ARTICLES

*Meb W. Anderson* .................................................................133

Keeping Wetlands Wet: Are Existing Protections Enough  
*Kim Diana Connolly* ...............................................................169

The Multilateral Development Banks in Latin America and the Caribbean Region  
*Oscar A. Avalle* ..................................................................193
The views expressed in this issue are those of the authors and do not represent the position or views of VJEL or Vermont Law School.

Submissions: VJEL welcomes the submission of unsolicited articles, comments, essays, and book reviews. Manuscripts may be submitted to the above addresses.

Subscriptions: The current bound volume can be purchased for $12.95. Law libraries can subscribe through William S. Hein & Co. Others can subscribe by directly contacting VJEL.

Copyright: © Copyright 2012 by Vermont Law School. All rights reserved. Except as otherwise provided, the author of each article in this issue has granted permission for copies of that article to be made for classroom use, provided that: (1) copies are distributed at or below cost; (2) the author and Vermont Journal of Environmental Law are identified on the copied materials; (3) each copy bears the proper notice of copyright; and (4) Vermont Journal of Environmental Law is notified in writing of the use of the material(s).

The Journal is published by Western Newspaper Publishing, Co. on 100% recycled paper and uses a soy-based ink.
# Vermont Journal of Environmental Law

## Vermont Law School

**Volume 14, Issue 4**  
**Summer 2013**

## 2012–2013 Editorial Board

**Editor-in-Chief**  
Robert Reagan

**Administrative Editor**  
Daniel Fineberg

**Senior Managing Editor**  
Robert Reagan

**Senior Articles Editor**  
Pierce Wiegard

**Senior Notes Editor**  
Juliette Balette

**Managing Editors**  
Rachel Stevens
Danielle Changala

**Symposium Editor**  
Thomas Broderick

**Web Editor**  
Mary Stubblefield
Clemmensen
Melissa Marks

**ARTICLES EDITORS**  
Jeffrey Aslan
Amanda Dumville
Andrew Fiscella
Sara Imperiale

**Events Editors**  
Alex Funk
Walter Sainsbury

**Head Notes Editors**  
Marcelo Betti
Cindy Hurt
Graham Jesmer

**Symposium Editors**  
Juliette Balette
Rachel Stevens
Thomas Broderick

**Production Editors**  
Zjok Durst
Jay Eidsness
Zachary Price
Daniel Niedzwiecki
Douglas Johnson
James E. Smith

**Editorial Staff**  
Molly Armus
Jordan Asch
Abigail Barnes
Jared Bianchi
Will Bittinger
Jonathan Blansfield
Andrew Bolduc
Emily Burgis
Kate Durost
Kalika Elofson
Andrew Fowler
Rob Glover
Jacqueline Goodrum
Molly Gray
Bob Harper
Christopher Keach
Will Labate
Lara Maierhofer
Megan McLaurin
Marissa Meredyth

Christine Mertens
Emily Migliaccio
Eric Mortensen-Nemore
Emily Remmel
Casey Ryder
Jared Schroder
Scott Seigal
Christopher Smith
Noah Strebeler
Sam Weihman
FACULTY ADVISORS

Janet Milne
Professor of Law

Christine Ryan
Environmental Research Librarian

ADMINISTRATION

Marc Mihaly
President, Dean, and Professor of Law

Mark Latham
Vice Dean for Academic Affairs and Professor of Law

Lorraine Atwood
Vice President of Finance and Administration

Kathleen Hartman
Associate Dean for Enrollment Management

Shirley Jefferson
Associate Dean for Student Affairs and Diversity
Faculty

Susan Apel          Oliver R. Goodenough          Patrick Parenteau
Tracy L. Bach       Cheryl Hanna              Craig M. Pease
Betsy Baker         Hillary Hoffman           Brian Porto
Alexander W. Banks  Gregory Johnson           Rebecca Purdom
Laurie Beyranevand  Martha L. Judy            Laurie Ristino
Margaret Barry      Laurie C. Kadoch           Doug Ruley
Richard O. Brooks   Kenneth R. Kreiling        Betsy Schmidt
Matt Carluzzo       Kevin Jones               Linda Smiddy
Christine Cimini    Donald Kreis              Benjamin Sovacool
Jason Czarnezki     Gil Kujovich              Pamela J. Stephens
Liz Ryan Cole       Siu Tip Lam               Gus Speth
Sheryl Dickey       Mark Latham               Jennifer Taub
Michael Dworkin     Yanmei Lin                Peter Teachout
Stephen Dycus       Jingjing Liu              Joan Vogel
John Echeverria     Reed E. Loder             Jessica West
Arthur C. Edersheim Michelle Martinez-Campbell Jeff White
Peg Elmer           James May                 Stephanie J. Willbanks
Stephanie Farrior   Beth McCormack           L. Kinvin Wroth
Paul Ferber         Philip Meyer              Tseming Yang
David B. Firestone  Marc Mihaly               Hanling Yang
Jackie A. Gardina   Janet E. Milne            Carl Yirka
Clara Gimenez       Laura Murphy              Maryann Zavez
                    Sean Nolon
                    Cathryn C. Nunlist
Vermont Journal of Environmental Law
Vermont Law School

Volume 14, Issue 4  Summer 2013

Visiting Faculty

Robert Gagnon  Jack Tuholske  Robert Sand

Adjunct Faculty

Bonnie Barnes  Kevin Griffen  Sheldon Novick
Robin Barone  David Hall  Larry Novins
Gary Brooks  Martina Hofmann  Tad Powers
Jared Carter  Michael Hogan  Linda Purdy
Matt Chapman  Eric Janson  Dan Richardson
Michele Childs  Elizabeth Kruska  Anabel Rideau
Teresa Clemmer  Benoit LeBars  Anna Saxman
Jennifer Emens-Butler  Mathew Levine  Belinda Sifford
John Evers  Eric Lopez  Nonny Soifer
Catherine Feeney  Randy Mayhew  Martha Smyrski
Catherine Gjessing  Billie Munroe Audia  Ann Vessels

Meb W. Anderson*

"We don't want wolves to come here, but if one goes to the trouble to get here, we'll let it stay . . . It's a little like how [the United States] treats Cubans."
—John Esler, Chairman Oregon Wildlife Commission

Table of Contents

I. Topic Overview .............................................................................................................. 133
   A. History of Wolves in the West ............................................................................. 134
   B. Wolves in Oregon ............................................................................................... 138
   C. Gray Wolf Reintroduction .................................................................................. 139
II. Background Law ......................................................................................................... 143
III. Current Developments ............................................................................................. 146
   A. The Movement to Change the Oregon ESA ......................................................... 148
IV. Possible Future Developments .................................................................................. 158
V. Conclusion .................................................................................................................. 164

I. Topic Overview

In response to the resounding success of the Yellowstone gray wolf recovery program the United States Fish and Wildlife Service delisted the gray wolf from the federal Endangered Species Act in parts of the United States. Under federal law the gray wolf is now classified as a threatened species.

* J.D., University of Oregon School of Law, 2004; B.S. Economics, University of Utah, 2001; A.S. Utah Valley State College, 1999. I would like to thank Professor Mary Wood for her comments and guidance. I also received insightful comments from Joan Abel. Any remaining errors are, of course, my own. I want to thank my family for their contributions and updates on wolf issues. I especially want to recognize Makenzie, Casey, and Ashleigh, and thank them for their overwhelming support. This Article is dedicated to my father, Melvin K. Anderson, run with the wolves dad.
species throughout the western United States. As a result of federal delisting of the gray wolf, state law now governs the status of all gray wolves that enter Oregon. The Oregon Threatened or Endangered Wildlife Species Act classifies gray wolves as endangered species and requires that action be taken to assure gray wolf recovery. Currently, the state of Oregon is not taking any action in regard to gray wolf recovery or reintroduction. Gray wolves from the central Idaho reintroduction program are venturing into Oregon. The establishment of a breeding pack of gray wolves is in Oregon’s near future. In fact, wolves may currently wander the mountains and valleys of Oregon.

Oregon’s inaction has engaged ranchers and wolf advocates in a heated debate about the future of the gray wolf in Oregon. Ranchers argue that gray wolves are predatory nuisances, and that they are not native to Oregon because they have been eradicated from the state. Wolf advocates counter with scientific data suggesting wolves are not only native to Oregon, but could presently thrive on public land in Oregon. Both groups have petitioned the Oregon Division of Fish and Wildlife to change the status of the gray wolf under the Oregon Threatened or Endangered Wildlife Species Act. Several attempts have been made in the Oregon legislature to amend or create state laws that would affect the status of gray wolves in Oregon. Oregon, like many other states where gray wolves once thrived, has not addressed how they will manage expansion of the gray wolf population. Therefore, this Comment will analyze the current law regarding gray wolves through an Oregon perspective and provide guidance for Oregon and other states faced with structuring law and policy pertaining to gray wolf management.

A. History of Wolves in the West

“The gray wolf [(canis lupus)] is native to most of North America north of Mexico City.”¹ “The only areas of the contiguous United States that” may not have supported “gray wolves since the last glacial events are much of California and the Gulf” as well as the “Atlantic coastal plain south of Virginia.”² Biologists believe that at one time North America was the home

---

to “anywhere between 140,000 and 850,000 wolves.” The gray wolf was found in “nearly every area . . . that supported populations of hoofed mammals (ungulates),” the gray wolf’s major food source. Due to the large number of ungulates in the northern Rocky Mountains, wolves were historically found in this region of the western United States.

“Wolves are social animals,” typically “living in packs of 2 to 10 members.” These packs usually “consist[] of a breeding pair, their pups from the current year, [and] offspring from the previous year.” An unrelated wolf will occasionally join the pack. “[T]he top-ranking [(alpha)] male and female in each pack” are typically the only wolves that will produce pups. Once these pups are yearlings they will “frequently disperse from their natal packs” and either “become nomadic” or “locate suitable unoccupied habitat and a member of the opposite sex and begin their own territorial pack.” This type of wolf movement can produce the numbers of wolves that were once present in the United States, so long as human forces do not intervene.

Misguided human activities caused the extirpation of wolves from the conterminous United States. European colonization of the Americas was accompanied by fear of, and disdain for, the wolf. Wolves were thought to be demonic, and stories of wicked wolves date back to the Bible. Generations of children have learned about the evil qualities of wolves from

3. Jennifer Li, The Wolves May Have Won the Battle, But Not the War: How the West was Won Under the Northern Rocky Mountain Wolf Recovery Plan, 30 ENVTL. L. 677, 681 (2000).
4. 459 Fed. Reg. at 60,253. “Wild prey species in North America” could include white-tailed and mule deer, moose, elk, woodland caribou, bison, muskox, bighorn sheep, mountain goat, beaver, and snowshoe hare, “with small mammals, birds and large invertebrates sometimes being taken.” 65 Fed. Reg. at 43,451. Domestic animals that wolves may also prey upon “include horses, cattle, sheep, goats, pigs, geese, ducks, turkeys, chickens, dogs, and cats.” Id.
6. 65 Fed. Reg. at 43,451. Wolves also have the following characteristics: weight “[r]anges from 40 to 175 pounds”; speed from a 5mph trot to a 35 mph burst; life span of 8-12 years; and the “wolf’s jaw can exert 1,500 pounds of pressure per square inch, twice that of a German Shepard.” Michael McCabe, Gray Wolves Heading to California—Defenders Seek Protection as Ranchers Howl, S.F. CHRON., Feb. 5, 2002, at A1. For an in-depth discussion of wolf characteristics, see BARRY HOLSTUN LOPEZ, OF WOLVES AND MEN (1978).
8. Id.
9. Id.
10. Id.
11. See Li, supra note 3, at 681 (discussing the prejudices that early immigrants to North America held toward wolves).
fairy tales and fables. One may “have heard about the boy who cried wolf once too often and lost his credibility.” One may also “recall the wolf that huffed and puffed at the cottages of three little pigs, and the wolf that lured Little Red Riding Hood astray and gobbled up grandma.” “The fascination with wolves also has an adults-only section” that includes Bruno Bettelheim’s description of Little Red Riding Hood “as a tale of girl’s sexual awakening,” with the wolf realizing “libidinous wishes.” Gruesome tales also include an eighteenth-century French legend where “two wolves devour[] 64 people in the countryside.” However, there is no evidence that a human “has ever been killed or eaten by a wolf in North America.”

Historically, Native North Americans “looked . . . favorably upon wolves.” In fact, “the mania for wolf control” brought on by early European settlers “appears to be an aberration, a temporary sickness that afflicted only some [humans], and which even some of the most avid wolf hunters came to regret.” The combination of fear and greed caused the eradication of the gray wolf from North America. “By the mid-nineteenth century, wolf pelts” were a “valuable commodity.” Hunters looking for buffalo hides on the Plains of North America quickly discovered that wolves would find abandoned buffalo carcasses an easy meal. At first, this increase in carrion led to an increase in wolf numbers in the late nineteenth century. Plains Indians were able to resourcefully kill wolves “for their warm, luxurious fur.” “For a brief while, the Plains Indians enjoyed an era of affluence” like no other “in the history of America.” Westward moving colonists exterminated almost every wolf they came across. Thus the demise of the Plains Indian, the buffalo, and the long grass prairie is often recounted, while the fate of the gray wolf is not.

14. Id.
15. Id.
16. Id.
17. Id.
20. Id.
22. Id.
23. Id.
25. Id. at 92.
26. Id. at 93.
27. Id. at 92–93.
Savvy hunters, sometimes called professional wolfers, would lace leftover buffalo carcasses with strychnine.28 A wolfer utilizing this method could poison as many as sixty wolves in one night.29 Between 1870 and 1877, approximately 385,000 gray wolves were killed by poisoning.30 Other activities “such as the elimination of native ungulates,” the conversion of wilderness into agricultural land, ranches, or homesteads, “and extensive predator control efforts” contributed to the demise of the gray wolf.31 Due to fewer ungulates to prey upon, the wolf turned to domestic livestock for subsistence.32 Gray wolves were labeled an “economic scourge” by livestock owners as well as sportsmen, who blamed the wolf for sharp declines in big game.33 “Ridding the landscape of wolves became” an integral “part of ‘taming’” the American frontier.34 Wolves were eradicated from the eastern United States by 1900; and by 1926, wolves were nearly gone from the Plains.35 By the 1930s, gray wolves were virtually exterminated from the United States altogether, the exceptions being the northern most points of the United States.36

By 1986, gray wolf reproduction had not been detected in the Rocky Mountains for fifty years.37 This continuous absence led to the gray wolf being classified as an endangered species in the United States with the passage of the federal Endangered Species Act (federal ESA) in 1973.38 In 1986, however, a gray wolf den was found in Glacier National Park near the Canadian border.39 This southern movement of Canadian gray wolves fueled the gray wolf reintroduction movement.

28. Id. at 93.
29. Id. at 94.
32. Israelsen & Knowles, Return of the Wolf, supra note 21.
33. Id.
34. Id.
35. Dinger, supra note 12, at 385.
B. Wolves in Oregon

The gray wolf is an integral part of the Oregon ecosystem, but has been extirpated from Oregon since the 1950s. During an expedition to compile a report on the territory of Oregon between 1828 to 1842, Charles Wilkes penned: “Abundance of game exists, such as elk, deer, antelopes, bears, wolves, foxes, muskrats, martins, beavers, a few grizzly bears, and sifflines.” Wolves were even found in Oregon as far west as the Willamette Valley. On a government expedition to the Oregon Territory in 1846, Lieutenant Howison reported that: “[In] the Wilhammete [sic] Valley . . . [w]olves are numerous, and prey upon other animals, so that the plains are entirely in their possession.” However, settlers began to descend upon Oregon during this time period, and from 1834 to 1837 the Hudson Bay Company reported that 19,544 gray wolves were killed in Oregon for fur.

Settling Oregonians were so concerned with wolves that in 1843 “[a] series of meetings, known as the Wolf Meetings, were held.” The purpose of these meetings was to discuss and make plans for the extermination of wolves and other carnivores whose natural predatory instincts were sometimes the causes for the loss of settlers’ cattle. Soon after these meetings, wolf numbers began to decline, leading to the eventual extermination of wolves in Oregon in the 1940s. Lone wolves have been spotted in Oregon since the 1940s, but the last documented pre-reintroduction era wolf was shot and killed in 1963. The continuous absence of the gray wolf has led the State of Oregon to consider the gray wolf an endangered species under the Oregon Threatened or Endangered Wildlife Species Act (Oregon ESA).

43. Sidney Teiser, A Pioneer Judge of Oregon—Mathew P. Deady, 44 Or. Hist. Q. 61, 67 (1943) (stating that “by 1843 about 100 more Americans had arrived in Oregon”).
46. Id.
47. Memorandum from the Senate Natural Resource Committee, to the Honorable Co-Chairs Senator Ferrioli and Representative Close (April 16, 2002) (on file with author).
C. Gray Wolf Reintroduction

It is now generally accepted that “[t]he natural history of wolves and their ecological role was” misunderstood “during the period of their extermination in the conterminous United States.” Once “considered a nuisance and threat to humans . . . the gray wolf’s role as an important and necessary part of natural ecosystems is better understood and appreciated” today. Wolf advocates note that “[f]or wolves to come back completes a niche. It puts things back in balance. Otherwise you have a vacuum, a man-made situation where, throughout the United States, a very important predator has been eliminated.”

In 1987, Congressman Wayne Owens of Utah surprised “his Western colleagues by introducing legislation requiring the reintroduction of wolves into Yellowstone National Park.” This legislation stalled, but later in 1987 a Yellowstone wolf “recovery plan was approved by the [United States Fish and Wildlife] Service” (USFWS). The election of Arkansas Governor William J. Clinton in 1992 enabled the return of wolves to Yellowstone to come to fruition. Wolf reintroduction efforts were made possible because of the Endangered Species Act Amendments of 1982. Congress amended the ESA with the addition of Section 10(j), “which provides for the designation of specific endangered species as ‘experimental.’” Section 10(j) states that a reintroduced endangered species “may be treated as a threatened species” within a defined reintroduction area. Labeling the wolves as “experimental,” and thus, “threatened,” makes management efforts easier because of the relaxed guidelines that accompany a status of “threatened” as opposed to “endangered.” After eight years of wolf recovery efforts, the [USFWS] plan was finally implemented in the winter of 1994–1995, when [sixty-six] Canadian gray wolves were captured and released into” Yellowstone

50. Id.
52. Israelsen and Knowles, Return of the Wolf, supra note 21.
53. Id.
55. Israelsen and Knowles, Return of the Wolf, supra note 21.
56. 59 Fed. Reg. at 60,252.
57. Id.
58. Id.
National Park and central Idaho. The Yellowstone recovery area covers parts of Montana and Wyoming, while the Idaho recovery area is currently wholly contained within the borders of Idaho. These wolves are classified as “experimental populations” under the federal Endangered Species Act, so long as they stay within the defined boundaries of these recovery areas. Until recently, if the wolves wandered outside these defined reintroduction areas they were fully protected as endangered species under the ESA. However, as a result of federal delisting, gray wolves that wander outside the defined reintroduction areas are now only protected as threatened species under the federal ESA.

Wolf packs are flourishing. In 2001, the number of documented wolves in the Yellowstone recovery area was 218, and the Central Idaho recovery area had 261 documented wolves. These numbers are likely unrepresentative of the overall success of the program since many wolves are not radio collared or observed by air counting methods and, therefore, are not counted in yearly totals. Regardless of the number of wolves that


64. U.S. Fish & Wildlife Serv., Gray Wolf Recovery Status Reports, supra note 63. What was once considered an accurate count of wolves in the Central Idaho Recovery area is becoming
go undetected, those that have been counted allowed the USFWS to meet its goal for wolf recovery. The goal was to have "30 breeding pairs of wolves, with an equitable and uniform distribution throughout the" recovery areas for three consecutive years. This goal was reached in 1999, and caused the USFWS to propose removing the gray wolf from the list of endangered and threatened wildlife in portions of the conterminous United States. Before the USFWS could delist the gray wolf, though, states were required to develop wolf management plans that "reasonably assure[d] that the gray wolf would not become threatened or endangered again." Idaho finished its thirty-eight page wolf management plan in March of 2002. Montana has also completed its plan. Wyoming is in the process of completing its plan. Meanwhile, the Federal government began the delisting process on April 1, 2003. Now, as a result, wolves that enter Oregon have greater protection under the language of the Oregon ESA than they do under the federal ESA.

Gray wolves from the Central Idaho recovery area are the most likely to enter Oregon and establish breeding packs, if they have not already done so undetected. Three lone wolves from Idaho's recovery area have already
been documented within Oregon’s boundaries. The first was a lone female gray wolf known by her radio collar identification number, B-45.\textsuperscript{74} B-45 entered Oregon in February of 1999 and was captured by a helicopter net gun crew near the Middle Fork John Day River and returned to Idaho in March of 1999.\textsuperscript{75} In May of 2000, another “collared wolf from the Central Idaho recovery area was struck by a vehicle and killed on Interstate 84 south of Baker City,” Oregon.\textsuperscript{76} The third and latest documented visit by a wolf into Oregon was an uncollared wolf which was likely the offspring of Central Idaho wolves.\textsuperscript{77} The wolf was found in October of 2000 between Pendleton, Oregon and Ukiah, Oregon, a location further west than was likely reached by the previous two wolves.\textsuperscript{78} The wolf was found dead from a bullet wound.

As many as “sixty reports of wolf or wolf track sightings” were reported in Eastern Oregon in the two years after B-45 first arrived in Oregon.\textsuperscript{79} Sightings have even been reported “as far west... [as] the Cascade Mountains near Crater Lake.”\textsuperscript{80} Biologists believe this is evidence that the wolves in the Central Idaho recovery area “have found a travel corridor to the west. Oregon could become the first state the wolves colonize outside their defined reintroduction area in Idaho.”\textsuperscript{81} Due to the fact that wolves breed quickly, travel far, and roam widely, Eastern Oregonians have conceded that they “don’t think... we can keep [wolves] out, [because] there’s enough of a [gray wolf] population in Idaho, [and] they’re going to be looking for new territory.”\textsuperscript{82} Based on the sightings, the wolves have indicated that new territory is in Oregon.

The imminent threat of wolves returning to their native lands in Oregon does not sit well with many; especially cattle ranchers and Eastern Oregonians whose ancestors may have had a hand in the original narrow-
minded extermination of wolves. Prior to delisting, wolves that wandered into Oregon were left alone by federal officials unless they caused problems, in which case they might be killed. Since delisting, however, wolves that venture into Oregon will be protected as an endangered species under the Oregon ESA. Confusion as to how the Oregon ESA will affect wolves that enter the State of Oregon has led to a vigorous debate between ranchers and wolf lovers. Ranchers have petitioned the State of Oregon to delist the gray wolf from the Oregon ESA, claiming that the gray wolf is not native to Oregon since it “has been extirpated for more than 50 years.” Wolf-lovers petitioned the state claiming that the Oregon ESA requires the preparation of ‘survival guidelines’ detailing the potential for reintroduction of the gray wolf to Oregon. Private conservation groups, scientists, ranchers, and others with an interest in the gray wolf have been lobbying for changes to state law and girding for hearings and, inevitably, lawsuits. The potential for legal action in Oregon caused by federal delisting of the gray wolf requires an analysis of the Oregon ESA.

II. BACKGROUND LAW

Wolves that venture into the state of Oregon are no longer classified as endangered species under the Federal ESA. However, Oregon State law classifies the gray wolf as an endangered species and thus Oregon law, rather than federal, governs the migration of wolves into Oregon. If gray wolves are roaming the hills of Eastern Oregon, as many biologists and

---

88. See 16 U.S.C. §§ 1531–1599 (2000). See generally, Bramblett, supra note 61; Cheever, supra note 71; Cook, supra note 60; Cowan Brown, supra note 61; Dinger, supra note 12; Li, supra note 3 (examining the treatment of wolves under the Federal ESA).
wolf-advocates suspect, they may have found a remarkable refuge because they are strongly protected by the “little-known, little-understood” Oregon ESA.90

Through a process called grandfathering, the Oregon ESA provides that species of wildlife listed as threatened or endangered under the federal ESA as of May 15, 1987 are afforded the same status under the Oregon ESA if the species is native to Oregon.91 Because the wolf was on the Federal ESA as of May 15, 1987, and is native to Oregon, the species falls within the category of species grandfathered into the Oregon ESA. Species that were grandfathered into the Oregon ESA may be delisted by the Oregon Division of Fish and Wildlife commission (the Commission or ODFW) at any time.92 The Commission has evidenced its intent to keep the gray wolf an endangered species in Oregon by not removing it from the Oregon ESA. Furthermore, the Oregon legislature supports the Commission’s protection of the gray wolf under the Oregon ESA.

Because the gray wolf was grandfathered into the Oregon ESA, none of the listing requirements for the gray wolf have been fulfilled. The ODFW therefore has not specifically considered the status of gray wolves, and likely does not understand how the Oregon ESA applies. State officials concede there is a wolf recovery obligation, but they are still “trying to understand how that [obligation] might dovetail with other wildlife laws.”93

At least once every five years, the Oregon ESA calls for ODFW to review the status of endangered or threatened species to determine if substantial scientific evidence exists to justify reclassification or removal from the list.94 The statute defines “substantial scientific evidence” as “that quantum of the best available documented information or evidence that a reasonable person would accept as adequate to support a conclusion. This includes information or evidence that may not have been reviewed by a scientific review panel, but that [ODFW] considers scientifically reliable.”95 This is the standard which evidence of gray wolf activity within Oregon will be analyzed.

Under the Oregon ESA, the State can decide not to list a species that is secure outside Oregon or “not of cultural, scientific, or commercial significance” to Oregon residents.96 The State may add, remove, or change

90. Id.
92. Id. § 496.176(6)(a).
93. Milstein, Wolves Rate Special Status Inside Oregon, supra note 89, at Al.
the status of any species “upon a determination that the species is or is not a threatened or endangered species.”

Furthermore, in 1995 the Oregon ESA was amended, allowing the Commission to determine not to list any species previously listed under the Federal ESA. In other words, the Commission may choose not to list any species grandfathered into the Oregon ESA, such as gray wolves. The Oregon ESA also provides that any person may petition the State to add, remove, or change the status of a species. “A petition shall clearly indicate the action sought” and include a showing of “documented scientific information” justifying the requested action. “If the petition is denied, the petitioner may seek judicial review . . . .”

When added to the list of threatened or endangered species, the 1995 amendments require the State to establish guidelines necessary to ensure the survival of individual members of the species. This includes take avoidance and protection of habitat critical to the survival of the species. These survival guidelines must be completed at the time the Commission adds a species to the list.

Recognizing that the use of state lands would be beneficial to the economic concerns of the State when recovering endangered or threatened species, the 1995 amendments allow the use of state land to achieve recovery when it can be done without significant impact on the primary use of that land. It is up to the state land owning or managing agency to determine if state land can play a role in the conservation of the endangered species, keeping in mind the conservation needs of the particular species and the purpose of the land. In conjunction with ODFW, the land owning agency is required to develop an endangered species management plan within eighteen months from when the species is listed as endangered. The plan is to “be based on the statutes, rules, and policies applicable to the agency’s programs” while taking into account “social or economic impacts the plan may have on the state.”

97. Id. § 496.176(2).
98. Id. § 496.176(6)(a).
99. Id. § 496.176(5).
100. Id. § 496.176(5)(a).
101. Id. § 496.176(5)(e).
102. Id. § 496.182(2).
103. Id.
104. Id. § 496.182(1).
105. Id. § 496.182(8)(a)(B).
106. Id. § 496.182(8)(a)(C).
107. Id.
ODFW has not undertaken sufficient measures under the Oregon ESA to prepare recovery guidelines or determine if state land provides a suitable habitat for migrating wolves entering Oregon from Idaho. ODFW explains that its Wildlife Diversity Plan directs the agency to reintroduce native species like extirpated gray wolves whenever possible.\textsuperscript{108} However, the same plan “predicts that there is no year round habitat in Oregon that would allow wolves to exist without conflicts with land uses already in place . . . [including] livestock depredation, livestock harassment, and changes to deer and elk populations.”\textsuperscript{109} ODFW contends that this is based on the large expanse of public land required for each wolf pack and the fact that more than one pack “would be needed to provide a viable population in Oregon.”\textsuperscript{110} Thus, the agency says gray wolves will not be actively reintroduced into Oregon.\textsuperscript{111} ODFW does not have a management plan for uninvited wolves that try to naturally reestablish or reintroduce themselves to their native lands in Oregon.\textsuperscript{112} In fact, it has been the policy of ODFW to request the USFWS to capture any wolf that has strayed into Oregon and return it to its point of origin.\textsuperscript{113} However, the USFWS has recently informed ODFW that the only wolves they will consider bothersome are those that kill livestock, which will be killed rather than removed.\textsuperscript{114} Under this scenario, it is obvious that ODFW will soon be faced with migrating wolves as well as the social and biological impacts of naturally reestablishing gray wolf populations.\textsuperscript{115} Although there are no known wolf packs to have established outside of the recovery areas in Montana, Wyoming, and Idaho, the USFWS reports that it is “almost certain that lone wolves have dispersed into and may still reside in Washington, Oregon, Utah, and possibly Nevada, and Colorado.”\textsuperscript{116}

\textsuperscript{108} Memorandum from the Senate Natural Resource Committee, to Senator Ferrioli and Representative Close, \textit{supra} note 47.
\textsuperscript{109} Davidson, \textit{supra} note 84, at 1.
\textsuperscript{110} Memorandum from the Senate Natural Resource Committee, to Senator Ferrioli and Representative Close, \textit{supra} note 47.
\textsuperscript{111} Davidson, \textit{supra} note 84, at 1.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} Memorandum from the Senate Natural Resource Committee, to Senator Ferrioli and Representative Close, \textit{supra} note 47.
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} U.S. Fish & Wildlife Serv., Gray Wolf Recovery Status Reports, \textit{supra} note 63, at 2.
Rocky Mountain gray wolf packs typically occupy and defend from other packs a territory of up to four hundred square miles.\textsuperscript{117} Lone wolves have been known to disband from the pack and set off on their own. For example, in October of 2002 an elk hunter in Utah reported seeing a gray wolf that he originally thought to be a coyote.\textsuperscript{118} In November of 2002, a coyote trapper in northern Utah possibly captured the same gray wolf.\textsuperscript{119} Federal officials returned the male gray wolf to its place of origin only because it had been captured.\textsuperscript{120} Another set of wolf prints was found near where the animal had been trapped.\textsuperscript{121} Wildlife officials believe that the other wolf was a female.\textsuperscript{122} This suggests that wolves are beginning to pair off and travel longer distances, across state lines, to establish breeding pairs, and eventually packs of wolves throughout the west. The USFWS suggests that:

\[\text{[I]t should not be surprising that [wolves] ... would make it to Utah. The nearest ... pack is only 130 miles away, and that distance is but a hop, skip and jump for a wolf. One wolf from a northern Michigan pack was recently killed hundreds of miles to the south in Missouri.}\textsuperscript{123}\]

States other than Oregon and Utah have also been gearing up for wolf arrival. In February of 2002, "a gray wolf wandered across from Montana into a town near Spokane, [Washington]."\textsuperscript{124} Additionally, gray wolf

\begin{flushleft}
\textsuperscript{120} Israelsen, \textit{Wolf Caught in Utah}, supra note 118, at A1.
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} Jerry Spangler, \textit{Big, Bad Wolves may be in Utah}, \textit{DESERET NEWS}, Nov. 13, 2002, at A1. Making the Utah wolf’s journey even more dramatic was the fact that it was a well-known Yellowstone wolf. The wolf had a limp that it had likely obtained from “learning how to topple an elk” when it was young. It was often spotted and watched by wolf watchers in Yellowstone. Even with this limp the wolf successfully made the journey south to Utah, leading one wolf expert to proclaim that wolves are “not like humans”, and that they “are conditioned to hardship”. Brent Israelsen, \textit{Wandering Wolf is Well Known to Yellowstone Visitors}, \textit{SALT LAKE TRIB.}, Dec. 4, 2002, at A1.
\textsuperscript{124} Carolyn Nielsen, Wolves Important to Ecosystem; Environment: Policies Needed to Establish what Man has Disrupted, \textit{BELLINGHAM HERALD} (Bellingham, Wash.), Nov. 7, 2002, at 11.
\end{flushleft}
experts believe that wolves are on their way to California.\textsuperscript{125} The optimism surrounding the return of the gray wolf to California is particularly encouraging to the Oregon wolf reintroduction movement; for gray wolves to wind up in northern California, they would have to establish packs in Oregon first.\textsuperscript{126}

In response to the likelihood that a breeding pair of wolves could soon begin repopulating Oregon, two petitions were filed with ODFW in 2002 that could have a marked impact on the future of gray wolves in Oregon.\textsuperscript{127} In light of these petitions, and to help clarify its stance regarding the Oregon ESA, and the petitions, the Oregon Department of Justice (ODOJ) released a preliminary analysis detailing the legal issues concerning wolves in Oregon in July of 2002.\textsuperscript{128} The ODOJ noted that USFWS proposed delisting the gray wolf and that in Oregon the gray wolf could be down-listed from endangered to threatened status under the federal ESA.\textsuperscript{129} The ODOJ analysis clarified that under the Oregon ESA gray wolves would still be an endangered species. However, the ODOJ believes that “the [ODFW] commission could . . . adopt rules that would allow essentially the same types of take (hazing, relocation, and killing) that the [USFWS] has proposed for dealing with problem wolves. In other words, the Oregon ESA already provides the Commission with a range of management options.”\textsuperscript{130} This wide range of management options is of little consolation to those who seek a clear definition of what the fate of Oregon wolves will be in the wake of federal delisting.

\textbf{A. The Movement to Change the Oregon ESA}

On May 22, 2002, a petition (OCA petition) was filed pursuant to section 496.176(5) of the Oregon Revised Statutes (“ORS”) by representatives of the Oregon Cattlemen’s Association (OCA),\textsuperscript{131} the

\begin{itemize}
\item \textsuperscript{125} McCabe, Gray Wolves Heading to California / Defenders Seek Protection as Ranchers Howl, supra note 6 at 2.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Petition from Stonebrink, to Esler, supra note 85. Petition from Lacy, to Oregon Department of Fish & Wildlife, supra note 86.
\item \textsuperscript{128}Memorandum from William R. Cook, Assistant Attorney General, Oregon Department of Justice, to the Joint Interim Committee on Natural Resources (July 9, 2002) (on file with author).
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} The purpose of the Oregon Cattlemen’s Association is to “advance the economic, political, and social interests of the Oregon cattle industry and to enjoy all rights and privileges accorded such non-profit corporations under the laws of the State of Oregon.” Oregon Cattlemen’s Association, Mission Statement, available at http://www.orbeef.org/oca.htm#mission (last visited Apr. 10, 2004).
\end{itemize}
Oregon Farm Bureau,132 the Oregon Hunter’s Association,133 and the Oregon State Grange.134 The OCA petition called for the State Fish and Wildlife Commission of Oregon to officially remove gray wolves from Oregon’s threatened and endangered species list.135 The OCA petition argues that because “the [g]ray [w]olf has been extirpated/extinct from . . . Oregon for over fifty (50) years, it cannot be threatened or endanger [sic] of becoming extinct because it is extinct.”136 The petition further argues that the gray wolf is not protected by the Oregon endangered species act because the act protects only “native” species, not “introduced” species.137 Thus, the gray wolf can be listed as neither be “threatened” nor “endangered” because the act does not cover introduced species.138 The OCA petition concedes that under the grandfather clause, listing the gray wolf was required when the Oregon ESA. The OCA petition argues that it should now be removed from the list.139 Substantial scientific evidence detailing why the gray wolf should be removed from the list was not provided in the OCA petition.140 Instead, the OCA petition argues that “there was no scientific information provided upon listing” of the gray wolf in 1987 because it was extinct, and therefore any scientific evidence brought forth would have no comparative value.141 The OCA petition argues that the Commission is required to remove the gray wolf from the list because: (1) there was no available scientific evidence to justify the.

132. “Oregon Farm Bureau is the state’s largest general agriculture organization. The non-partisan, not-for-profit Farm Bureau is a grassroots organization dedicated to finding positive solutions to the challenges facing today’s family farmers and ranchers, and others in the natural resource community.” Oregon Farm Bureau, About Oregon Farm Bureau, available at http://www.oregonfb.org/aboutfb.htm (last visited Apr. 10, 2004).

133. The Oregon Hunter’s Association (OHA) mission is “to [p]rovide an abundant huntable wildlife resource in Oregon for present and future generations, enhancement of wildlife habitat and protection of hunter’s rights.” Oregon Hunter’s Association, Our Mission, available at http://www.oregonhunters.org/about_oha.htm (last visited Apr. 10, 2004). “OHA’s current focus is insuring sound and scientific management of all hunted wildlife species. However, our financial resources are split between wildlife, habitat and a legislative agenda. Id. OHA will strive to increase hunter access to private lands statewide.” Id.

134. “The Oregon State Grange is a part of one of America’s foremost grassroots, volunteer organizations. Oregon State Grange website, available at http://www.grange.org/Oregon (last visited Apr. 10, 2004). The Grange is comprised of families and individuals who share common interests in community, agriculture and cooperation. Id. Every Grange reflects the interests and talents of its members.” Id.

135. Petition from Stonebrink, to Esler, supra note 85, at 1.

136. Id.

137. Id.

138. Id.

139. Id.

140. See generally Petition from Stonebrink, to Esler supra note 85.

141. Id. at 2.
listing of the gray wolf at the time of enactment, and (2) the gray wolf was merely grandfathered into the Oregon ESA. This argument was clarified in testimony before the Joint Natural Resources Committee: “[b]ecause there is no verifiable scientific information available (DNA) about the Oregon wolves prior to their extirpation, there is no possible way to be sure those wolves straying [into Oregon] from the Idaho population that originated in Canada were ‘native’ to Oregon as is required by Oregon Law.”

Other arguments advanced in the OCA petition are that because of gray wolf recovery successes in Idaho, the gray wolf is “flourishing” outside the state of Oregon and is thus secure outside Oregon under ORS section 496.176(9). Furthermore, the OCA petition argues that because County Commissions in every county in Oregon are opposed to having wolves in Oregon, the wolf is of “no cultural, scientific, or commercial significance to the people” of Oregon, meaning that taxpayers should not have to bear the cost of wolf recovery. However, the OCA petition concedes that if the Commission continues to list the gray wolf, “then the Commission is required... to work towards [wolf] recovery.”

A July 12, 2002 addendum to the original OCA petition argues that the Commission has the power under ORS section 496.176(6)(a) to determine to remove any species that is grandfathered into the Oregon ESA. The OCA petition addendum references audio tapes of hearings in 1995, which shows that the intent of the 1995 amendment to the Oregon ESA is to “get [Oregon] out of the business [of protecting endangered species] if the feds are involved in listing these species. The biggest concern is... [having] a duplication of effort.” This argument has been significantly weakened by the federal delisting of the gray wolf from the federal ESA.

Ranchers in Oregon are against the reintroduction of wolves into the Oregon wilderness in any form. Ranchers declare that “livestock producers

142. Id.
144. Petition from Stonebrink, to Esler, supra note 85, at 2.
145. Id.
146. Id. See also Release from Stonebrink to Esler, supra note 143 (stating that “if the Commission decides to allow the [gray wolf] to remain on the Oregon ESA: the Commission and the ODFW must establish and implement a Recovery Plan.”).
147. Petition from Stonebrink, to Esler, supra note 85.
148. Addendum to Petition from Glen Stonebrink, Executive Director, Oregon Cattlemen’s Association, to John Esler, Chair of the Oregon Fish and Wildlife Commission (July 12, 2002) (on file with author).
cannot live with wolves,”¹⁴⁹ and “the livestock industry [will] have zero tolerance for wolves in Oregon.”¹⁵⁰ Ranchers believe that [w]olves were extirpated from the West because it was abundantly clear that we could not have an economically viable livestock industry and share the range with a large, efficient livestock killer.”¹⁵¹ Oregon Ranchers also believe that the wolves in the Idaho recovery area should altogether be sent back to Canada.¹⁵² Cattle owners’ claim that wolves will increasingly cost Oregon taxpayers money, inflict severe economic loss upon the cattle industry in Oregon, send rural communities into bankruptcy, create lawsuits, deplete big game herds, and cause “destruction and depredation on more populated areas of the public.”¹⁵³ Oregon ranchers are also concerned that the underlying agenda of so called wolf advocates is to force Oregon ranchers off public land.¹⁵⁴

In response to these worries, the cattle industry and some rural Oregonians have tried to change Oregon law regarding wolves. In 2001, Oregon House Bill 3363 was introduced by Representative Greg Smith of Heppner, at the request of the OCA.¹⁵⁵ House Bill 3363 would have classified wolves as a “predatory animal” that could be hunted, trapped, and poisoned.¹⁵⁶ The Bill was amended to include only the term “wolf hybrids,” and passed with any reference to gray wolves.¹⁵⁷ However,

---

149. Release from Stonebrink to Esler, supra note 143.
151. Id.
152. See id. (claiming that the experiment of reintroducing wolves into Idaho has failed and that the federal government “needs to . . . get these wolves out”).
153. Release from Stonebrink to Esler, supra note 143.
154. Amalie Young, Oregon Ranchers Fear Wolf’s Return, SEATTLE TIMES, Feb. 17, 2002, at B4. In fact this is likely the case as one wolf lover commented, “[w]e do not see any gray areas . . . . We want livestock off of public land.” Id.
155. H.B. 3363, 2001 Leg., 71st Assem., Reg. Sess. (Or. 2001) as proposed:
   As used in this chapter, ‘predatory animal’ or ‘predatory animals’ includes coyotes, wolves, wolf hybrids, rabbits, rodents and birds which are or may be destructive to agricultural crops, products and activities, but excluding game birds and other birds determined by the State Fish and Wildlife Commission to be in need of protection.
   (emphasis added).
   Be it Enacted by the People of the State of Oregon:
   SECTION 1. OR. REV. STAT. § 610.002 is amended to read:
   610.002. As used in this chapter, ‘predatory animal’ or ‘predatory animals’ includes coyotes, wolf hybrids, rabbits, rodents and birds which are or may be destructive to agricultural crops, products and activities, but excludes game birds
“the ultimate showdown may come in [Oregon’s 2003 and 2004 legislative sessions because] wolf opponents [have had time to mobilize efforts] to revise or repeal [the Oregon ESA].”158 Lawmakers from Eastern Oregon, whom are backed by ranchers and wolf opponents, control many of the key committees in the Oregon legislature.159

In the Oregon 72nd Legislative Assembly (2003), gray wolf opponents introduced two bills that would eliminate the gray wolf from the Oregon ESA,160 and one of these bills now has no effect on the gray wolf because of federal delisting.161 Oregon Senate Bill Number 97, introduced on January 21, 2003, defined the gray wolf as a predatory animal, not an endangered species, within the borders of Oregon.162 The effect of this bill would be to remove the gray wolf from the Oregon ESA. Oregon House Bills 2458 and 2468 were both introduced January 28, 2003.163 House Bill 2458 directs the Commission to remove species from the Oregon ESA at the time they are removed from the Federal ESA.164 If this bill were to become law, the gray wolf would retroactively be removed from the Oregon ESA because it has already been reclassified as threatened under the Federal ESA. Thus, passage of House Bill 2458 would likely leave the gray wolf a threatened species under the Oregon ESA. House Bill 2468 would prohibit the Commission from listing threatened and endangered species on the Oregon ESA that are listed as such under the Federal ESA.165 Since the gray wolf is no longer listed as threatened under the federal ESA this bill, would have no effect on the gray wolf under the Oregon ESA. The 2003 Oregon legislature could disregard the intent of previous legislatures

and other birds determined by the State Fish and Wildlife Commission to be in need of protection.


162. S.B. 97, 2003 Leg., 72nd Assem., Reg. Sess. (Or. 2003) (adding the following to the Oregon ESA: “the Commission may not include *Canis lupus*, commonly known as the gray wolf, on the lists of threatened species or endangered species.”).


164. H.B. 2458, 2003 Leg., 72nd Assem., Reg. Sess. (Or. 2003) (adding the following to the Oregon ESA: “[t]he list of threatened species or endangered species . . . may not include those species that are removed from the federal Endangered Species Act of 1973.

165. H.B. 2468, 2003 Leg., 72nd Assem., Reg. Sess. (Or. 2003) (eliminating the grandfathering portion of the Oregon ESA, and also adding that the Commission may not list a species as endangered or threatened so long as it is listed as such under the federal ESA).
and remove the gray wolf from the Oregon ESA. This reality is made even more probable because of the current budget crisis in the state of Oregon.\textsuperscript{166} While these bills will likely fail in 2003, they will probably resurface in years to come.

The pro-wolf petition regarding the status of the gray wolf in Oregon was filed with the Commission in June of 2002 by representatives of the Oregon Natural Desert Association,\textsuperscript{167} the Hells Canyon Preservation Council,\textsuperscript{168} the Humane Society of the United States,\textsuperscript{169} the Siskiyou Regional Education Project,\textsuperscript{170} Cascadia Wild,\textsuperscript{171} the Southern Oregon Forest Coalition,\textsuperscript{172} the Oregon Sierra Club,\textsuperscript{173} the Oregon Natural Resources Council,\textsuperscript{174} and the Oregon Wildlife Federation ("ONDA

\begin{footnotesize}
\begin{itemize}
    \item 167. The Oregon Natural Desert Association (ONDA) is "an Oregon non-profit public interest organization of approximately 1500 [sic] members. It is headquartered in Bend, Oregon and also has offices in Portland, Oregon. ONDA was established to protect, defend, and restore forever, the health of Oregon’s native deserts. ONDA actively participates in state and federal agency proceedings and decisions concerning the management of public lands in eastern Oregon." Petition from Lacy to Oregon Department of Fish & Wildlife, \textit{supra} note 86 at 2.
    \item 168. The Hells Canyon Preservation Council (HCPC) is "a nonprofit corporation of approximately 2,400 members, based in La Grande, Oregon. For over thirty years, HCPC has involved itself in land management issues and decisions that affect the Blue Mountains . . . and the Hells Canyons ecosystems. HCPC’s mission is the protection and restoration of these ecosystems, and their associated wildlife, including the grey [sic] wolf." \textit{Id.}
    \item 169. The Humane Society of the United States (HSUS) is "a national animal protection organization based in Gaithersburg, Maryland and with ten regional offices. The HSUS has over 7 million members and constituents, including more than 70,000 who reside in Oregon. The HSUS works actively to protect and conserve wildlife species and habitat through participation in state and federal agency actions, legislation, and legal action. In particular the HSUS has had a long-standing interest in the recovery of the gray wolf and the ecosystem in which the species plays a vital role." \textit{Id.}
    \item 170. The Siskiyou Regional Education Project (SREP) is "an Oregon non-profit public interest organization of approximately 1400 [sic] members with approximately 950 residing in Oregon. SREP’s mission is to defend and permanently protect the globally significant Siskiyou Wild Rivers area of Southwest Oregon and Northwest California . . .." \textit{Id.}
    \item 171. Cascadia Wild is "an environmental education organization focused on teaching animal tracking and nature awareness to both youth and adults. Cascadia Wild is particularly focused on continuing to track . . . wolves in the Pacific Northwest and western United States." \textit{Id.} at 3.
    \item 172. The Southern Oregon Forest Coalition is "compromised of the Rogue Group Sierra Club, Headwaters, Siskiyou Project, Klamath Siskiyou Wildlands group, Provolt Grange, Deer Creak Valley Natural Resources Association, Humbug Creek Watershed Council, Takilma Watershed Council, The Endangered Little Applegate Valley association and SEEDS. The Coalition members are working to reestablish healthy and fully ecologically functioning forest ecosystems in Southern Oregon." \textit{Id.}
    \item 173. The Oregon Sierra Club's mission and primary objective are "maintaining and improving the health of Oregon's forests and watersheds and protecting wildlife." \textit{Id.}
    \item 174. The Oregon Natural Resources Council ("ONRC") is a "non-profit conservation group dedicated to protecting and restoring of Oregon's wildlands, waters, and wildlife. ONRC actively pursues permanent protection of roadless lands and works to enforce the Endangered Species Act." \textit{Id.}
\end{itemize}
\end{footnotesize}
petition”). This petition calls for the ODFW’s State Fish and Wildlife Commission to comply with mandatory requirements of the Oregon ESA by developing “survival guidelines” under ORS section 496.172(3), and ORS section 496.182(8)(A)(a), and by making a “determination as to whether state lands may play a role in the recovery of [gray wolves] in Oregon.”

Although ORS section 496.172(3) was amended in 1995, the ONDA petition argues that the requirements of the original Oregon ESA are still applicable. The ONDA petition asserts that by not acting upon the requirements of the Oregon ESA as it pertains to gray wolves, the ODFW frustrates the legislative intent behind the Oregon ESA.

The ONDA petition concludes by instructing the Commission to comply with the mandatory conservation requirements of the Oregon ESA before it delists or changes the status of the gray wolf in Oregon. The petition explains that “[w]ith no ‘quantifiable and measurable guidelines’ in place, and no public rulemaking process to consider and establish such survival guidelines, the Commission has left its hands tied with respect to future actions under the Oregon ESA affecting the gray wolf.” Under the Oregon ESA, when a species like the gray wolf is native to Oregon, and found within the state, the Commission is required to determine the following before removing a species from the Oregon ESA:

1. The species is not, or is not likely to become within the foreseeable future, in danger of extinction throughout any significant portion of its range in this state, or is not at risk of becoming endangered throughout any significant portion of its range in this state.

2. That the natural reproductive potential of the species is not in danger of failure due to limited

---

175. The Oregon Wildlife Federation (“OWF”) purpose is “to conserve, preserve, and restore Oregon’s fauna, flora, and their habitat. 500 OWF members live throughout the state of Oregon.” Id.

176. Id. Other groups are calling for the Restoration of the gray wolf to Oregon as well. The Defenders of Wildlife has the following petition available for signature on its website: “We, the undersigned, support the restoration of wolves in Oregon. We encourage the U.S. Fish and Wildlife Service and the Oregon Department of Fish & Wildlife to move forward on developing management plans and actions that will secure wolf protection and support the long-term restoration or wolves in Oregon. We fully oppose any action to remove wild wolves (uninvolved in livestock losses) from Oregon.” DEFENDERS OF WILDLIFE, PETITION, RESTORE THE GRAY WOLF TO OREGON (on file with VERMONT JOURNAL OF ENVIRONMENTAL LAW).

177. Petition from Lacy to Oregon Department of Fish & Wildlife, supra note 86, at 6.

178. Id. at 7.

179. Id. at 8.

180. Id.
population numbers, disease, predation or other natural or human-related factors affecting its continue [sic] existence; and

(3) The species no longer qualifies for listing under [the regulatory listing criteria].”

None of these prerequisites has been fulfilled by the Commission. The ONDA petition guides the state towards achieving the end-goal of the Oregon ESA. The first step is to collect scientific information on wolves in Oregon and set survival guidelines and management standards in order to know how to achieve the goal of eventually delisting the gray wolf from the Oregon ESA.182

The ONDA petition calls for survival guidelines that: “(1) protect migrating wolves from harassment; (2) allow for establishment and recovery of viable populations in appropriate habitat; (3) prevent direct taking or habitat degradation with very limited exceptions; and (4) involve survey and monitoring for wolves before irreversible commitments of resources are made.”183 ONDA is aware that recovery and eventual delisting of the gray wolf are goals of the Oregon ESA.184 “However,” ONDA argues that “without [sufficient] survival guidelines and a recovery plan in place, and without knowing the role state and other public lands [can] play in the wolf’s recovery in Oregon, there is no [foundation] of information or plan of action,” from which to make an informed, scientifically defensible, decision regarding delisting gray wolves.185 Wolf advocates and ONDA believe that much of Oregon’s public land is “prime wolf habitat.”186 Although required by the Oregon ESA, the ODFW has failed to address how Oregon’s public land could facilitate recovery of the gray wolf.

The Commission reviewed both of the petitions and voted unanimously to deny each on the theory that “neither petition met the procedural

181. OR. ADMIN. R. 635-100-0112 (2001); see also, Petition from Lacy to Oregon Department of Fish & Wildlife, supra note 86.
182. Petition from Lacy to Oregon Department of Fish & Wildlife, supra note 86 at 1–2.
184. Id. at 2–3.
185. Id. at 1, 3.
186. Young, supra note 154.
requirements identified in the Oregon Administrative Rules.”

Although this was a blow to both groups’ efforts, at least one Commissioner proclaimed “[t]his is certainly not the end of the discussion on wolves in Oregon.”

In a memo dated August 6, 2002, William R. Cook, Assistant Attorney General for the Natural Resources Section, outlined the legal issues that the Commission considered in reaching these decisions. With regard to the OCA petition the memo declares that it does not specifically address the requirements of Oregon Administrative Rule 635-100-0110(1) and (2).

Oregon Admin. R. 635-100-0110 provides the procedure for listing species and calls for a petitioner to provide specific pieces of information classified as substantial scientific evidence, including discussions on the existence, destruction, or modification of habitat and the natural reproductive potential of the species petitioned for. In denying the OCA petition, the ODFW determined that

---


188. Id.


190. Id.

191. OR. ADMIN. R. 635-100-0110 (2003). The Rule states:

1) Any person may petition the commission to list, reclassify or remove wildlife species on the state list. The petition shall be in writing and shall include the following information:
(a) The action sought; and
(b) Documented scientific evidence about the species' biological status to support the requested action.

2) The documented scientific evidence under subsection (1)(b) of this rule shall include the following:
(a) Common and scientific names of the species and any taxonomic problems or questions;
(b) A discussion of the existence, or lack thereof, of past, present or threatened destruction, modification or curtailment of the species' habitat or geographical distribution, describing and documenting:
(A) Threats, or lack thereof, to the species' habitat and distribution;
(B) The species' historical and presently known distribution;
(C) Any changes in habitat and reasons for such changes, such as overutilization for commercial, recreational, scientific or educational purposes, if known;
(D) Any land use practices adversely or positively affecting the species' habitat; and
(E) Measures that have been or could be taken to alleviate a reduction in habitat of the species.
(c) A discussion of the existence, or lack thereof, of present or threatened danger or failure of the natural reproductive potential of the species including:
(A) The species' present population status;
"[t]he petition does provide information responsive to requirements (1)(a) (the action sought) and (2)(c)(A) (the species' present population status). However, the OCA petition does not provide all of the information required by the Commission’s rule. The OCA may file a new petition to address the requirements of the rule."192

Regarding the ONDA petition, the ODFW determined that both Oregon Admin. R. 635-100-0130, “Requirement for Survival Guidelines,” and Oregon Admin. R. 635-100-0135, “Survival Guidelines for Species Listed as Threatened or Endangered,” do not apply to the gray wolf.193 These administrative rules provide that the requirement to adopt survival guidelines for a species applies only to species placed on the Oregon ESA after 1995. The Commission interprets the 1995 amendments to the Oregon ESA and the Oregon Administrative Rules to mean that because the gray wolf was grandfathered into the Oregon ESA in 1987, the Oregon Administrative Rules bar the Commission from adopting survival guidelines or determining agency roles regarding the gray wolf.194 However, the ODFW website proclaims that “the Commission has the flexibility to adopt survival guidelines or use other management tools for those species listed under the state’s ESA before 1995.”195

(B) Any changes in population, and the reasons for such changes, such as disease, predation, or overutilization of the species or its habitat, if any, for commercial, recreational, scientific or educational purposes, if known;
(C) Any land use practices adversely or positively impacting or having impacted the species;
(D) Measures that have been or could be taken to alleviate a reduction in population of the species;
(E) A discussion of other natural or human-related factors affecting the continued existence of the species, including:
(i) Climatic, successional, reproductive, genetic or other factors such as competition with an introduced species affecting the species existence;
(ii) The effects of environmental pollution and other human-related factors on the continued existence of the species; and
(iii) The relative impact of human actions on the continued existence of the species, as compared to nonhuman impacts. Id.

192. Memorandum from William R. Cook, to the Oregon Fish & Wildlife Commission, supra note 190.
193. Id.
194. Id.
195. Press Release, Oregon Department of Fish & Wildlife, supra note 188.
IV. POSSIBLE FUTURE DEVELOPMENTS

As the evidence suggests, the gray wolf is poised to return to many states it once inhabited. This same evidence shows that Oregon will be one of the first states to see the establishment of a gray wolf population. In response, the OCA is likely in the process of trying to submit a revised OCA petition which will distort this evidence, or cite to other evidence, supporting its position that gray wolves are not in Oregon. Whether the OCA will be able to gather substantial scientific evidence that would meet all of the requirements of Oregon Admin. R. 635-100-0110 is unlikely since the scientific evidence available would support the conclusion that wolves could survive, and may already be present, in Oregon. The mountains of Oregon are prime territory for wolves. The abundance of deer, elk, and uninhabited land make Oregon an ideal location for wolves relocating from the Idaho recovery area. Once the gray wolf is back in the Oregon ecosystem, all of the species within Oregon would have the potential to become “more robust [and] more genetically diverse.”

Possibly because the OCA understands that the scientific evidence pertaining to wolves in Oregon is contrary to its anti-wolf position, the OCA and other anti-wolf groups have began an assault in the Oregon legislature on the Oregon ESA and the gray wolf.

Oregon lawmakers will likely resist the proposed changes to the Oregon ESA urged by eastern Oregon legislators. The ranching industry may control the key committees in the Oregon legislature, but the proposed changes are too drastic, leaving the gray wolf with no protection under the Oregon ESA. The Oregon legislators must realize that the gray wolf is a valuable species to the state of Oregon. After all, the gray wolf was grandfathered into the Oregon ESA in 1987. Oregon lawmakers, ranchers, and wolf lovers should look to the wolf management plan proposed in the 2003 Utah legislative session. This resolution was sponsored by Representative Michael Styler, of Delta, Utah, who believes that “the wolf could be managed as well as other large predators, such as cougars and bears.” Cooperation between ranchers and wolf lovers, similar to what is occurring in Utah, is necessary to bring wolves back into Oregon and eventually delist the gray wolf from the Oregon ESA. 

196. Young, supra note 154.
legislatures impacted by gray wolf population growth should also follow the Utah legislature in stimulating rancher and wolf lover cooperation.

The Oregon Natural Desert Association and other groups that have petitioned the Commission will continue the effort to bring wolves back into Oregon. The Oregon ESA provides judicial review for denial of a petition to add, remove, or change the status of a species on the list, effectively seeking the same as the ONDA petition. By requesting ODFW to establish survival guidelines for the gray wolf, the ONDA petition was asking the Commission to implement required actions that would have eventually lead to the delisting of the gray wolf in Oregon, a change in status from its current endangered listing. Thus, because the Commission incorrectly applied Oregon law in denying the ONDA petition, it should be ripe for judicial review under the Oregon ESA. Furthermore, if substantial evidence that the gray wolf is in Oregon can be gathered, an Oregon court or the Commission would have to look to that evidence in reviewing the Commission's initial decisions.

The Commission incorrectly denied the ONDA petition asking for the ODFW to implement survival guidelines and to begin working to determine if state land could play a role in gray wolf recovery. By finding it unnecessary to adopt survival guidelines for the gray wolf, the Commission created a class of species that was grandfathered into the Oregon ESA before 1995 that has no protection under the 1995 amendments. Thus, the gray wolf is in a state of limbo under the Oregon ESA, because ODFW did nothing to recover the gray wolf from the time the gray wolf was listed on the Oregon ESA in 1987 to the time of the 1995 amendments to the Oregon ESA. Basically, the Commission believes that because the gray wolf was grandfathered into the Oregon ESA, it is not a species which requires recovery under the 1995 amendments. Interpreting the 1995 amendments in this manner leaves the gray wolf without any means of species recovery. This is at odds with the long term goal of the Oregon ESA as it was enacted. The statute's goal is to "manage the species and their habitats . . . to a point where listing is no longer necessary," which is precisely what the ONDA petition asks the ODFW to do. It is illogical, if not absurd, to think that the legislature of Oregon would consider the gray wolf worth recovering in 1987, only to then freeze recovery efforts due to ODFW inaction by enacting amendments that did not apply to those species

200. See Reguero v. Teacher Standards & Practices Comm’n, 822 P.2d 1171 (Or. 1991) (holding that in Oregon agency decisions must be supported by substantial evidence).
202. Petition from Lacy to Oregon Department of Fish & Wildlife, supra note 86.
grandfathered into the list. Nowhere does the Oregon ESA as amended or the Oregon Administrative Rules suggest this was the intent of the Oregon legislature.

Because no recovery efforts or management plans were ever put into effect regarding the gray wolf, it contravenes the purpose and goal of the Oregon ESA to determine that gray wolves do not fall within the 1995 amendments’ protections. The reason there was no recovery plan—or even a thought about the status of gray wolves in Oregon prior to 1995—was because there were no gray wolves in Oregon between 1987 and 1995 due to the extirpation of the species. However, even with an absence of gray wolves, attempt after attempt to reclassify the gray wolf as a predator has failed to pass muster in the Oregon legislature in recent years. The inference must be drawn that by acting as it has, the Oregon legislature considers the gray wolf worth recovering into the wilderness of Oregon. If this is not the case, the Oregon legislature should clearly manifest its intent on how Oregon will treat the gray wolf in light of the recent federal delisting. The Oregon legislature appears reluctant to proceed with wolf reintroduction because of the enormous costs that would be associated with a Yellowstone-like gray wolf recovery effort. Yet, this type of reintroduction is not necessary due to recent events relating to wolf dispersal into Oregon from the Idaho recovery area.

Wolves are poised to re-enter Oregon again, and the Commission is buckling under the pressure of cattlemen and hunters who fear that the gray wolf will impair their livelihoods or sports. Among those groups, no legitimacy is given to the fact that the gray wolf is native to Oregon, listed as an endangered species, or is currently developing breeding populations within Oregon or very close to state borders. If the Commission has the flexibility to adopt survival guidelines, or to use other management tools for those species listed under 1987 Oregon ESA, then it should use this flexibility to begin forming survival guidelines for gray wolves. In this respect, the Commission has a number of options. These options are to (1) “[a]ctively reintroduce [gray] wolves into [Oregon],” (2) “[a]llow the [gray] wolf to recolonize [the state] naturally and unregulated,” or (3) to “[a]llow [gray wolf] recolonization but with active management, such as killing

203. The ODFW is in the process of compiling public opinion about the gray wolf. Fourteen “wolf town hall meetings” were held in the fall of 2002 attracting approximately 1,600 people. Brent Israelsen, Oregon Brings Public Into Wolf Debate, SALT LAKE TRIB., Dec. 31, 2002, at A6. Wildlife officials presented a short “history of wolves in Oregon, their current biological and legal status, and the issues surrounding their migration into Oregon.” In Brief, Meetings to Focus on Wolves in Oregon, STATESMAN J., Dec. 7, 2002, at B8.
wolves that cause problems.\textsuperscript{204} The Commission should begin implementing survival guidelines or a wolf management plan that would allow for recolonization from Idaho, but with strict management of problem wolves. In order to ensure delisting when the gray wolf sufficiently repopulates Oregon, a count of the wolves in Oregon is necessary. The ODFW has already purchased much of the equipment required to conduct counts to determine when wolves have recolonized sufficiently to allow delisting from the Oregon ESA.\textsuperscript{205}

These wolf management guidelines would not need to be costly or burdensome for the state of Oregon. It is possible to form survival guidelines that would give wolf advocates a chance to hear a gray wolf howl in the wilderness of Oregon, while at the same time allowing ranchers to maintain their livelihoods in those same hills. To be cost efficient, the survival guidelines or wolf management plan must rest on the condition that reintroduction draws wolves into Oregon from other recovery areas. It is not necessary to have a costly and burdensome Yellowstone-like recovery effort which would entail transplanting Canadian wolves into Oregon. The wolves from the Idaho recovery area need protection in Oregon under the Oregon ESA so long as they are not problem wolves. This would allow the wolves to gain a foothold in Oregon and establish breeding pairs. Once the first breeding pair arrives in Oregon, that first pack should take about three years to become sufficiently large enough to allow lone wolves to disband and form new packs.\textsuperscript{206} Of course, these lone wolves may stray back into Idaho or move into Washington or California, thereby slowing the process. However, other breeding pairs may move into Oregon from Idaho, thereby accelerating the process.

“Problem wolves” would be those identified wolves that have a conflict with ranchers. The Commission should determine strict guidelines for what constitutes a conflict. This could be done in a manner which is beneficial to Oregon ranchers. Ranchers should be allowed to shoot on sight any wolf that is caught in the act of killing or attempting to kill any form of livestock. This has been the status quo in Yellowstone.\textsuperscript{207} Oregon could implement a plan where the rancher must call the ODFW upon shooting a gray wolf, so that ODFW can determine whether the wolf was terminated for the proper reason. If it were determined that the wolf was terminated for reasons other

\textsuperscript{204} Israelsen & Knowles, \textit{Will Utah Find Room for Wolves}, supra note 118.
\textsuperscript{205} Milstein, \textit{Agency Gears up for Wolf Visits}, supra note 75.
\textsuperscript{206} Yellowstone and Idaho gray wolf recovery data was used to determine how long it would take the first breeding pack of wolves in Oregon to become large enough for lone wolves to leave the pack. \textit{See generally} 2001 ANNUAL REPORT, supra note 36.
\textsuperscript{207} Id.
than protection of livestock, the rancher should be cited. To ease these burdens, Oregon could take advantage of livestock compensation programs such as the Bailey Wildlife Foundation Wolf Compensation Trust administered by the Defenders of Wildlife.  

Implementing this program could ease the financial burden on Oregon ranchers and on state commitment of funds.

Further, Oregon should promote gray wolf recovery by creating an incentive for ranchers to abide by these proposed rules. Essentially, this system would reward ranchers for allowing gray wolves to use the same public land as ranchers. An incentive for ranchers to comply with these proposed wolf management guidelines could be garnered by instituting a point or merit system. Under this system, ranchers could be compensated by the state for having a low number of wolf conflicts. Legally shooting a wolf that was harming a rancher’s livestock would not count against that rancher. Rather, Oregon wildlife officials would monitor wolf movement through counts and determine which ranchers were taking wolves and not reporting the losses. Finding an unreported wolf kill on a rancher’s property would be the type of infraction that would count against the rancher in this proposed merit-based point system. At the end of the year, the ranchers who helped most to restore the gray wolf to Oregon would be compensated for their efforts. Any burden to ranchers that would accompany this plan is a small inconvenience in comparison to the ranchers’ allowance to use public lands to earn a living.

The number of incidents between wolves and livestock would be minimal under this plan. It is documented that in the greater Yellowstone recovery area, reports of wolf depredation have been low: “[s]ince 1987 the [USFWS] has confirmed wolves in Montana, Wyoming and Idaho have killed 188 cattle, 494 sheep and 43 dogs.” During this time 103 of the 563 documented wolves that inhabited the three states were killed for control purposes. The number of livestock killed by the gray wolf in these areas is reasonable for such a large three-state recovery area. Furthermore, the Defenders of Wildlife compensated ranchers for each documented livestock wolf kill.  

It is true that monetary compensation

---

209. Barnard, supra note 83; see also, Davidson, supra note 84.
210. Davidson, supra note 84; see also, 2001 ANNUAL REPORT, supra note 36 (stating that the “[e]stimates of wolf numbers at the end of 2001 were 261 wolves in the Central Idaho Recovery Area, 218 in the Greater Yellowstone Recovery Area, and 84 in the Northwest Montana Recovery Area . . . . By state boundaries, there were an estimated 251 wolves in the state of Idaho, 189 in Wyoming and 123 in Montana”).
211. Davidson, supra note 84.
does not replace all lost cattle or sheep, or replace the lost genes that result from the wolf kill, but compensation is available to ranchers and it is from a non-public source.

Oregon cattlemen claim that as many as “eighty percent of wolf kills are never found,” and that the payout to ranchers has been disappointingly low. However, the low payout is more likely because the numbers of depredations have declined. To the dismay of ranchers, the Defenders of Wildlife program is not meant to make cattlemen rich off of wolf kills, but rather to supplement what has been lost. But given the low numbers of documented livestock losses in the Yellowstone recovery area, ranchers could be compensated at a value higher than the current market rate.

Cattlemen could also change ranching habits in order to help their own cause in relation to wolf conflicts. Many issues with wolves can be solved with proper livestock management. For example, “[c]attle ranchers can breed their cattle earlier in the year so the calves are bigger when they are moved to public land.” If the ODFW follows this proposed wolf management plan, and ranchers obey the necessary guidelines, the return of the gray wolf to Oregon should have a minimal, if any, impact on the Oregon cattle industry.

Hunters are also crying wolf about the potential destruction they claim will accompany the reintroduction of the gray wolf into Oregon. However, destruction of elk and deer herds is not occurring in the greater Yellowstone recovery area and will not occur in Oregon. In fact, elk, deer, and moose are learning to be wary in Yellowstone; “they are simply [behaving] differently with wolves in the picture.” “A predation process that was missing without the [gray wolf] has returned,” and animals are wary of predators. At least one Oregon hunter has declared that:

I wouldn't be a thinking person if I thought I was the only hunter with a right to be out there . . . . One of the reasons we hunt is the connection to wildness and the land. Wolves, . . . add to that, they don't detract from it. When you sterilize the landscape by taking

212. Robert H. Schmidt, The Wolves are Coming to Utah; We Must Plan How to Get Along, SALT LAKE TRIB., May 6, 2001, at A7.
213. Davidson, supra note 84.
214. Id.
215. Schmidt, supra note 212.
216. Id.
components out, what you're left with isn't much better than a game farm.\textsuperscript{217}

Oregon hunters may actually benefit from wolves being in the hills, as the hunt would be more fulfilling knowing that they had taken an animal that had the savvy and alertness not to become prey to the wolves. The sport of the hunt would be increased.

Wolves would also thrive under the proposed plan. The gray wolf will establish itself in Oregon if it is sufficiently protected as set forth in this wolf management plan. There is ample public land to support wolf packs in Oregon. The guidelines for determining when recovery is successful in Yellowstone can also be used in Oregon. The goal in Oregon should be to delist the gray wolf from the Oregon ESA once ten breeding pairs of gray wolves is documented in Oregon. During this time, the wolves within the Yellowstone and Idaho recovery area will continue to recolonize other areas in the western United States. Thus, by the time Oregon reaches the proposed goal of ten breeding pairs of gray wolves, they should have a significant foothold in the western United States. Under this plan, gray wolves will return to Oregon and other states for generations to come.

V. CONCLUSION

Gray wolves are native to the western United States, including Oregon. Although gray wolves have been extirpated from Oregon for over fifty years, they are poised to return to Oregon from the Central Idaho wolf recovery area that was part of the Yellowstone wolf reintroduction program. As a result of federal delisting of the gray wolf, the Oregon ESA governs the status of gray wolves in Oregon because it considers them an endangered species. Yet, the Commission is intent on not allowing the gray wolf to realize the protections due under the Oregon ESA. In misinterpreting the intent of the Oregon legislature to protect and recover the gray wolf in Oregon, the Commission has denied a petition from wolf lovers to create survival guidelines and determine whether state land is available for the reintroduction of wolves in Oregon. Cattle ranchers are decidedly opposed to the reintroduction of wolves into Oregon. However, it is feasible to implement a wolf management plan that would appease both wolf lovers and ranchers. The wolf management plan would require the Commission and the State of Oregon to properly recognize the intent of the Oregon legislature to protect the gray wolf when it was grandfathered into

\textsuperscript{217} Milstein, \textit{When Wolves Move In}, supra note 82.
the Oregon ESA. The guidelines which accompany this wolf management plan would allow flexibility in the manner ranchers and private property owners protect their assets from problem wolves, while at the same time sufficiently giving the wolves the chance to re-populate in Oregon. Cooperation between lawmakers, ranchers, and wolf lovers is essential to the implementation of this plan, as each side to the gray wolf debate must give some ground.

The first step in implementation of this wolf management plan, or any wolf recovery plan under Oregon law, is for the Commission to recognize its mistaken application of the Oregon ESA. Second, the Commission should implement the Oregon Administrative Rules in the context of the ONDA petition and proceed with the development of survival guidelines or creation of a wolf management plan. This wolf management plan could serve as a model for other states, such as Oregon, that will soon be facing the imminent return of the gray wolf. If the Commission implements this proposed wolf management plan, the ODFW will have the ability to allow both the gray wolf and ranchers to co-exist in Oregon.
Keeping Wetlands Wet: Are Existing Protections Enough?

Kim Diana Connolly

Table of Contents

I. Introduction ................................................................. 169
II. Discussion ................................................................. 170
   A. Why Do We Care? Wetlands Functions and Values........ 170
   B. Introduction to the Clean Water Act Section 404 Wetlands
      Regulatory Framework.............................................. 173
   C. Areas and Activities Currently Subject to Section 404 Jurisdiction 175
III. Conclusion: What Steps Can We Take to Protect Wetlands?........ 190

I. Introduction

Recent years have seen reinterpretation and reworking of the measures used by the federal government to protect wetlands. Consequently, federal oversight of certain wetlands and certain wetland activities has been substantially reduced. The Bush Administration has taken action that could further limit federal control of activities in wetlands. As a result, existing protections are not enough to maintain the crucial functions and values that the nation’s wetlands provide to United States citizens. Action must be taken soon if wetlands are to be saved.

* Asst. Prof. of Law, Univ. of South Carolina School of Law; Dir., Environmental Law Clinic; Assoc. Faculty, Univ. of South Carolina School of the Env’t. J.D. 1993, Georgetown Univ. Law Center. The author can be reached at connolly@law.sc.edu. The author appreciates the helpful comments on earlier drafts from Robin Mann, F. James Cumberland, Jr., and Roy Stuckey. The author also thanks Cynthia Jones for her diligent research assistance in preparing these remarks. This write-up is based on a July 15, 2003, presentation as part of Vermont Law School’s Summer 2003 “Hot Topics in Environmental Law” Lecture Series.

† The author submitted this article to the Vermont Journal of Environmental Law with the understanding that it would be included in the previous 2003-2004, Volume Five. However, the Vermont Journal of Environmental Law has recently undergone a significant website overhaul and faced publication difficulties as a result. Therefore, this article has been included in the 2004-2005, Volume Six with the understanding that some of its material may be out-of-date. If you have any further questions, please contact the Vermont Journal of Environmental Law.
This article begins by discussing the importance of wetlands and by providing a brief overview of Clean Water Act ("CWA") Section 404. It continues by analyzing the current interpretations of both the breadth of Section 404 jurisdiction and the activities regulated under Section 404. The article concludes by recommending measures for strengthening wetlands protections in light of these narrowed interpretations.

II. DISCUSSION

A. Why Do We Care? Wetlands Functions and Values

Wetlands provide many services, often labeled "functions and values." These include but are not limited to: habitat provision, water quality improvement, flood protection, biological productivity, recreational, educational, and research opportunities.

Wetlands provide crucial food and habitat to many species including—mammals, birds, fish, amphibians, reptiles, insects, mollusks, and crustaceans. The U.S. Fish & Wildlife Service has estimated that up to forty-three percent of species listed by the federal government as threatened or endangered rely on wetlands for their survival.


2. See infra nn. 2-18 and accompanying text.

3. "Many animals need wetlands for part or all of their life-cycles. In late winter and early spring, for example, adult tiger salamanders migrate from uplands to vernal pools for breeding . . ." William S. Sipple, Wetland Functions and Values, available at http://www.epa.gov/watertrain/wetlands/text.html (last visited July 25, 2003). Once larvae develop lungs, they leave the vernal pools to live as adults in adjacent upland. In other words, tiger salamanders depend on a combined area of wetlands and uplands to exist. Id.

Wetlands can also receive, store, and release water in various ways, thereby improving water quality. For example, wetlands: intercept surface runoff; remove or retain inorganic nutrients thereby decreasing biological oxygen demand; remove suspended solids and organic wastes; and reduce certain metals and pathogens.\textsuperscript{5}

At the same time, some wetlands act as reservoirs, maintaining stream flow and lake levels during dry periods; others replenish groundwater.\textsuperscript{6} Wetlands also store and slowly release surface water, rain, snowmelt, groundwater, and floodwaters.\textsuperscript{7} Trees and other wetland vegetation impede floodwater movement and distribute water slowly over floodplains, thus serving to minimize or eliminate damage to other areas.\textsuperscript{8} Wetlands even improve water quality by protecting shorelines and stream banks against erosion.\textsuperscript{9} Wetlands also play a role in atmospheric maintenance.\textsuperscript{10} Even so-called "isolated" wetlands perform many important functions and values.\textsuperscript{11}

The biological productivity of wetlands generate and support a variety of products used by humans, such as timber sold in interstate commerce.\textsuperscript{12} Similarly, wetlands support numerous plants such as blueberries, cranberries, mints, and wild rice.\textsuperscript{13} Many medicines are derived from...
wetland soils and plants. The fishing and shellfishing industries, particularly recreational angling, harvest many wetland-dependent species (e.g., striped bass and brown shrimp).

Wetlands foster diverse recreational, educational and research opportunities with significant economic impacts. For example, more than half of all United States adults (98 million people) hunt, fish, watch birds or photograph wildlife; they spend about $59.5 billion per year undertaking these activities. In 1991, it is estimated birdwatchers alone spent $5.2 billion, much of it associated with wetlands. Three million migratory bird hunters generate $1.3 billion annually in retail sales, with a total economic multiplier effect of $3.9 billion, which is further associated with 46,000 additional jobs, and sales and income tax revenues of $176 million. Harvests of fur and reptile skins associated with wetlands species are also multi-billion dollar industries.

The science of wetlands is rich and diverse. In light of all these diverse functions and values, many educators and scientists use wetlands as learning laboratories. The United States Army Corps of Engineers ("Corps") sponsors federal scientific research regarding wetlands generally through the Waterways Experiment Station's Environmental Laboratory. In addition, the Association of State Wetlands Managers has put together an excellent scientific bibliography exploring the functions and values of isolated wetlands because they perform many crucial functions and values.

---

14. NCSU, supra note 1.
15. Sipple, supra note 3.
16. Id.
17. Id.
18. Id.
19. Id. See also NCSU, supra note 1.
Given the importance of wetlands on so many levels, it would stand to reason that the federal government should provide strong protections for these valuable areas. Sadly, this is not the case. The following section will discuss the federal framework for wetlands protection.

B. Introduction to the Clean Water Act Section 404 Wetlands Regulatory Framework

The U.S. does not have a single, comprehensive law providing protection for wetlands. A number of federal laws bear upon wetlands, including: laws to address agricultural wetlands; incentives to encourage preservation of wetlands through the Wetlands Reserve Program; and programs that protect specific wetlands located on federally-controlled lands like National Wildlife Refuges.

Far and away, the most important federal program in terms of wetlands regulation is the permitting program under Section 404 of the CWA. Under this program, close to 90,000 activities in wetlands and other jurisdictional waters of the U.S. receive federal review each year. It is the breadth of this permitting program that has been diminished in recent years.


24. See ASWM, State Wetland Protection Statutes, at http://www.aswm.org/swp/states.htm (last visited July 25, 2003) (It is important to note that some states have certain measures in place to provide a level of protections for wetlands). See also WILLIAM L. WANT, LAW OF WETLANDS REGULATION, Ch. 13: State Wetlands and Coastal Laws (2002).


The 1972 Amendments to the Federal Water Pollution Control Act\textsuperscript{31} created what commonly is called Section 404 authority.\textsuperscript{32} The overall congressional intent for what has come to be called the CWA\textsuperscript{33} was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."\textsuperscript{34}

The relevant portion of Section 404(a) reads as follows: "[t]he Secretary [of the Army] may issue permits for the discharge of dredged or fill material into the navigable waters."\textsuperscript{35} Thus, in order to determine if a permit is required, an assessment must be made as to whether: (1) dredged\textsuperscript{36} or fill\textsuperscript{37} material; (2) is being "discharged;" (3) into "navigable" waters.\textsuperscript{38} The definitions of these latter two requirements have come under recent fire.\textsuperscript{39}

Congress designed a shared responsibility for Section 404 implementation between the Corps and the newly created Environmental Protection Agency ("EPA").\textsuperscript{40} The Corps' Regulatory Branch administers Section 404 permitting and day-to-day activities,\textsuperscript{41} while EPA has an


\textsuperscript{33} "SEC. 518. This Act may be cited as the 'Federal Water Pollution Control Act' (commonly referred to as the Clean Water Act)." Pub. L. No. 95-217, 91 Stat. 1566 (1977).

\textsuperscript{34} 33 U.S.C. § 1251(a) (2000).

\textsuperscript{35} 33 U.S.C. § 1344(a) (2000).

\textsuperscript{36} "[D]redged" material is defined in the regulations as "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c) (2002).

\textsuperscript{37} \textit{See} Dept. of the Army, Corps and EPA, \textit{Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material."} 67 Fed. Reg. 31,129 (2002) ("Fill" material, a matter of recent controversy is now redefined); 33 C.F.R. § 323.2(e) (2002) ("material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States. (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States. (3) The term fill material does not include trash or garbage").

\textsuperscript{38} 33 U.S.C. § 1311(a) (2000).

\textsuperscript{39} \textit{See infra} section III.

\textsuperscript{40} \textit{STRAND, supra} note 30, at 8.

\textsuperscript{41} \textit{See} Corps, \textit{Regulatory Program}, \textit{at} \url{http://www.usace.army.mil/inet/functions/cw/cecewo/reg} (last visited July 25, 2003); Corps, \textit{Regulatory Program}, \textit{at} \url{http://www.usace.army.mil/inet/functions/cw/cecewo/reg/boundmap.pdf} (last visited July 25, 2003) (The Corps has eight divisions, also called Regional Business Centers, throughout the U.S., Asia, and Europe as well as field offices in other locations worldwide. The Corps divisions and districts follow watershed boundaries, not state boundaries, so states are sometimes divided into several divisions/districts).
oversight and enforcement role. Other federal agencies (such as FWS and the National Marine Fisheries Service) are involved in permitting decisions by lending expertise otherwise not available. States also play a role in the permitting process, primarily through CWA Section 401 water quality certifications and, if required, through Coastal Zone Management Act certification.

Although Congress did not mention wetlands specifically in the CWA, the Corps and EPA have interpreted it to provide authority over those areas. The Corps defines “wetlands” in its regulations as: [T]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Thus, in order to determine whether an area is a wetland, its hydrology, vegetation, and soil characteristics must be assessed.

Permits are required for most activities in wetlands over which the Corps and EPA have jurisdiction. The interesting question explored in the next section of these remarks is the areas and activities over which the Corps and EPA have jurisdiction.

C. Areas and Activities Currently Subject to Section 404 Jurisdiction

Because Congress elected to provide such a broad grant of authority to the Corps and EPA, implementation of section 404 largely has been a creature of administrative and judicial interpretation. This situation is not uncommon in environmental law; section 404 contains approximately 3800

---

47. 33 C.F.R. § 323 (2002).
48. 33 C.F.R. § 328.3(b) (2002).
50. See 33 U.S.C. § 1344(f)(2)(A) (2000); 33 C.F.R. § 323.3 (2002); 33 C.F.R. § 323.4 (2002) (some activities are automatically exempt from permitting requirements under the statutes and regulations, including normal farming, silviculture and ranching activities, certain maintenance, farm or stock ponds, temporary sedimentation basins on construction sites, farm roads, etc.).
words actually enacted by Congress, which are supplemented by about a dozen regulatory sections as well as multiple guidance documents, memoranda of agreement, other regulatory documents, and hundreds of judicial decisions. Likewise, section 9 of the Endangered Species Act, which among other things prevents the “taking” of any listed species, contains just over 1600 words enacted by Congress, but is similarly supplemented by regulatory sections, multiple guidance documents, policy statements, and hundreds of judicial decisions.

As noted above, Section 404(a) requires permits for “the discharge of dredged or fill material into the navigable waters at specified disposal sites.” This section will explore more fully how the Corps and EPA have construed the terms “navigable waters” and “discharge” in implementing the responsibilities given to them by Congress through Section 404.

1. What Are “Waters of the United States?” What Is the Extent of Jurisdiction over “Navigable Waters?”

Although there was already a rich body of regulation and case law defining the term “navigable waters” under the Rivers and Harbors Act of 1899, Congress provided a different definition to the term in the CWA.
That statute defines the term “navigable waters” to mean “the waters of the United States, including the territorial seas.”

In 1975, shortly after Congress passed the CWA, the Natural Resources Defense Council challenged the extent of this jurisdiction. The District of Columbia District Court declared in a very short opinion that “Congress by defining the term ‘navigable waters’...to mean ‘the waters of the United States, including the territorial seas,’ asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution.” During the subsequent 1977 reauthorization of the CWA, Congress further debated the proper extent of the Corps’ jurisdiction. As the Supreme Court summarized in a later case, “the legislation as ultimately passed, in the words of Senator Baker, ‘retain[ed] the comprehensive jurisdiction over the Nation’s waters exercised in the 1972 Federal Water Pollution Control Act.’”

The current Corps regulatory definition of “waters of the United States” is a result of these court directives. In basic terms, there must be some connection between the use of the waters and interstate commerce in order for the Corps to claim regulatory authority. Under the regulations, the
Corps claims jurisdiction over use, degradation, or destruction of any wetlands “by interstate or foreign travelers for recreational or other purposes” or “[f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce” or “[w]hich are used or could be used for industrial purpose by industries in interstate commerce.”

The Corps also claims jurisdiction over wetlands “adjacent” to other waters of the United States with connections to interstate commerce. In 1985, the Supreme Court interpreted this concept of adjacency in *Riverside Bayview Homes* as meaning bordering, contiguous, or neighboring, even if separated by human-made or natural dikes or barriers. In upholding the Corps’ claim of jurisdiction, the Court noted that “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined.”

---

playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)–(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)–(6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal Agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.” 33 C.F.R. § 328.3(a) (2002).

73. *Id.* at § 328.3(a)(3)(i).
74. *Id.* at § 328.3(a)(3)(ii).
75. *Id.* at § 328.3(a)(3)(iii).
76. *Id.* at § 328.3(a)(7).
77. *Riverside Bayview Homes*, 474 U.S. at 122, (White, J., delivered the unanimous decision for the Court on petition from the Sixth Circuit).
78. *Id.* at 133. The Court held “we therefore conclude that a definition of ‘waters of the United States’ encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act. Because respondent’s property is part of a wetland
The *Riverside Bayview* decision, however, specifically noted that the Court was "not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." It thus left open the question as to the jurisdiction over so-called "isolated" wetlands.

The Corps and EPA, taking seriously their Congressional responsibility for protecting waters of the U.S. as far as the Commerce Clause allows, thereafter provided the regulated community with guidelines for how they would manage such isolated areas. The Corps and EPA identified a body of water’s use (or potential use) as migratory bird habitat to satisfy the interstate commerce connection. These agencies believed waters that are or may be used as habitat for migratory birds are examples of waters whose use, degradation, or destruction could affect interstate or foreign commerce. Therefore, those waters must be regulated as "waters of the United States." These explanations became known as the "Migratory Bird Rule." For a number of years, the Migratory Bird Rule was upheld as a viable interpretation under existing law by those district and circuit courts who gave substantive consideration to the rule itself. Following a 1997 Fourth Circuit decision in a criminal case that called into question the

---

79. *Id.* at 131 n.8.

80. The recent FWS report on isolated wetlands discusses the difficulty in defining this term by noting that "[t]he term ‘isolated’ is a relative term. There is no single, ecologically or scientifically accepted definition of isolated wetland because this issue is more a matter of perspective than scientific fact. Nonetheless, it is a question of particular relevance for wetlands since it may affect their future well-being. *Webster’s New World Dictionary of the American Language* (Guralnik 1972) defines ‘isolate’ as ‘to set apart from others; place alone.’ An isolated wetland, therefore, would be one that is separated from other wetlands or other waters – standing alone. Isolation can be viewed from a number of perspectives. Two common viewpoints are based on landscape or geomorphic differences and hydrologic interactions. Others may consider ecological relationships." *TINER, ET AL., supra* note 11, at Section 2: Overview of Isolated Wetlands.


82. *Id*.

83. *Id*.


85. See e.g., *Leslie Salt Co., supra* note 84 (Ninth Cir. upheld the Migratory Bird Rule); Hoffman Homes v. EPA, 999 F.2d 256 (7th Cir. 1993) (Seventh Cir. upheld the rule); Tabb Lakes v. U.S., 715 F. Supp. 726 (E.D. Va. 1988), *aff’d without opinion*, 885 F.2d 866 (4th Cir. 1989) (the Migratory Bird Rule was ruled invalid in the Fourth Cir. in 1989 for failure to follow the Administrative Procedure Act required notice and comment procedures).
Commerce Clause authority for wetlands regulations, however, attacks on the Migratory Bird Rule were renewed.

Solid Waste Agency of No. Cook County v. U.S. Army Corps of Engineers ("SWANCC"), redirected jurisprudence in this area in early 2001. In a 5-4 ruling, the Supreme Court held improper the Corps’ and EPA’s claims of jurisdiction based solely on actual or potential use of a water of the United States by migratory birds. This case involved statutory and constitutional challenges to the assertion of CWA jurisdiction over isolated, non-navigable, intrastate waters used as habitat by 121 species of migratory birds. SWANCC, a consortium of suburban Chicago municipalities, wanted to develop a solid waste disposal site in a 533-acre parcel that was formerly a gravel mining pit. The pit had reverted into a successional stage forest with seasonal and permanent ponds, but it was not a delineated wetland. SWANCC purchased the site and applied for a Section 404 permit, which the Corps subsequently denied.

SWANCC then sued the Corps, claiming that: 1) the Migratory Bird Rule was beyond their jurisdiction as granted by Congress and 2) Congress lacked authority under the Commerce Clause to grant the Corps such

86. U.S. v. Wilson, 133 F. 3d 251 (4th Cir. 1997) (a divided panel of the Fourth Cir. concluded “that 33 CFR 328.3(a)(3) (1993) (defining waters of the United States to include those waters whose degradation ‘could affect’ interstate commerce) is unauthorized by the CWA as limited by the Commerce Clause and therefore is invalid . . . . Id. at 253–254.”). See Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson (May 1998), available at http://www.epa.gov/earth1r6/ben/w/wilguid.pdf (last visited July 25, 2003). The Corps and EPA issued guidance following the Wilson decision. It limited the Wilson holding to the Fourth Cir., stating that “within the five states comprising the Fourth Cir., the Corps and EPA will adhere to the holdings of law in the Wilson decision. At the same time, within the Fourth Cir. states, both the Corps and EPA will continue to assert CWA jurisdiction over any and all isolated water bodies, including isolated wetlands, based on the CWA statute itself, where (1) either agency can establish an actual link between that water body and interstate or foreign commerce and (2) individually and/or in the aggregate, the use, degradation or destruction of isolated waters with such a link would have a substantial effect on interstate or foreign commerce. This approach addresses the concerns of the Fourth Cir. regarding jurisdiction over these waters.” Id.

87. Solid Waste Agency of No. Cook County v. United States Army Corps of Eng’rs, 531 U.S. 159, 121 S. Ct. 675 (2001). SWANCC was the second case the Supreme Court had ever heard on Section 404 jurisdictional matters. Copies of parties’ briefs as well as the transcript of the oral argument are available at http://www.swancc.org (last visited July 25, 2003).

88. Id.

89. Id.

90. The reasons for the permit denial were that (1) SWANCC had not established that the proposal was the least harmful practicable alternative; (2) the fact that SWANCC failed to set aside funds for leak remediation was unacceptable risk to public drinking water supplies; and (3) the impact to the waters was unmitigable because a landfill cannot be redeveloped into forested habitat. Id. at 165. The Corps and EPA had prevailed in the federal district and circuit courts. See SWANCC, 91 F.3d 845 (7th Cir. 1999).
A majority of the Supreme Court agreed, and effectively limited the agencies’ approach to asserting jurisdiction under the statute while sidestepping the Commerce Clause challenge. The dissent argued that the CWA’s ambitious and comprehensive goals coupled with the new, expansive definition of navigable waters, meant that Congress had intended expansive jurisdiction pursuant to its Commerce Clause powers under the CWA such that the Migratory Bird Rule should be upheld.

For two years after the United States Supreme Court issued SWANCC, the Corps and EPA offered no official guidance as to how to interpret the decision in the field. Finally, on January 15, 2003, the EPA and Corps published a “Joint Memorandum” to provide guidance with respect to jurisdictional issues after SWANCC. The Memorandum did little but state the obvious: namely, that “SWANCC squarely eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the

---


92. Specifically, the decision held that “33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner’s balefill site pursuant to the ‘Migratory Bird Rule,’ 51 Fed. Reg. 41,217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA.” SWANCC, 531 U.S. at 174. Many observers anticipated that the decision in the case would rest on Commerce Clause analysis, the Court side-stepped that issue, and based its analysis on the authority granted to the Corps and EPA under the CWA. Id. (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result. [Citation omitted.] This requirement stems from our prudential desire not to needless reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. See id. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. [Citation omitted.”). Id. at 172–173.

93. “Because of the statute’s ambitious and comprehensive goals, it was, of course, necessary to expand its jurisdictional scope. Thus, although Congress opted to carry over the traditional jurisdictional term ‘navigable waters’ from the RHA and prior versions of the FWPCA, it broadened the definition of that term to encompass all "waters of the United States." 33 U.S.C. § 1362(7). Indeed, the 1972 conferees arrived at the final formulation by specifically deleting the word ‘navigable’ from the definition that had originally appeared in the House version of the Act. The majority today undoes that deletion. [footnotes omitted].” Id. at 180–181.

94. The Corps and EPA issued a legal interpretation of the case on January 19, 2001 (in the waning days of the Clinton administration). Gary S. Guzy, EPA, Robert M. Andersen, Corps, Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters, Jan. 19, 2001, available at http://www.aswm.org/fwp/swancc/index.htm (last visited July 25, 2003). That interpretation was the only formal guidance for almost two years following the SWANCC decision. In brief, it directed that field staff should no longer rely on the use of waters or wetlands as habitat by migratory birds as the sole basis for the assertion of regulatory jurisdiction under the CWA. Id.

waters as habitat for migratory birds that cross state lines in their migrations. The agencies did, however, set forth a prior-approval standard for many jurisdictional determinations. At the same time, the guidance said that, "generally speaking," tributaries would continue to be jurisdictional. Yet, for the most part, interpretation remains an ad hoc determination by the EPA and Corps field staff. After SWANCC, it is estimated that at least a quarter, if not more, of the nation’s wetlands are no longer subject to federal regulation.

Many experts from all sides of this issue have weighed in on the ramifications of SWANCC. Dozens of law review articles have commented on the matter. Congress has held a number of hearings.

96. Id. at 1996.
97. “In view of SWANCC, neither agency will assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the ‘Migratory Bird Rule.’ In addition, in view of the uncertainties after SWANCC concerning jurisdiction over isolated waters that are both intrastate and non-navigable based on other grounds listed in 33 CFR § 328.3(a)(3)(i)-(iii), field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters, including permitting and enforcement actions.” Id. at 1995. Dispute over this guidance was undoubtedly anticipated by the agencies in a footnote that stated: “Therefore, interested person are [sic] free to raise questions and objections about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the law and regulations.” Id. at 1996 n.1.
98. Id. at 1998.
At the same time, a rich body of case law interpreting the meaning of “waters of the United States” following SWANCC has developed because courts are interpreting SWANCC differently.\textsuperscript{103} For example, the Fifth Circuit interpreted SWANCC as holding that “a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water.”\textsuperscript{104} The Ninth Circuit, however, held that tributaries with intermittent flows are still “waters of the United States.”\textsuperscript{105} And the Fourth Circuit recently held that “waters of the United States” include distant, non-navigable tributaries of navigable waters.\textsuperscript{106}

Meanwhile, EPA and the Corps issued an Advanced Notice of Proposed Rule Making suggesting it may be appropriate to revise the regulatory
definition of “waters of the United States.” The agencies sought comment in 2003 on issues associated with the scope of waters subject to the CWA in light of SWANCC, and solicited input from the general public, scientific community, federal and state resource agencies on the implications of SWANCC on jurisdictional decisions and other changes stakeholders might consider appropriate. Over 135,000 comments were submitted. After a public debate over severely narrowed language, the agencies ultimately withdrew the proposed rulemaking, leaving the definition in the hands of the courts (for now). Accordingly, regulators, the regulated community, and those seeking to protect wetlands resources are left with continued uncertainty as to the parameters of jurisdictional waters.


108. Id.

109. Specifically, the Corps and EPA are seeking comment on:
(1) Whether, and, if so, under what circumstances, the factors listed in 33 CFR 328.3(a)(3)(i)-(iii) (i.e., use of the water by interstate or foreign travelers for recreational or other purposes, the presence of fish or shellfish that could be taken and sold in interstate commerce, the use of the water for industrial purposes by industries in interstate commerce) or any other factors provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters?
(2) Whether the regulations should define ‘isolated waters,’ and if so, what factors should be considered in determining whether a water is or is not isolated for jurisdictional purposes?

68 Fed. Reg. 1994. The level of interest in this ANPRM was so high that the deadline for accepting comments was extended to April 16, 2003. 68 Fed. Reg. 9613 (Jan. 15, 2003).


111. See, e.g., BNA Daily Environment, Draft Language Defining U.S. Waters Narrows Clean Water Act Protections, Nov. 7, 2003 (“Draft wetlands regulatory language defining ‘waters of the United States’ that was drawn up by the U.S. Army Corps of Engineers and the Justice Department would significantly scale back existing regulatory language and was done without input from the Environmental Protection Agency…”); BNA Daily Environment, Administration Should Rescind Notice On Waters Definition, House Members Say, Nov. 26, 2003 (“‘Not only do the January 15 ANPRM and guidance reach far beyond the holding of the SWANCC case, they also both apply to the entire Clean Water Act,‘ the letter from 218 members of the House including about 20 Republicans, said.”) See also Felicity Barringer, U.S. Won’t Narrow Wetlands Protection, N.Y. TIMES, Dec. 17, 2003, at A35.

2. What is a “Discharge?” What Is the Extent of Jurisdiction over Activities in Jurisdictional Wetlands?

Even if a wetland is determined to be a water of the U.S. under the type of analysis described above, not all activities in that wetland would be regulated by the federal government. Unlike several states that regulate all activities in wetlands, Congress did not empower the Corps and EPA with such authority. Instead, Congress only requires permits for “discharges” into navigable waters.

The task of defining the term “discharge” is complex. Congress defined “discharge of a pollutant” to mean: “(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.” Accordingly, in order to understand whether an activity is regulated, in addition to understanding what “navigable waters” means, one must understand how “pollutant” and “point source” are defined.

In the CWA, Congress defined “pollutant” to include “dredged” material as well as other more traditional pollutants. The Corps further defined “dredged material” to mean “material that is excavated or dredged

---


115. Congress included in its definition the plural, “discharge of pollutants.” Id.


117. See, supra section 3(a).

118. 33 U.S.C. § 1362(6). The entire definition reads as follows:

The term ‘pollutant’ means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) ‘sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces’ within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources. Id.
In other words, discharge of material that comes from the waters of the United States requires a permit, assuming that such discharge comes from a "point source."\footnote{33 C.F.R. § 323.2(c) (2002).}

Even the act of "redepositing" soil from mechanized land clearing devices is considered a discharge from a point source.\footnote{33 U.S.C. § 1362(14). The definition reads as follows: The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. \textit{Id.}} Courts have interpreted "point source" to include mechanized land-clearing devices. See \textit{U.S. v. Lambert}, 915 F. Supp. 797 (S.D.W.Va. 1996); \textit{U.S. v. Banks}, 873 F. Supp. 650 (S.D. Fla. 1995), \textit{aff’d} 115 F.3d 916 (11th Cir. 1997), \textit{cert. denied} 522 U.S. 1075 (1998).

In other words, if a bulldozer or other mechanized equipment picks up earth and puts it elsewhere on a jurisdictional site, it is considered a discharge. In 1986, the Corps issued a rule that expressly exempted from regulation "de minimus, incidental soil movement occurring during normal dredging operations."\footnote{Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,232 (1986).} This rule exempted land-clearing operations which removed materials from wetlands, deposited them in an enclosed vehicle, and later removed the materials from the site. This exemption resulted the draining and destruction of thousands of acres of wetlands.\footnote{Avoyelles Sportsmen’s League \textit{v. Marsh}, 715 F. 2d 897 (5th Cir. 1983).}

Following a judicial challenge to dredging activities in North Carolina,\footnote{Avoyelles Sportsmen’s League \textit{v. Marsh}, 715 F. 2d 897 (5th Cir. 1983).} EPA and the Corps issued a new rule in August 1993 requiring Section 404 permits for redepots of dredged material in waters of the U.S., including jurisdictional wetlands.\footnote{Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,232 (1986).} Referred to as the "Tulloch Rule" in reference to the original court case,\footnote{58 Fed. Reg. 45,008 (1993), \textit{formerly codified in} 33 C.F.R. § 323.2(d)(1)(iii).} that rule was successfully challenged by a number of trade associations in the 1998 D.C. Circuit Court decision \textit{National Mining Association v. U.S. Army Corps of Engineers.}\footnote{National Mining Association concluded that the Corps could not regulate from waters of the United States.\footnote{See Tulloch, \textit{supra} note 124.} National Mining Ass’n \textit{v. United States Army Corps of Eng’rs}, 145 F.3d 1399 (D.C. Cir. 1998).} 

\textit{National Mining Association} concluded that the Corps could not regulate
“incidental fallback,” described by the Court as small amounts of material that fall back to substantially the same place of their initial removal.128

Since this 1998 decision, tens of thousands of wetland acres have been targeted for ditching, draining, and destruction, and hundreds of miles of streams have been channelized.129 Unlike the SWANCC decision, only a handful of law review articles have examined this issue since the court’s ruling.130

Some subsequent court decisions interpret National Mining Association narrowly. For example, the Fourth Circuit reasoned that:

[Even in a pristine wetland or body of water, the discharge of dredged spoil, rock, sand, and biological materials threatens to increase the amount of suspended sediment, harming aquatic life. [Citation omitted.] These effects are no less harmful when the dredged spoil is redeposited in

---

128. Id. at 1403.
the same wetland from which it was excavated. The effects on hydrology and the environment are the same.\textsuperscript{131}

Courts generally find it appropriate for the Corps to require permits for sidecasting (moving significant volumes of earth around in a wetland) and deep-ripping (dragging four-to seven-foot long metal prongs through the soil behind a tractor or a bulldozer to gouge through a restrictive layer of soil),\textsuperscript{132} holding both are not “incidental” fallback.\textsuperscript{133}

In 2001, EPA and the Corps issued a final rule to clarify the scope of activities that may be subject to Section 404 permits.\textsuperscript{134} The final rule modifies the definition of “discharge of dredged material” and clarifies types of regulable discharges based on the nature of the equipment used by the permittee and agency experience.\textsuperscript{135} The rule creates a presumption that the use of mechanized earth moving equipment in landclearing, ditching, channelization, in-stream mining, or other earth-moving activities in waters of the U.S. require dredge and fill permits.\textsuperscript{136} Activities are generally exempted from this requirement if project-specific evidence shows that the activity results in only “incidental fallback.”\textsuperscript{137} Despite agency efforts to clarify the rule, uncertainty remains about the types of activities that constitute discharges, and the rule is currently on appeal.\textsuperscript{138} It is clear,

\begin{itemize}
\item \textsuperscript{131} U.S. v. Deaton, 209 F.3d 331, 336 (4th Cir. 2000). See also U.S. v. Bay-Houston Towing Co., 33 F. Supp. 2d 596 (E.D. Mich. 1999) (finding that the question as to whether defendant’s activities could be characterized as discharge under the CWA created a genuine issue of material fact thereby denying defendant’s motion for summary judgment); Greenfield Mills, Inc. v. O’Bannon, 189 F. Supp. 2d 893 (N.D. Ind. 2002) (“the court concludes that the term ‘discharge of dredged materials’ includes dredging that occurs by means of hydraulics”). \textit{But see} Froebel v. Meyer, 13 F. Supp. 2d 843 (E.D. Wis. 1998) (finding that a redeposit of sediment did not involve material that had been actively dredged, so there was no discharge of dredged material).
\item \textsuperscript{132} Borden Ranch P’ship v. U.S. Army Corps of Eng’rs, 261 F.3d 810 (9th Cir. 2001), aff’d by 537 U.S. 99 (2002) (“National Mining Assoc. v. U.S. Army Corps of Eng’rs, 145 F.3d 1399 (D.C. Cir. 1998), upon which Tsakopoulos heavily relies, does not persuade us to the contrary. That case distinguished ‘regulable redeposits’ from ‘incidental fallback.’ 145 F.3d at 1405. Here, the deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit.”). \textit{Id. at} 815.
\item \textsuperscript{133} U.S. v. Hummel, 2003 U.S. Dist. LEXIS 5656 (N.D. Ill. 2003) (“There is no dispute of material fact that Defendants dug trenches through the wetland, sidecast the resulting dirt and vegetation, and then redeposited this dredged material into the trenches to cover the new sewer pipes. The Court finds that these activities constitute a ‘discharge of pollutants’ as those terms are defined by the CWA.”).
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id. at} 4575.
\item \textsuperscript{138} \textit{Id. See ‘Incidental Fallback’ Defined Too Narrowly In Rewritten Tulloch Rule, NAHB Suit Says,} 33 \textit{DAILY ENV’T REPORT A-2} (Feb. 16, 2001).
\end{itemize}
however, that ditching and draining of wetlands is subject to severely limited and spotty federal oversight.

III. CONCLUSION: WHAT STEPS CAN WE TAKE TO PROTECT WETLANDS?

In an ideal world, all activities in wetlands (not just discharges) would be federally regulated. Likewise, all wetlands (not just those with surface water connections) would be federally regulated. Such federal regulation would recognize that wetlands are an integral component of the hydrological cycle upon which all life depends. Such federal wetlands regulation would also acknowledge the fact that wetlands are important parts of different ecosystems, and provide appropriate levels of protection not only for the wetlands, but for some adjacent areas as appropriate. Such federal wetlands regulation would recognize and account for cumulative impacts; and at the same time require significant measures to avoid impacts to wetlands; minimize those impacts deemed necessary; and only after such avoidance and minimization require immediate compensation for all lost values and functions.

Recognizing that we do not live in an ideal world, a best-case scenario would have Congress pass legislation to strengthen federal wetlands protections in light of these recent judicial and administrative developments. In fact, during this and recent congressional sessions, a number of bills have been introduced seeking to restore federal wetlands coverage cut back by the recent court decisions. The likelihood of such

139. See, e.g., Clean Water Authority Restoration Act of 2003, S. 473, 108th Cong. (2003) (which has as its purposes: (1) To reaffirm the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 816) to restore and maintain the chemical, physical, and biological integrity of the waters of the United States. (2) To clearly define the waters of the United States that are subject to the Federal Water Pollution Control Act. (3) To provide protection to the waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution.”); Clean Water Authority Restoration Act of 2002, S. 2780, 107th Cong. (2002) (an earlier version of the current S. 473, which had as its purposes “(1) To provide protection to waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution, including the Commerce Clause, the Property Clause, the Treaty Clause, and the Necessary and Proper Clause of Articles I and IV of the Constitution. (2) To regulate activities affecting the waters of the United States, including intrastate and isolated waters. (3) To restore and maintain the chemical, physical, and biological integrity of the waters of the United States.”); Wetlands and Watershed Management Act of 1997, H.R. 2762, 105th Cong. (Text includes the following amendments: “(a) PROHIBITION OF ACTIVITIES- Section 301(a) (33 U.S.C. § 1311(a)) is amended by inserting after ‘the discharge of any pollutant’ the following: ‘or other alteration of navigable waters’... (d) DEFINITIONS- In this section, the following definitions apply: ‘(1) DISCHARGE OF DREDGED MATERIAL- The term ‘discharge of dredged material’ means any addition of dredged material into navigable waters and includes, without limitation, any addition (including redeposit) of dredged material (including excavated material) into such waters which is incidental to any activity (including
legislation being enacted into law is, however, minimal: none of the bills introduced in recent years has been voted out of Committee. Such inaction is due to the inherent controversies surrounding wetlands protection and shows Congress’ general inability to reach a consensus on any environmental matter. However, there is growing awareness in Congress of the need to pursue solutions to the current situation.

Given the low probability of reworking CWA Section 404 in the near future, the best way to ensure protection is through strong guidance and regulations from the Administration. However, the Bush Administration has lived up to its anti-environmental reputation in its treatment of wetlands. For example, the SWANCC decision resulted in an agency proposal to narrow the definition of “navigable waters.” Likewise,

140. This can be verified by doing a “Bill Summary and Status” report for each of the bills mentioned above on the Library of Congress’ Thomas web page, available at http://thomas.loc.gov/.

141. As an example of this controversy, EPA and the Corps received over 135,000 comments on their Advance Notice of Proposed Rulemaking. See Docket, supra note 110. See also National Association of Homebuilders, Wetlands, http://www.nahb.org/generic.aspx?ContentId=9008.


guidelines for mitigation of allowed adverse impacts on wetlands are weaker than ever, despite a recent National Academy of Sciences study pointing to the failures of existing mitigation measures. In short, on a federal level wetlands are likely to either remain at today’s lowered level of protection, or lose even more protections.

Wetlands can, however, receive some increased protections through indirect means. Advocates can continue to challenge unduly narrow interpretations of existing law. Activists can work to enact or strengthen state and local legislation. Those who care about wetlands can work to see that the laws already in existence are properly enforced. Those who are concerned about wetlands also can engage in citizen education and

---


148. For example, Wisconsin passed state legislation following SWANCC. 2001 WISCONSIN ACT 6, available at http://www.dnr.state.wi.us/org/water/fhp/wetlands/links.shtml (last visited July 25, 2003). Furthermore, local ordinances offer strong possibilities for protections. See Thomas E. Slowinski, Comparison of Federal and Various Local Wetland Regulations in the Chicago Metropolitan Area, available at http://www.illinoisenvironmental.com/Presentations/Comparison%20of%20Federal%20and%20Various%20Local%20Wetland%20Regulations%20in%20the%20Chicago%20Metropolitan%20Area.htm (last visited July 25, 2003). “DuPage County has been regulating wetlands since 1992 under the DuPage County Countywide Stormwater and Flood Plain Ordinance and has significant overlap with the COE wetland permit program. Kane County DEM and Lake County SMC regulate only isolated wetlands. Lake County has recently entered into an Intergency Cooperative Agreement with the COE that will allow SMC to make preliminary jurisdictional determinations throughout Lake County.” Id.

organizing grassroots campaigns. Moreover, we can educate our children about the importance of wetlands.

It will take hard work to keep our nation’s wetlands wet. Nevertheless, remembering Emily Dickinson’s words “sweet is the swamp with its secrets,” we must undertake that work to protect the functions and values of wetlands for future generations.


I. INTRODUCTION

You are not here merely to make a living. You are here in order to enable the world to live more amply, with greater vision, with a finer spirit of hope and achievement. You are here to enrich the world, and you impoverish yourself if you forget that errand. — Woodrow Wilson

In March of 2002, the President of the World Bank, Jim Wolfensohn, made a presentation to the Woodrow Wilson Center on the future of the World Bank development agenda after the events of September 11th. Mr.
Wolfensohn asked the staff of the World Bank to share his vision of the future of the World Bank. On that occasion, he stressed:

After September 11th, poverty is our greatest long-term challenge. Grueling, mind-numbing poverty which snatches hope and opportunity away from young hearts and dreams just when they should take flight and soar.

Can we win a war against poverty? And if we can't be sure, should we wager our resources? Can we afford to lose the war against poverty? How much are we prepared to commit to preserve our children's future? What is the price we are willing to pay to make progress in our lifetime toward a better world? And to the doubters I would say: Look at the facts. For the facts show that despite difficulties and setbacks, we have made important progress in the past, and we will make progress in the future.

However, in order to understand the role of the World Bank in the struggle against poverty, it is imperative to clearly define the power relations among the industry's major forces: the buyers, competitors, suppliers, and potential substitutes.

Thus, the objective of this paper is to apply Michael Porter's Five Force Model to the Regional Department for Latin America and the Caribbean Region of the World Bank. By doing so, we can respond to the questions above and develop a framework that could be used as part of a broader strategy for other multilateral development banks ("MDBs"), and in particular the World Bank. We will focus our attention on the normal lending activities of the World Bank in the region and its private sector lending activities through the International Financial Corporation ("IFC").

---

1. See generally Michael E. Porter, Competitive Strategy (1980) (The present discussion takes as the major output of the multilateral development banks ("MDBs") the amount of lending provided to the Region. Due to the nature of MDBs, profitability is not be a good way to measure the success or failure of a MDB. Currently there is a discussion under way to develop an "output" oriented approach. However, there is no agreement yet on how to effectively measure the effectiveness of MDBs' outputs.).
II. FIVE FORCES ANALYSIS

A. The Role of MDBs in the Industry?

Thus is said that one who knows the enemy and knows himself will not be endangered in a hundred engagements. One who knows neither the enemy nor himself will be invariably be defeated in every engagement. –Sun Tzu, The Art of War, Planning and Offensive

One of the problems facing international financial institutions is how to clearly identify the industry in which they are acting. In many instances their mission is confused with the area in which they are acting. For example, it has been said that the World Bank is in the “poverty alleviation” business. However, by definition, there is no such thing as a business to alleviate poverty.

In order to identify the industry in which MDBs are acting, we have to look at the product MDBs are providing to their clients and their core competencies. The core competency of MDBs is to lend money to governments in developing countries and economies in transition. These funds, in turn, can be used to cover shortfalls in budgets or to allow governments to continue program development without having to increase their debts by borrowing from the international capital markets. As a result of providing this financial assistance, MDBs introduce their own policy agendas into the governments to which they lend money. Therefore, we can conclude that MDBs are competing in the global capital markets.

Thus, it can be said that MDBs compete with investment banks for their clients and not with other official development institutions, such as United States Agency for International Development (“USAID”) or Deutsche Gesellscaft für Technische Zusammenarbeit (“GTZ”), or private foundations such as the Rockefeller Foundation. This makes sense if we look at the reason why MDBs were actually created. The initial idea to create MDBs was simple and perfectly adapted to the opportunities and constraints of the capital markets in the postwar era. With capital flows restricted, as well as financially risky, many governments were unable to attract foreign private capital to finance public sector activities.

The business model of MDBs was to create an institution backed by the capital commitment of capital rich countries, such as the United States, which could borrow at the lowest market rates and lend economically to countries with need. First in line were nations destroyed by the war and those in the early stages of economic development. Today, however, the
scope has expanded to those countries that are simply in need of international financial support and cannot access international financial markets to borrow money on reasonable financial terms on their own.

In return for this more favorable rate, the borrowing country agrees to undertake a set of actions called conditionalities, which are designed to reform the borrowing country’s economic sectors in accordance with a set of policy measures identified by MDBs’ own political agenda. The World Bank defines its agenda based on the need to achieve its Millennium Development Goals.

**B. Who are the competitors in this market?**

1. Inter-American Development Bank

The Inter-American Development Bank (“IDB”), the oldest and largest regional multilateral development institution, was established in December of 1959. The IDB was created in response to the limitations of the World Bank and the IMF, also known as Bretton Woods institutions, which were increasingly focusing away from Latin America and the Caribbean Region towards other parts of the world. The goal of the IDB is to help accelerate economic and social development in Latin America and the Caribbean.

In carrying out its mission, the IDB has mobilized financing for projects that represent a total investment of two hundred and sixty-three

---

billion U.S. dollars. Annual lending has grown dramatically from two hundred and ninety-four million dollars in approved loans in 1961 to almost five point three billion in 2000. Loans peaked in 1998 at just over ten billion dollars.

The IDB is considered extremely "Latin" and close to its client governments. Its President, Enrique Iglesias, is a well-known former Uruguayan Foreign Minister. His influence has given the IDB a definite Latin American flavor. Nevertheless, despite these attempts to be as close as possible to their clients, the IDB's disbursement ratio of approved loan commitments is extremely low compared to the World Bank and the Andean Development Corporation ("CAF").

2. Andean Development Bank

The Andean Development Corporation provides development financing to promote sustainable development and trade integration in the Andean Region (Bolivia, Colombia, Ecuador, Peru, and Venezuela). It is currently the leading source of multilateral finance in the Andean region. Its capital ownership is structured so that the five Andean shareholder countries contribute ninety-five percent of the paid in capital and ninety-nine percent of the callable capital. To date, these shareholders have borrowed twenty-five billion dollars on terms they would not have enjoyed if their countries had remained outside the collective.

Unlike the World Bank and the IDB, the amount paid into callable capital by the CAF is high, nearly fifty percent (compared to five percent for the World Bank). In 1993, the CAF received an "A" investment grade rating from Standard and Poors as well as Moody's and Fitch. This rating is now higher than any other sovereign in Latin America. The CAF's success in a region, characterized by high volatility, economic crisis, and political instability has much to do with its unique structure. Shareholders have a clear self-interest in maintaining and increasing CAF's institutional credibility and have opted to keep their obligations to CAF in full despite numerous crises.

4. Spanish is the working language in the IDB, and many of its senior advisors are former Ministers of Finance from the region. The modus operandi of the institution is similar to other institutions in Latin America.

5. See BLACK'S LAW DICTIONARY 198 (7th ed. 1999) ("security redeemable by the issuing corporation before maturity").
3. Caribbean Development Bank

The Caribbean Development Bank ("CDB") was established on October 18, 1969, in Kingston, Jamaica. Its purpose was to contribute to harmonious economic growth and development of member countries in the Caribbean. In addition, CDB has promoted economic cooperation and integration among its member countries—with special regard to the needs of the less developed members of the Caribbean. Major donors to the CDB include Canada, the United Kingdom, the United States, Germany, and the IDB. Since its establishment, the CDB has provided nearly two billion dollars in loans and credits to Caribbean countries.

4. The World Bank

The World Bank Group ("the Bank") is one of the world's largest sources of development assistance. The Bank, which provided over seventeen billion dollars in loans to its client countries in fiscal year 2001, is now actively working in more than one hundred developing economies. It brings a mix of financial aid and ideas to improve living standards and eliminate the worst forms of poverty. For each of its clients, the Bank works with government agencies, nongovernmental organizations, and the private sector to formulate assistance strategies. Worldwide offices institute the Bank's programs, act as liaisons with government and civil society, and work to increase understanding of development issues. The World Bank provides between four and six billion dollars in loans and credits to the Latin America and Caribbean regions. See Chart 1 for a comparative analysis of lending commitments of all MDBs to the region.

The World Bank has been accused of lacking a clear understanding of what is happening in the Latin American and Caribbean regions. For example, until 1999, the Vice Presidents responsible for Latin America were Pakistanis who did not speak Spanish. However, new Vice President David de Ferranti, a U.S. citizen, has made a clear commitment to change the image of the World Bank in the Region. Based on the latest client surveys, he has been successful.6

5. Private Investors

When interest rates in industrialized ("OECD countries") are low, capital is abundant and opportunities to earn a good return are scarce.
Private investors start looking at emerging markets as a potential source of income. In the 1990s, emerging market funds became an investment option for many institutional and private investors in OECD countries.

High rates of return made this industry extremely attractive. Many investors, such as MDBs, who traditionally imposed tougher non-financial conditions on the borrowers, saw themselves competing with emerging market funds that provided money to governments in developing countries without proper safeguards. The immediate impact on MDBs was a reduction in lending volume to their clients. In many cases, clients preferred to borrow money at a higher rate without the strings that are attached to the loans of institutions such as the World Bank or the IDB.

Currently, the situation has changed significantly. The Asian, Russian, Brazilian and Argentinean financial crises have increased the risk of such investments, and have therefore reduced the attractiveness of such funds. Thus, investors have avoided putting money into emerging markets. This leaves only extremely selective investments in low risk countries such as Mexico. The situation may change again if economic conditions in industrialized countries improve along with confidence in some emerging economies. Should this occur, MDBs might be crowded out because private investors can become very selective. This leaves MDBs only the high-risk, low return, and small volume candidates.
C. Competitive Analysis

MDBs, namely the IDB and the World Bank, provide approximately fourteen to seventeen billion U.S. dollars in loans and credits to the Latin American and Caribbean Regions. See Chart 1. Rivalry among these MDBs is moderate in the Latin America and Caribbean regions, particularly between the IDB and the World Bank.

Why? Both institutions offer similar lending and advisory instruments; both lend on similar terms and volume; and both cater to the same governments. As a result, they compete for business in a market that is limited by the capacity of the country to take on additional debt.

The World Bank enjoys a comparative advantage in the Latin American and Caribbean regions. Comparing the terms of the loans both institutions offer, the World Bank presents the borrower with better terms than the IDB (total spread equivalent over LIBOR: World Bank: 64 basis points, IDB: 114). Furthermore, the World Bank can provide global expertise, whereas the IDB's knowledge base is more regional.7

However, from the point of view of the borrower, the IDB is considered to be more lenient when it comes to negotiating the loan. Furthermore, its "Latin nature" makes it easier to deal with for Latin American and Caribbean countries. Clients also assert that the IDB has better customer service than the World Bank. However, in terms of disbursements, the IDB's willingness and time frame to disburse their commitments after

---

Board approval is significantly longer than the World Bank. Ultimately, it is hard to say which institution prevails because governments often try to play one institution against the other.

Some proposals are being floated to replace the World Bank with regional institutions such as the IDB. Although possible, I do not believe that the clients or the donors would be better served by eliminating competition, thus creating a virtual monopoly for the IDB in the region. The smaller players in the region, such as CAF and CDB, do not compete directly with the IDB or with the World Bank. Instead, they have carved out a niche market for themselves by concentrating their lending and advisory services on smaller activities limited to specific sub-regions.

D. Who are our buyers?

The main buyers, or clients, of MDBs are governments, and in particular their ministries of finance. From the period spanning the end of World War II until 1990, MDBs, particularly the World Bank, were the main source of capital for many governments. However, in the 1990’s, the implementation of the so called “Washington Consensus” (free market reforms, deregulation of the economies, democratization, etc.) prompted private capital flows to many middle income countries (“MICs”), as well as to a few low income countries such as China and India.

III. THE ROLE OF MDBS AND PRIVATE FLOWS TO EMERGING MARKETS ECONOMIES

By the 1990s, private flows to the developing world suddenly outnumbered the flows from MDBs. This has raised the question of whether the original mission of MDBs still makes sense in these economies. See Chart 2. Until 1997, the reality on the ground seemed to support those who argued in favor of a retreat of MDBs from the global capital markets. This was based on the assumption that the buyers were becoming too powerful and were actually using the private capital flows as leverage against MDBs.

Argentina, Brazil, and Mexico consumed around seventy-five to eighty-five percent of the total capital flows to the region. Flows from the private sector to these countries in the 1980s were six times that of MDBs. The

8 See THE INTERNATIONAL FINANCIAL INSTITUTION ADVISORY COMMISSION, March 8, 2000 Report 68, available at http://www.house.gov/jec/imf/meltzer.htm (“To function more effectively, the development banks must be transformed from capital intensive lenders to . . . providers of regional and global public goods.”)

ratio of private/public capital flows increased in the 1990s, peaking in 1994. Therefore, a crisis in one of these countries can have a significant impact, not only on the region, but also on the borrower.

In the Latin American and Caribbean Region, the success of the first wave of 1990’s reforms seemed to indicate that graduation of some countries out of MDBs system was a reality. Demand for borrowing from the World Bank and other MDBs in 1999 and 2000, in terms of percent of GDP, was below 1980 levels. In many loan negotiations, the borrowers argued that they could get a better rate with the World Bank. Therefore, they tried to leverage the private investor to improve the terms of the loan.

![Chart 2: Net Resource Flow to the Emerging Market Economies](image)

Source: Author’s calculations based on World Bank data.

During this period, the buyers also started to pressure MDBs by demanding reduction or more flexibility in the conditionalities applied to the loans. However, the 1994 Mexican financial crisis changed the situation again. The international community felt that there was need for a concerted effort to respond to the requirements of the emerging economies and ensure a constant flow of resources to developing countries to avoid extreme downturns in their economic cycles. The amounts requested to cover these needs skyrocketed because of the exposure of emerging economies to private international debtors. International debt payments had increased in relative and absolute terms. Governments became much more dependent on funding from MDBs to compensate for shortfalls in their current account balance. In this context, emerging economies such as
Turkey, South Korea, Argentina, Brazil, and Mexico started to demand “emergency packages” to rescue their economies from cash flow problems. In requesting these packages, these countries argued that the downfall of one economy would have a devastating impact on the international financial markets. If their economies crashed, poverty would increase and much of the gains of the 1990s would be lost.

The prospects for the near future have dimmed even further in light of the weaker international economic and political environment. Growth rates for the Latin American region as a whole have gone down to 0.3% for 2002 and 0.6% for 2003. In 2004, the region is once again expected to reach growth rates of 3.5% or higher. Based on projections prepared by the World Bank, the Latin America and Caribbean Region, will require an additional net inflow of resources valued at seventy-five billion dollars in 2002 to cover new financial needs. For 2003 and beyond, we could assume that the demand for fresh money will increase at least at the projected GDP growth rate of 3.5%. These projections confirm that demand for international financing for the Latin America and Caribbean Region is expanding.

Despite this increased demand, it is highly unlikely that in the next three to five years private sector financing will play as significant a role in providing funding for emerging economies as it did in the past due to the growing political and economic risks in the region. See Chart 3. Under the best case scenario, the market will become much more selective by promoting investment in countries that bear the lowest risk for their investments.
The MDBs responded to these conditions and provided emergency assistance through what became to be known as “adjustment lending” operations. Huge, single, and quick, these disbursements of more than two to three billion U.S. dollars became the modus operandi for MDBs and replaced project oriented investment loans. Encouraged by this shift in demand, MDBs tried to increase their conditionalities, in exchange for lower interest rates, to respond to their constituencies in donor countries.

Over time, MDBs became more involved in issues that were outside their core competencies. MDBs thus became more alienated from their clients in developing countries, because the conditions imposed went against the political will of the borrower. In this context, during such times of crisis, MDBs should not be viewed as mere adjuncts to emergency stabilization lending programs such as the International Monetary Fund (“IMF”).

One way to allow MDBs to avert crisis would be to develop a new product line and provide pre-approved, counter-cyclical lending programs to help emerging economies anticipate, respond to, and ultimately avoid financial shocks. For example, a drawdown option makes sense

---

particularly in countries that have good access to private markets because of reasonable policies and institutional environment. If this proposal materializes, it could reduce the competition of MDBs with private capital flows, but it could also increase the risks of MDBs.\textsuperscript{10}

Another consideration concerns the exposure of MDBs’ activities in other countries within the region. Due to the relative importance of funding, compared to their current account balances, smaller countries such as Peru, Colombia, and others in the Caribbean region are more inclined to accept conditionalities suggested by MDBs. The return on smaller investments, ranging from one hundred to one hundred and fifty million dollars per loan, looks more favorable to these countries in terms of quality and development effectiveness. Although these countries are small borrowers, demand is increasing and becoming progressively more important in terms of both quality and quantity.

\textbf{IV. EXPOSURE AND NET INCOME CONSIDERATIONS}

We have to also keep in mind an additional factor that could have a significant influence on the power relation between MDBs and the governments—that MDB’s net income depends heavily on revenue generated from loans to middle income countries. For example, for the World Bank to be financially viable it needs to lend between ten and twenty billion U.S. dollars a year. Below that amount, the revenue stream is insufficient to pay off the commitments in the market. Above twenty billion dollars, it would be extremely difficult for the Bank to raise enough money without compromising its credit rating.

From 1997 to 2001, the World Bank’s lending to Argentina, Brazil, and Mexico accounted for thirty percent of its total worldwide commitments. Therefore, a reduction in the demand from these countries will have a negative impact on the long-term financial sustainability of MDBs, including the World Bank. This makes lending to these countries imperative in order to ensure a constant flow of net revenue for MDBs. In other words, to stay alive financially, MDBs also need the big borrowers the same way smaller countries need MDBs to cover their financing. This situation, also known among the staff of MDBs as “pressure to lend,” generates an important shift of power towards countries such as Mexico, commitments against loss of confidence in the Presidential election as an example of a new MDB project).

\textsuperscript{10}See \textit{id.} at 17–18.
Brazil, or Argentina. These countries are aware of the situation and take advantage of it by requesting large amounts of money in exchange for commitments. These commitments, however, are often not even worth the paper on which they are written.

Another consideration is the risk that such a portfolio concentration generates. As we can see in Chart 3, some countries are already getting close to their exposure limits. Additionally, in 2001, the credit quality of World Bank’s loan portfolio deteriorated, reflecting a net deterioration in the risk ratings assigned to World Bank borrowers. This may limit the capacity of the World Bank to respond to demands for new funding. The IDB is facing a potentially more serious limitation in its capacity to lend to the Region, because its exposure to Argentina, Brazil, and Mexico is even higher.

Looking at the recent trends in MDBs’ portfolios, the concentration will probably become even worse. The deepening dependency of MDBs on these major borrowers could in the next few years have a negative effect on the viability of MDBs, if one of these countries were to default on its debt.11

---

11 In reality, this has already happened with smaller countries such as Ecuador, or with rogue states such as Yugoslavia. However, the lenient bylaws of the MDBs make it extremely difficult for a country to default on its debt. The recent announcement of the IFC to put aside some provisions to respond to a
V. Suppliers

A. Financial Constituencies

As previously mentioned, the financial strength of MDBs is based on the support they receive from their shareholders as well as its array of financial policies and practices. Shareholder support is reflected in the capital backing MDBs have received from their members, and in debt servicing obligations.

To raise funds, MDBs issue debt securities in a variety of currencies to both institutional and retail investors. These securities are generally rated “B” or higher, and in the particular case of the World Bank they are rated “AAA”. These borrowings, coupled with their equity, are used to fund lending and investment activities as well as general operations. MDBs working in Latin America and the Caribbean Region hold their assets primarily in U.S. dollars, Euros and Japanese Yen. They mitigate their exposure to exchange rate risks by matching the currencies of their liabilities with those of their assets.

Because government shareholders back MDB portfolios, they are an extremely solid and conservative investment alternative, similar to T-bonds. Absent a major problem in the international financial system, the relationship with the financial suppliers does not seem to be an issue. However, we should keep in mind that if some of the larger debtors (such as Argentina) were to default on MDBs, the situation could change and the bonds issued could lose their ratings. This would undermine the capacity of MDBs to fulfill their role.

B. Political Constituencies

The anti-globalization movement has created an increasingly hostile environment for MDBs in general, and for the World Bank in particular. This climate has manifested itself during the gatherings MDBs have organized for their shareholders. Beyond the anecdotal evidence, the main possible default on some of its investments in Argentina is a clear sign that this is scenario is becoming probable scenario.

danger for MDBs lies in an erosion of public opinion in donor countries. This loss of support could have a long-term impact on:

- The capacities of the MDBs to raise capital and therefore keep their high credit rating.
- Their capacities to attract and hire new staff into the institution from top universities. This is particularly dangerous, because without its human capital and their capacity to present innovative responses to the needs of their clients, the MDBs become just another source of funding in the market.

C. Conservative Forces

The recent trend in some of the larger shareholders towards an increased unilateralism and politicization of MDBs’ activities is evident in the day-to-day activities of MDBs, as well as in the policy discussions in some of these countries.

In this context, some academics from conservative constituencies in the U.S. have proposed changing the system of MDBs by reducing their number and by having the MDBs provide grants instead of loans. Although opposed by most shareholders (with the exception of the U.S.), even the partial implementation of this proposal could have a negative impact on the development community as whole and on the credibility of the MDBs. However, despite these debates and the attacks on the MDB system, I would hypothesize that for the next few years the power relations will be balanced in favor of the industry more than the suppliers.

D. Potential Entrants

The capacity to enter this market is extremely difficult. From the public sector perspective, some governments tried to create new MDBs to satisfy specific needs of a group of countries or sectors of the economy. However, due to the extremely high capital requirements and the need to rely on the political support of the constituencies in capital providing countries, the chances for such an initiative are low. For example, the MERCOSUR trade pact (formed by Argentina, Brazil, Paraguay, and Uruguay) tried to create a sub-regional development bank similar to the

---


CAF. However, due to a significant lack of capital, the initiative never materialized.

It seems simple for a private investment fund to enter the international capital markets for sovereign debt lending. However, looking at the existing risks and the limited capacity to identify potentially viable investments in recipient countries, such an initiative becomes extremely complex and daring. Based on this risk, the threat of entry to this market is rather low.

E. Substitutes

Potential substitutes of MDB’s are official funds provided by Governments through official development assistance (“ODA”) and non-governmental organizations (“NGOs”). ODA is mentioned as a potential substitute, in the form of grants, for lending activities of MDBs. Currently, around fifty billion U.S. dollars are channeled through official development assistance from OECD countries and other multilateral institutions towards emerging economies.

Compared to ODA, the twelve billion dollars provided by MDBs seems rather low. However, the comparison changes dramatically if we consider that the fifty billion dollar figure includes military aid, including that provided by the U.S. to Israel, Egypt, Colombia and other countries. ODA funds are either channeled through bilateral government institutions such as USAID, GTZ, Canadian International Development Agency (“CIDA”), and the U.N. system or through NGOs. Nevertheless, due to ODA’s highly politicized nature, its low per capita graduation threshold, and the nature of its grants, the potential for ODA to replace MDB lending to Latin America and the Caribbean Region is rather low.

15 The situation may change if we were to consider the concessional arm of the World Bank IDA. Here ODA may replace at least partially the activities of the World Bank.

F. Bilateral Aid

Conditions tied to bilateral aid are so stringent that it becomes, in many cases, extremely difficult for the recipient to use the resources. This often occurs when the resources are targeted at lower income countries. In the Latin America and Caribbean Region, ODA plays an even smaller role due to the relatively higher GDP/per capita levels of the region.

Bilateral aid is also perceived as a complement to resources provided from the MDBs, and not as a substitute. The reason for this is that (with the exception of military aid) grants are normally smaller and targeted towards
specific activities, whereas MDBs use a more programmatic approach. Grant money based on non-economic considerations is also provided to projects that are not viable from an economic perspective.

G. U.N. Agencies

Funding provided to U.N. agencies is considered part of ODA flows. Once again, the nature of the projects and levels of funding provided to the countries are different from the resources provided through the MDBs. The main difference is the fact that grant money is mainly used for projects that otherwise would not be viable from an economic perspective.

Politically, MDB and U.N. boards have agreed on a division of labor; establishing a close cooperation between the United Nations Development Program ("UNDP"), United Nations Children’s Fund ("UNICEF"), the FAO and the MDBs. This facilitates the complementary use of resources and the maximization of returns in terms of measurable and non-measurable outputs. Ultimately, from a financial point of view, resource allocation provided by the U.N. agencies to Latin America and Caribbean regions is so small (in absolute and relative terms) that it minimizes the threat of substitution for MDBs.

H. Non-Governmental Organizations ("NGOs")

The NGO movement has gained momentum since the United Nations Conference on Environment and Development in 1992. NGOs have become extremely active in advocating, funding, and implementing projects on the ground. Donor governments have also decided to fund some of their activities through NGOs, because they feel they are more responsive to the needs of people on the ground.

Despite the fact that these organizations have become effective in doing their task at the field level, they have not been able to expand their functions or mandates to compete directly with MDBs. Although some NGOs would like to see MDBs disappear from the face of the earth, they would not be able to replace them. Thus, due to the nature of their funding, the NGOs compete more with U.N. agencies than with the loans from MDBs.

Additionally, one donor country is pushing the MDBs to provide part of their resources through grants and not loans in order to channel them through NGOs. Despite the fact that this could endanger the long term sustainability of the concessional lending arm of the MDBs, while also compromising the development effectiveness of their activities, this would
constitute more of a threat of substitution for the NGOs and U.N. system than a replacement of the MDBs.

VI. CONCLUSIONS AND RECOMMENDATIONS

- Due to the lack of differentiation, rivalry will remain high over the next years.
- Demand for lending from MDBs, in particular Argentina, Brazil and Mexico will increase over the next years.
- MDBs will have to take some action to diversify their portfolios in order to avoid seeing their credit ratings affected. One way to achieve this risk diversification could be achieved through:
  - An increase in the number of loans and diversification across the Region (in particular away from Argentina, Brazil and Mexico and more towards Peru, Ecuador, El Salvador, etc.) combined with a reduction of their average size.
  - For Argentina, Brazil, and Mexico, new lending instruments could be considered to support countercyclical policies without increasing ex ante the exposure to these countries.
  - Increase flexibility in MDBs’ project based lending activities, moving from individual projects to a programmatic sector-wide approach.
- In order to promote their own political agenda, (reaching MDBs) and to respond to their political constituencies, MDBs should diversify their lending towards lower to middle income countries in the region such as Peru, Ecuador and Colombia, where their development impact could be higher.
- Reduce the processing time of MDBs’ loans and their preparation costs, making them more competitive with other private and public institutions.
- Strengthen MDBs’ knowledge base and advisory work in the countries of the Latin American and Caribbean Region.
- Due to the political pressure of some constituencies, an increase in rivalry between the IDB and the World Bank can be expected. Thus, MDBs should strengthen their political outreach activities to constituencies in developed countries to counterbalance arguments for their radical reform.