



Habitat Conservation Plans and the Promise of Deliberative Democracy



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Abstract

Recent reforms in U.S. environmental policy have been directed away from traditional command and control regulation or scientific management and toward collaboration and democratic participation in decisionmaking. Evaluating these changes requires attention not only to their effects on environmental protection, but also to the normative aims behind such democratization. This article examines a procedure that allows for collaboratively produced exceptions to the Endangered Species Act, paying particular attention to the normative and democratic dimensions of those experiments. Paradoxically, the effort to increase participation in policy processes has, in some cases, actually decreased opportunities for meaningful citizen input in the regulatory process, to the detriment of both environmental protection and democratic objectives.

Environmental policy in the United States at the turn of the twenty-first century is undergoing profound change. The direction of that transformation is away from centralized command and control regulation of pollution and the scientific management of public lands and their natural resources, and toward greater reliance on input from local stakeholders rather than just from ostensibly apolitical, scientifically trained government officials. The democratization of environmental policy consists of a shift toward more decentralized and collaborative stakeholder participatory processes and greater transparency and dissemination of environmental information. Although the impetus for such change can partly be understood as a reaction

against the corruption or failure of the old environmental policy regime and the attendant stalemate and mutual animosity that its adversarial procedures have brought about (Sagoff, 1999; Nelson, 1995), these changes also reflect equally profound re-orientations in environmental philosophy and contemporary political theory.

Evaluating the Democratic Turn

In making sense of these changes, and in evaluating and refining them, both the empirical nature of the policy process and the underlying normative issues reflected by it must concern analysts of environmental policy reform. Three decades have passed since the first Earth Day marked the emergence of the environmental movement onto the main stage of American politics, and the publication of John Rawls' *A Theory of Justice* (1971) sparked a renewed interest in the philosophical analysis of con-

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temporary issues of social justice. Since then environmentalism has flourished as a significant and vital social movement, and environmental ethics has developed as a vibrant field within philosophy. Yet the connections between the philosophy and politics of the environment have only begun to be sketched by political theorists. This article represents an attempt to bridge that chasm.

Although political theorists have largely remained silent regarding environmental policy reform, this democratic turn has been met with some skepticism from other quarters. Especially when combined with devolution, critics of democratiza-

tion predict greater ecological exploitation than would occur under command and control regulation. Ever since Madison's analysis of the "mischiefs of faction" in *Federalist 10*, states and localities have been understood as being more vulnerable to capture by minority factions (especially industry interests), as well as to the tyranny of local majorities. As Kathleen Sullivan points out, "the decentralizers may anticipate that transferring power to the states will reduce the role of government altogether, leaving matters once governed at the federal level not to the states but to the market" (1997, p. 13). A shift to local control has for years been the express aim of industry groups intending to wrest control away from regulators, with "states' rights" being the rallying cry of the Sagebrush Rebellion as well as other antiregulatory movements going back a century or more.

Many of the critics of democratization cite worries about the effects of these processes on the environment, although the environmental community is far from unanimous regarding these efforts. The big national groups prefer centralized, national control, in large part because their resources are already deployed at that level, and have been among the most vocal critics against collaborative conservation projects. Smaller grassroots groups prefer to address problems at the local level, largely because their strengths are in community organizing rather than in massive fundraising and lobbying efforts in Washington (Little, 1997, pp. 7-8).

This article examines the democratization of environmental policy, paying particular attention to the case of an amendment to the federal Endangered Species

Act that provides for legal exceptions to the strictures of the Act, through a procedure that promises to embody norms of collaborative and deliberative democracy as well as integrated ecosystem management. Following that discussion, several existing evaluations of this democratic experiment will be canvassed, sketching both its promise and shortcomings. The goal is to illustrate the normative and empirical issues surrounding such attempts at reform and to identify several key points by which these policy changes might be evaluated. Greater democracy, it shall be argued, ought to play a prominent role in the formation and execution of environmental policy, although problems exist in this case study that demand attention. As fundamental matters of social justice, environmental policy decision procedures ought to take account of issues of justice in distribution and representation if they are to avoid the criticism that has aptly been leveled against them, and if they are to avoid the problems of capture and interest group domination that plague outcomes in a scientific management policy regime. To illustrate how ideas of justice apply to the design of these “collaborative conservation” efforts, the article concludes by offering several prescriptions for addressing the main shortcomings of these experiments.

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Habitat Conservation Plans as Democratic Experiments

Since its inception in 1973, the federal Endangered Species Act (ESA) has been one of the most powerful tools in the legal arsenals of environmental groups. Recognizing the threat to species posed by human development of critical habitat and their resultant declines in number, the Act declares that “these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”¹ It strictly prohibits actions on public or private land that “take” habitat of species that have been listed by the Fish & Wildlife Service or National Marine Fisheries Service as threatened or endangered. The impetus for the ESA was the set of scientific management principles mentioned above: the view that the most effective means of protecting endangered species and their habitats was to remove the issue from politics by enacting an absolute ban on development in affected areas and by making the listing process a purely scientific enterprise conducted by wildlife biologists insulated from political pressures. However, the pressures on the agency from both Congress and presidential administrations (not to mention interested parties from outside government) have, over the years, politicized both the listing process itself and the enforcement of the Act.

Yaffee describes the Endangered Species Act as an example of “prohibitive policy” that “is prescriptive in an absolute, boundary-setting direction” and “does not let regulatees make legal choices about their behavior” (1982, p. 1). Lacking an “escape valve” to allow for limited development after a species is listed and critical habitat identified, Yaffee argues that the putatively prohibitive ESA was implemented nonprohibitively, allowing prodevelopment pressures to delay and obstruct

the listing process. Likewise, environmentalists sought to influence the listing process in favor of charismatic species whose protection resonates with the public. As a result, the manner of implementing and enforcing the Act became an adversarial battle in the courts between environmental and prodevelopment interests, in which plans for economic activity on public and private lands were routinely challenged as constituting an illegal “take” of critical habitat. Likewise, prodevelopment political forces routinely challenged Fish & Wildlife Service listing decisions of new species as threatened or endangered, as well as reports of the presence of such species on particular lands.

By 1982, the Endangered Species Act had become such a contentious issue that it had become clear that some modifications were needed if it was to survive at all. On the one hand, prodevelopment interests were mounting a constitutional assault on its provisions as violating Fifth Amendment “takings” provisions and their associated property rights. In addition, the Act was coming up for renewal, and political pressures had also been forged in an effort to strike it from the books entirely. On the other hand, the provisions of the law contained clear shortcomings in its goal of species protection. Only listed threatened or endangered species were protected, which prevented protection of species whose numbers had not yet declined enough (or were not charismatic enough) to gain formal protection. Moreover, conservationists noted that, by the time a species was listed, the chances of recovery were significantly lower than they would be under more adaptive and proactive land management policies than the ESA offers. Because the law, when it was actually enforced, amounted to a ban on development in affected areas, it failed to encourage the kind of integrated ecosystem management favored by ecologists as necessary for species preservation over the long term. So when Congress opted to amend the ESA in 1982 to allow for some exceptions to the “take” prohibition, they did so under pressure from development interests but with the support of many environmental groups as well (Kostyack, 1998, pp. 19–20).

Legal Exceptions to the Endangered Species Act

Specifically, the Endangered Species Act was amended under section 10 by adding the provision that an “incidental take permit” could be issued to a landowner (including state and federal government agencies) to allow for some development on otherwise protected lands so long as the development will not “appreciably reduce the likelihood of the survival and recovery of the species in the wild” and that permitted actions mitigated adverse impacts on critical habitat to the “maximum extent practicable.” Landowners were allowed an exception to ESA development prohibitions as long as they could demonstrate through the creation of habitat conservation plans (HCPs) that they were in return mitigating the effects of development by appropriate habitat protection efforts elsewhere. This exception would seem to encourage the kinds of integrated ecosystem management favored by environmentalists, as well as gain the support from landowners necessary for the Act’s renewal, and enable future monitoring and enforcement of the Act’s provisions (two difficulties under the highly adversarial atmosphere of previous ESA cases). Importantly, the amendment, which allows for the creation of mitigation strategies to justify the “take” of species habitat, has been inter-

preted by the Supreme Court as allowing for some indirect “harm” to threatened or endangered species, such as the destruction of species habitat. The 1982 amendment also contains provisions for a public comment period after incidental take permit applications are filed and before the Secretary of the Interior either grants or denies them.

At first, this exception to the Act was used sparingly, with just 14 HCPs approved in the first decade, covering only 1000 acres of land. Under the Clinton administration, however, HCP exceptions to allow for development on or extraction of natural resources from land otherwise protected skyrocketed. According to Fish & Wildlife Service data, there are (as of February 8, 2001) currently 341 habitat plans in operation, covering 30 million acres of public and private lands containing habitat for 200 endangered or threatened species, with another 300 or so plans in the development stage. Because the HCP provisions were initially supported by environmental as well as development groups, and because some early plans incorporated stakeholder participatory processes in shaping the species conservation mitigation strategies, HCPs were celebrated by the administration as examples of “win-win” collaborative processes and were aggressively pursued as such. The plans sometimes involve the kinds of democratization (how much genuine democracy is a question posed below), decentralization, and voluntarism that have characterized the Clinton approach to environmental policy reform, and that Mark Dowie has called “third wave” environmentalism (1996).

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Developing Habitat Conservation Plans

The first habitat conservation plans were developed and implemented in southern California following the 1982 amendment, and in conjunction with that state’s Natural Communities Conservation Planning Act. This state statute provided for, as Sabel, Fung, and Karkkainen describe it, “a process (initially voluntary) that brought together landowners, state and local officials, conservationists, and other interested parties to develop integrated, regional-level ecosystem protection plans” (1999, p. 9). Other HCPs that would follow also incorporated similar collaborative stakeholder processes. At their best, they promised to offer a new and attractive model of policy process; they allowed landowners flexibility in meeting conservation goals like species protection, they offered community stakeholders the opportunity to shape decisions that would affect common pool resources that depended on (sometimes) private land, and they did so in a collaborative setting that allowed for a legitimacy, an openness, and trust in implementation and monitoring of the plans that would have been impossible under the adversarial atmosphere of the ESA. Exactly how many of the HCPs enacted (if any) met these lofty expectations is another matter, but their promise, at least, was notable for its departure from the previous policymaking regime and its associated shortcomings.

Sabel, Fung, and Karkkainen point to the general trends toward democratization of environmental policy as examples of what they call a “rolling rule regime”:

Central authorities ensure that local units live up to their commitments by coordinating their activities, monitoring their performance, pooling their experiences, and enforcing feasible standards that emerge from their practice. But unlike conventional, hierarchical forms, in which subordinate parts answer to the center’s authoritative command, rolling-rule regulation creates a collaborative and mutual accountability of center to parts, parts to center, parts to other parts, and all to the whole enterprise—and to the public generally. (1999, p. 4)

The advantage of this pragmatically informed adaptive management scheme, the authors claim, is that it is both more responsive and more accountable than traditional

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centralized command and control models of environmental policymaking. Cohen and Sabel describe similar trends toward democratization as embodying “directly-deliberative polyarchy,” which they describe as “an attractive kind of radical, participatory democracy with problem-solving capacities useful under current conditions and unavailable to representative systems” (1997, p.

313). The advantages of democratization and decentralization, according to both of Sabel’s coauthored pieces, lie in their flexibility, accountability, and legitimacy. If problems are addressed by those best equipped to solve them (and if given the authority to enact chosen solutions), then the regulatory process not only yields better outputs but also gains from the procedures used to generate those outputs. HCPs, at least potentially and in some cases, appear to embody several of these characteristics.

Critical Perspectives on Habitat Conservation Plans

Others, however, are more skeptical. Lowi, in response to the Sabel, Fung, and Karkkainen article, criticizes the authors’ optimism about the prospects for democratic reform. Instead of a new and promising direction for the future, Lowi contends, the “rolling rule regime” is nothing but a new facade pasted over the tired, old ideology of classical liberalism that he declared dead three decades ago: “that free-market localism bordering on anarchy is the best way to serve the public interest” (Lowi, 1969). The motivation behind the authors’ efforts, he claims, is “to try to finesse the coercive nature of public authority in order to validate, or embrace, or make more convincing the key principle of that ideology as it goes into decline” (1999, p. 15). Lowi directs his fiercest criticism at the idea that environmental concerns should be locally managed, noting that “environmental policies almost always exist in a geographical context considerably larger than the area or principality within whose jurisdiction or boundaries the policy applies” (1999, p. 16). The problem of environmental externalities, Lowi argues, was correctly diagnosed by Mancur Olson decades ago, when he noted that this mismatch of problem scope and political jurisdictions would create incentives to displace spillover effects onto others (Olson, 1971). Local citizens, in shutting out nonlocal interests (despite the re-

gional, national, and international nature of ecosystem health), set up a classic collective action problem, and their efforts should be understood in this context.

Fung and Wright, in an article setting out terms of assessment for such democratic experiments, make five general criticisms applicable to the HCP reforms. First, that “the democratic character of processes and outcomes may be vulnerable to serious problems of power and domination *inside* deliberative arenas,” especially given material and informational inequalities among the participants, and the educational, income, and racial or ethnic biases frequently found in participation. Second, that “powerful participants may engage in ‘forum shopping’ strategies in which they use deliberative institutions only when it suits them,” which undermines any potential of deliberative groups since participants can easily opt in or out as their interests dictate. Third, these powerful groups may engage in rent-seeking activities, manipulating the process to secure private rather than public benefits. Finally (to group the last two together), the “devolutionary elements of empowered deliberative democracy *may balkanize the polity* and political decision-making,” and these processes may demand “unrealistically high levels of popular participation” and may, after some initial success, “be difficult to sustain over the long term” (Fung and Wright, 2000, p. 12). The authors are generally optimistic about the prospects of democratic reform but wary of inequalities in (or a complete lack of) the deliberative processes in existing HCP case studies.

How Much Deliberation?

As a procedural reform (as opposed to a set of substantive policy outcomes), critics most often point to the lack of democratic participation in the policy formation and development stages. Although several HCP cases do incorporate some stakeholder input throughout the process, most do not. As John Kostyack notes, “regulated entities generally negotiate plans with the Service behind-the-scenes, and citizens are generally given an opportunity to comment only after plans are essentially complete” (Kostyack, 1997, p. 52). This after-the-fact comment period, which Kostyack characterizes as the “minimal effort” approach, constitutes the limit of public input in the “vast majority” of approved HCPs. The only formal “democratic” requirements for an HCP are the publication of the plan in the Federal Register, followed by a 30-day comment period. Indeed, even the basic mandates of the National Environmental Policy Act (NEPA), including the development of and public hearings for environmental impact statements (EIS), have commonly been waived in HCPs at the suggestion of government regulators. Kostyack notes: “The FWS and NMFS stated in their (1996) HCP Handbook that NEPA’s scoping and EIS processes ‘normally’ should not be followed in developing HCPs, and that a 30-day notice-and-comment period for a combined HCP and Environmental Assessment would satisfy NEPA and save ‘paperwork and time’” (1997, p. 53).

When public or stakeholder participation does get included in the HCP process, the deliberative nature of that participation remains in question. As Craig Thomas points out, the decision to include the public in the process may be more strategically preventative of future litigation rather than deliberative. He notes, “to avoid future lawsuits, applicants may request public participation early in the planning process so the completed HCP will not be challenged during implementation”

(2000, p. 13). In other words, public input is not properly empowered if it is merely being solicited as cover against future restrictions on development. But other external political pressures likewise limit the empowered nature of the deliberative process. Some observers have remarked that the “political climate at the time” of the Plum Creek HCP in western Washington state created an implicit threat to conservation interests at the meetings, noting that “the fear created by the potential gutting of the ESA in 1994 pushed the Service to be more conciliatory in negotiations” (Miller, 1998).

A Michigan study on levels of participation in HCPs “indicated that public participation resulted in substantive changes to only 3 out of 45 responding HCPs (7%),” and then most often led to “only minimal or moderate changes” (Yaffee et al., 1998, p. xv). Moreover, the input stages may constitute something less than the deliberative ideal of forming and transforming preferences regarding environmental policies. According to one participant in the Balcones Canyonlands HCP:

The public participation process is really not designed to help people develop a new or redirected self-interest. It allows people who already have preconceived positions to continue to state and argue for those. . . . It’s a process designed to allow people to express preconceived or pre-established positions, not to adjust those positions based on new information. I don’t think it’s a dynamic or real iterative process; it’s a real static process. (Yaffee et al., pp. 3–4)

Of the participatory elements of the Plum Creek HCP (regarded as one of the more inclusive processes), one respondent to a later survey “felt the process evoked stress

and anxiety because the perception of an uneven playing field and a failure to establish trust made the struggle to attain meaningful conservation even more difficult. ‘The process was obviously not open,’ he asserted” (Miller, 1998). In short, existing HCP cases do not provide evidence that these processes are much more than an exemption from the ESA forged between developers and state and federal regulatory agencies.

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Further Amendments to the Endangered Species Act

Have positive steps been taken to rectify this shortcoming? Instead of encouraging more citizen participation, changes in the HCP process have been aimed toward greater levels of protection for developers from conservation responsibilities. If anything, the early plans contained some modicum of public participation, while later ones have largely abandoned that goal in favor of expediency, as John Kostyack notes: “The statute is moving away from a system of regulation by citizen enforcement toward a system of largely closed-door negotiations between agencies and reg-

ulated interests, with little meaningful public involvement” (1998, p. 19). The process has recently been altered through two further amendments, both added by the Clinton administration in an effort to encourage more HCPs.

The first, known as the “no surprises” rule, frees landowners from additional environmental regulations on HCP land for up to 100 years. In practice, this rule undermined any possibility of adaptive land management, since the appearance of new ecological problems or the failure of planned remedies on the land in question would not lead to any required changes in management. While the “no surprises” rule was under consideration, a consortium of 167 scientists sent a letter to Congress urging its rejection, noting that it “does not reflect ecological reality and rejects the best scientific knowledge and judgment of our era” (Kostyack, 1998, p. 22). Nonetheless, the rule was adopted in February of 1998.

The second change, which allows for what are known as “safe harbor” agreements, gives a landowner under a habitat conservation plan exception who “creates, restores, or improves” species habitat immunity from any future Endangered Species Act obligations should the “improved” habitat attract new listed species. Like the “no surprises” rule, “safe harbor” agreements were added to the HCP amendments to make the process more attractive to developers, rather than out of an interest in protecting endangered species or their habitats.

In practice, the combination of “safe harbor” agreements and “incidental take” permits has led to abuse of the intent of the ESA: “The effect of this practice—as used in the Plum Creek Cascades HCP and several others—is to allow the landowner to destroy habitat and then to insulate some or all of the subsequently-restored habitat from ESA protections” (National Wildlife Federation, 2000, p. 1). Also consistent with the “no surprises” rule is the undermining of one of the primary advantages of the HCP process over the inflexible and adversarial nature of the unamended ESA: that management practices can be adapted to ecological needs as they become evident over time. Granted, landowners need some incentive to enter into the HCP process, but immunity from laws designed to protect endangered species hardly seems the appropriate enticement given that the original aim is to protect endangered species habitat, not to shield landowners from conservation responsibilities.

Critical Perspectives of the “Safe Harbor” and “No Surprises” Rules

Critics unanimously recommend elimination of the “no surprises” rule, although the variety of reasons for such a reversal provides further illumination of its problems. Kostyack, for example, finds it to be based on bad science, the product of development pressures, and ultimately counterproductive to the aim of protecting listed (and unlisted) species. Furthermore, he argues, the exemption has begun to “creep into other ESA agreements and other vital environmental laws,” jeopardizing their future enforcement as well.

For example, industries currently negotiating large-scale plans for the management of the Columbia River, the San Francisco Bay Delta, and other imperiled aquatic ecosystems are seeking long-term assurances against enforcement of the Clean Water Act, the Federal Power Act, and a host of other federal and state environmental laws.

In Congress, a similar movement is under way. For example, a lobbyist for the electric utility industry recently testified that the Federal Energy Regulatory Commission relicensing decisions for hydroelectric facilities should include no-surprises assurances that the terms in the license will not be revisited for environmental reasons. (Kostyack, 1998, p. 20)

Thomas concurs, especially with regard to its reliance on bad science. He writes, "information and knowledge about the relationship between species and their habitats is constantly changing." The "no surprises" rule, with its moratorium on further regulation, falsely assumes that relationship to be static. "Viewing it as fixed is to ignore the evolving nature of scientific knowledge and the accumulated information gleaned from monitoring programs" (2000, pp. 37–38).

For Thomas, though, the problems with the "no surprises" rule go beyond their effect on habitat preservation and species protection, but undermine the very possibility of meaningful political deliberation as well. By providing assurances against future conservation obligations on the part of the landowner, the effect of this rule is to indefinitely remove the authority for land management and species protection from the deliberative arena, thus negating any beneficial effect that earlier deliberation may have brought about. He writes:

In a world of limited regulatory surprises, the habitat pie is relatively constant and participants grind out rational-comprehensive plans. Even a devoted pluralist like Charles Lindblom understood that rational-comprehensive plans are technically unfeasible. Yet, such plans are still being promoted under the "no surprises" banner. (p. 38)

If democratization lends legitimacy, creates trust, fosters the exchange of information, and allows for adaptive management of sensitive lands, then the "no surprises" rule undermines all of these advantages. Insofar as the ESA (absent the HCP amendment) offers superior species protection with real enforcement power, HCPs with this exemption appear to have little to recommend them, save the attraction of "regulatory certainty" for developers and the false promise of a "win-win" process to the "third wave"³ environmentalists in the Clinton administration.

Ecology, Justice, and Democracy

Given the critical perspectives canvassed above, the question remains, "What does viewing these reform experiments through the lens of normative political theory add to the existing analyses?" To ask the same question in a slightly different way, "What do justice and democratic theory have to do with environmental policy procedures?" The plans produced under HCPs can be critically analyzed in terms of their success in meeting the aims of ecosystem or species protection, but to focus only on the end product of these procedures is to miss much of their (at least potential) value. Clearly, fairness and accountability are parallel objectives that also warrant attention in these reform efforts. On the other hand, a purely procedural analysis likewise misses a crucial element in any environmental policymaking regime. Environmental policy that fails to protect the environment cannot, regardless of the procedures that produce it, be good

policy. Some combination of substantive and procedural analysis, then, must be applied to these experiments in democratization to reach normative conclusions from them. Normative political theory provides just such a critical perspective, and the remainder of this section will sketch some of the questions that should be central to such an examination.

One might begin by inquiring about the proper role for democracy in environmental policy reform. At first blush, it might not be clear what role democracy is to serve in this area. The problem of democracy when applied to environmental regulation is usually presented as a dilemma between means and ends; if the focus is on particular ends (wilderness designations, species protection, resource conservation), then the weight of those substantive goals is viewed as too important to be left to the vagaries of human preferences, which might (and probably will) cause one to choose otherwise in a democratic process. If, on the other hand, one is committed to democratic procedures, then one cannot specify particular ends in advance, and thus cannot really be said to be “green” at all. As Andrew Dobson puts it, proceduralism cannot serve as the basis for a green political theory “because a procedural theory of justice cannot guarantee any outcomes—and certainly not the outcome of the preservation of critical natural capital” (1998, p. 194).

Brian Barry makes a similar point in his description of the dilemma within liberal democracies given his theory of justice as impartiality. Imagine, he suggests, environmentalists arguing in the public forum against a dam that, if built, would wipe out the endangered snail darter. Such arguments may carry the day, but the history of such conflicts between economic benefits and the protection of endangered species renders this outcome improbable (hence the need for adversarial legal machinery like the Endangered Species Act). Faced with this possibility, the environmentalist has little choice but to accept whatever outcome results from a process deemed as fair: “The outcome is, as far as you are concerned, legitimate but bad—bad in the precise sense that it offends against your conception of the good” (Barry, 1995, p. 150). Though one can argue in the public forum from a conception of the good that values the continued existence of the snail darter more highly than another dam, one is limited in this capacity to trying to persuade a possibly unreceptive majority. Either one embraces democracy and impartiality (along with whatever outcomes it produces), or one abandons them in favor of a political decisionmaking procedure that is more likely to protect the snail darter, even if this means endorsing ecoauthoritarianism (Carter, 1999).

Too Little Democracy?

If one accepts a premise of this article—that scientific management, not environmental aims, is what is antithetical to democracy—then the dilemma may not be as stark as Dobson and Barry suggest. With HCPs, it is not the democratic elements of the reform that are in conflict with environmental aims. Here, the most prominent objection against existing HCP cases is not their collaborative nature at all, but rather the absence of truly deliberative democratic participation, along with the “no surprises” and “safe harbor” rules. Those HCPs that drew the most suspicion from environmental groups were the ones that, in effect, were deals between state bureaucrats

and land developers in which public input (if it existed at all) was limited to disclosure and comment rather than playing any role in policy development. Indeed, the main criticisms within the literature point at areas in which HCPs fall short of democratic ideals, such as Thomas's observation that participants in the process were unrepresentative of the affected population. "Indeed," he writes, "HCP planning and implementation require relatively high levels of commitment and knowledge to participate effectively. For this reason, extraordinary—rather than ordinary—people are likely to predominate" (2000, p. 24). When environmental interests have been excluded from the table, or otherwise marginalized from the decisionmaking process (e.g., relegated to a lower decisionmaking tier, or limited to reaction and comment roles), participants outside of the development interests (including government administrators and scientists) expressed higher levels of dissatisfaction with the process.

So far, the foregoing observations have only remarked that democracy need not be inconsistent with sound environmental policy, but have given few ecological reasons to recommend it. Others, though, have commented more extensively on the

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harmony between democracy and environmentalism. Mike Mills, for example, interprets the four principles of *die Grünen* (the German Green Party)—ecology, social responsibility, grassroots democracy, and non-violence—as both ends and means that work in harmony with each other. Noting the dilemma of environmentalists who are both outcome-oriented and committed to democratic

principles, he suggests that the best means to ensuring adequate environmental protection can be found in fair, open, and accountable democratic procedures. If the relevant interests have an equal place at the deliberative table, then fair representation (combined with relevant constraints) ought to lead to ecologically sound policies. He writes, "We simply have to construct our political institutions (which would include rules, structures, basic laws) in a way which guarantees that the political process will be 'considerate' of all those interests which are represented" (Mills, 1996, p. 107).

Mills has in mind an "expansion of the moral community" such that the interests of nature as well as of future generations of humans are represented; this leads to a problem of implementation that he concedes is "a very difficult question." Nonetheless, as in the observations above, he might find the shortcomings in existing democratic experiments to lie in their inability to properly or equally represent all affected interests. Certainly, those environmental groups denied a voice in HCP development would concur with that assessment. Considerations of procedural equality and justice would likewise argue for more inclusiveness, which ought likewise to produce better policy.

John Barry takes this notion of a harmony between democracy and ecology a step further. Assuming sustainability to be the goal of environmentalists, he finds democracy rather than scientific management to be the appropriate forum for the creation of sustainable environmental policies. Sustainability, he notes, is not a rational concept discoverable in the laboratory independent of human preferences and needs,

but is rather an essentially contestable and ultimately discursive concept that can be defined only through deliberation. He writes:

Sustainability is thus more than finding ecologically rational methods of production and consumption; it also involves collective judgment on those patterns. It is not just a matter of examining the ecological means to determined ends; ultimately sustainability requires a political-normative judgment on the ends themselves. Sustainability is therefore a matter for communicative as well as instrumental rationality, but the former takes precedence over the latter. The normative character of sustainability as a public principle or social goal makes it conducive to democratic as opposed to non-democratic "will formation." (Barry, 1996, p. 116)

Decisions regarding sustainability are ultimately decisions about the proper allocation of resources, not only between conservation and consumption, but also within society and through time, and such decisions are unavoidably political rather than scientific. Attempting to remove them from the sphere of politics—as scientific management does—betrays the true nature of the decisions regarding their allocation. That is why "the issues involved in the translation of sustainability from a political-ethical concept to a regulative social principle, expressed in law and policies, for example, require the deliberation as well as the consent and action of those whose lives will be affected by such a principle" (Barry, 1996, p. 118).

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Likewise, Yaffee finds public deliberation to have an essential role in resolving conflicts over such apparently technical and inflexible policy decisions as species protection. In reference to the "prohibitive" policy of the ESA, he argues that bureaucratic rationality and scientific management can neither banish nor serve as a substitute for politics.

While science can and should inform choice, rarely can it do so definitively. Most policy choices involve fundamental choices of social value—issues for which technicians have only one voice among many. The central issues of the endangered species case—determining what is ethical behavior and what is valuable to protect at what cost—require individual and group assessments of what is moral and what is valued. Economics and biology can only help us slightly in making those choices. (Yaffee, 1982, p. 162)

Instead of viewing science and democracy as rivals (as scientific management does), he argues, they should be regarded as complementary facets of the policy process. Knowledge from conservation biology and the economic impacts of listing decisions are necessary contributions to a policy debate, but they are not in themselves sufficient. Though prohibitive policies are sometimes appropriate, they require "escape valves" to be built into them so that political pressure can be exercised through open and accountable public processes.

The Role of Democratic Norms

The challenge for normative political theory, then, is to assist in designing institutions and procedures through which fruitful deliberation over sustainable environmental policy can take place. Perhaps those institutions might include constraints on democratic decisionmaking, such as the Endangered Species Act, or the various other land use or wilderness protection statutes. Perhaps they might include some kind of “rolling rule regime” in which different levels of government and nongovernmental bodies collaborate and distribute authority over policy as the nature of the decision dictates. Normative theory can also guide us in eliminating inequalities within the deliberative process itself, in addition to suggesting distributive principles for environmental goods across political boundaries and generations.

The key to refining these democratic experiments is to recognize the role of democracy in them—to recognize the integral nature of fair and open procedures in generating policy outcomes, such that those procedures can continue to be refined. As John Barry notes, “by portraying it as a political question we avoid crude, technocratic solutions, and by then portraying it as a particular type of political problem, that is democratic, we avoid the ecoauthoritarian scenario, which is often a subset of the technocratic approach” (Barry, 1996, p. 120). We must, therefore, recognize these decisions as inherently political, and that our deliberation over potential solutions is intended not just to aggregate our existing preferences, but to form and even transform them in the process. Habitat conservation plans are reflections of the procedures employed in their production, and fulfilling their promise requires attention not simply to expedience but also to representational fairness, participatory equality, and the norms and ideals of deliberative democracy.

NOTES

1. *Endangered Species Act*, 16 U.S.C., sec. 153 a.
2. *Endangered Species Act*, 16 U.S.C., sec. 153 a.
3. Dowie describes this approach: “The essence of third wave environmentalism is the shift of the battle for the environment from the court room to the board room. Many of the same organizations that were once eager to take environmental offenders to court now wish to sit down and hammer out a deal that allows each party to declare victory and appear green” (1996, pp. 106–10).

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