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Triumph, Not Triage

Healthy ecosystems depend on the presence of healthy populations of native species. A new policy claims that a species is endangered only if it is at outright risk of extinction. But that's not what the law's drafters wanted, nor is it all we can and should do

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Panda bears, raccoons, tigers, the American robin. Every school child can identify which of these species is in trouble, and which is not. The simplicity of that exercise betrays an enormously challenging question: What does the law consider to be an "endangered species"? Legal and political developments over the past decade clearly indicate that the answer is both important and uncertain. The answer will also greatly shape the future of conservation — both its aspirations and manifestations. The legal community will have an important influence on the answer to this question, and therefore on the future of conservation.

In December 1973, President Nixon signed into law "an act to provide for the conservation of endangered and threatened species of fish, wildlife, and plants, and for other purposes." It was intended to ensure the continued existence of species that were in jeopardy as a "consequence of economic growth and development untempered by adequate concern and conservation."

The new Endangered Species Act was preceded by two laws, the Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969, which had simply defined an endangered species tautologically as being "in danger of extinction." The 1973 ESA mandated a conspicuously more sophisticated definition of an endangered species: "in danger of extinction throughout all or a significant portion of its range." A species is endangered if it meets that definition and is threatened if it is likely to meet that definition in the foreseeable future. In either case, threatened or endangered, such species qualify for protections afforded by the act. A species is said, by convention, to be recovered when it is no longer threatened or endangered.

For most of the ESA's history a key phrase in the definition of endangered species — "or a significant portion of its range"; hereafter, SPOR — did not draw any special attention. About a decade ago, decisions to not list various species (e.g., the flat-tailed horned lizard, green sturgeon, Queen Charlotte goshawk, among others) that had been petitioned for listing and associated litigation raised questions about the meaning of the phrase. Case law indicates that the SPOR phrase is important, that it requires interpretation, and that those words carry meaning beyond the first part of the definition, "in danger of extinction." Some read the case law as indicating that a species should be, at least, well distributed throughout its former range. Others read even more into the case law, especially in a recent decision by Judge Howell of the D.C. District Court, which led to the relisting of wolves in the Great Lakes region. What causes great concern is not knowing how exactly SPOR should be interpreted.

One perspective was introduced almost a decade ago and continues to maintain the attention of scholars. That perspective begins by considering a hypothetical species that has been driven to extinc-

tion from portions of its geographic range. Suppose it is agreed that 25 percent is the smallest portion of the species' range that is considered a *significant* portion. Now suppose this species' status improves such that it is not in danger of extinction on 30 percent of its range. Has recovery been achieved? No. The species still fits the definition of an endangered species: it is in danger of extinction on a portion of its range that exceeds the smallest portion that was agreed to be significant. Only if the species were not in danger of extinction over 75 percent or more of its range could it be considered recovered (i.e., the percentage remaining would be below the significance threshold). In other words, at this point the species would be considered not in danger of extinction throughout all or a significant portion of its range, or equivalently in danger of extinction throughout at most an insignificant portion of its range.

For emphasis, an easily misapprehended definition of recovery is securely occupying at least a significant portion of its range (25 percent). The inappropriateness of this definition is confirmed by noting that if the species from our example above were not in danger of extinction throughout 30 percent of its range, the species would fit this misapprehended definition of recovery. However, this species should instead fit the appropriate definition of an endangered species because it would be in danger of extinction throughout 70 percent of its range, an area that greatly exceeds the smallest portion of range that was agreed to be significant.

By this perspective, recovery requires a species to securely occupy much or most of its former range. Whatever "much" or "most" might mean, it seems untenable, for example, that the grizzly bear be considered for downlisting or the gray wolf be considered for delisting throughout the lower 48 states given that they each occupy less than about 15 percent of their former ranges.

On July 21, 2014, the Department of the Interior's Fish and Wildlife Service and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (hereafter, collectively the Service) implemented a final policy that codified a very different interpretation of SPOR. Much to the disappointment of the conservation community, the final policy severely limits the reach of the ESA, and seems to be at odds with congressional intent and the purpose of the law. The final policy effectively says that a species is endangered throughout a significant portion of its range, if and only if the loss of the species from that portion of range would cause the species to be at risk of going completely extinct. In effect, the new policy discards "throughout all or a significant portion of its range," replacing it with the short, essentially meaningless phrase used in earlier law, "in danger of extinction."

As long as even a small, geographically isolated population remains viable, it does not matter if the animal or plant species in question has disappeared across most, or even nearly all, of its former habitat. That species will not qualify for protection under the ESA. Ultimately, this new policy claims that a species is endangered if and only if it is at outright risk of extinction. As such, this interpretation threatens to reduce the ESA to a mechanism that merely preserves representatives of a species, like curating rare pieces in a museum. Also likely to suffer are efforts to protect or repopulate areas where endangered species once lived.

What if this new policy had been in place when the bald eagle was being considered for protection in the 1970s? Because a healthy population of bald eagles remained in Alaska and Canada at that time, arguably the national bird might never have been listed as endangered in most of the lower 48 states, even though illegal hunting and the pesticide DDT had nearly extirpated it. Today, we are proud of the bald eagle's recovery and consider it a triumph of the ESA. That species is flourishing in precisely those areas where it had previously been wiped out. As a result, the bald eagle is reasserting its position in the ecological order that was disrupted by its absence. This success was accomplished in part by using the authority in the ESA to protect nesting sites, and summer and winter roost sites, and to reintroduce bald eagles into their historical range. Under this new interpretation a case could have been made to withhold the law's safeguards once the bird was no longer at risk of extinction outright.

More recently, other imperiled animals have not been so fortunate. In recent cases involving the gray wolf and the wolverine, the Service, employing the logic of this new policy, decided or proposed to remove or withhold protections for those animals after concluding there was no risk that they would go extinct. Never mind they had vanished from most of the range they once inhabited. The Service reasoned that there were enough of these animals left

in their much-diminished range to avoid extinction.

In defense of their final policy, the Service asserts that its reading of the law is a "reasonable interpretation," though they have likewise suggested, "there is no single best interpretation." Their reading seems especially narrow and contrary to Congress's intent when it passed one of the nation's most important conservation laws.

The Findings, Purpose, and Policy section (Section 2) of the ESA states "these species . . . are of . . . ecological value to the nation and its people." That finding speaks to a belief, widely held among conservation scientists, that an ecosystem is healthy to the extent that it is inhabited by populations of native species. It is hard to imagine how the "ecological value" of a species could be realized if that species occupied a range that excluded most of the ecoregions that it originally inhabited. Section 2 of the ESA indicates why the legal definition of endangered species is necessarily broader than its predecessor laws. As such, it is important that species are at least well distributed throughout the ecosystems to which they are native — ecosystems they had inhabited prior to being degraded by human activities. Further evidence for the general importance of geographic extent of a species range is found in well-established policy on Distinct Population Segment and written records expressing congressional intent.

The ESA has been instrumental in saving many species from extinction: California condor, American crocodile, whooping crane, black-footed ferret, and others. More than 1,500 plant and animal species remain protected. While the Service's new interpretation of an endangered species does not necessarily mean that endangered species won't still be saved, it certainly falls far short of the conservation aspirations the law once embodied. It is hard to imagine that this new policy won't result in a world for our children far more diminished than the one we inherited.

The ESA — with its purpose, findings, and legal definition of endangered species — mandates realization of the moral conviction that species ought to exist in the ecosystems to which they are native. That moral commitment is an effort to right past wrongs. That is, to mitigate harms that humans have perpetrated against certain species, such as severely reducing their geographic range. That position was affirmed in *Tennessee Valley Authority v. Hill,* the snail darter case, which reiterated that humans have an obligation not only to perpetuate the continued existence of species but also "to halt and reverse the trend toward species extinction," and to do so "whatever the cost." The ESA essentially recognizes the intrinsic value and direct moral worth of species. In doing so, the ESA is conceptually akin to legislation that ended slavery or granted women the right to vote. These laws are akin to the expansion of our moral community.

We expressed many of the above-mentioned ideas in a technical paper that appeared in *Conservation Biology* some time ago, and in a recent *New York Times* Op-Ed article. In a subsequent letter to the editor, and in defense of their new policy and re-interpretation of the ESA, senior officials from the Service Dan Ashe of FWS and Eileen Sobeck of NMFS defended the new policy. They state that while it is an "admirable goal" to return species "to most or all of the areas in which they can possibly live," it is not the ESA's burden to achieve this end. That response is disappointing and distracting hyperbole because no one has suggested that the ESA's mandate is to restore species "to most or all of the areas in which they can possibly live." The moral and legal obligation is to restore species to most of the places from which we have extirpated them.

The Services' defense of their new policy raises deeper concerns about the course FWS and NMFS are steering for conservation in the United States. They indicate that other interpretations of an endangered species "would have decidedly negative consequences" for conservation. In particular, they indicate that resources for conservation are too scarce to recover all species and the principal intent and effect of the new policy is to provide flexibility to focus resources on species at greatest risk or species that would benefit most from those resources.

That focusing of resources is known as conservation triage. The principal effect of the new policy is not, however, triage. An analogy illustrates. Imagine being seriously injured on a battlefield and medical attention is withheld because resources are scarce and your compatriot is more seriously injured or would benefit more from attention. You are not declared healthy and sent on your way to celebrate your recovery or the withholding of attention. No. Your condition is acknowledged and the inability to provide you with treatment is considered a tragedy.

The appropriate response to a tragedy is not a declaration of accomplishment or occasion for celebration. The appropriate response to failing to recover a species (because resources are scarce) is not to redefine "recovery" and then celebrate the disguised tragedy. To do so is as bizarre as believing that those are not wounds that you are suffering,

rather it is just scarce resources. If scarce financial resources genuinely preclude the recovery of a species then that is the tragedy of triage. And so it would be.

The triage analogy requires two conditions. First, it requires that resources are genuinely scarce. That condition certainly applies within the Service, but it does not apply across the federal government and society at large. Resources are available. The analogy's second condition is that we are genuinely caring about our fellow compatriots (in this case, species). Having the resources, as we do, and not allocating them to recover species suggests that we do not care. The new policy is disturbing for one or several of these reasons: It leads us to care less for nature, or it reflects society's existing disregard for nature, or it dishonors the care many or most citizens harbor for nature. The future of conservation, as it unfolds, will tell us which of these is the case.

The Service already has mechanisms allowing flexibility to focus scarce resources. If those mechanisms are inadequate, then appropriate policies should be developed. However, conservation professionals have an uneasy relationship with conservation triage because it is difficult to administer wisely and can easily be a subterfuge for unburdening ourselves from what otherwise are the obligations of conservation, as seems to be the case here.

If we accept a disingenuous interpretation of "endangered species," then it seems that some species such as the wolf, wolverine, grizzly bear, black-footed ferret, swift fox, and many others will never be genuinely recovered. Those failures will not result from inability, but rather unwillingness — society deciding to not recover them. We decide that some other value (usually related to economic development) is more important than recovery. This is tantamount to a societal admission that we simply do not care that much.

But that lack of caring is not absolved with the Service's tortured interpretations of the legal definition of recovery, or by Congress's delisting species without regard for the ESA. This is another sense in which a species could be thought of as conservation-reliant (i.e., a species that will always require active and sometimes intensive conservation, such as polar bears). The reality of conservation-reliant species is sometimes the product of the world we live in, but at other times it is the result of our own choosing — a choosing not to care. But that lack of caring does not exonerate congressional meddling and the Service's tortured interpretations of the legal standards of recovery, in effect redefining a triage tragedy into a conservation triumph.

In March 2014, the states of Michigan and Wisconsin and the Service announced their intent to appeal the decision by Judge Howell of the D.C. District Court that led to relistings. That decision may very well be at odds with the new policy and is the most recent of a series of decisions to support what seems to be a plain language reading of the ESA. The appellate court's judgment will be important to watch.

Congress has also been considering several bills that would delist wolves in the Great Lakes Region and Wyoming by fiat. That bill was preceded by a budget rider that disallows the Service from using any funds to protect either the greater or Gunnison sage grouse. Several years ago wolves in Montana and Idaho were delisted through a rider on an appropriations bill. The concern is Congress's growing tendency to declare species recovered, by fiat, and quite aside from the requirements of the ESA.

The discrepancy that many see between the new policy and an alternative reading of the legal definition of endangered species is emblematic of a profound schism within conservation over its purpose. If the purpose of conserving species is merely to prevent outright extinction, then we should be content to preserve the fewest possible members of a species and the new policy may be appropriate. But if the purpose of conservation is something more, then the new policy is inappropriate, and is a profound retreat from conservation aspirations long animating the ESA. If the ESA and the nation's conservation ethic are motivated by species' intrinsic value, the righting of past wrongs against species, and the idea that healthy ecosystems depend on the presence of native species, then the final policy is certainly a monstrous step backward for species and for society.

Important choices about the nation's conservation ethic will be made by a handful of agency decision-makers, judges, litigants, lawmakers, and lobbyists. The circumstances surrounding these choices are symptomatic of a nation that has not come to broad agreement about a deceptively simple question — what is an endangered species? We need a national dialogue focused on that question. A starting point for that discussion could be the sociological fact that the vast majority of us continue to support the ESA and believe that nature possesses intrinsic value. Recent work, in collaboration with Jeremy Bruskotter of Ohio State University, indicates that 90 percent of the public supports the ESA, and some 80 percent of the public acknowledges that at least some portions of nature possess intrinsic value. Whether those core commitments are sufficiently important to most Americans, or held by Congress, or by those entrusted to administer the ESA, is unknown. **TEF**