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Q&A: A new history of the ESA

Lawyer and environmental historian Lowell Baier talks about his book on the Endangered Species Act.



BY: **MICHAEL DOYLE** | 04/21/2023 01:45 PM EDT



Lowell Baier has written a new history of the Endangered Species Act. | Len Spoden

GREENWIRE | *Second in an occasional series.*

Lowell Baier was present at the beginning of the Endangered Species Act.

Now, in time for the landmark law's 50th anniversary, the 83-year-old lawyer and environmental historian is coming out with what's being billed as the most comprehensive history of the ESA.

Set for publication in mid-August by Rowman & Littlefield, Baier's mammoth work, titled "The Codex of the Endangered Species Act," digs deep into the genesis and subsequent evolution of the 1973 law. It's the first of what will be two volumes.

Spanning 700-plus pages, the book elucidates well-known ESA episodes such as the protracted fight over habitat for the northern spotted owl and the Tellico Dam-versus-

snail darter controversy, while also illuminating the trade-offs and turns of the wheel that have shaped the law and its impact (*Greenwire*, April 3).

A graduate of Valparaiso University and the Indiana University School of Law, Baier practiced law in Washington, D.C. This is his fifth book.

The interview has been condensed and lightly edited for clarity.

When did you get the crazy idea to write a comprehensive history of the Endangered Species Act?

About seven years ago. I knew the 50th anniversary was coming up. I looked around, and the histories that had been written were pretty brief, and they would only focus on the issue of the day or one aspect of the law.

What prior experience did you have with the ESA?

I knew [Democratic Rep.] John Dingell from Michigan, who was the bill's prime mover. I watched him work with [prior laws], and he would tell me when I would see him occasionally about their shortfalls. And so I was there when he was working during '72 and '73 on the sausage-making, as we call it.

At that time, were you there on behalf of clients?

No. I knew him because I'm a sportsman. I'd hunt, shoot and be in the wild. And John was a great sportsman, and so I met him through the sporting world. And we just had kind of hit it off, as you know some people do.

What has been the hardest part for you in writing this book?

Reading all of the court decisions and making sense of them. The courts, in my opinion, have lost sight of the big picture of what the ESA is.

How did you decide what to put in and what to leave out?

It was a matter of priorities, and figuring out what thought really deserved to be included. I mean, it was getting beyond control, and so I went back and melted down a lot of areas to try to make it more readable.

How did you actually conduct the research?

Well, first of all, the interviews. I knew that the people that were involved were going to die. And John [Dingell] was at the top of the list, as well as other older people that were involved back then, like Dr. Lee Talbot from [the White House Council on Environmental Quality] and John Whitaker from the White House, etc.

And so I made it a point to basically hit the road with a tape recorder. I flew out to Dearborn [Mich.] for a day and spent a day with John recording his recollection. And I probably conducted 50 interviews with people around the country. [Dingell died in February 2019.]

I had an assistant, an attorney [Christopher Segal], and we went and we collected every magazine and newspaper article about the ESA.

I read every word in the congressional papers and the reports and the committee hearings and all the testimony at the hearings. I've read every word. And then the magazine and newspaper articles, I skim those and read some of them more in depth when they begin to talk about the polarization and the fighting and so forth.

And then we spent an awful of time down at the [National] Archives, going through unpublished materials, office memos, that kind of thing.

What did you find?

What struck me early on was the tremendous bipartisanship among [lawmakers'] dialogue and their gentility with each other, no matter how greatly that they might have differed over a particular issue. They were very gentlemanly in their dialogue, in their communications, their interoffice memorandum, that sort of thing.

I saw beautiful bipartisanship and courtesy amongst the members. And you don't see that today at all.

How was the law put into effect?

You have to look at who these people were: Lee Talbot. Frank Potter. Doug Wheeler. The assistant Interior secretary, Nathaniel Reed. They were hardened in the command-and-control mentality that President Eisenhower so ably used.

They were used to being in charge. They were used to being in control and running things, and so that's how the regulations got structured to be the way they are today. ... They're 5,000 pages, and the law is 50 pages.

Did you find surprises?

I was really amazed at the role played by Frank Potter, who was the subcommittee counsel for John Dingell's subcommittee. I really didn't anticipate him playing the major role that he actually did. He was really the peacemaker, because there were differences between certain members and certain NGOs out there, and Frank was the one that had his hand on that tiller.

Did the bill's authors anticipate the role that litigation would play?

They didn't. We weren't as litigious then as we are today. The litigation machines that the Center for Biological Diversity and Western Watersheds [Project] and others have built weren't in existence, and this litigation complex that's overtaken much of the ESA and other environmental laws was just not the focus of the legislators and the policymakers back then.

What effect does this litigation have on the ESA?

It's terrible, because what it does is it gums up personnel time. The federal budget only gives them so much money for personnel, and it takes an enormous amount of people and staff time to prepare and deal with the litigation, and then do all the follow-up that's ordered by the courts. Those biologists could be more readily dealing with species and species recovery plans and not litigation.

Final thoughts?

I used to be a Republican, and now I'm more of an independent. I consider myself as an educator and a peacemaker. And I'm trying to do a public service by putting these facts out there for people.

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salesops@politico.com

(571) 342-8232

