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## Surviving Without Nature

**Inside the Equal Access to Justice Act: Environmental Litigation and the Crippling Battle over America's Lands, Endangered Species, and Critical Habitats. By LOWELL E. BAIER [Rowman & Littlefield, 2016, 648 pp, ISBN 978-1-4422-5744-3, Hardback, £49.95]**

This book is about the Equal Access to Justice Act (EAJA) and its use by non-governmental organisations (NGOs) to fund environmental litigation, especially litigation concerning the Endangered Species Act (ESA). The book is not, however, about ways to help conserve endangered species and their critical habitat in the United States (US). Instead, it is 'about reforming the [EAJA], and putting "Equal" back into the law',<sup>1</sup> which the author describes as 'cutting off' funding under the EAJA 'to aggressive environmentalists which incentivizes destructive lawsuits'.<sup>2</sup>

The author believes that the use of the EAJA by NGOs 'enables and incentivizes [the] takeover of American land, sabotage of good government, and judicial hijacking of policy by extremists whose goal is to save Mother Earth at the expense of human well-being'.<sup>3</sup> As well as reforming the EAJA, he argues that Congress should 'act responsibly' to reform the ESA to deal 'with the dilemma that a rigid ESA has caused the nation'.<sup>4</sup>

The author's views are not unprecedented. The ESA tends to generate strong opinions, as indicated by the word 'battle' in the title of the book. Other commentators have used similar military terms to describe actions under the ESA, including 'pitched battleground',<sup>5</sup> and 'war'.<sup>6</sup> This is not surprising;

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<sup>1</sup> Lowell Baier, *Inside the Equal Access to Justice Act; Environmental Litigation and the Crippling Battle over America's Lands, Endangered Species, and Critical Habitats* (Rowman & Littlefield 2016) xxiii.

<sup>2</sup> *ibid* 508.

<sup>3</sup> *ibid* 448.

<sup>4</sup> *ibid* 506.

<sup>5</sup> Zygmunt Plater, 'Endangered Species Act Lessons Over 30 Years, and the Legacy of the Snail Darter, A Small Fish in a Pork Barrel' (2004) 34 *Env L* 289, 292.

<sup>6</sup> Benjamin Jesup, 'Endless War or End this War? This History of Deadline Litigation under Section 4 of the Endangered Species Act and the Multi-District Litigation Settlements' (2013) 14 *Vermont J Env L* 327, 387.

the ESA has been described as ‘the most powerful of all [American environmental] laws’<sup>7</sup> and the ‘pit bull of federal environmental statutes’.<sup>8</sup>

The differences between the ESA and its counterparts in European Union (EU) legislation, the Birds and the Habitats<sup>9</sup> Directives, are massive. In addition, there is no equivalent to the EAJA under EU law or UK domestic law. Still further, the US Administrative Procedure Act (APA),<sup>10</sup> which governs rulemaking procedures under, and challenges to a federal agency’s implementation of, legislation such as the ESA differs substantially from rulemaking and judicial review procedures under domestic law in the UK. In short, comparing the ESA, APA, EAJA and other topics in this book with their counterparts under EU law and domestic law in the UK is like comparing apples with oranges. Without this comparison, however, it is not possible to understand the topics in the book or the author’s viewpoint on them. This review, therefore, describes the US laws discussed in the book and compares them with their counterparts in the EU and the UK before reviewing the book itself.

## **I. THE ENDANGERED SPECIES ACT AND THE BIRDS AND HABITATS DIRECTIVES**

The bitter divide between admirers of the ESA and its critics was absent when President Nixon signed the Act into law on 28 December 1973,<sup>11</sup> following a vote of 355 to four in the House of Representatives and a unanimous vote in the Senate.<sup>12</sup> Unlike two former federal Acts that

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<sup>7</sup> Joseph L Sax, ‘New Departures in the Legal Protection of Biological Diversity; Implementing the Endangered Species Act’ (1997) 27 Env Policy and L 347, 347.

<sup>8</sup> Robert Thornton, ‘Searching for Consensus and Predictability: Habitat Conservation Planning under the Endangered Species Act of 1973’ (1991) 21 Env L 605, 605, referring to address by Donald Barry, Majority Counsel, House of Representatives Committee on Merchant Marine and Fisheries, Am Bar Association Section on Natural Resources, Energy and Env Law, Workshop on Endangered Species (6 April 1990); see also Patrick Parenteau, ‘Citizen Suits under the Endangered Species Act: Survival of the Fittest’ (2004) 10 Widener L Rev 321, 321 (attributing term ‘pit bull of environmental statutes’ to Senator John Chafee).

<sup>9</sup> Directive 2009/147/EC on the conservation of wild birds (2009) OJ L20/7; Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (1992) OJ L206/7.

<sup>10</sup> 5 USC ss 551 *et seq.*

<sup>11</sup> Pub L No 93-205, 87 Stat 884 (1973) (codified at 16 USC ss 1531-1543); see Richard Nixon, ‘374 - Statement on Signing the Endangered Species Act of 1973’ (28 December 1973) <<http://www.presidency.ucsb.edu/ws/?pid=4090>> accessed 6 May 2017.

<sup>12</sup> See Brian Gray, ‘The Endangered Species Act: Reform or Refutation?’ (2007) 13 Hastings West-Northwest J of Env L and Policy 1, 1; see also Holly Doremus, ‘The Endangered Species Act: Static Law Meets Dynamic World’ (2010) 32 Wash UJL and Policy 175, 177.

protected only a limited number of species,<sup>13</sup> and had been ineffective in doing so, the ESA did not limit the scope of species that could be protected under the Act. Its definition of ‘species’ includes all species and subspecies of animals and plants and also, in the US, ‘distinct population segments’ of animals.<sup>14</sup>

In contrast to many other US environmental statutes enacted during the 1970s that focus primarily on protecting human health,<sup>15</sup> the ESA prioritised the conservation of endangered and threatened species over its economic consequences. An NGO, individual or a state agency may petition the Fish and Wildlife Service (Service)<sup>16</sup> to list, or much less commonly the Service may propose listing, a species as ‘endangered’ on the basis that it is ‘in danger of extinction throughout all or a significant portion of its range’<sup>17</sup> or is ‘threatened’ because it is ‘likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range’.<sup>18</sup>

In deciding whether to list a species, the Service must consider only ‘the best scientific and commercial information available’;<sup>19</sup> the economic and social implications of the listing are irrelevant. The Service must also designate the ‘critical habitat’ of a listed species, which is defined as the area that contains the physical or biological features essential to conserve the species.<sup>20</sup> This

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<sup>13</sup> See Endangered Species Preservation Act, Pub L No 89-669, 80 Stat 926 (1966); Endangered Species Conservation Act, Pub L No 91-135, 83 Stat 275 (1969).

<sup>14</sup> 16 USC s 1532(16); see Gray (n 12) 2.

<sup>15</sup> For a discussion, see, for example: Lisa Heinzerling, ‘Reductionist Regulatory Reform’ (1997) 8 Fordham Env LJ 459, 490-91; and Adam Davis, ‘Ecosystem Services and the Value of Land’ (2010) 20 Duke Env L and Policy Forum 339, 344-45.

<sup>16</sup> The Service is part of the US Department of the Interior. It administers the ESA for terrestrial and freshwater animals and plants. The National Marine Fisheries Service administers the ESA for marine wildlife including mammals such as whales and anadromous fish such as salmon. See US Fish & Wildlife Services, ESA Basics; 40 Years of Conserving Endangered Species (January 2013) <[https://www.fws.gov/endangered/esa-library/pdf/ESA\\_basics.pdf](https://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf)> accessed 6 May 2017. The agencies share responsibility for species such as sea turtles that live on land and in the ocean. US Government Accountability Office, *Report to the Ranking Member, Committee on Natural Resources, House of Representatives; Environmental Litigation; Information on Endangered Species Act Deadline Suits* (GAO-17-304, February 2017) 1 n 2. The book being reviewed concerns only the Service’s administration of the ESA.

<sup>17</sup> 16 USC s 1532(6).

<sup>18</sup> *ibid* s 1532(20). The ESA provides less protection to threatened species although as a practical matter the difference tends to be minimal. See Michael J Bean, ‘The Endangered Species Act; Science, Policy and Politics’ (2009) *The Year in Ecology and Conservation Biology*, Annals of the New York Academy of Sciences, 369, 373.

<sup>19</sup> 16 USC s 1533(b)(1)(A).

<sup>20</sup> *ibid* s 1532(5)(A).

designation must be made ‘on the basis of the best scientific data available’ after considering the economic impact, the impact on national security and any other relevant impacts of the designation.<sup>21</sup> The Service may exclude part of the area if, ‘based on the best scientific and commercial data available’, doing so outweighs the benefits of its inclusion, provided that the failure to designate it would not result in extinction of the species.<sup>22</sup>

Protection of the species does not commence unless – or until – it is listed. If the species is listed, two key protections are triggered. Any federal action that would ‘jeopardize the continued existence’ of a listed species or that would destroy or adversely modify its critical habitat is prohibited,<sup>23</sup> as is any action by any person to ‘take’ the species,<sup>24</sup> that is, ‘to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct’ concerning it,<sup>25</sup> including significant modification of its habitat.<sup>26</sup> Neither prohibition is absolute; a key exception authorises the Service to issue ‘incidental take’ permits<sup>27</sup> that allow the ‘taking’ of a listed species when the taking is incidental to, rather than the purpose of, an otherwise lawful activity<sup>28</sup> provided that the Service has approved a habitat conservation plan.<sup>29</sup> After a species is listed, the Service must develop a recovery plan for it;<sup>30</sup> the plans are, however, non-binding.<sup>31</sup>

As is apparent, the ESA differs significantly from the Birds and Habitats Directives. First, no species or habitat types are listed in the ESA itself. In contrast, species protected under the Directives are listed

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<sup>21</sup> *ibid* s 1533(b)(2).

<sup>22</sup> *ibid*; see M Lynne Corn and Alexandra Wyatt, ‘CRS Report for Congress, The Endangered Species Act: A Primer’ (RL31654, updated 8 September 2016) 15 <<https://fas.org/sgp/crs/misc/RL31654.pdf>> accessed 7 May 2017.

<sup>23</sup> 16 USC s 1536(a)(2).

<sup>24</sup> *ibid.* s 1538(a)(1)(b).

<sup>25</sup> *ibid* s 1532(19).

<sup>26</sup> *Babbitt v Sweet Home Chapter of Communities for a Great Oregon* 515 US 687, 708 (1995).

<sup>30</sup> *ibid* s 1533(f).

<sup>31</sup> See Corn and Wyatt (n 22) 17-18.

in annexes, together with habitat types in the Habitats Directive.<sup>32</sup> The European Commission updates the lists of species and habitat types for each of the (now) nine biogeographical regions in the EU,<sup>33</sup> albeit that the annexes are over and under inclusive of endangered and threatened species and their habitats in the EU.<sup>34</sup>

Second, the priority of the ESA, and its implementation by the Service, is the conservation of species not designation of their critical habitat.<sup>35</sup> In contrast, the focus of the Birds and Habitats Directives is (respectively) the classification of special protection areas (SPAs)<sup>36</sup> and the designation of special areas of conservation (SACs)<sup>37</sup> to form Natura 2000.<sup>38</sup> There is no such network across the US, although a substantial area of land in the US is conserved and managed under legislation other than the ESA.<sup>39</sup>

Third, unlike the ESA, NGOs do not submit petitions to list species under the Birds and Habitats Directives, although they may make suggestions.<sup>40</sup> Fourth, the ESA is not a pure nature conservation statute; it includes the incidental 'take' permit programme indicated above.<sup>41</sup> Whilst the Birds and

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<sup>32</sup> See Doug Evans, 'Interpreting the habitats of Annex I: past, present and future' (2010) 157 *Acta Botanica Gallica* 677, 678-79 (describing original annexes to the Habitats Directive).

<sup>33</sup> See eg Commission Implementing Decision (EU) 2015/71 adopting an eighth update of the list of sites of Community importance for the Alpine biogeographical region (2015) OJ L18/328.

<sup>34</sup> See Dirk Maes and others, 'Not the Right Time to Amend the Annexes of the European Habitats Directive' (2013) 6 *Conservation Letters* 468, 468-69; and Axel Hochkirch and others, 'How Much Biodiversity does Natura 2000 Cover?' (2013) 6 *Conservation Letters* 470, 471.

<sup>35</sup> See Margaret Rosso Grossman, 'Habitat and Species Conservation in the European Union and the United States' (1997) 45 *Drake L Rev* 19, 48 n 233; and Joseph Sax, 'Nature and Habitat Conservation and Protection in the United States' (1993) 20 *Ecology LQ* 47, 52.

<sup>36</sup> Birds Directive (n 9) art 4(1).

<sup>37</sup> Habitats Directive (n 9) art 3.

<sup>38</sup> *ibid*.

<sup>39</sup> See eg Joseph Sax, 'Nature and Habitat Conservation and Protection in the United States' (1993) 20 *Ecology LQ* 47; Robert Glicksman and George Cameron Coggins, 'Wilderness in Context' (1999) 76 *Denver UL Rev* 383; Robert Fischman, 'The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation' (2002) 29 *Ecology LQ* 457; Robert Glicksman, 'Wilderness Management by the Multiple Use Agencies: What makes the Forest Service and the Bureau of Land Management Different?' (2014) 44 *Env L* 447.

<sup>40</sup> Case C-3/96 *Commission v Netherlands* [1998] ECR I-3031, paras 40-41.

<sup>41</sup> See Robert Fischman and Jaelith Hall-Rivera, 'A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery under the Endangered Species Act' (2002) 27 *Columbia J Env L* 45, 47.

Habitats Directives allow specified derogations,<sup>42</sup> this is vastly different from a permitting programme.

Fifth, the Service implements the ESA across the entire US. In addition, states implement their versions of the ESA, with the Service entering into cooperative agreements to provide funding to states that have 'adequate and active' programmes to conserve endangered and threatened species approved by the Service.<sup>43</sup> In contrast, the Birds and Habitats Directives do not specify any sources of EU funding that can be used for co-financing although Member States may request funding from other EU funds.<sup>44</sup>

The funding is necessary in the US because approximately half of the listed species have at least 80% of their habitat on privately-owned land.<sup>45</sup> Indeed, this factor is a – if not *the* – major reason for most of the controversy concerning the ESA.<sup>46</sup> Whilst the ESA does not require private landowners to carry out any action to maintain or improve habitat on their land,<sup>47</sup> the designation of critical habitat impacts that land, just as classification or designation of land as an SPA or SAC impacts land in the EU, with resulting litigation.<sup>48</sup>

## II. RULEMAKING AND JUDICIAL REVIEW

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<sup>42</sup> Birds Directive (n 9) art 9; Habitats Directive (n 10) arts 15-16.

<sup>43</sup> 16 USC s 1535(c)(1).

<sup>44</sup> See Communication from the Commission to the Council and the European Parliament, Financing Natura 2000 7, s 3.1 (COM(2004) 431 final, 15 July 2004); see also Marianne Kettunen and others, 'Assessment of the Natura 2000 Co-financing Arrangements of the EU Financing Instrument, A project for the European Commission – Final Report' 34-37, s 4.1.3 (Institute for European Environmental Policy, No. 070307/2010/567338/ETU/FI, March 2011) (describing funding sources); Regulation (EU) No 1293/2013 on the establishment of a Programme for the Environment and Climate Action (LIFE) (2013) OJ L347/185. The LIFE Fund was created from the consolidation of several existing environmental funds when the Habitats Directive was adopted.

<sup>45</sup> See US Fish and Wildlife Service, 'Our Endangered Species Program and How It Works with Landowners' <<https://www.fws.gov/endangered/esa-library/pdf/landowners.pdf>> accessed 7 May 2017.

<sup>46</sup> See eg Robert Meltz, 'Where the Wild Things are: The Endangered Species Act and Private Property' (1994) 24 Env L 369; Jeffrey Rachlinski, 'Protecting Endangered Species without Regulating Private Landowners: The Case of Endangered Plants' (1998) 8 Cornell JL and Public Policy 1; JB Ruhl, 'Endangered Species Act and Private Property: A Matter of Timing and Location' (1998) Cornell JL and Public Policy 37.

<sup>47</sup> See *Markle Interests LLC v US Fish & Wildlife Service* 827 F 3d 452 (5<sup>th</sup> Cir 2016).

<sup>48</sup> See Report from the Commission on the implementation of the Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora 19, s 4.1.1 (COM(2003) 845 final, 5 January 2004).



The Service implements the ESA through provisions in the ESA and the APA. The APA, which was enacted in 1946 to establish the public accountability of federal administrative agencies,<sup>49</sup> applies to procedures and decisions by the Service under the ESA.<sup>50</sup> A federal agency, such as the Service, publishes a proposed rule in the *Federal Register*.<sup>51</sup> Publication triggers a public comment period and, sometimes, hearings. When the agency has reviewed public comments to its proposed rule, and assuming it decides to proceed with it, the agency publishes the final rule together with responses to those comments. Publication of a final rule in the *Federal Register* gives it legally binding effect.<sup>52</sup> Final rules are subsequently codified into the 50 titles of the *Code of Federal Regulations* (CFR), which is updated annually.<sup>53</sup>

The timetable for rulemaking under the ESA is set out in the ESA itself. If the Service receives a petition to list a species, it must ‘to the maximum extent practicable’ make an initial determination within 90 days of receipt of a petition whether it contains ‘substantial scientific or commercial information’ in support of the action requested in it.<sup>54</sup> If the Service concludes that the requested action may be warranted, it has 12 months from the date of receipt of the petition to make a finding that the action is: warranted; not warranted; or warranted but precluded.<sup>55</sup> Warranted but precluded findings have been much criticised, being referred to as a ‘black hole’ from which petitions do not emerge.<sup>56</sup> A substantial proportion of actions by NGOs concerns such findings.<sup>57</sup>

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<sup>49</sup> 5 USC ss 551 *et seq*; see Cass Sunstein, ‘Changing Conceptions of Administration’ [1987] Brigham Young UL Rev 927, 944; Richard Stewart, ‘Administrative Law in the Twenty-First Century’ (2003) 78 New York UL Rev 437, 440 (same); Peter Strauss ‘The Place of Agencies in Government: Separation of Powers and the Fourth Branch’ (1984) 84 Columbia L Rev 573, 578.

<sup>50</sup> 5 USC s 553; see 16 USC s 1533(b)(4).

<sup>51</sup> 5 USC s 552. The agency also publishes all other rulemaking information in the *Federal Register*, The *Federal Register* is published daily; the electronic version is available at <<https://www.federalregister.gov/>> accessed 6 May 2017.

<sup>52</sup> *Federal Crop Insurance Corp v Merrill* 332 US 380, 385 (1947).

<sup>53</sup> The electronic version is available at <<http://www.ecfr.gov/cgi-bin/ECFR?page=browse>> accessed 6 May 2017. Regulations pertaining to the ESA are codified in title 50 of the CFR.

<sup>54</sup> 16 USC s 1533(b)(3)(A).

<sup>55</sup> *ibid* s 1533(b)(3)(B).

<sup>56</sup> See James Jay Tutchton, ‘Getting Species on Board the Ark one Lawsuit at a Time: How the Failure to List Deserving Species has Undercut the Effectiveness of the Endangered Species Act’ (2014) 20 Animal L 401, 418-20.

<sup>57</sup> See eg *Wildwest Institute; Alliance for the Wild Rockies v Kurth* No. 14-35431 (9<sup>th</sup> Cir, 28 April 2017).



If the Service makes a warranted finding, it issues a proposed rule to list the species.<sup>58</sup> The Service then has 12 months, with a six-month extension in the event of scientific uncertainty, to issue a final rule or withdraw the proposal.<sup>59</sup> Concurrent with listing, or no more than 12 months after that date, the Service must ‘to the maximum extent prudent and determinable’ designate the species’ critical habitat.<sup>60</sup>

The US procedures for promulgating regulations differ substantially from procedures in the UK. For example, there may be one or more consultations on draft regulations, including any issued under the legislation that transposed the Birds and Habitats Directives into domestic law.<sup>61</sup> The final version of regulations for England (or England and Wales in some cases) is approved (or not) by the Secretary of State and laid before Parliament, usually under the negative resolution procedure. In contrast, there is no need for the US Congress to approve rules promulgated by the Service or any other federal agency; Congress delegates power to the agencies to promulgate rules (regulations) and to administer, implement and enforce them in the relevant statute.

The Service (and other federal agencies) thus has considerably more power than administrative authorities in the UK, with the crucial caveat that a federal regulation in the US can be challenged judicially pursuant to the APA. In contrast, legislation enacted by Parliament is not subject to a direct judicial challenge, although legislation enacted by a devolved government is subject to it.<sup>62</sup>

Further, the above procedures concern the transposition of the Habitats Directive (and other Directives); they do not concern its implementation in Member States. That is, the Habitats Directive

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<sup>58</sup> 16 USC s 1533(b)(5)(A).

<sup>59</sup> *ibid* s 1533(b)(6)(A)-(B).

<sup>60</sup> *ibid* s 1533(a)(3)(A).

<sup>61</sup> The current version of the legislation transposing the Birds Directive into domestic law in Great Britain is the Wildlife and Countryside Act 1981, as amended by the Countryside Rights of Way Act 2000. The current version of the legislation transposing the Habitats Directive into law in Great Britain is the Conservation of Habitats and Species Regulations 2010/490, as amended. There are differences in both pieces of legislation in relation to Scotland due to amendments to them.

<sup>62</sup> See Peter Leyland, ‘The Multifaceted Constitutional Dynamics of U.K. Devolution’ (2011) 9(1) *Intl J Constitutional L* 251, 271; and, for example: *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46.

does not contain any rulemaking procedures that must be transposed into the national law of Member States.

The APA waives the sovereign immunity of the US for judicial review of actions that seek relief other than monetary damages. The Act establishes the general mechanisms for judicial review of final actions by a federal agency;<sup>63</sup> the applicable standard is whether the action is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’.<sup>64</sup> In respect of the ESA, the APA applies, among other things, to: (i) a decision that action in a petition is warranted, not warranted or warranted but precluded;<sup>65</sup> (ii) a decision to list, reclassify or delist a species; (iii) a designation regarding critical habitat; and (iv) withdrawal of a proposed rule.<sup>66</sup>

The above standard of judicial review differs from the standard for judicial review in England and Wales, in which the grounds for challenging an administrative act or failure to act are illegality, irrationality (*Wednesbury* unreasonableness) and procedural impropriety. Judicial review under the APA is much more searching than judicial review in England and Wales, equating to what is known as a ‘hard look’ standard.<sup>67</sup>

The ESA includes a ‘citizen suit’ provision, that is, a provision that authorises a private person (including an NGO) to bring an action against any person alleged to be in breach of the ESA or regulations issued under it,<sup>68</sup> a provision authorising an action against the Service to compel it ‘to apply [specified sections of the ESA] with respect to the taking of any resident endangered species or threatened species within any State’,<sup>69</sup> and a provision authorising an action against the Service for

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<sup>63</sup> 5 USC ss 702, 706.

<sup>64</sup> *ibid* s 706(2)(A). Other grounds are set out in sub paras (B) to (F) of s 706(2).

<sup>65</sup> See K Mollie Smith, ‘Abuse of the Warranted but Precluded Designation: A Real or Imagined Purgatory?’ (2010) 19 *Southeastern Env LJ* 119, 128.

<sup>66</sup> 16 USC s 1533(b)(6)(B)(ii); see 5 USC s 706(2)(A).

<sup>67</sup> See *Citizens to Preserve Overton Park v Volpe*, 401 US 402, 416 (1971); *Motor Vehicle Manufacturers Association of the United States v State Farm Mutual Automobile Insurance Co*, 463 US 29, 43 (1983); see generally Patrick Garry, ‘Judicial Review and the “Hard Look” Doctrine’ (2006) 7 *Nevada LJ* 151.

<sup>68</sup> 16 USC s 1540(g)(1)(A).

<sup>69</sup> *ibid* s 1540(g)(1)(B).

failing to carry out ‘any act or duty under section 1533 of [the ESA] which is not discretionary with the [Service]’,<sup>70</sup> which includes meeting a deadline mandated by the ESA.

The ESA also authorises the recovery of attorney fees in citizen suits.<sup>71</sup> If, however, an action is brought against the Service under the APA, it falls outside this provision and the EAJA, instead of the ESA, applies.<sup>72</sup>

The citizen suit provisions in the ESA and the funding system introduced by it and the EAJA have no equivalents in the UK. There are no provisions in UK or EU environmental legislation that: (i) authorise a person to bring an action against another private person in lieu of a competent authority; (ii) establish judicially enforceable deadlines for rulemaking; or (iii) authorise an action against a competent authority for failing to comply with a duty.

### **III. THE EQUAL ACCESS TO JUSTICE ACT**

Congress enacted the EAJA in 1981 to authorise a federal court to award attorney fees and costs to an individual or organisation that prevails in a judicial review action against a federal agency if the government fails to demonstrate that its position was ‘substantially justified’<sup>73</sup> (that is, has a reasonable basis in law and fact).<sup>74</sup> The EAJA thus introduced an exception to the ‘American rule’ that parties to litigation must bear their own attorney fees and costs unless they contractually agree otherwise.<sup>75</sup> The American rule differs markedly from the UK norm, in which the unsuccessful party

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<sup>70</sup> *ibid* s 1540(g)(1)(C).

<sup>71</sup> 16 USC s 1540(g)(4) (a ‘court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate’).

<sup>72</sup> 28 USC s 2412(b) (‘[u]nless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity’); see Parenteau (n 8) 348.

<sup>73</sup> 28 USC s 2412 and s 2412(d)(1)(A).

<sup>74</sup> See Harold Krent, ‘Fee Shifting Under the Equal Access to Justice Act – A Qualified Success’ (1993) 11 Yale L and Policy Rev 458, 459.

<sup>75</sup> See *Alyeska Pipeline Service Co v Wilderness Society* 421 US 240, 247-71 (1975) (describing history of American rule and exceptions to it).

pays the costs of the successful party in litigation. In this respect, there is continued controversy over limiting the legal and other fees of NGOs that fail to succeed in a judicial review challenge.<sup>76</sup>

The major reason for enactment of the EAJA was the deregulation movement of the late 1970s<sup>77</sup> with the intention that it would provide funding to small businesses ‘to resist unreasonable Government conduct’.<sup>78</sup> In addition to small businesses, the EAJA authorises non-profit making organisations, such as NGOs, to claim funding under it.<sup>79</sup> It is this provision that Baier bitterly opposes, as discussed below.

#### **IV. AN UNEASY READ**

The book is substantial; its 648 pages include a prologue, 10 chapters, an epilogue and appendices. It is not objective and does not pretend to be. Instead, as the author states, it is ‘a call to action mobilizing broad citizen support to reform [the] EAJA’,<sup>80</sup> by cutting off funding for environmental NGOs. The author, a lawyer, is in his own words ‘a lifelong conservationist and wildlife advocate’,<sup>81</sup> a fact acknowledged on the book’s jacket by others. He is one of 14 founders of the Wild Sheep Foundation (a safari club),<sup>82</sup> and president emeritus of the Boone and Crockett Club.

Due to the strong emotional content of the book, this review contains many quotes by the author rather than paraphrasing him; the latter would not accurately convey the substance of the work. It is not an easy read for anyone who disagrees with the author’s views that rights in property have

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<sup>76</sup> See HM Courts and Tribunal Services, ‘The Administrative Court Judicial Review Guide 2016’ 137-39; and Ministry of Justice, ‘Costs Protection in Environmental Claims; The government response to the consultation on proposals to revise the costs capping scheme for eligible environmental challenges’ (November 2016).

<sup>77</sup> See Susan Gluck Mezey and Susan Olson, ‘Fee Shifting and Public Policy: the Equal Access to Justice Act’ (1993) 77 *Judicature* 13, 13.

<sup>78</sup> President Jimmy Carter, Small Business Legislation Statement on Signing H.R. 5612 Into Law (21 October 1980) <<http://www.presidency.ucsb.edu/ws/?pid=45346>> accessed 6 May 2017.

<sup>79</sup> 28 USC s 2412(d)(2)(B).

<sup>80</sup> Baier (n 1) xxvii.

<sup>81</sup> Testimony of Lowell Baier before the Subcommittee on Interior of the Committee on Oversight and Government Reform, United States House of Representatives, ‘Barriers to Endangered Species Act Delisting, Part I’ (20 April 2016) [https://oversight.house.gov/wp-content/uploads/2016/04/Baier-Testimony\\_April-20-2016\\_Revised.pdf](https://oversight.house.gov/wp-content/uploads/2016/04/Baier-Testimony_April-20-2016_Revised.pdf) last accessed 14 August 2017.

<sup>82</sup> See *Conservation Force, Inc v Jewell* 733 F.3d 1200, 1202 n 2 (DC Cir 2013).

primacy over nature conservation and that the US 'legal system and [US] environmental laws ... define value in nature in relationship to human benefit'.<sup>83</sup> The 'property' to which the author refers includes wildlife. That is, the author believes that 'non-human creatures [are the] "property" of humans',<sup>84</sup> and that people's relationship with other species is 'based on ownership and exploitation' of them.<sup>85</sup>

The prologue sets the tone of the book. Among other things, it describes funding under the EAJA for NGOs as a loophole and questions why this 'piggy bank' funded by American taxpayers should pay for environmental litigation brought by them.<sup>86</sup> The first four chapters trace the history of the EAJA and the statute itself. The author has two main issues with the EAJA, which he views as having 'been badly warped in its application from the original intent of Congress'.<sup>87</sup> The first is an '11th-hour amendment'<sup>88</sup> that allows a non-profit organisation such as an NGO to be awarded attorney fees regardless of its net worth.<sup>89</sup> The author contends that this extension of eligibility for EAJA funding created 'a free pass for non-profit organizations opening a gaping loophole that has turned the law on its head, making it a ready source of cash for environmental litigants that were neither intended to benefit from the law nor need it'.<sup>90</sup> The second issue is the removal of a sunset clause that made reauthorisation of funding permanent rather than subject to periodic review by Congress.<sup>91</sup>

Chapters 5 and 6 discuss environmental NGOs, in particular, those founded between 1971 and 2000, which the author describes as the 'generation of biocentrics'.<sup>92</sup> The author considers that 'biocentrism', a term used in a derogatory sense throughout the book,<sup>93</sup> 'challenges the values and

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<sup>83</sup> *ibid* 502.

<sup>84</sup> *ibid* 8.

<sup>85</sup> Lowell Baier, 'The Secret World inside the Animal Rights Agenda' *Fair Chase Magazine* (Fall 2010) 3.

<sup>86</sup> Baier (n 1) xxxiii.

<sup>87</sup> *ibid* 271.

<sup>88</sup> *ibid* 93.

<sup>89</sup> 28 USC s 2412(d)(2)(B).

<sup>90</sup> Baier (n 1) 93.

<sup>91</sup> *ibid* 104-07.

<sup>92</sup> *ibid* xxvi.

<sup>93</sup> See, for example, *ibid* xxvi-xxvii, 282, 291, 296, 297, 414, 443, 448, 502.

ideology of [the] legal culture [of the US]'. He also considers that NGOs founded between 1971 and 2000 have brought:

hyperactive, saturation litigation that ... generates media attention and headlines, intimidates policy makers, manipulates regulatory mechanisms, and contributes to analysis paralysis and a tangle of bureaucratic and legal red tape preventing federal agencies from accomplishing their missions.<sup>94</sup>

He criticises NGOs for 'strictly enforcing continuing protection for the northern spotted owl'<sup>95</sup> (a keystone species whose removal from old growth forests in the Pacific Northwest significantly impacts the ecology of those forests); the alternative perhaps being not to enforce the ESA strictly. He states that this action by NGOs:

led to the destruction of the timber and logging industry in the Northwest where initially 90% of the harvest was eliminated, 40,000-50,000 jobs lost, and a nationwide increase in intermediate wood product prices of \$40 billion.<sup>96</sup>

In a similar manner, he states that protecting endangered owls in the Southwest US:

caus[ed] damage beyond measure in lost jobs, resources rendered useless, property depreciated or became worthless, rural timber-dependent towns destroyed, city and county tax bases dissolved, and people's livelihoods, friends, and homes lost, creating rural refugees struggling to start anew.<sup>97</sup>

Chapter 7, entitled 'The Environmental Litigation Crisis', discusses litigation brought by NGOs under the ESA. There has indeed been substantial litigation. This is due, in part, to various moves by the US Administration and the US Congress to reduce implementation and enforcement of the ESA

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<sup>94</sup> *ibid* 236.

<sup>95</sup> *ibid* 221.

<sup>96</sup> *ibid*.

<sup>97</sup> *ibid*.

depending on the politics of the time. For example, Congress' introduction of judicially enforceable deadlines in the ESA,<sup>98</sup> and the authorisation of actions by NGOs against the Service for failing to comply with those deadlines, in 1982 were a reaction to what Congress viewed as the then Administration's failure to implement the Act.<sup>99</sup> Subsequent moves to limit the Service's implementation of the ESA included President George HW Bush's imposition of a moratorium on new regulations including those under the ESA in 1992,<sup>100</sup> and Congress' reduction of funding for the ESA and imposition of a moratorium on final listing decisions in 1995.<sup>101</sup> The purpose of citizen suit provisions is, of course, to authorise citizens to bring actions and to require the relevant federal agency to act when it has a duty to act but fails to do so. As Representative Eckhardt stated during the hearings that led to the ESA, 'maybe a little self-help will keep the representative of the public interest really representing the public interest'.<sup>102</sup>

Whilst Baier criticises NGOs for having 'unleashed' a 'torrent of petitions and litigation [as] part of a deliberate strategy that is primarily meant to overwhelm the [Service] and impede development, not to protect species',<sup>103</sup> he fails to criticise ESA litigation brought by groups with diametrically opposed

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<sup>98</sup> See Jason M Patlis, 'The Endangered Species Act: Thirty Years of Politics, Money, and Science: Riders on the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts' (2003) 16 Tulane Env LJ 257, 282.

<sup>99</sup> Endangered Species Act Amendments of 1982, Pub L No 97-304, 96 Stat 1411 (1982); 16 USC s 1540(g)(1)(C). The ESA has been amended in 1976, 1977, 1978, 1979, 1980, 1982, 1988, and 2003. Congress has not authorised funding under the ESA since authorisation expired on 1 October 1992. Since that time, funding has been provided by annual appropriations by Congress. See M. Lynne Corn & Alexandra M. Wyatt, 'CRS Report for Congress, The Endangered Species Act: A Primer' (RL31654, updated 8 September 2016) 1. The deadline for designations of critical habitat had been introduced in 1978. See Bean (n 19) 377.

<sup>100</sup> See Jesup (n 6) 342. The moratorium was challenged by NGOs on the basis that it did not apply to statutory deadlines. The challenge resulted in a settlement. See *ibid* 343, citing *Fund for Animals, Inc v Lujan* No 92-800 (DDC 1992).

<sup>101</sup> Congress reduced funding for the ESA by \$1.5 million from \$7.999 million in the fiscal year 1995 budget. Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub L No 104-6, 109 Stat 73, 86 (1995); see Endangered and Threatened Wildlife and Plants; Restarting the Listing Program and Final Listing Priority Guidance, 61 Fed Reg 24,722 (16 May 1996).

<sup>102</sup> Endangered Species: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries, 93d Congress 344 (1973), quoted in *Environmental Litigation; Information on Endangered Species Act Deadline Suits* (n 18) 9 n 23.

<sup>103</sup> Baier (n 1) 277.



views.<sup>104</sup> Rather he applauds their actions. For example, in describing the lengthy and bitter controversy over the Service's listing of the lesser prairie chicken, he states that:

[e]xtraordinary efforts were made to avert [the] listing because the potential impacts of managing the lesser prairie chicken as a threatened species are tremendous' ... [e]nergy development could be restricted, including not just oil and gas drilling but wind power development as well.... The eventual designation of critical habitat could be even worse, with additional layers of regulation applying to millions of acres'.<sup>105</sup>

Chapter 8 discusses, 'one possible solution to the problem of debilitating lawsuits'.<sup>106</sup> The solution Baier proposes is voluntary cooperative conservation, which he considers to be 'the best, if not only, response to crippling endangered species litigation'.<sup>107</sup> The book, he states, 'is a call to Congress and the American people to support this nascent voluntary cooperative conservation movement and to arrest the abuses of the [ESA] and EAJA that threaten this experiment in cooperative federalism'.<sup>108</sup> Whilst voluntary action to conserve species and their critical habitat is indeed welcome and is encouraged by the Service, it is unrealistic to suggest that it is a panacea, especially given the opposition to the ESA by people who hold the author's views about it.

Chapter 9 is entitled 'Abuses of the Equal Access to Justice Act; Endangered Species and Beyond'. It 'discusses specific and correctable abuses of EAJA' by NGOs.<sup>109</sup> A particular target is litigation by NGOs to delay delisting a species, in particular wolves. Wolves have been re-introduced in several areas of the US following their extermination.<sup>110</sup> One re-introduced subspecies referred to in chapter

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<sup>104</sup> See *Environmental Litigation; Information on Endangered Species Act Deadline Suits* (n 19) 18. Other litigants that brought actions on deadlines against the Service include '[t]rade associations, representing businesses and industry such as the California Cattlemen's Association and Florida Home Buildings Association'.

<sup>105</sup> Baier (n 1) 340.

<sup>106</sup> *ibid* xxvii.

<sup>107</sup> *ibid* 331.

<sup>108</sup> *ibid* xxiv.

<sup>109</sup> *ibid* xxvii.

<sup>110</sup> See generally Valerie Fogleman, 'American Attitudes Towards Wolves; A History of Misconception' (1989) 13(1) *Env Rev* 63.

9 is the grey wolf that was re-introduced in Montana, Idaho and Wyoming in the mid-1990s. In 2013, the Service proposed delisting it on the basis that it was no longer endangered. The author considers that actions by NGOs against the delisting were simply delaying tactics. He does not, however, appear to have a problem with Congress providing in the arguably obscure section 1713 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011 that the Service should reissue its rule to delist the wolf in Montana irrespective of the ESA and barring judicial review of its reissuance.<sup>111</sup> Rather, he criticises the NGOs' 'attempt to overturn a lawful act of Congress [that] they had the audacity to appeal on constitutional grounds'.<sup>112</sup>

Chapter 10 sets out the author's suggestions for reforming the EAJA. They include limiting eligibility to persons with 'a direct and personal interest' in the proceeding,<sup>113</sup> limiting awards to \$200,000 in any single case with a maximum of three awards per year, reducing fees if parties use staff attorneys instead of outside counsel, and reversing fee shifting so that a person who brings an action against the US Government and fails to prevail pays the Government's fees.<sup>114</sup> Unsurprisingly, all the suggested reforms are designed to stop NGOs being able to claim funding under the EAJA.

Finally, the epilogue sets out the author's unequivocal opposition to the ESA and prevention of the extinction of animals and plants if doing so affects the economy. He states his belief that:

That goal to save every species from extinction is simply unrealistic given our expanding population, and their demand for basic commodities such as oil and gas, livestock, coal, timber, minerals, etc.<sup>115</sup>

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<sup>111</sup> *Alliance for the Wild Rockies v Salazar* 672 F 3d 1170 (9<sup>th</sup> Cir 2012).

<sup>112</sup> Baier (n 1) 414.

<sup>113</sup> *ibid* 487.

<sup>114</sup> *ibid* 484-93.

<sup>115</sup> *ibid* 505.

He considers that 'the ESA ... and its judicial theorists haven't caught up with the reality of the demands of a burgeoning population'.<sup>116</sup> He queries

[a]t what point is slickspot peppergrass, the giant palouse earthworm or the Arapahoe snowfly more important to save from extinction, than the West's economy and lifestyle that are iconic in America's heritage and character and part of our national identity? How do we make the distinction between our keystone species that are valued enough to be saved such as the bald eagle, polar and grizzly bear, orca whales, etc., and those that appear to be irrelevant to society's daily functioning and valued by only a few crusading, uncompromising environmentalists who want to protect complete interconnectedness and biodiversity at any cost? When do Americans say, 'Enough, no more!' to an environmental fundamentalist who will go to court to protect the intrinsic value of a loach minnow at the risk of putting a fifth-generation rancher out of business?<sup>117</sup>

Although the above statement indicates that the author may believe in saving charismatic megafauna such as bald eagles and whales,<sup>118</sup> this is questionable because the book also refers to '[t]he life and health of whales [having] again prevailed over human needs'.<sup>119</sup>

As indicated above, the book is replete with highly emotive text. For example, in discussing another lengthy controversy over listing the greater sage grouse, the author states that:

[f]or private landowners, and especially ranchers, the outcome of the greater sage grouse listing could be a matter of life and death, the difference between staying on or being forced off their land, where in some cases their families have been for generations.<sup>120</sup>

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<sup>116</sup> *ibid* 506.

<sup>117</sup> *ibid* 505.

<sup>118</sup> *ibid*.

<sup>119</sup> *ibid* 174.

<sup>120</sup> *ibid* 347.

Emotive words and phrases that occur frequently throughout the book include ‘rapacious’,<sup>121</sup> ‘torrent’,<sup>122</sup> ‘aggressive’,<sup>123</sup> ‘extremist’,<sup>124</sup> ‘extreme’,<sup>125</sup> ‘abusive’<sup>126</sup> and ‘harassing’,<sup>127</sup> with statements that such ‘litigation will continue ad nauseum’<sup>128</sup> and there will be ‘endless litigation’.<sup>129</sup>

Despite proposing reform of the EAJA, the author does not propose reform of the ESA. He considers that although such reform is ‘badly needed’, it would be ‘inherently risky and extremely controversial, the political equivalent of wildfire’.<sup>130</sup> The author is, of course, entitled to his own views that wildlife is the property of people and the economic needs of people should always be supreme to those of nature. In advocating such views, however, he does not appear to understand that whilst nature can survive without people, people cannot survive without nature. He also fails to recognise the significance of the threat caused by the loss of biodiversity. Thankfully, the European Commission has taken a different view. As it stated in 2011, if ‘we lose species and habitats and the wealth and employment we derive from nature [we] endanger our own wellbeing’.<sup>131</sup>

Is this book, therefore, to be recommended? If you agree with the author’s views, reading it is likely to be enjoyable. If, like this reviewer, you disagree, it describes an alternative viewpoint but, as indicated above, it is not an easy read.

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<sup>121</sup> *ibid* 273.

<sup>122</sup> *ibid* 277, 442.

<sup>123</sup> *ibid* 295, 443, 479, 508.

<sup>124</sup> *ibid* 296, 448.

<sup>125</sup> *ibid* 308.

<sup>126</sup> *ibid* xxvii, 492.

<sup>127</sup> *ibid* 492.

<sup>128</sup> *ibid* 425.

<sup>129</sup> *ibid* 501.

<sup>130</sup> *ibid* 371.

<sup>131</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Our life insurance, our natural capital: an EU biodiversity strategy to 2020, 1, s 1 (COM(2011) 244 final, 3 May 2011).