A Recovery Plan for the Endangered Species Act

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Editors' Summary:

Efforts to reauthorize the ESA have been uniformly unsuccessful since the current authorization expired in 1992. Here are five steps the newly elected Administration can take to build a stronger and more effective ESA, even without reauthorization: (1) revitalize the listing priority framework; (2) promote recovery; (3) enhance incentives for habitat conservation on nonfederal lands; (4) address priority issues related to ESA §7(a)(2) consultation process and its prohibitions on jeopardy to species or adverse modification of critical habitat; and (5) increase funding for ESA implementation. By pursuing these administrative steps, President-elect Barak Obama can lay the groundwork for the eventual reauthorization of the ESA and a new commitment to conserving endangered species.

In the essay "Wilderness," Aldo Leopold wrote: "Relegating grizzlies to Alaska is about like relegating happiness to heaven; one may never get there."[1] He could have just as easily been describing the long-stalled effort to reauthorize and amend the Endangered Species Act (ESA)[2]: two decades after the law was last reauthorized, many question whether we will ever "get there."

Efforts to reauthorize the ESA, either under the banner of strengthening it or reforming it, have been uniformly unsuccessful since the current authorization expired in 1992. Bipartisan efforts, such as a 1997 bill cosponsored by then-Sen. Dirk Kempthorne (R-Idaho), Sen. Max Baucus (D-Mont.), Sen. Harry Reid (D-Nev.), and the late Sen. John Chafee (R-R.I.), failed to pass the Senate.[3] The only reauthorization bill to pass the U.S. House of Representatives, a 2005 bill sponsored by Rep. Richard Pombo (R-Cal.), was so controversial that the U.S. Senate declined to consider it.[4]

With proponents of strengthening and reforming the ESA each having the political wherewithal to block the other's efforts, reauthorization has been stymied. Nevertheless, progress has been made in some areas of ESA implementation, particularly with regard to enhancing incentives for the conservation of endangered species on nonfederal lands. Other areas have suffered, however. Backlogs in listing species, designating critical habitat, adequately funding and staffing ESA implementation, responding to court decisions finding fault with regulations implementing the ESA, and making species recovery the focus of ESA implementation all require attention.

While each of these needs could be addressed through congressional action, it is not a prerequisite to doing so. Moreover, as the authors of this Article can attest, there is much common ground on which the newly elected Administration of Barack Obama can build a stronger and more effective ESA program, even without reauthorization.

In the sections below, we discuss five such areas: (1) revitalizing the listing priority framework; (2) promoting recovery; (3) enhancing incentives for habitat conservation on nonfederal lands; (4) addressing priority issues related to the ESA §7(a)(2) consultation process and its prohibitions on jeopardy to species or adverse modification of critical habitat; and (5) increasing funding for ESA implementation.

Certainly, there are more dramatic steps that could be taken to implement the ESA either more aggressively to protect species or with less impact on resource development activities. The recommendations in this Article do not lean in either direction. Rather, we believe these proposals could greatly improve species conservation without imposing signifi-

1. Aldo Leopold, *Wilderness for Wildlife*, *in* A Sand County Almanac With Essays on Conservation From Round River 277 (Oxford Univ. Press 1966).
2. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
3. S. 1180, 105th Cong. (1997).
4. H.R. 3824, 109th Cong. (2005).

cant new burdens on regulated entities and, thus, be readily attainable for the Obama Administration to achieve without a high degree of conflict.

I. Establish and Follow Science-Backed Priorities in the Listing Program

The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), in both the Bush and Clinton Administrations, have repeatedly voiced their frustration that the citizen petition process—and the litigation that frequently accompanies it—prevents them from following sensible priorities in the listing of species. In practice, priorities are frequently set by court-ordered deadlines rather than the Services' own statutorily mandated listing priority guidance. As Eric Freyfogle and Dale Goble have noted, the citizen petition process, though beneficial in a number of ways, "is not an unalloyed good," particularly when the volume of petitions exceeds the Services' capacity to process proposed rulemakings.[5] This forces many petitioned actions into a "warranted but precluded" status, challenges to which compel the Services to "spend time defending [that status] rather than processing as many species as possible."[6]

The Obama Administration will inherit this dilemma and almost certainly experience the same frustrations that have bedeviled its predecessors unless it devises a solution. The obvious and desirable result—securing sufficient funding to process citizen petitions along with the listing proposals generated by the Services through their own review—has proven to be unattainable. Fashioning a solution that is respectful of the citizen petition process but also allocates limited listing resources according to scientifically defensible criteria, therefore, should be a near-term priority for the new administrators of the ESA.

First, the FWS should redo its existing listing priority guidance[7] based on independent science. The guidance ranks each potentially listable taxon in 1 of 12 categories of priority, based on the magnitude and imminence of the threat it faces and its taxonomic distinctiveness. It is deficient in a number of respects, including the fact that the three categories of taxonomic distinctiveness it recognizes do not encompass all the potentially listable entities. For example, a recent opinion[8] by the U.S. Department of the Interior Solicitor concluding that species may be listed in only portions of their range was clearly never contemplated when the existing guidance was promulgated one-quarter century ago. Yet if the FWS intends to follow that opinion,[9] it will have to decide what priority to give to taxa that are to be listed in only portions of their range. Even without the Solicitor's interpretation, the existing guidance omits any mention of "distinct population segments," the taxonomic entities that represent an increasingly large portion of all listings. This omission thus leaves unanswered the question of what priority to afford these taxa. Further, it is now clear that there are likely to be many species that may be at risk solely due to future climate change, a threat not contemplated at the time the guidance was developed and one that may lie beyond the effective reach of the ESA. The priority due to species sensitive to climate, relative to other species facing more tractable threats, logically ought to be addressed in the revised listing priority guidance.

Developing an independent, science-based listing priority guidance that addresses these and other factors is only the first needed step. The FWS also must scrupulously adhere to that guidance by assigning every petitioned action a priority ranking and pursuing listing or delisting proposals according to those rankings. If the revised guidance reflects the input from independent scientists, and if the FWS tries to follow it, litigants ought to be less likely to try to force their own priorities on the federal government and the courts will likely be less receptive to those who do. If, nevertheless, the FWS genuinely tries to follow published, science-backed priorities but is prevented from doing so by the courts, Congress should intervene to allow those science-backed priorities to control.

II. Reduce Regulatory Impediments to Clearly Beneficial Actions

Another needed near-term initiative should focus on clearing away regulatory impediments to carrying out conservation actions that offer clear, long-term benefits to listed species, even if those actions entail some incidental take in the short term. The Bush Administration's August 2008 regulatory proposal on ESA interagency consultations[10] did not address this important issue and instead focused on reducing review of potentially detrimental actions without providing significant relief for many clearly beneficial projects.

When the Bush Administration proposed changes to the interagency consultation process governing federal actions that affect listed species, it asserted that one of the goals was to allow the Services to focus their limited consultation resources on the most potentially harmful projects. That worthy goal would best be served by streamlining approvals for projects with clearly beneficial impacts for listed species. Yet the 2008 proposals did nothing to streamline such approvals

5. Eric Freyfogle & Dale Goble, Wildlife Law: A Primer (Island Press forthcoming).
6. *Id.*
7. Final Listing and Recovery Priority Guidance, 48 Fed. Reg. 43098 (Sept. 21, 1983).
8. Solicitor Opinion M-37013 (Mar. 23, 2007), available at http://www.doi.gov/solicitor/opinions/M38013.pdf.
9. Related to the Solicitor's Opinion is a little-noticed proposed rulemaking that, on its face, appears only to change the format of the endangered and threatened species list as it appears in the *Code of Federal Regulations*. Proposed Amendments to the Format of the Lists of Endangered and Threatened Species, 73 Fed. Reg. 45383 (Aug. 5, 2008). In fact, however, it aligns that list with the Solicitor's view that species may be listed in only portions of their range, whether or not the portion listed constitutes a "distinct population segment." The new Administration should open the Solicitor's Opinion and the proposed rulemaking to closer public scrutiny.
10. Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47868 (Aug. 15, 2008).

if the proposed project had the potential to take as much as a single listed organism.

For a number of listed species, long-term improvement will often require management actions that are likely to cause the take of at least some individuals in the short term, e.g., periodic mowing or burning of Karner blue butterfly habitat to maintain the early successional characteristics that the species requires. Moreover, safe-harbor agreements, which must meet a net conservation benefit test to be approved, by definition authorize some level of take. Under existing practice, however, it is the potential take of an individual organism that trumps even the anticipated net benefit for the species as a whole, at least in terms of the procedural hurdles that must be cleared to gain regulatory approval. As a result, many clearly beneficial projects—whether federal or private—face the same regulatory obstacles as projects that offer no benefits to listed species or would cause harm to them, thus delaying their approval and implementation.

This situation could be remedied most simply by revising the FWS' consultation handbook to clarify existing regulations.[11] The handbook describes in detail the various consultation processes required for federal actions having different types of impacts. Instead of requiring predominantly beneficial actions to go through the formal consultation process to secure a full-blown biological opinion, the FWS should authorize beneficial actions based on a concurrence letter from the Services to which it would append an "incidental take statement" just as it now appends incidental take statements to full-blown biological opinions. In this manner, clearly beneficial actions could be expedited and finite Services resources for interagency consultations could be put to better use.

III. Make Greater Use of Incentives to Encourage Nonfederal Landowners to Promote Species Conservation

It is widely accepted by all sides in the ESA debate that encouraging nonfederal parties to play a role in species protection and recovery is highly desirable. The importance of doing so is based on five principles: (1) much of the habitat needed for species recovery is on nonfederal lands; (2) active management of this habitat is often needed; (3) nothing in the ESA compels, or even encourages, such management; (4) there are costs associated with active habitat management; and (5) engaging in these desirable habitat activities can give rise to legal restrictions on use of the land under the ESA.

Over the last 15 years, significant steps have been taken to advance the goal of increased nonfederal participation in ESA programs. These efforts collectively are called "incentives" and they fall into the economic and regulatory arenas. On the regulatory side, former Secretary Bruce Babbitt initiated, and former Secretaries Gale Norton and Dirk Kempthorne continued, administrative initiatives to reduce the threat of federal enforcement, or at least make such actions more predictable, for activities on nonfederal lands that have a positive effect on listed species.

Safe-harbor agreements, under which a landowner commits to doing something positive for species on its land in exchange for assurances that additional restrictions on the use of the property will not result, is an example of a regulatory incentive. Other examples include long-term assurances associated with habitat conservation plans (HCPs) to achieve incidental take authorization, and prelisting and candidate conservation agreements with assurances, which encourage proactive measures before a species achieves ESA protection in exchange for incidental take authorization should listing eventually occur.

Economic incentives also exist, such as the FWS Partners in Fish and Wildlife Program and the U.S. Department of Agriculture (USDA) Wildlife Habitat Incentives Program, under which the government pays a portion of the cost of land management practices that are beneficial to species.

While important steps have been taken to recognize the need for incentives and to establish some basic tools for this purpose, there is much more that can be done. Few meaningful economic incentive programs are available, yet numerous opportunities exist to undertake administrative actions for this purpose. For example, better-targeted implementation of FWS-administered programs such as the Partners for Fish and Wildlife Program and USDA-administered 2008 Farm Bill programs to promote species conservation on agricultural lands—such as the Conservation Reserve, Environmental Quality Incentives, and Wildlife Habitat Incentives programs—could achieve rare species conservation while providing broader environmental benefits. The programs could expand their use through more efficient procedures and better coordination with regulatory incentives. For example, programmatic safe-harbor agreements could apply to program participants so that in addition to obtaining funds for habitat improvement, beneficial actions would not subject participants to new regulatory restrictions.

Improvements also can be made to regulatory incentive initiatives. Timelines could be established to expedite decisions for acting on safe-harbor agreements and HCPs. Section 7 consultation could be better integrated into HCP review to eliminate duplication, such as by removing the requirement for future consultation under §7(a)(2) for activities clearly covered by an HCP, provided there are no significant changed circumstances in threats to, or the condition of, species covered by the HCP. The federal government could make better use of its land exchange authority so that federal land that is not essential for species recovery could be traded for nonfederal habitat that is significant for ESA purposes.[12] States also can be given more incentives, for example, through agreements to promote sharing of data and expertise, developing and implementing plans, and acquiring or better managing habitat.

Congressional action initiated or supported by the Obama Administration can make even greater contributions to the

11. U.S. FWS & NMFS, Endangered Species Consultation Handbook (1998), *available at* http://www.fws.gov/endangered/consultations/S7HNDBK/s7hndbk.htm.

12. Land exchange authority that could be used for this purpose is found in many federal statutes, including the ESA, 16 U.S.C. §1534, the Federal Land Policy and Management Act, 43 U.S.C. §1716, and the Land and Water Conservation Fund Act, 16 U.S.C. §§460-9, 460-22.

incentives program. Reasonable changes to the tax code, such as providing tax credits for habitat enhancement, hold great potential for enlisting private-sector contributions to ESA implementation. Legislative action could also codify and, in various ways, improve regulatory incentives, or even create new ones.

While the incentives topic is a broad one, the new officials responsible for ESA implementation will have the benefit of a ready-made list of recommendations developed by a cross-section of interested parties. In response to a request in 2005 by a bi-partisan group of six senators, the Keystone Center convened a cross-sector working group to develop recommendations for improving the habitat provisions of the ESA. Although that group could not come to an agreement on ESA amendments, the resulting report, issued in April 2006, included detailed discussion on how to make better use of incentives.[13] Most of the report's recommendations on incentives remain viable and worthy of consideration by President -elect Obama's ESA team.

IV. Clarify the ESA §7(a)(2) Prohibitions and Procedures

The principal action-forcing mechanism in the ESA is its §7(a)(2) prohibition on federal actions that would cause jeopardy to listed species or result in adverse modification or destruction of critical habitat.[14] Whether a federal action will give rise to prohibited impacts is evaluated through a consultation process between the action agency and the FWS or the NMFS.

Although this provision has been an integral aspect of the ESA since 1973, the scope and meaning of its terms remain unclear, and its implementation is still subject to controversy and litigation. A priority task for the new Administration should be to resolve the key uncertainties associated with §7(a)(2). Three issues are at the forefront of the §7(a)(2) agenda: (1) defining the prohibited federal actions causing adverse modification to critical habitat; (2) determining how the ESA should be used to respond to climate change; and (3) creating the most efficient and effective role for action agencies in the consultation process.

A. Defining Adverse Modification

Two of the most basic concepts of §7(a)(2)—the meaning of "jeopardy" and "adverse modification of critical habitat"—remain unclear. For many years, the FWS and the NMFS defined both terms to mean essentially the same thing: an impact that "appreciably diminishes" the prospects for "both the survival and recovery of a listed species." The U.S. Court of Appeals for the Fifth Circuit[15] and the U.S. Court of Appeals for the Ninth Circuit[16] invalidated this definition. The statutory definition of "critical habitat" includes the term "conservation."[17] The Act, in turn, defines conservation to mean all methods that can be used to "bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary."[18] Accordingly, the courts reasoned that "adverse modification" must mean more than mere "survival."

Four years after the Ninth Circuit joined the Fifth Circuit in striking down this regulation, a new definition has yet to be developed. While the relative value of critical habitat protection in the grand scheme of ESA tools remains the subject of debate, there is considerable regulatory significance attached to the designation of these areas and the enforcement of the §7(a)(2) prohibition. Defining "adverse modification" and determining how that term relates to "jeopardy" should be a high priority for the new Administration.

B. Responding to Climate Change

Secretary Kempthorne's decision on May 15, 2008, to list the polar bear as a threatened species[19] has crystallized another question about §7(a)(2): to what degree does the ESA address the causes and consequences of global warming? The new Administration needs to come to grips with this important question. Although the intersection of climate change with the ESA occurs in several areas (listing, critical habitat designation, recovery), the most significant and pressing questions arise under §7(a)(2). Foremost among the issues to be answered is whether an analysis of an action under §7(a)(2), if that action involves the emission of greenhouse gases (GHG), must include the effects on species whose habitat is affected by global warming. Does §7(a)(2) compliance for permitting of a coal-fired power plant in the Southeast need to evaluate the effects of the loss of sea ice due to global warming caused by GHG emissions on the polar bear in Alaska? What level of detail is required to meet ESA requirements? What should the outcome of the evaluation be? Are there regulatory consequences for sources of GHG emissions under the ESA?

The Bush Administration proposed, in its August 2008 rulemaking, an across-the-board approach of precluding from §7(a)(2) any action that is an "insignificant contributor" to impacts on a listed species or produces effects that are "not capable of being meaningfully identified or detected."[20] This approach is intended to remove most sources of GHG emissions from §7(a)(2) consultation. At the date of publication of this Article, the end result of the August 2008 rulemaking on the consultation process is unclear. If adopted as proposed, litigation is likely. Whatever the fate of that proposal, it is certain that the questions of how to address cli-

13. Keystone Center, The Keystone Working Group on Endangered Species Act Habitat Issues (2006), *available at* http://www.keystone.org/spp/documents/ESA%20Report%20FINAL%204%2025%2006%20(2).pdf.
14. 16 U.S.C. §1536(a)(2).
15. Sierra Club v. Fish & Wildlife Serv., 245 F.3d 434, 31 ELR 20500 (5th Cir. 2001).
16. Gifford Pinchot Task Force v. Fish & Wildlife Serv., 378 F.3d 1059, 34 ELR 20068 (9th Cir. 2004).
17. 16 U.S.C. §1532(5)(A).
18. *Id.* §3(3).
19. Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range, 73 Fed. Reg. 28212 (May 15, 2008).
20. Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47868, 47871 (Aug. 15, 2008).

mate change under §7(a)(2) will be an issue inherited by the Obama Administration.

Whether settled within the framework of the August 2008 rule or through application of the consultation process to specific actions that result in GHG emissions, or litigation, an answer eventually will emerge as to the appropriate relationship between climate change and the ESA. While the new Administration cannot avoid this issue, it is clear that its answer will be least disruptive if President-elect Barack Obama puts in place a comprehensive program to regulate the causes of global warming. By identifying the species that are threatened by climate change and those actions that can be taken to provide achievable protection for these species, the ESA could be administered as a safety net, leaving other legal mechanisms outside the ESA to control the global warming threat.

C. The Role of Action Agencies in the Consultation Process

The §7(a)(2) consultation process works best when there is close cooperation between the action agency, whose decisions are subject to the jeopardy/adverse modification prohibitions, and the consulting Service, whose advice typically establishes whether a violation will occur, sets the terms under which incidental take is allowed, and recommends conservation measures to further recovery.

Under the §7(a)(2) regulations published by the two Services in 1986,[21] clear responsibilities were defined for the respective roles of the action and consulting agencies: the action agency having the duty to develop information and make preliminary findings, and the FWS or the NMFS needing to concur with those findings or define a different course for ESA compliance. This approach has not been without its problems, sometimes resulting in interagency disputes over the ESA findings, with attendant delays and added costs.

Secretary Kempthorne's August 2008 proposal takes on this issue by proposing that action agencies make the threshold determinations as to whether ESA consultation is needed at all and, if so, for what species and to what level of detail. While there is general agreement that action agencies should play a more extensive role in ESA implementation, the Kempthorne proposal has generated criticism from the environmental community for going too far by vesting important biological decisions in agencies that may lack the expertise and resources to make them and, in some cases, have missions for resource development or management that may conflict with species conservation.

At the time of this Article, it is unclear how the Bush Administration will act on the August 2008 proposed rules. Certainly, the record contains extensive comments on both sides of the proposal. Assuming final regulations are developed before President-elect Obama takes office, the new Administration will have to decide whether those rules strike a workable balance and, if so, how to implement the redefined turf between action and consulting agencies and how to defend them against near-certain legal challenges. If the new ESA team disagrees with the final rule, it will need to come up with a new proposal and a process to carry it forward.

Whatever the outcome of the August 2008 rule and subsequent implementation, an issue that has not yet been addressed to any significant degree is how more can be done to cause action agencies to take affirmative actions to advance species conservation outside of the §7(a)(2) process. Section 7(a)(1) calls upon federal agencies to "utilize their authorities in furtherance of the purposes" of the ESA.[22] Scant attention has been paid to the meaning of this provision. With added emphasis from the Obama Administration, perhaps in the form of guidance or an Executive Order, it may be possible to take significant strides forward in initiating federal actions and programs under §7(a)(1) that will move species closer to recovery and, in doing so, lessen the burden on the §7(a)(2) process.

V. Funding

As ESA reauthorization has been stalled since 1992, the law has continued to be implemented through annual appropriations, which have not kept pace with the needs for endangered species conservation. Consequently, there is a pressing need to restore and increase funding for efforts by the FWS and the NMFS to protect and recover species that are listed under the ESA as well as species that are candidates for such listing.

While the need for additional ESA funding is clear, the new Administration will face tight budgetary constraints given the global economic crisis. Obtaining the level of funding necessary to implement adequately the ESA is almost certainly wishful thinking. Nonetheless, it is critical for the new Administration to identify the program areas that are in need of financial support so that a start can be made toward restoring funding that has been lost and setting priorities for any additional funds that are made available.

The endangered species program has four main accounts within the FWS budget: Candidate Conservation; Listing; Consultation; and Recovery. All four of these program areas are experiencing significant staffing shortages due to budget constraints, thereby impairing the successful implementation of the ESA.

The Candidate Conservation account supports protection of species for which FWS has sufficient information to warrant a proposal for listing under the ESA. As of early 2008, there were 280 candidate species awaiting listing under the ESA or other conservation actions.[23] Although the number of candidate species continues to increase, the Candidate Conservation program has experienced a 10% reduction in staffing since fiscal year (FY) 2002, according to sources within FWS.

The Listing account supports the protection of new plants and animals under the ESA and designation of their critical habitat. Sources within FWS estimate that clearing the backlog of pending listing and critical habitat decisions will require

21. Interagency Cooperation, 51 Fed. Reg. 19957 (June 3, 1986) (codified at 50 C.F.R. pt. 402).

22. 16 U.S.C. §1536(a)(1).

23. Candidate Notice of Review, 72 Fed. Reg. 69034 (Dec. 6, 2007).

$160 million. Increased funding well over current levels, as well as making more efficient use of funds, given that the FWS currently lists far fewer species per dollar spent today than in 2000, will be needed.

The Consultation account supports §7(a)(2) consultation, which helps federal agencies carry out their conservation obligations for listed fish, wildlife, and plants. The Consultation budget also funds FWS work with nonfederal entities for permitting and development of HCPs. Sources within the FWS have indicated that lack of funding and a 9% staff reduction since FY 2002 have prevented the FWS from ensuring that these plans are properly developed, implemented, and monitored.

The purpose of the ESA is to recover endangered and threatened fish, plants, and wildlife. The Recovery account supports FWS efforts to achieve this. Unfortunately, according to sources within the FWS, the Recovery program has experienced a 13% reduction in staff since FY 2002.

In addition to these four FWS endangered species program accounts, the Cooperative Endangered Species Conservation Fund provides grants to state wildlife and natural resource agencies to support conservation of candidate, threatened, and endangered species. Fifty percent of listed plants and animals have 80% of their habitat on nonfederal lands, with many absolutely dependent upon these lands for their survival.[24] State conservation activities supported by these grants include research, species status surveys, habitat restoration, captive propagation, and reintroduction of species. Funding is also provided for planning assistance and land acquisition by states for HCPs and recovery. Twenty-three states and one territory received planning assistance and land acquisition funding in FY 2008 to benefit species ranging from butterflies to the Canada lynx.[25] However, sources within the FWS indicate the amount of funding sought each year for HCP land acquisition and recovery land acquisition is two to three times greater than the amount actually provided. Increased emphasis should be placed on use of the ESA's §6 conservation grants to support state endangered species program activities targeted at reducing threats facing candidate species.

There are also urgent needs to restore and increase funding for the NMFS to carry out activities within its Protected Species Conservation and Management Programs. The NMFS is responsible for the conservation of most marine mammals, most marine and anadromous fish, turtles at sea, corals and other marine invertebrates, and marine plants. Under its Protected Species programs, the NMFS works to protect these species through proactive conservation of candidate species and species of concern, listing of threatened and endangered species and designation of critical habitat under the ESA, and support for active recovery efforts. With the ongoing threats to species such as sea turtles and salmon, as well as the additional threats posed by climate change and ocean acidification to marine species, endangered species funding and staffing for the NMFS needs to be increased.

If the ESA is to achieve its purpose of recovering threatened and endangered species, the new Administration, over the course of its first term, should make a concerted effort to increase funding for ESA implementation in these areas. In addition, staffing of endangered species conservation programs in both agencies should be substantially increased in order to improve, if not restore, lost capacity to implement the Act.

VI. Conclusion

With challenges such as the global economic crisis and the fighting of two wars facing the new Administration, reauthorizing the ESA is unlikely to be President-elect Obama's highest priority. Nevertheless, preserving species for the benefit of future generations remains as important a national goal as it was when President Richard M. Nixon signed the ESA into law in 1973. Thus, the new Administration should work to keep the promise of the ESA, while also making the law work better for landowners and the regulated community whose cooperation is key to its success. As outlined in this Article, there is much the new Administration can do in this regard, even without action by Congress. By pursuing these administrative steps, President-elect Obama can lay the groundwork for the eventual reauthorization of the ESA and a new commitment to conserving endangered species.

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24. F.W. Davis et al., *Renewing the Conservation Commitment*, *in* THE ENDANGERED SPECIES ACT at 30, 296-306 (J.M Scott & D. Goble eds., Island Press 2005).
25. U.S. FWS, *Cooperative Endangered Species Conservation Fund (Section 6) Grants to States and Territories*, http://www.fws.gov/endangered/grants/section6/FY2008/index.html.