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Recommended Citation

Cho, Yoona. "The Role Of The Public In The American Pika's Future." *Sustainable Development Law & Policy*, Spring 2010, 41, 56.

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THE ROLE OF THE PUBLIC IN THE AMERICAN PIKA'S FUTURE

by Yoona Cho*

The U.S. Fish and Wildlife Service (“the Service”) recently announced its decision not to list the American pika under the Endangered Species Act (“ESA”).¹ While many view this as a defeat, the story of the American pika is instructive in that it demonstrates that science alone cannot drive change and ensure protection for vulnerable species. Rather, it has historically been, and will continue to be public participation and pressure that will bring about the necessary change.

The American pika is a small mammal that lives on the fields of alpine and subalpine mountain areas. These small mammals are extremely sensitive to hot temperatures, and certain to be impacted by climate change.² In 2007, the Center for Biological Diversity (“CBD”) filed a petition with the Service to list the pika under the ESA.³ Then in 2008, the CBD filed lawsuits against both the California Fish and Game Commission and the Service for failing to list the pika.⁴ As a result of these actions, the Service decided to launch a full review to determine if pikas warrant protection under the ESA.⁵

The ESA directs the Secretary to make a determination solely on the basis of the best scientific and commercial data available.⁶ This language, however, fails to provide a clear standard. After completing what it called an “exhaustive review of the scientific information currently available,” the Service determined that the pika’s survival is not at risk for the foreseeable future.⁷ The Service’s finding, however, contradicts certain scientific studies which show that the pika is rapidly disappearing from the United States.⁸ Given the frequent variance of scientific data, the pika’s story serves as a warning to environmental advocates: public participation and pressure, not science, are the most important tools for saving the pika and other endangered species.

Principle 10 of the Rio Declaration declares that environmental issues are best handled with active participation from concerned citizens.⁹ Wide acceptance of principle 10 led to the adoption of the Aarhus Convention,¹⁰ which calls for three standards to be met in decision-making: public participation, access to information, and access to justice.¹¹ More than empty rhetoric, these provisions have since been used to protect vulnerable species in a number of cases.

The road to protection has been long and complicated for the polar bear. Science certainly provided the rationale for their protection, but it was the efforts of a group of interested citizens that led to the long-awaited listing of the bears. The journey began with a petition filed in 2005 by the CBD, which was promptly joined by the Natural Resources Defense Council and

Greenpeace.¹² These organizations filed a lawsuit against the Bush administration for ignoring the petition.¹³ After three years and much struggle, the Service published a final rule announcing its intent to list the polar bear as a threatened species under the ESA.¹⁴ The deciding factor was continuous pressure from the public, not scientific proof.

Concerned citizens have also prevailed in the courtroom. When the Secretary of the Interior failed to include mute swans on the list of birds protected by the Migratory Bird Treaty Act, a citizen filed a complaint in District Court.¹⁵ She claimed that this failure was arbitrary and capricious under the Administrative Procedure Act.¹⁶ Ultimately, the Court of Appeals found for the complainant, ruling that the reference to “swans” found in the treaty indisputably included mute swans.¹⁷ Similar efforts saved a little-known species that lives in the Little Tennessee River. Environmental groups filed a suit against a construction company seeking to enjoin the completion of the Tellico dam, which would have caused the extinction of the snail darter.¹⁸ Despite recognizing that this injunction would cause considerable economic loss, the Supreme Court ruled to protect the snail darter’s habitat.¹⁹

In addition to these examples of proactive citizen advocates, provisions in relevant legislation also demonstrate the increasing recognition of the public’s role in protecting the environment. The National Environmental Policy Act has a provision that requires the government to provide for public involvement in completing its environmental impact assessments (“EIA”).²⁰ Provisions requiring public input during the EIA process are not unique to the United States. The European Union compels similar action through its directive.²¹

The story for the American pika continues, and the recent announcement is only a hurdle. Rarely has society gained meaningful change through governmental action alone. Continuous efforts by the concerned public armed with the necessary scientific data will effectuate policy change. Public participation has proven effective for the polar bear, and hopefully it will do the same for these small mammals in the mountains.



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¹ Press Release, U.S. Fish & Wildlife Serv., Endangered Species Act Protection for the American Pika is Not Warranted (Feb. 5, 2010), *available at* <http://www.fws.gov/mountain-prairie/species/mammals/americanpika/PressRelease02052010.pdf>.

² U.S. Fish & Wildlife Serv., Endangered Species: American Pika, *available at* <http://www.fws.gov/mountain-prairie/species/mammals/americanpika/>.

³ Ctr. for Biological Diversity, Action Timeline, http://www.biologicaldiversity.org/species/mammals/American_pika/action_timeline.html.

⁴ *See id.*

⁵ Press Release, U.S. Fish & Wildlife Serv., Fish and Wildlife Service to Conduct Status Review of the American Pika (May 7, 2009), *available at* <http://www.fws.gov/mountain-prairie/species/mammals/americanpika/05072009PressRelease.pdf>.

⁶ Endangered Species Act, 16 U.S.C. §§1531-1544 (1973).

⁷ *See* Press Release, U.S. Fish & Wildlife Serv., *supra* note 1.

⁸ About My Planet, American Pika Declined ESA Listing Despite Warming Concerns, <http://www.aboutmyplanet.com/environment/american-declined/> (last visited Apr. 18, 2010).

⁹ United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, 31 I.L.M. 874 (1992).

¹⁰ Aarhus convention, 2161 U.N.T.S. 447; 38 I.L.M. 517 (1999), *available at* <http://www.unece.org/env/pp/documents/cep43e.pdf>.

¹¹ *See id.* art. 1.

¹² About.com, The Long Road to Listing: Protecting the Polar Bear Under the Endangered Species Act, <http://animals.about.com/od/carnivores/qt/polar-bearesa.htm>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See* Hill v. Norton, 275 F.3d 98, 102 (D.C. Cir. 2001).

¹⁶ *Id.*

¹⁷ *Id.* at 104.

¹⁸ *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

¹⁹ *See id.* at 173.

²⁰ National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (1969).

²¹ Council Directive 97/11, art. 7, 1997 O.J. (L 073).