmental statutes by government agencies. In \textit{Lujan I} a wildlife conservation interest group protested a reclassification of federal land without proper environmental review, and the government claimed that the group did not have standing to sue because it could not claim direct injury under the APA. The high court accepted this line of reasoning.\textsuperscript{86} Standing for environmental groups was given its closest examination yet in \textit{Lujan II}, in which a different wildlife group contested an agency interpretation of the Endangered Species Act. In the Court’s ruling, not only was the group unable to prove direct injury, it was also unable to prove that the government agency was directly responsible for the alleged environmental harms or that the agency

\begin{footnotes}
\footnote{82}{Standing based on a general interest (also known as the doctrine of “private attorneys general” in the wider realm of administrative law) in saving a natural resource for its own sake was first promoted by Justice William O. Douglas in a dissent to \textit{Sierra Club v. Morton}, 405 U.S. 727, 744-745 (1972). Standing for general-interest environmental citizens’ groups, without the need to demonstrate “injury in fact,” was first endorsed by the majority in \textit{U.S. v. Students Challenging Regulatory Agency Procedures}, 412 U.S. 669 (1973).}
\footnote{83}{5 U.S.C. §§ 500-706 (1946).}
\footnote{85}{\textit{Lujan v. Defenders of Wildlife}, 504 U.S. 555 (1992).}
\footnote{86}{497 U.S. 891-894.}
\end{footnotes}
would be able to correct the problem. Thus, by the early 1990s the substantive goals of federal environmental statutes were becoming subsumed by procedural minutiae, with citizens forced to prove that they were directly impacted by agency noncompliance while those same agencies were not required (under judicial review, it must be noted) to provide evidence that they attempted to comply with those procedures proactively.

The wider public interest philosophies of federal environmental statutes also suffered a crucial blow from the Supreme Court during this period. The key turning point for public interest environmental legislation came with the Lucas case in 1992, in which the high court ruled in favor of a landowner who argued that the enforcement of federal environmental requirements (land use restrictions in particular) on his property amounted to an unconstitutional taking. In addition to the constitutional aspects of this argument, the landowner also claimed that the environmental restrictions at issue caused uncompensated economic harms – another argument that the high court found persuasive. For environmental activists, this was perhaps even more troubling because natural protection became less a matter of non-economic public interest and would only gain legitimacy if it could deliver economic benefits of its own.

This distinction has become especially vexing for the enforcement of the Endangered Species Act, which requires the protection of habitat that often falls within private property. The Supreme Court ruling in Lucas indicates that in the new conservative era, the public interest was bound to fall behind private property rights and

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87 504 U.S. 568-571.
89 505 U.S. 1010-1014.
90 505 U.S. 1052-1056.
92 See LAZARUS, supra note 13, at 135-136.
economic development, and this presents a fundamental conflict with the aims and goals of most federal environmental legislation. Fundamentally, the Endangered Species Act requires accountability in government efforts to preserve species habitat, but such accountability becomes a moot point when private land owners are able to restrict those protection efforts before they even begin.\(^93\)

**Defenders of Wildlife and Procedural Obfuscation**

In addition to the changing perceptions of standing and private property rights at the Supreme Court, during the same time period the Eighth Circuit delivered an esoteric but far-reaching decision that damages the ability of citizens to acquire information on whether or how federal agencies comply with the Endangered Species Act. The *Defenders of Wildlife* case of 1989\(^94\) reflects how a judicial focus on administrative procedure can weaken not just the public interest spirit of American environmental statutes like the Endangered Species Act, but can damage the transparency and accountability of the federal agencies that are assigned to execute those statutes. The case involved alleged federal agency violations of a series of environmental statutes that fall under the purview of the National Environmental Policy Act (NEPA); the Endangered Species Act (ESA); the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA);\(^95\) the Bald and Golden Eagle Protection Act (BGEPA);\(^96\) and the Migratory Bird Treaty

\(^94\) *Defenders of Wildlife v. Administrator, Environmental Protection Agency*, 882 F.2d 1294 (8th Cir. 1989).
The overlapping environmental requirements of these various statutes, and their observance under the Administrative Procedure Act (APA), illustrate the procedural quagmire of American environmental jurisprudence and the concurrent loss of agency transparency and accountability.

In this court dispute, the citizens’ group Defenders of Wildlife protested the Environmental Protection Agency’s classification of certain pesticides and rodenticides containing strychnine as acceptable for above-ground use, believing the classification to be dangerous to wildlife and therefore in violation of the aforementioned environmental statutes. The group in turn asked the court to review the agency’s compliance with those statutes as well as the requirements of the APA. The primary issue in the case was the EPA’s failure to hold an administrative hearing before making the regulatory decision at the heart of the dispute. Here the EPA relied on a D.C. Circuit precedent in which the court ruled that an agency need not hold hearings in which environmentalists are invited, because those citizens would have the option of calling for judicial review later.

Defenders of Wildlife noted that this stance ignored both the proactive spirit of American environmental law and the procedural transparency required under the APA. The group argued instead that the agency had violated the procedural requirements of the APA, and

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97 16 U.S.C. §§ 703-712 (1918). This act codified the aesthetic and environmental values of birds, making it one of the first statutes in American history to consider the protection of animals to be in the public interest. The act was also the first internationally-oriented American environmental statute, originating with a 1916 treaty with the United Kingdom (acting on behalf of Canada in foreign affairs) to regulate hunting. See Hye-Jong Linda Lee, The Pragmatic Migratory Bird Act: Protecting “Property”, 31 B.C. ENVTL. AFF. L. REV. 649, 652-653 (2004).

98 882 F.2d 1296-1298. The pesticides in question were believed to be harmful to birds when used above ground. Since the proposed regulation would be relevant across the United States, according to Defenders of Wildlife practically any bird present in the country could be at risk, hence the action under the ESA and the two statutes that protected specific families of birds, the BGEPA and the MBTA. Id. at 1299-1303.

in particular its prohibition against “arbitrary and capricious” decision-making.  

After a discussion of the judicial review requirements of FIFRA, the Eighth Circuit court looked into the relevant provisions of the Endangered Species Act. That statute includes its own judicial review and administrative relief procedures, and allows any citizen to initiate a civil suit against any government agency for its violation. Further support was provided by the Administrative Procedure Act, which allows judicial review of agency action when no other administrative relief is available; and which mandates judicial review for injuries suffered within the meaning of a relevant statute (in this case, the ESA and the other named species protection statutes). The court’s conclusion in the *Defenders of Wildlife* case was that the petitioners could indeed pursue a claim against the Environmental Protection Agency and its contested classification of fungicides and rodenticides. The agency was then enjoined from making the classification until it could prove that doing so would not violate the Endangered Species Act, while the procedures warranted by the Administrative Procedure Act must be followed.

However, the ultimate result of the *Defenders of Wildlife* case is that a great amount of procedural contortion is necessary to achieve environmental protection whenever incompatible statutes overlap. The ruling demonstrates how American administrative law makes proactive environmental protection nearly impossible, with judicial relief only being found after environmental damage has been done, and often

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101 882 F.2d 1298-1299.  
104 5 U.S.C. § 702. The discussion of judicial review under the ESA and the APA is found at 882 F.2d 1299-1303.  
105 882 F.2d 1303-1304.
with tortuous statutory interpretation by the courts. Meanwhile, the ruling indicates indirectly that the process of judicial review cannot inspire federal agencies to operate transparently while decisions are being made, and that citizens must rely on convoluted procedural arguments later to prove that the agencies did not act transparently.\textsuperscript{106} While \textit{Defenders of Wildlife} is only a circuit court precedent and applies more to the judicial review procedures mandated by a variety of federal environmental statutes, the case stemmed from possibly noncompliant agency activities toward creatures that had been officially listed as endangered or threatened, not to mention restrictions on public participation. In the \textit{Defenders of Wildlife} case, the presence of creatures on the official endangered species list did not bring them protection in the fashion that was intended by Congress when it passed the ESA.

\textbf{THE OPAQUE AND POLITICIZED ENDANGERED SPECIES LIST}

The Endangered Species Act can be considered an informational and procedural statute not unlike the National Environmental Policy Act, which directly inspired it.\textsuperscript{107} The ESA was the first substantial wildlife protection statute in America, adding a new philosophy (for federal law) that considered plants and animals to be natural resources that were worthy of protection.\textsuperscript{108} Consequently, the ESA requires the creation and upkeep of an official government list of threatened and endangered creatures, which can

\textsuperscript{106} The court’s ruling in \textit{Defenders of Wildlife} is completely lacking in any discussion of the procedural quagmire it created. Also missing is any insight into how this focus on procedural minutiae can create problems for judicial review of agency decisions in all realms of law, not just environmental protection. \textsuperscript{107} See \textit{supra} notes 13-16 and accompanying text. Also recall that the NEPA was partially inspired by the transparency protections of the Freedom of Information Act. See \textit{supra} notes 8-10 and accompanying text. \textsuperscript{108} George Cameron Coggins, \textit{Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973}, 51 N.D. L. REV. 315, 320 (1974).
be especially useful for citizens with either ethical concerns about irreversible species loss or political concerns about destructive development projects. However, the exact pieces of information on that list and how they got there, as well as the absence of other pieces of information and why they’re not there, are the result of politicized phenomena in which accuracy and transparency can be trumped by partisan trickery, while administrative law continues to emphasize procedure over substance.

**Controversial Enforcement of Habitat Protection**

Recall that the Endangered Species Act includes precise definitions of “endangered” and “threatened” species, followed by the requirement that all federal agencies must ensure that any agency action is not likely to jeopardize the continued existence of any such species, under the rationale that it is in the public interest to save such creatures from extinction. The key method of protecting endangered species from extinction, according to the philosophy of the ESA, is to prohibit habitat destruction. While the ESA generated little political opposition at the time of its enactment in 1973, within a few years the philosophy of habitat protection would generate intense controversy toward not just that act but toward all of environmental law.

The greatest source of political opposition to the ESA is its power to derail the

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110 See supra notes 48-49.
111 16 U.S.C. §§ 1531(b)-1531(c).
112 The preservation of ecosystems upon which endangered species depend for survival is mandated at 16 U.S.C. §§ 1531(b). This philosophy remains from the Congressional debates before the passage of the ESA in 1973 and reflects then-current scientific knowledge. See supra note 43 and accompanying text. Nonetheless, the notion that habitat preservation is crucial for species survival has been strengthened by subsequent scientific research and is accepted without dispute by most zoologists and biologists. See generally Reed F. Noss, Michael A. O’Connell & Dennis D. Murphy, *The Science of Conservation Planning: Habitat Conservation Under the Endangered Species Act* (1997).
113 See supra note 73 and accompanying text.
114 See supra note 73 and accompanying text.
actions of any government agency in order to protect the habitat of even the smallest endangered or threatened species, with little room for debate over how to balance the benefits of species preservation with the costs of restricting development.\footnote{See \textit{Salzman} \& \textit{Thompson}, supra note 11, at 256.} The act also requires federal agencies to describe in detail the type of agency action most likely to jeopardize an endangered creature’s survival by damaging or altering its habitat.\footnote{This level of detail is required by the ESA at 16 U.S.C. § 1536(c), which references the environmental impact statement process as required under the National Environmental Policy Act at 42 U.S.C. § 4332.} Consequently, the ESA has the power to restrict residential, commercial, and industrial development if an endangered species is found to reside in a given location.\footnote{Note that developers and construction companies are usually regulated in one way or another by various federal agencies, such as the Department of Agriculture, the Department of Housing and Urban Development, the Federal Highway Administration, and myriad others depending on the nature of the project. Since these agencies are required to comply with the Endangered Species Act, the parties they regulate are indirectly required to comply as well. The requirement for all federal agencies to observe the ESA is found at 16 U.S.C. § 1531(c).} This has inspired development interests to lobby federal officials to ease or eliminate enforcement of the act for particular projects. Public controversy over derailed developments has also encouraged arguments in court and in Congress as severe as whether the act violates the Commerce Clause of the U.S. Constitution.\footnote{Philip Weinberg, \textit{Endangered Statute? The Current Assault on the Endangered Species Act}, 17 Vill. Envtl. L.J. 389, 394-398 (2006). \textit{See also} U.S. Const. art. I, § 8, cl. 3, giving Congress the power to regulate interstate commerce.} The ongoing controversy has also politicized the process by which species are listed as “endangered” or “threatened” under the ESA.

**How a Species Officially Becomes “Endangered”**

The majority of case law surrounding the Endangered Species Act concerns restrictions on development plans, in scenarios similar to that found in the \textit{Tennessee}
But for present purposes, it is useful to look at a less prominent aspect of ESA case law— that surrounding the accuracy of the official list of endangered and threatened species, which illustrates the importance of government-managed information and the processes of its creation. Occasionally, the political machinations surrounding species and habitat protection develop into an assault on the very meaning of what makes a species “endangered” and whether or not a species is added to the official government-managed list.

It is important to note that the terms “endangered” and “threatened” are indeed used by scientists to assess the populations of species and to call for protection of those that are in danger of extinction. However, in the context of the Endangered Species Act these are administrative and legal terms that are assigned by employees of federal agencies. These agencies are held to the transparency requirements of the Freedom of Information Act and the procedural requirements of the Administrative Procedure Act, but they do not work in a political vacuum. Vociferous opposition from conservative economic interests and property rights activists has turned the listing of species as officially endangered or threatened into a highly contentious and politicized process with its own history of court disputes, with potentially damaging consequences

119 See supra notes 74-79 and accompanying text.
120 At the international level, zoologists have implemented a much more precise jargon for the health of species populations. The International Union for Conservation of Nature (IUCN) of Geneva, Switzerland has implemented a series of categories of concern including Least Concern, Near Threatened, Conservation Dependent, Threatened, Vulnerable, Endangered, Critically Endangered, Extinct in the Wild, and Extinct. Unlike the Endangered Species Act and similar laws in other countries, this classification system also acknowledges missing information with additional categories called Data Deficient and Not Evaluated. See the IUCN Red List of Threatened Species, available at http://www.iucnredlist.org/ (last visited Sept. 6, 2009); International Union for Conservation of Nature, About IUCN, available at http://www.iucn.org/about/ (last visited Sept. 6, 2009).
121 5 U.S.C. §§ 552(a)(1)(B)-552(a)(1)(D). The phrase “each agency” appears in almost every clause of the FOIA, with the term “agency” describing any administrative agency or cabinet-level department.
for the informational integrity of the ESA.\textsuperscript{123}

Via an agency petition and response process supported by the Administrative Procedure Act,\textsuperscript{124} any citizen can make a request to the U.S. Fish & Wildlife Service for protection of a particular species, and the FWS is required to determine the merit of the petition and respond within ninety days.\textsuperscript{125} The FWS then has one year to conduct scientific studies, and is required to officially list the species if it finds that “natural or manmade” factors threaten the species with extinction.\textsuperscript{126} There is no requirement for the FWS to consider political factors in this decision,\textsuperscript{127} and given the use of scientific expertise during the listing process, courts have traditionally been reluctant to overturn FWS species listings simply because of political controversy.\textsuperscript{128}

The \textit{Tennessee Valley Authority} case was the only noteworthy example of a dispute over the protection of endangered species habitat reaching the Supreme Court, but the species in question (the snail darter) was already officially listed by the FWS via proper procedures under the ESA. As for the listings themselves, judicial deference to agency expertise, and the impact of public controversy, were the ultimate questions in a pair of contentious court cases in Oregon and Washington. The unlucky northern spotted owl, which merely chooses to live in ancient hollow trees, was the source of the dispute.

\textsuperscript{123} In recent years, a favored strategy of ESA opponents is to cite the Commerce Clause of the U.S. Constitution. \textit{See supra} note 118 and accompanying text.
\textsuperscript{124} 5 U.S.C. § 553.
\textsuperscript{125} 16 U.S.C. § 1533(b)(3)(A).
\textsuperscript{126} 16 U.S.C. § 1533(b)(1)(A).
\textsuperscript{127} Note that the ESA includes a requirement for the consideration of economic and national security impacts upon listing a species, but this pertains to the effects of losing the species in question or its habitat, not the effects of restricting planned development projects. 16 U.S.C. § 1533(b)(2).
\textsuperscript{128} \textit{See} Salzman and Thompson, \textit{supra} note 11, at 259-260. This can be explained via the doctrine of judicial deference in administrative law, in which during judicial review a court will assume that Congress has given the agency in question the authority to make decisions based on its particular area of expertise. The procedures for courts to follow when reviewing an agency decision, considering the agency’s statutory duties, and determining how much deference to give to the agency’s subject matter expertise were largely laid out by the Supreme Court in \textit{Chevron USA, Inc. v. Natural Resources Defense Council}, 467 U.S. 837 (1984).
The Possibly Endangered Northern Spotted Owl

In the late 1980s, the northern spotted owl instigated a nationwide debate over the conflict between species preservation and economic development, with particularly nasty rhetoric exchanged between progressive proponents of environmental protection and conservative proponents of development and property rights. This controversy was the catalyst for a national political debate over the Endangered Species Act itself, which still rages to the present day. Logging companies wished to extract timber from the old growth forests of the Pacific Northwest, which aroused the opposition of environmentalists, who then attempted a legal challenge based upon the presence in the region of the northern spotted owl – at the time a potentially endangered species whose habitat is the old-growth trees coveted by the loggers. If this bird were to be officially listed as endangered or threatened, destruction of its habitat would then be illegal per the Endangered Species Act. Thus, the ESA could restrict economically lucrative logging over a large region of the American Northwest.

A large coalition of environmental groups petitioned the U.S. Fish & Wildlife Service to add the northern spotted owl to the official list of endangered and threatened species. After its legally mandated investigation process, the FWS declined to list the

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129 The northern spotted owl (Strix occidentalis caurina) is a medium-sized owl that stands at sixteen to nineteen inches and nests inside hollow old-growth trees, in a range extending from southwestern Canada to southern Oregon. It has been classified as “vulnerable” by the International Union for Conservation of Nature, while its status in the United States is politically uncertain, as will be discussed infra. See S.P. Courtney et al., Scientific Evaluation of the Status of the Northern Spotted Owl, available at http://www.sei.org/owl/finalreport>Titleandexecsummary.pdf (last visited Sept. 6, 2009).


bird.\textsuperscript{132} As opposed to the much more frequent pressure from economic interests to \textit{not} list a species as endangered,\textsuperscript{133} here there was great political pressure from environmentalists to list the bird as endangered in order to strengthen their opposition to logging. The environmental coalition subsequently sued the FWS under both the Endangered Species Act and the Administrative Procedure Act, claiming an error in the decision not to list the bird as endangered.\textsuperscript{134}

In the closely-watched \textit{Northern Spotted Owl} case, the district court in western Washington State found that the FWS had indeed erred in its decision and ordered the agency to perform a more robust scientific examination and then issue another decision on whether to list the species.\textsuperscript{135} In addition, the court concocted a useful precedent in declaring that decisions of endangered species listings should be overturned by the courts only when the FWS neglects to articulate a satisfactory explanation for its actions.\textsuperscript{136} The result of the second decision-making process was the listing of the northern spotted owl as a “threatened” species, leading to a court-ordered stoppage of logging in several forested areas of Washington and Oregon.\textsuperscript{137} Bowing to the intense public controversy brought about by this ruling, the White House subsequently instructed the God Squad\textsuperscript{138} to review the listing of the northern spotted owl as threatened. The God Squad ultimately decided in favor of limited logging of the northern spotted owl’s habitat and against

\textsuperscript{133} See SALZMAN AND THOMPSON, supra note 11, at 260.
\textsuperscript{134} Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988). The bird was listed as the primary plaintiff on its own behalf, supported by a wide variety of environmental and conservation groups as secondary plaintiffs. \textit{Id.} at 480.
\textsuperscript{135} 716 F. Supp. 481-483. The initial FWS decision was ruled to be “arbitrary and capricious” under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).
\textsuperscript{136} 716 F. Supp 482.
\textsuperscript{138} Officially known as the Endangered Species Committee; see supra notes 78-79 and accompanying text.
listing the bird as worthy of habitat protection under the ESA.\textsuperscript{139}

The God Squad’s decision inspired another closely-watched court dispute, this time at the Circuit Court level. The \textit{Portland Audubon} case\textsuperscript{140} illustrates thus-far unresolved questions about the transparency of the God Squad and the public participation requirements of the Endangered Species Act. An Oregon chapter of the Audubon Society, the well-known bird lover’s organization,\textsuperscript{141} took the God Squad to task for the opaqueness of its decision about the northern spotted owl. At issue in particular were \textit{ex parte} contacts between the God Squad and the White House.\textsuperscript{142} The citizens’ group found such contacts to be a violation of the spirit of the ESA, which requires that the God Squad’s meetings and the records thereof be open to citizens.\textsuperscript{143}

Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals declared the matter to be “a most important and controversial case.”\textsuperscript{144} The court found the undisclosed \textit{ex parte} communications to be violations of both the ESA and the Administrative Procedure Act, and “prohibited by law.” Under both statutes, full public participation in committee meetings and disclosure of the associated records are required.\textsuperscript{145} However, this was a pyrrhic victory for the environmentalists, because as is usual in administrative law, the remedy for the violation was framed as a matter of procedural compliance. Per the Administrative Procedure Act, the God Squad was

\textsuperscript{140} Portland Audubon Society v. Endangered Species Committee, 984 F.2d 1534 (9th Cir. 1993).
\textsuperscript{141} The roots of the Audubon Society go back to 1886, when naturalist George Bird Grinnell organized bird lovers who had been inspired by the works of naturalist John James Audubon. The present National Audubon Society was organized in 1902 and consists of numerous state and local chapters. See National Audubon Society, About Audubon, \textit{available at} http://www.audubon.org/nas/ (last visited Sept. 6, 2009).
\textsuperscript{142} Introduced into this case was the declaration of a government employee who claimed that the God Squad faced political pressure from the George H.W. Bush Administration to exempt the northern spotted owl from the Endangered Species Act, thus allowing logging and development projects in the area to proceed. 984 F.2d 1550-1551.
\textsuperscript{143} 16 U.S.C. § 1536(e).
\textsuperscript{144} 984 F.2d 1536.
\textsuperscript{145} \textit{Id.} at 1538-1541.
required to supplement the official record to include the disputed *ex parte* communications, and to conduct another hearing in which the public was invited. After this was done, the procedural requirements were satisfied but the God Squad’s substantive decision did not change. Subsequently, the northern spotted owl received no habitat protection under the ESA and a federal judge dropped the restriction on logging in the region.147

Ironically, a minor victory for transparency under the Endangered Species Act resulted in absolutely no protection for the potentially threatened creature at the heart of the dispute. Meanwhile, the northern spotted owl’s declining population continues to be a source of concern for scientists and environmentalists.148 Due to continuing disputes over the alleged economic viability of logging, the jobs generated by it, and the perceived threats to these jobs brought by environmentalists, the listing and delisting of the northern spotted owl has continued to be controversial up to the present day.149

**Political Redefinitions of “Endangered”**

Political pressure for or against (usually against) the listing of endangered species is a continual problem for the credibility of the Endangered Species Act and the viability of its mandates for useful and transparent information for environmental activists. In 1995, the Republican-controlled Congress forced a one-year moratorium on the listing of any new species under the ESA, at the behest of property rights and economic

146 *Id.* at 1548-1549.
148 *See* Knickerbocker, *supra* note 130.
149 *See supra* note 130 and accompanying text.
development interests. The continual political pressure has also forced the U.S. Fish & Wildlife Service to create a new category called “candidate species” through which it can defer official decisions on listing certain species until the political winds change. This category has contained as many as 250 species waiting for official protection from extinction. The FWS has even been known to avoid politically contentious species listings by encouraging states and municipalities to enact land-use restrictions pertaining to the habitats of the species in question. Few of these political controversies make the transition to legal challenges in court, but the political pressure has still been effective in influencing protection decisions by the FWS and perhaps damaging the integrity of the official endangered species list as an accurate piece of information to be used by citizens.

The political controversy surrounding the Endangered Species Act, brought most vociferously by property rights activists and federal politicians with deregulatory interests, has made the act one of the most manipulated and tweaked federal statutes in recent memory, going through several rounds of weakening, strengthening, and attempted reforms. To start, Congress has never provided nearly enough funding for the FWS to fully protect listed species through habitat preservation. Also, during a period of especially vehement Congressional opposition to the ESA, in 1998 the Clinton Administration enacted some regulatory reforms including a “no surprises” policy to reduce uncertainty for landowners by restraining government action on their property until all scientific questions have been fully studied.

During the administration of George W. Bush, the deregulatory and property

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150 See Salzman and Thompson, supra note 11, at 260.
151 See Id.
152 See Id. at 255.
rights ideologies of the time resulted in several efforts to weaken the Endangered Species Act, including an attempt to remove habitat loss and population as the defining factors in what makes a species endangered, which would have made the informational requirements of the act, not to mention the very meaning of “endangered,” essentially meaningless.\textsuperscript{154} Bush also instituted a round of eleventh-hour regulations just before leaving office, including the elimination of the ESA requirement that federal agencies consult with the U.S. Fish & Wildlife Service when planning any project with a potential impact on the habitat of a listed species,\textsuperscript{155} unceremoniously discarding a crucial component of accountability and transparency in the federal government’s handling of species protection and habitat preservation. In March 2009, new president Barack Obama announced plans to roll back Bush’s eleventh-hour efforts.\textsuperscript{156} By April of that year, the protections of the Endangered Species Act were restored and Bush’s later efforts to weaken the act were repealed.\textsuperscript{157}

Notwithstanding these periodic political shifts, the fundamental spirit of the

\textsuperscript{154} See HAYS, supra note 56, at 161-163. Representative Richard Pombo (R-Cal.), a longtime advocate of private property rights and a vociferous critic of the Endangered Species Act, was tapped by Bush to make these revisions to the act. At the time, Pombo was raising concerns among government watchdogs for inappropriate industrial ties, a source of controversy that caused him to lose a reelection bid in 2006. See Paul D. Thacker, Hidden Ties: Big Environmental Changes Backed by Big Industry, ENVTL. SCI. & TECH., Mar. 8, 2006, available at http://www.truthout.org/article/hidden-ties-big-environmental-changes-backed-big-industry (last visited Sept. 6, 2009); Brody Mullins, Puppy Power: How Humane Society Gets the Vote Out, WALL ST. J., Nov. 7, 2006, at A9.


Endangered Species Act faces more timeless challenges, and the source of difficulty is the official list of species. The informational focus of the Endangered Species Act is both a blessing and a curse to its public interest goals, not to mention the rare and threatened creatures that the act strives to save from extinction. With the official list of endangered species acting as the catalyst for government action, any species and its habitat can be abused until the political process of adding that creature to the official list is complete. And once that happens, landowners who possess areas sufficiently similar to those named as habitat for a listed species might be inspired to willfully damage that habitat before government investigators discover it on their lands, thus avoiding future government action against what they deem to be their property rights. Landowners have also been known to directly exterminate listed species residing on their lands for the same reason, before government investigators become aware of their local presence. Here the Endangered Species Act ironically encourages the destruction of the habitat that is crucial to the creatures it is trying to protect, with landowners (the regulated parties under the ESA) making use of the informational focus of the act in ways that directly contradict its environmental spirit. This is clearly an unintended and contradictory consequence of the transparency that the act tries to promote.

Of course, the ultimate goal of the Endangered Species Act is not to turn threatened creatures into pieces of information by adding them to the official list, but to later remove them from that list. Listing and delisting are ostensibly indicators of a

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158 See SALZMAN AND THOMPSON, supra note 11, at 270.
159 See generally Dean Lueck & Jeffrey A. Michael, Preemptive Habitat Destruction Under the Endangered Species Act, 46 J. L & ECON. 27 (2003). This practice of willful habitat destruction or species extermination by landowners is common enough to have earned its own nickname: “shoot, shovel, and shut up.” See also SALZMAN AND THOMPSON, supra note 11, at 270.
160 See SALZMAN AND THOMPSON, supra note 11, at 270.
creature’s endangerment and later recovery, which itself should be inspired by the creature’s presence on the list. But while the ESA mandates habitat protection actions by federal agencies, the act is wholly dependent on scientific knowledge (or lack thereof) about the listed creatures. The transparency and accountability of agency interactions with independent scientists thus becomes another vexing problem for the informational integrity of the ESA. 161 Scientists consider the official endangered species list to be woefully inadequate, with only about 15% of the world’s plant and animal species having been studied enough to know if their populations and habitats are threatened; while in the United States alone, the official endangered species list may only include (and therefore attempt to protect) 10% of species that are actually in danger of becoming extinct. 162 This illustrates a further problem with accountability, because American statutes that promote the transparency and accessibility of government-held information say nothing about what a citizen can do if that information is simply incomplete.

Meanwhile, in the first three decades of the ESA, of the more than one thousand officially listed species, only 33 were delisted163 – and due to the vagaries of administrative law and the uncertainties of scientific knowledge, delisting often is not even an indication of species recovery. Seven of those species were delisted because they had become extinct, and twelve were delisted administratively because of taxonomic revisions or changes in regulatory requirements. Only fourteen listed species, including

161 Scientific uncertainty is a problem with environmental protection in general, as federal law is often unable to accept that some environmental problems remain poorly understood, while politicians and courts demand evidence that scientists have not yet obtained through research. See LAZARUS, supra note 13, at 185-186.
163 See SALZMAN AND THOMPSON, supra note 11, at 272. Per the ESA, the Secretary of the Interior is required to evaluate the endangered species list at least every five years and determine if each species therein should be reclassified (“endangered” to “threatened” or vice versa) or delisted. 16 U.S.C. § 1531(c)(2).
some true success stories like the peregrine falcon and the American alligator, have been delisted because their populations actually recovered enough to make them no longer endangered.\textsuperscript{164} Therefore, the crucial information mandated by the Endangered Species Act – the official list of protected species – does not adequately reflect the severity of the environmental problems it purportedly informs the public about, while delisting is not an adequate indicator of the act’s ability to actually bring threatened species back from the brink of extinction.\textsuperscript{165} In a roundabout fashion, this makes the transparency of the official endangered species list and the accountability of the government officials who manage it all the more important, because the ESA encourages citizen oversight of government efforts to protect those species and their habitats.\textsuperscript{166}

CONCLUSIONS

The proliferation of public interest-oriented statutes in the early 1970s revolutionized the protection of nature by the American government, by mandating specific procedures for federal agencies to follow and allowing judicial review of those procedures in the event of citizen suits over noncompliance.\textsuperscript{167} The federal government was now firmly entrenched in the protection of the natural world. While

\begin{itemize}
  \item \textsuperscript{164} See \textsc{Salzman and Thompson, supra} note 11, at 272. Another supposed Endangered Species Act success story, the bald eagle, has moved in and out of the official list several times, and not always for scientific reasons, but because of the bird’s cultural and political value. \textit{See also} Saralaine Millet, \textit{Birds Make Comeback}, \textsc{Atlanta J.-Const.}, Aug. 2, 2007, at A19.
  \item \textsuperscript{166} 16 U.S.C. § 1540(g).
  \item \textsuperscript{167} Elliott, Ackerman & Millian, \textit{supra} note 9, at 336-338.
\end{itemize}
environmentalists are usually (but not always) appreciative of government support,\textsuperscript{168} many nature lovers are unaware of two central characteristics of procedure-intensive environmental legislation.

First, substantive natural protection goals (often proclaimed prominently in the headers of statutes like the National Environmental Policy Act\textsuperscript{169} and the Endangered Species Act\textsuperscript{170}) are bound to be subsumed by narrow procedural focus of administrative jurisprudence. Second, procedure-oriented environmental legislation has revolutionized the use of information in the natural protection process and has greatly increased public participation in environmental regulation. But as this article shows, the potential usefulness of that information, and the true effectiveness of public participation, can be blunted by opaque (and often unlawful, statutorily speaking) agency behavior and the inability of citizens to achieve true transparency through retroactive judicial review.

The Endangered Species Act is much beloved by environmentalists thanks to its fundamental philosophy of protecting threatened creatures for their own sakes, while law-savvy activists have made use of the act’s power to halt destructive development projects if an endangered species is present. But it is important to remember that the power of the ESA boils down to what could be considered its Achilles Heel – the official list of endangered and threatened species. The act cannot begin to protect a creature’s habitat if it is not on this simple list, and the creation and management of this list is not so simple.

Assuming that this list is an accurate reflection of the natural world, it can be imminently useful for agency oversight efforts by environmentalists who wish to preserve species from extinction, scientists who wish to learn more about the benefits that

\textsuperscript{168} See supra note 44.
\textsuperscript{169} 42 U.S.C. § 4331.
\textsuperscript{170} 16 U.S.C. § 1531(a)(4).
certain species can deliver to ecosystems or to human society, activists who wish to raise legal challenges against destructive development projects, and government watchdogs who wish to hold federal agencies accountable for their actions and to bring light to incidents of statutory noncompliance. Given the legal history of environmental law in general, the Endangered Species Act in general, and the official endangered species list in particular, citizens cannot assume that this list is truly accurate or that the processes of its creation are transparent. The inherent scientific uncertainty of environmental protection and the procedural focus of American administrative jurisprudence are also important factors in the informational integrity of the endangered species list.

This article has attempted to reconstruct the Endangered Species Act as an informational statute that is dependent upon a government-held and agency-managed item of information – the endangered species list – that must be held to the transparency, accountability, and disclosure requirements of the Freedom of Information Act and the National Environmental Policy Act. All of these statutes must be observed by all federal government agencies, and incidents of opaque behavior and unaccountable manipulation of informational integrity are statutory violations that must be countered by citizens and subjected to rigorous judicial review. Furthermore, during judicial review the courts must balance their recent focus on only the procedural stipulations of the Administrative Procedure Act with an acknowledgement of the equally relevant substantive requirements for transparency and environmental protection that are mandated by the public interest statutes at issue.

Citizen activists would be wise to avoid the assumption that the wide-ranging substantive goals of the Endangered Species Act can lead to truly enlightened natural
protection efforts by federal agencies. Administrative realities have steered American environmental law away from natural protection for its own sake and toward the observance of narrowly-defined procedures, via a yet-to-be proven belief by lawmakers that procedural minutiae will automatically lead to wise decisions, environmental or otherwise. The official endangered species list is certainly not immune to these pressures, leaving the question of how many deserving creatures are not being protected the way Congress and the American people intended.

171 See LAZARUS, supra note 13, at 208; SALZMAN & THOMPSON, supra note 11, at 44-45.