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## Prohibitive Policy: Implementing the Federal Endangered Species Act

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PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT. By *Steven Yaffee*. Cambridge, Mass.: MIT Press. 1982. Pp. xii, 239. \$17.50.

Public policy is shaped by the interaction between governmental institutions and private interest groups, constrained by the substantive demands of the particular policy at issue. In *Prohibitive Policy*, Steven Yaffee analyzes the Endangered Species Act (ESA), as a case study of how these forces affect the interpretation of an absolute prohibitive mandate. He describes the technical and political tensions inherent in a prohibitive statute and explains why policy results often differ from articulated statutory goals. Yaffee notes that even the most explicit statutory language may not ensure effective control over policy development. Yaffee instead encourages draftsmen to recognize that policy outcomes are determined by the relative power of each of the actors affected by a statute. He believes a statute will succeed only when it tips the balance of power in favor of the intended objective.

A prohibitive statute outlaws certain action completely. Thus, beyond a set standard, benefits may not be balanced against the cost of compliance. On its face, such a statute leaves little room for bargaining among concerned parties. As a result of this absolutism, it is often difficult to enact a prohibitive statute in controversial areas. Yaffee believes Congress adopted the prohibitive language of the ESA only because no one perceived any cost to doing so (p. 57). The preservation of species had strong symbolic and political value. Experts defined extinction as a technical problem that would not affect any domestic interests. The ESA thus escaped emasculation and became a mandate to preserve society's environmental heritage (p. 57).

Yaffee cautions that prohibitive policy works no more rapidly than other kinds of policy and that implementing prohibitive policy is not much different from implementing other types of policy. The ESA advocates' high hopes for vastly improved protection of species and their critical habitats rested on the dual assumptions that the federal agencies empowered to implement the ESA had little discretion and that the ESA itself had provided clear and certain scientific criteria for implementation (p. 58). A lack of resources and technological uncertainty, however, prevented the agencies<sup>1</sup> from confidently deciding to list an endangered species or habitat, which made swift and effective implementation impossible.

Scientific professionals in the agencies set priorities among species and habitats to enable them to set standards and begin carrying out their statutory mission. According to Yaffee, subjective value judgments made by agency decisionmakers were the primary factor in ordering priorities. Thus, staff ideologies and personal goals unexpectedly played a major role

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1. The critical decisions to list species or habitats are made by the Fish and Wildlife Service's Office of Endangered Species in the Department of Interior and by the Office of Marine Mammals and Endangered Species of the National Marine Fisheries Service in the Department of Commerce.

in what were originally to be nondiscretionary scientific decisions. Once the objective criteria were discarded, issues of environmental protection became open to negotiation within the agencies (p. 85).

Yaffee next describes the political influences that affected the negotiation of scientific decisions. He asserts that politics play an important role in the implementation of the ESA — interagency consultations under Section 7 of the ESA may result in the continuation of projects despite their impact on endangered species or critical habitats, delay of certain listings and habitat designations, low priorities assigned to other species or habitats, and private interests influencing the degree of protection ultimately provided (p. 86). Yaffee thus demonstrates that the implementation of the ESA in particular and prohibitive policy in general will balance competing public interests despite the absolute language of a prohibitive statute.<sup>2</sup> Nonetheless, he insists that the statutory language of the ESA should remain unchanged despite its apparent ineffectiveness. If the ESA were not prohibitive, threatened species would rarely prevail in court against a powerful private interest. A three-inch fish could never compete with a virtually completed \$90 million dam,<sup>3</sup> nor could a Furbish lousewort survive a battle with a \$600 million federal project.<sup>4</sup> The negotiation that occurs within the prohibitive framework of the ESA becomes the vehicle for balancing dollar costs with the need to protect endangered species.

The prohibitive policy of the ESA has proved successful in practice because it forces all federal agencies to consider the environmental mandate seriously. A more flexible statute would have seriously undermined the bureaucracy's ability to carry out the ESA's goals. Settlement and reconciliation of environmental disputes is only possible where the parties are willing to negotiate. The ESA forces all interested parties to a bargaining table and encourages compromises which, according to Yaffee, have often resolved disputes. The negotiation process reconciles the competing political, social, and economic interests implicated by species preservation conflicts. Without the incentives to negotiate provided by a prohibitive statute, Yaffee doubts whether the goal of species preservation could have been achieved.

Obstacles to implementation remain, however. Federal agencies' biases in favor of tradition and against accountability combine with the capture of upper level policymaking by the regulated development interests, to slow the environmental protection process. If immediate agency action cannot be spurred by a mandate as clear as the ESA, Yaffee wonders whether any statute can overcome the phenomena of inertia and capture (pp. 117-31). Yaffee contends that the impetus for vigorous implementation and enforcement of a prohibitive policy must, therefore, come from outside the bureaucracy to counteract these institutional barriers. His advice is borne out in

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2. Even supporters of the ESA have noted that some account of the social costs of species preservation is already considered in implementing the ESA. *See, e.g.,* Sagoff, *On the Preservation of Species*, 7 *COLUM. J. ENVTL. L.* 33 (1980). Yaffee argues that this desired balancing of interests necessarily occurs in the action agencies, especially at higher, more politically sensitive levels of the bureaucracy. P. 86-87.

3. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

4. A compromise which saved the species emerged from what could have been an irreconcilable conflict between preserving the lousewort and building the Dickey-Lincoln Dam. P. 102.

practice, as a strong constituency of support organizations, backed by the ESA provision allowing citizen suits, have pressured an otherwise unresponsive bureaucracy to respond to the national will expressed in the ESA. Ultimately, hope for the vindication of general interests, such as those all citizens share in the environment, may depend more upon such sources of countervailing private power than upon formal legal rules, however broad their scope or noble their intent.

*Prohibitive Policy* is instructive in revealing how a prohibitive statute can regulate agency behavior in areas where traditional forms of regulation cannot. The book's greatest contribution is its admonition to lawyers and legislators to develop more realistic appraisals of the potentials of legislation. Although Yaffee concentrates on the implementation of the ESA, his message — that the language of legislation cannot, by itself, contain private power unless the legislature also enlists its own constituencies in defense of the statutory purpose — applies to the effectiveness of prohibitive statutes in almost any substantive area. Legislators would do well to ponder that advice.