NOT FOR CITATION

IN SEARCH OF A LEGAL ARRANGEMENT FOR PROTECTING WILDLIFE AND ENDANGERED/THREATENED SPECIES ON PRIVATE LAND: A HARD LOOK AT SECTION 10 OF THE ENDANGERED SPECIES ACT AND PART VII OF KENYA'S DRAFT WILDLIFE BILL OF 1997

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1.0 Introduction

Kenya's legislative framework for wildlife conservation and management originated from a series of game ordinances in the early 20th century. These ordinances were designed to promote game hunting by an increasing colonial population, and to curtail perceived destructive indigenous African subsistence hunting activities. These ideas were manifested in the creation of national parks and game reserves built along the Yellowstone model. At independence the state maintained the restrictive legal regimes, providing few opportunities for local community involvement, despite increasing burdens of wildlife depredation. The restrictive legal regimes reached a peak in the 1970s when, in response to international concern over the decimation of elephant and rhinoceros populations, the government imposed additional bans on hunting and trade of wildlife products. In spite of increasing restrictions and protectionism, Kenya's wildlife resources continued to decline. In addition, these remnant populations increasingly inhabited areas outside the protected area system (PAS) intended to protect them. As a result, conflicts between wildlife preservation and land development escalated, with serious consequences for wildlife. The conflicts were aggravated by a rapidly-increasing human population wholly dependent on land resources for survival. Faced with a changing socio-economic and political circumstance, with explicit challenges for wildlife conservation, the Kenya government was forced to recognize the advantages of designing programs that would incorporate community conservation imperatives within the wider goals of wildlife conservation. This change in philosophy is exemplified by an increase in the number of community-based wildlife conservation programs, and more recently with attempts at legalizing and institutionalizing such efforts. The draft wildlife bill of 1997 (KWS, 1997), debated in parliament and awaiting enactment, is the epitome of this protracted process in Kenya's conservation history, and forms part of the focus of this discussion.

In the United States, early federal efforts at protecting wildlife emphasized the protection of individual species, with an essential focus on prohibiting the "take", or commercial trade, in any member of a protected species (Gidari, 1994). Such legislation included the Lacey Act of 1900, 16 U.S.C Section 3321-3378 (1988) ; the Bald Eagle Protection Act of 1940, 16 U.S.C Section 668-668d (1989), and the Marine Mammal Protection Act of 1972, 16 U.S.C. Section

1362 (13) (1988). None of these early efforts protected habitat on private lands or considered habitat modification as a form of prohibited take. Passage of the Endangered Species Preservation Act (ESPA) of 1966 (Pub. L. No. 89-669, 80 Stat. 926) marked the first time protection of habitat became part of a larger conservation strategy. For private lands, ESPA made no provision to prohibit "take", let alone habitat modification. Rather, it merely provided funding for an expanded land acquisition program to protect the habitat of threatened species on private lands. ESPA was revised 1969 and renamed the Endangered Species Conservation act (ESCA). The ESCA (Pub. L. No. 91-135, 83 Stat. 275) continued and expanded the government's land acquisition program, but also authorized the Secretary of Interior to promulgate a list of threatened wildlife worldwide and to prohibit importation of listed wildlife into the United States. A significant contribution of this legislation was to convene the international community to create treaty aimed at enhancing the conservation of endangered species, and the restriction of trade in any such species- the Convention on International Trade in Endangered Species of 1969 (CITES).

Up to this point, America's wildlife legislation was focused on the protection of species largely on federal lands; efforts to address species on private land were limited to purchase of such land. The realization that a more expansive approach was required to stem species extinction, and to operationalize new policies for preserving endangered species led to the enactment of the Endangered Species Act (ESA) in 1973, U.S.C.16 1531-1544 (1994). Its purpose was to conserve ecosystems upon which endangered species are dependent, and to provide programs that would achieve the recovery of these species. The Act sought to accomplish these goals through two mechanisms: the prohibition of takings (on all land) and the prohibition of the destruction of critical endangered species habitats. Although the ESA has provided protection for endangered species, its rigors have engendered controversy on multiple grounds, particularly the restrictions it imposes on private land. These have precipitated resentment among private landowners and developers who regard it as an expensive regulatory instrument, one that does not consider individual property rights in its pursuit of protecting wildlife and plants. Given that a substantial proportion of habitat for listed species is on private land, more proactive and voluntary collaboration between private landowners and the mandated

agency would have a net positive effect on protection and recovery. Such efforts would also serve to diffuse the growing antipathy of private landowners and developers to endangered species protection. Thus Congress in 1982, as a step towards reducing these conflicts and promoting partnerships, amended the ESA to accommodate incidental take of endangered species on private land. The amendment authorized the issue of incidental take permits to applicants, subject to the development of a Habitat Conservation Plan (HCP). HCPs detail specific obligations of permitees toward the protection of endangered species.

This discussion compares the community conservation program proposed by Kenya's draft wildlife bill of 1997 (KWS, 1997), and the habitat conservation planning component of the ESA. I examine the substantive (standards and principles) and procedural provisions of each statute, and the implementation challenges and prospects for each with the aim of identifying strengths and weaknesses, and defining possible remedies. Most importantly, I attempt to describe how both programs could borrow from each other. Both Kenya's draft bill and U.Ss ESA define programs to address the issue of species conservation on private land, and both lay emphasis on collaborative ventures between private parties and government agencies to achieve this goal. The strength of Kenya's proposed program is that it provides a mechanism for incorporating ecosystem concerns within the context of community involvement. On the other hand, the strength of the U.S program is that it provides greater opportunity for the general public's involvement in the process of planning for endangered species protection on private lands. Procedural provisions of both programs are very clear. However, both programs suffer from conferring discretionary powers to the agencies, and from the articulation of ambiguous substantive standards. Since both programs have been developed to respond to intense conflicts between private and public interest in conservation, as a result of unintegrated land use planning, I conclude that land use planning should be enhanced to prevent further conflict. More importantly, I recommend that both programs provide clearer, and more specific legal standards to facilitate a consistent and efficient application of the law.

I first provide a description of the legislative history of wildlife and endangered species conservation in both countries, after which I analyze the legal provisions of ESAs Section 10, and Part VII of Kenya's draft wildlife bill. I finally conduct a comparison of the two provisions.

2.0 A historical background of the legal framework for wildlife conservation in Kenya and the United States

2.1 Wildlife legislation in Kenya: A historical perspective

The earliest wildlife regulations in Kenya, for example the Queen's regulations of 1899, were designed to protect the interests of indigenous Africans and wildlife from commercial animal hunting and trade (Western, 1997). At this time, expanding colonial settlements were considered a threat, and the "romantic" notion that primitive man and wildlife had always lived in harmony was promoted. Further influx of settlers in later years, and the availability of firearms, led to the elimination of wildlife, and subsequently the imposition of game and hunting laws (Ofcansky, 1981). These laws precluded local Africans from their traditional subsistence hunting, and converted hunting into a predominantly European preserve. The national park system was set up by Ordinance No. 9 of 1945, and replaced by an amended National Parks of Kenya Act, Chapter 377 of the laws of Kenya in 1964 (Republic of Kenya, 1964). Game reserves, local sanctuaries and controlled areas were provided for under the Wild Animals Protection Act of 1964, Chapter 376 (Republic of Kenya, 1964). The Wildlife Conservation and Management Act of 1977 amalgamated the Kenya National Parks and the Game Department as a department under the Ministry of Tourism and Wildlife (Republic of Kenya, 1977). The year 1977 saw the enactment of supplementary legislation to outlaw hunting and trade in wildlife species, in response to international pressures to curb poaching, and diminishing revenues from a declining tourism industry. These were accompanied by various presidential and highly publicized anti-poaching campaigns intended to discourage hunting/poaching, and ultimately restore Kenya's reputation as a leading tourist wildlife destination.

With the exception of the earliest regulations, all the colonial legislative interventions were prohibitive in nature. They were characterized by the alienation of the African through the process of appropriating land for national park and game reserve creation; the separation of the local people from wildlife; and the denial of hunting rights to the African (Lelo, 1994). The legislation and subsequent creation of protected areas took place without regard for the social, ecological, economic and political facts; fomenting resentment among the local communities (Akama, 1993). Post-colonial legislation further entrenched ideologies and practices of a defunct

colonial administration, with only minor concessions for community-related activities. For instance, the Wildlife Conservation and Management Act of 1977 (Republic of Kenya, 1977) committed itself to the protection of human life and property from wildlife depredation (Section 30 (1)), and assured compensation for loss of life, limb or property resulting from wildlife depredation (Section 31). In 1989, this legislation was amended to create the Kenya Wildlife Service (KWS), an autonomous corporate organization linked to the government through the tourism ministry. KWS was created to re-vitalize the conservation and management of wildlife in Kenya (which up to this time had been plagued by corruption, inefficiency and poaching), and most significantly to design programs and practices that would engender community support for wildlife conservation.

Although protectionist schemes were established to conserve wildlife, there has been a gradual decline in overall wildlife population numbers, as indicated by the Department of Remote Sensing and Resource Survey's statistics between 1977 and 1993 (Grunblatt et. al., 1995). More significantly, only about 16% of large mammal populations are found within the system of areas created to protect them (Mwangi, 1997). The remaining 84% reside on private land surrounding the protected areas, where they are exposed to multiple threats from conflicting land use systems, and an increasingly intolerant human population. Some species, such as the Hunter's Hartebeest, has its entire population of 302 individuals resident outside the protected area system! Strict protectionism, via a plethora of prohibitive legal regimes has failed to fulfil the objective. The Kenya government is now moving beyond its traditional approach of separating people and wildlife; to approaches seeking the accommodation and coexistence of people and wildlife. Programs intended to enable landowners accrue benefits from keeping wildlife on their property, to mitigate and contain mounting conflicts between wildlife and people, and ultimately to devolve wildlife management responsibility from the state, have been articulated in the draft wildlife bill of 1997. This bill, for the first time in Kenya's conservation history, seeks to provide legal support for community conservation programs and assure the conservation of wildlife and biological diversity over the long term.

2.1.1 Community wildlife conservation programs in Kenya

Community conservation initiatives in Kenya began in the 1950s, when wildlife authorities were confronted with human-wildlife conflicts. In the Amboseli game reserve, for instance, the presence of the Masai and their cattle in the central portion of the reserve created fears that tourists would be put off; with the likely consequence that tourism revenues would decline (Barrow, 1995). Recognizing that the future of the Amboseli wildlife depended on the Masai seeing it as a resource, the reserve administration initiated benefit sharing schemes with the Masai, and arranged to compensate them for loss of access to water resources in the central swamps of the Amboseli basin. In 1971 the World Bank funded water projects around Amboseli, Kitengela and the Masai Mara. It also instituted revenue sharing programs with the Masai. Displacement of the Masai from Amboseli upon its gazettement as a national park in 1973 resulted in the initiation of more schemes to compensate them for the loss of grazing land and water. A water pipeline and boreholes were constructed, a grazing compensation fee instituted and direct economic benefits through the development of wildlife viewing circuits and tourist campsites in the Masai group ranches generated. Additional benefits in the form of services such as schools, a dispensary and a community center were provided. Although these efforts addressed the elements of revenue sharing, compensation, joint management and re-distribution of wildlife benefits, they saw limited success due to lack of a clear definition of responsibility, and an undefined mechanism for the distribution of benefits.

The 1980s saw more widespread community conservation programs instituted via the African Wildlife Foundation projects. Lack of institutional commitment by the concerned government authority precluded positive and sustained achievements. For instance, even though community groups were mobilized and organized, the structure of the current wildlife authority did not permit direct revenue sharing with communities. Secondly, while the Wildlife Conservation and Management Department had a policy to compensate damage caused by wildlife to crops, livestock as well as human injury and death, the system was increasingly abused (KWS, 1994). Most importantly, the complete lack of legal support has constrained opportunities for longer term focus,for more formal contractual arrangements between parties, and ultimately a sustained implementation of community based conservation programs. By emphasizing the complexities of community conservation and the importance of policy/legal

support, these experiences laid the foundation for Kenya's most recent community conservation initiative- the Community Wildlife Service (CWS) program of the Kenya wildlife Service (KWS, 1990).

Creation of the CWS in 1990 gave community conservation a more definitive footing in Kenya. The aim of this program is to initiate benefit sharing and enterprise development; to undertake problem animal management; and to evolve strategies for increased wildlife utilization. This represents the first definitive statement in Kenya wildlife authority policy documents concerning community conservation, and lays the foundation for integrating plan with policy. While the CWS has achieved some successes, it has still been hampered by the lack of legislative support. The 1975 policy is outdated, and the lack of a legal framework to support community conservation activities e.g. wildlife user right schemes, has created considerable uncertainty amongst landowners and limited the extent of potential investment in such activities (KWS, 1994). Landowners claim they can make no real benefits from such schemes until the legal status on hunting and trade in wildlife products is lifted. More profits accrue from hunting than from the current use programs, which are either tourism based or focus on the production of wildlife products such as meat and hides. Hunting a zebra, for example, has the potential to generate up to $500 per animal, whereas the sale of zebra meat, hides and skins does not generate more than $250 (Western, pers. Com.). Wildlife user rights schemes are currently on a pilot basis, and derive support from "the director's special authorization to hunt". This is intended for application under special circumstances such as research, and does not provide for commercial operations. Additionally, landowners require a clearer benefit and cost sharing scheme to effect wildlife conservation on private lands. KWS dishonored its commitment to share 25% of its revenue with local authorities (KWS, 1994). Questions related to how this 25% should be distributed amongst the many possible recipients still remain unresolved. The revised legislation (draft wildlife bill of 1997) attempts to address these concerns, and is the object of discussion in subsequent sections of this paper.

2.2 The Endangered Species Act

Congress enacted the ESA in 1973, (U.S.C. 1531-1544,1994) to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, and to provide a program for the conservation of such species." This was in response to its findings that species extinctions are a result of "economic growth and development untempered by adequate concern and conservation" 16 U.S.C. 1531 (a) (1) (1994).

The ESA contains 2 primary protective provisions: sections 7 & 9. Section 9 prohibits "any person" from "taking" a single member of a listed animal species. Congress broadly defined the term take to mean: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct" (16 U.S.C. 1532, 1994). The Fish and Wildlife Service (FWS) in 1975 broadened the definition of "harm" to include acts which "significantly disrupt essential behavioral patterns." (50 C.F.R. 17.3). In drafting this broad definition, Congress intended to define taking in the "broadest possible manner to include every conceivable way" in which fish or wildlife could be harmed. Taking was further broadened by the FWS to include "significant habitat modification or degradation". The courts upheld this aspect of take prohibition in 1979 by its decision in *Palila v Hawaii Department of Natural Resources.* The U.S Supreme Court found that Congress intended the ESA to be rigid in its resolve to prevent such extinctions *(Tennessee Valley Authority* v *Hill, 437 U.S. 153, 1978).* According to The Court, the language of the ESA and its legislative history manifest a congressional intent "to halt and reverse the trend toward species extinction, whatever the cost."

The ESA reflects a commitment by the federal government to preserve endangered and threatened species of plants and animals. However, the ESA has been the object of widespread criticism and controversy. Critics argue that the ESA approach does not address species protection before the species become endangered or threatened. Rather, it delays intervention until the point at which it is likely too late to save the species (Knich, 1994). Secondly, by focusing on the scientifically questionable concept of species as the fundamental unit to be protected, the ESA tackles conservation in a piecemeal, fragmentary manner, ignoring the biological realities of survival and extinction. The listing process and its tendency to afford greater attention to "charismatic megafauna" rather than less showy, but often essential species

has also been a concern to scientists and conservationists. Further, the ESA was unable to address situations where a property owners' otherwise lawful activities might result in some limited incidental take of a protected species. This hinders the ability of private landowners and developers to formulate long term plans needed for land or project development, and presents them with perverse incentives. Rather than be restricted in the use they can make of their property, some landowners have opted for the "3-S"alternative: shoot, shovel and shut up. In this regard, the rigid strictures of Section 9 significantly undermine the goals of ESA.

The local property owner or developer bears the burdens necessary to avert the extinction of a listed species. Consequently, landowners and developers have no incentive to tolerate the presence of listed species on their property. Yet over one-third of all endangered species are found exclusively on private property, and about three-quarters of listed species reside on habitat found on these lands (Lockwood, 1997). According to the General Accounting Office, over 90% of threatened and endangered species rely on non federal lands for some part of their habitat; and over 60% rely on these lands for the majority of their habitat (US, 1994). In addition, declining wildlife populations are not doing well on private property. For listed species that are found entirely on federal lands, about 18% seem to be improving and some 39% are stable in status (Turner and Rylander, 1997). For those on private property, only 3% are improving and only 16% are thought to be stable (Turner and Rylander, 1997). Clearly, strategies which incorporate landowners are needed to protect species on private land. While a regulatory component is important to species protection, much more may ultimately be achieved for wildlife and for conservation through the use of voluntary, proactive measures.

2.2.1 Habitat Conservation Planning

In 1982, Congressional amendments to the ESA authorized the FWS to permit otherwise prohibited takings "if such taking is incidental to, and not the purpose of the carrying out of an otherwise lawful activity" ESA amendments of 1982, Pub. L. No. 97-304 6(1) (a) (1) (b), 96 stat. 1411, 1422 (codified at 16 U.S.C 1539 (a) (1) (b)). In order to obtain this "incidental take permit" the applicant is required to submit a Habitat Conservation Plan (outlined in the next section).

The legislative history of these amendments indicate that section 10 (a) is intended to foster "a unique partnership between the public and private sectors", and to provide long-term commitments regarding the conservation of listed as well as unlisted species. It is also intended to provide long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to, and that further mitigation requirements will only be imposed in accordance with the terms of the plan (H.R. Conf. Rep. No. 835, 97th Cong., 2nd Sess. 30, 1982). This is " in order to provide sufficient incentives for the private sector to participate in the development of such plans." The conferees vested the FWS with discretion to issue permits of thirty years or more, since "adequate assurances must be made to the financial and development communities. HCPs and related plans represent an important strategy for protecting imperiled species on non federal lands.

HCPs offer an opportunity to resolve endangered species issues and avoid multiple, successive and conflicting demands to mitigate the impact of development on endangered species. Despite the advantage of the HCP approach in providing innovative opportunities to resolve land use conflicts for both listed and unlisted species at a regional level, several shortcomings have been identified. Addressing the conservation requirements of unlisted species is a time-consuming task since less is usually known about such species, and considerable biological investigations are required (Thornton, 1991). In addition the NEPA process by requiring an environmental assessment or EIS adds more time to the time required to obtain a section 10 (a) permit. Additional challenges to HCP implementation have included: lack of an ecosystem approach leading to piecemeal implementation and consequently habitat fragmentation; a protracted planning process characterized by gathering of scientific information, post-application reviews and the consensus-building process; and lack of certainty and funding constraints (Thornton, 1991).

From 1982-1991 only 11 HCPs were approved by FWS; and between 1986-1991, the FWS placed an average of forty-four species on the endangered species list per year, (Fisher, 1996). Without clear and explicit assurances, landowners were reluctant to enter into an HCP. The "no surprises" policy, announced in 1994, provided assurances that landowners needed. If in the course of HCP development landowners invest money and land into saving endangered,

threatened or unlisted species, the government will not later require that the landowners pay more or provide additional land even if the status of species change over time. This policy responded to the issue of economic uncertainty raised by private, state and municipal landowners, since changing/changed circumstances may lead to additional activities with economic implications. Additionally (with economic uncertainty) lenders were unwilling to make financial commitments to developers. By providing the assurance that in the event of changed circumstances the obligation for additional action does not rest with the HCP, but rather with the FWS, the policy shifts the burden to the public.

As of September 1994, 130 HCP permits had been issued; and by end August of the same year 179 incidental permits were issued, with 200 HCPs under development (Fisher, 1996). By late 1995 most HCPs approved were less than 100 acres each; by early 1996 approximately 25 were greater than 10 000 acres, 25 greater than 100 000 acres and 15 greater than 500 000 acres (USFWS and NMFS, 1996). Evidently, the HCP concept is evolving into a broad-based landscape-level concept, incorporating a planning function into the ESA while reducing ESAs characteristic emergency response to listed species. It begins to diffuse the conservation-economic development dichotomy. However, the no surprises policy has not been codified into law, and in any case, the ESA still requires the existence of an endangered species as a pre-condition for habitat conservation planning.

3.0 DESCRIPTION AND ANALYSIS OF LEGAL PROVISIONS OF KENYA'S DRAFT WILDLIFE BILL AND U.S. ENDANGERED SPECIES ACT FOR CONSERVATION ON PRIVATE LANDS

3.1 Draft Wildlife (Conservation and management) Bill 1997

3.1.1 Preamble

This bill repeals the Wildlife (Conservation and Management) Act, Chapter 376 of the Laws of Kenya, as amended by Act No. 16 of 1989. It proposes to enact a "comprehensive law relating to the protection, conservation and management of biodiversity in Kenya" (KWS, 1997). It confers management mandate to the Kenya Wildlife Service, whose prime objective shall be to ensure that biodiversity is conserved and managed to "yield to the nation in general, and to **local**

areas and communities in particular, optimum returns in terms of cultural, recreational, aesthetic, scientific, environmental, security and other pertinent gains as are incidental and not inimical to proper biodiversity management and conservation." To achieve the foregoing objectives "full account should be taken of the varied forms of land use and the interrelationships between biodiversity conservation and management and other forms of land use so as to ensure multiple land uses and the fair distribution of benefits".

Out of a total of 13 specific objectives, about half are dedicated explicitly to reducing costs of wildlife conservation to communities, to increasing the benefits of wildlife conservation and ultimately to enlisting the support of local communities in wildlife conservation. This signifies a distinct commitment to redistribute the costs and benefits of biodiversity conservation, through the pursuit of multiple objectives to land management. A departure from previous legislation, it ostensibly attempts to make amends for the previously punitive and prohibitive measures undertaken in the name of wildlife preservation.

3.1.2 Conservation and management of wildlife outside national parks, reserves and sanctuaries (Part VII of Kenya's draft wildlife bill, 1997)

Previous sections of this discussion highlighted the large proportion of wildlife populations resident outside protected areas, where land management decisions are made by private landowners. Similarly, previous sections also noted the escalating conflicts between wildlife and private landowners, and the negative consequences such conflicts have on wildlife conservation. The importance of community participation, the requirement that the costs borne by communities are mitigated and benefits increased in order to create incentives to conserve, were also underscored. I mentioned that genuine legal reform is required to create an environment conducive to these goals. This section of the proposed bill focuses on wildlife conservation beyond the state-run protected areas. It provides a legal framework for incorporating community needs into wildlife conservation. It seeks to redistribute the costs and benefits of wildlife conservation. By allowing for the creation of user-rights, it attempts to provide direct benefits to landowners. In this part of the discussion, I describe and critique the

adequacy/effectiveness of the legal provisions in achieving its goals. I have restricted my effort to those sections which I consider to have a direct bearing on biodiversity conservation.

3.1.2.1 Section 78: Participation in conservation by local communities

This section provides for interested parties within a conservation area to form a Community Wildlife Association (CWA), to undertake conservation and management of flora and fauna within the conservation area, subject to the approval of the KWS director and pursuant to a management agreement between the Service and the applicant. Interested parties should submit an application which lists the extent of the proposed area, the constitution, a management plan and financial regulations.

The management plan should provide : an inventory of wildlife stocks to be used; methods of use; sustainable use criteria; plans for using and maintaining whatever method of use or mix of use envisaged; land use plans showing how biodiversity will be conserved; methods of monitoring and protecting animal and plant populations and enforcing regulations; dispute resolution procedures and evidence of: fair and equitable representation, asset and cost sharing, and financial accountability of the applicant.

Although the bill requires management plan formulation prior to CWA registration, and outlines the required contents of a management plan, it fails to provide specific guidelines on the components of the management plan. For instance, the bill should specify sustainability criteria that prospective CWAs should adhere to. By not being specific, the proposed Act lends itself to differing interpretations, since sustainability can be interpreted in many different ways. The bill also requires evidence of "fair and equitable representation" and "asset and cost sharing", but fails to specify what each of these terms means. The opportunities for varied interpretation are immense. This is important because equity and distributional issues have been a source of controversy in the implementation of pilot community conservation programs. Since the law is attempting to re-distribute the costs and benefits of conservation at a national level, it should provide a mechanism or guidelines for translating this goal into reality at the local level. For example, the law could specify a requirement that all benefits and costs are apportioned in proportion to shares or amount of land contributed by each individual in the CWA. In the

implementation of pilot community programs, the KWS failed to provide adequate guidelines on this issue; it also failed to fulfill a benefit-sharing obligation in which it had committed to sharing 25% of park revenues with surrounding communities.

With respect to fair and equitable representation, the proposed bill should firstly provide a definition of the term, and secondly a guide on how this could be achieved. The risk that membership of CWAs could be dominated by influential, politically-connected individuals, and powerful interest groups, to the exclusion of other interested community members, provides a strong justification for a legal guideline. Agency conceptions of fair and adequate representation may be biased by influential politicians. Thus if the law provides a specification on what fair and equitable is/should be, then more objective judgements are likely, and clear standards will be available to keep in check agency action, or CWA member recruitment. Issues of representation and benefit-sharing are particularly significant in that they determine the motivation and incentive to conserve.

This section also sets a standard which requires each CWA to monitor and protect plant and animal populations within its area of jurisdiction. It also requires that each CWA enforce regulations. This obligation is significant because it defines a CWA responsibility which has direct implications for biodiversity conservation. It represents a sharing of the costs of conservation and a shifting of burdens from the agency to the communities. The provision does not mention a standardized method for achieving monitoring, protection or enforcement goals. CWAs may not have the skills to formulate necessary procedures; more importantly, the KWS needs to define monitoring criteria that are standardized and which will provide it with meaningful information for evaluating CWA performance.

This provision also anticipates conflict, and forces the CWA to think of possible solutions beforehand. Most importantly the bill keeps the conflict resolution procedure open, thus providing for the use of the most appropriate methods given the cultural and socio-economic diversity present in the country. This is an interesting departure from the usual state-controlled procedures. I see this approach as allowing for a creative, community driven approach to problem solving; an approach that is likely to foster compliance. KWS conflict mechanisms have often relied on heavy-handed, militaristic force, which fosters resentment amongst communities.

Each community has its own system of conflict resolution, equipped with sanctions and penalties to foster compliance within the framework of the social structure. This provides opportunity for incorporating creative indigenous systems, and is likely to be more effective. Ultimately, if indigenous methods do not succeed, the option of agency-driven conflict resolution mechanisms remains open to the CWA.

3.1.2.2 Section 80: General provisions as to membership of CWAs

The bill requires that membership of the CWA be restricted to individuals ordinarily resident within the conservation area. It further requires that the CWA fulfil this before considering an applicant for membership, but qualifies that "the CWA should not unreasonably deny admission to such an applicant". This section also stipulates that any CWA member shall have rights and obligations as per the association's constitution and by- laws, and loss of membership to a CWA can occur either when an individual resigns or breaches the association's constitution or by-laws.

While it is important that CWA members are resident within the conservation area to minimize complications and maintain a uniformity of interest, the proposed law over-extends itself into the internal management aspects of the CWA. Membership provisions of CWA should be determined by each CWA, through its constitution. By inappropriately extending itself into CWA membership the government is exerting excessive control, stripping proposed CWAs of their freedom. Moreover how the government shall determine "unreasonable" denial of admission to an applicant is unclear. This aspect is best left to the CWAs to decide. The proposed law here is intrusive, and enforcement may neither be practical nor desirable. Although the link between this membership provision and biodiversity conservation is peripheral, it is still significant. If CWAs are not provided with the freedom to determine their internal working without agency interference in such crucial aspects as membership recruitment and management, it is likely that the incentive to remain organized as a group could be eroded. The whole idea of community wildlife conservation and benefit-sharing is premised on the assumption that group formation and organization is likely to yield greater benefits than individual enterprise. Large parcels of land are desirable to cater for the wide ranging species requirement for space. Group

disorganization can lead to splintering, partitioning of land parcels, fencing and ultimately a reduction in available wildlife range. A situation which the agency is trying to avoid. Since agency interference may threaten group decision-making processes, the agency's role should be advisory, and not provided for within the legal framework.

3.1.2.3 Section 81: Functions of community Wildlife Association

Section 81(a) obligates the C W A to "protect, conserve and manage all wild flora and fauna within the conservation area pursuant to a management agreement (see next section) with the service". 81 (b) requires that the C W A "formulate and implement wildlife use programs consistent with sustainable national and international biodiversity conservation goals". Section 81c) requires the C W A to "complement" the K W S role in enforcing wildlife legislation and regulation. The C W A is allowed to develop partnerships with relevant authorities and stakeholders for the efficient and sustainable conservation and management of biological diversity. Part (e) requires the association to develop and implement human-wildlife conflict mitigation programs within the conservation area, while (f) expects the C W A "to keep the service informed of any developments, changes, and occurrences within the conservation area which are critical for the conservation of biodiversity", (g) provides for the development and management of a local wildlife fund for development for enhancing benefit sharing among the association members. The last part of the section requires that the C W A "undertake any other functions and duties as agreed between the Service and the association".

While this section provides for crucial obligations such as local level financing mechanisms, the need for forming partnerships to enhance the efficiency of conservation, the mitigation of human wildlife conflicts, and the formulation of programs by the C W A, it fails to issue clear standards for guiding the implementation of the mentioned activities. Sustainability at national and international levels has not yet been clearly defined within the law, and is amenable to differing interpretations; while the duty to protect, conserve and manage is at best ambiguous. It requires specification. The requirement for C W A s to keep the Service informed of any developments, changes and occurrences which are critical for biodiversity is also ambiguous. The proposed law does not define a procedure for reporting, frequency of reporting, or even

what type of information it considers "critical" for the conservation of biodiversity, and how it shall be obtained. At best, this section sets out overall goals but does not articulate enforceable standards. By specifying a timing for reporting e.g. annually, and the content and format, the agency would be able to monitor C W A activities more effectively. As currently designed, the CWAs have latitude to provide information they want to, when they want to. I see the requirement for reporting as an important mechanism for providing the agency with an indication of wildlife conservation status within the C W A for monitoring purposes. The more detailed and precise and structured the reporting procedure is, the more useful or meaningful for agency decision-making. If part lh) must be included, then it should clarify by example the range or nature of "other functions and duties."

3.1.2.4 Section 82: Devolution of wildlife user rights

This section sets out provisions for devolving user rights to CWAs. Wildife user rights means a bundle of rights granted by the Service, through the relevant competent authorities, to stakeholders, which clearly define each stakeholder's access to direct and indirect use of wildife resources (KWS, 1997). These are contingent upon each C W A having a "demonstrated ability" to protect and conserve biological diversity in the conservation area; and upon observing "well articulated terms and conditions as set out in the management agreement." Management agreement means any agreement between the Service and any other person, department, association, body corporate or other competent authority for the conservation of biodiversity in accordance with provisions of the Act (KWS, 1997). The management agreement must include the categories of user rights devolved, licensing mechanisms and schedules, fee schedules, marketing procedures, by-laws, caveats and other instruments, the right of the Service to inspect management facilities, count or monitor wild animals, arbitrate disputes over user rights and conditions and/or appoint qualified agents to do so. Most significantly "the right of the Service to introduce regulations or restrictive covenants relating to endangered or threatened species or habitat" is provided. Section 81 (2) outlines consumptive and non consumptive user rights that may be devolved to C W A s. Consumptive rights include culling, cropping, game farming, sport hunting, bird shooting, egg or nest collection, live animal capture or sale and any other act

causing death or removal from the wild of any plant or animal (KWS, 1997). Non consumptive rights include ecotourism, recreation, adventure tourism, science and education and green hunting. Interestingly, the Service has the discretion to waive the requirements of Section 81 (1) where the rights to be devolved are non-consumptive.

This section of the proposed act introduces detailed measures and conditions for the devolution of wildlife user rights to community associations, within the framework of binding agreements between the Service and CWAs. Provisions within this section ensure that the Service maintain control over the utilization activities of the CWAs. Such control includes the right to monitor animal populations and inspect management facilities; the right for the Service to introduce additional regulations and restrictions in the event of change; and to perform its regulatory function with minimal obstruction. Such a provision is crucial, and will likely curtail abusive practices by CWAs. The significance of this section's provisions is that they clearly define the responsibilities of KWS and the CWA. More importantly, they articulate the oversight mandate of the agency in ensuring that the overall goal of biodiversity conservation is realized. They provide support for the agency to perform its function without obstruction, particularly to keep in check the risk of abusive practice by CWAs. By providing the agency with the mandate to monitor and routinely check CWA activities, and to introduce additional regulations particularly where endangered species are concerned, the bill acknowledges the dynamic nature of species and ecosystems. It thus provides the agency with the flexibility to respond to changing circumstances by instituting appropriate adaptive management programs. Measures articulated within this section's provisions are to safeguard a public resource against extermination, since the state retains ownership of wildlife. The disadvantage of this provision is that it may introduce an element of uncertainty to the CWAs who may tend to curtail investments; and even be encouraged to practice unsustainable/uncontrolled harvesting due to the threat of future restrictions.

By requiring CWAs to "demonstrate the ability to protect and conserve wildlife", the Service should provide guidelines of what this entails; whether this is represented by increasing numbers of animals, or institution of protection measures, or both. It provides no measurable standard, and is open to interpretation. Further, the time frame over which user rights are granted

has not been indicated. This is likely to influence the level of C W A investment in long-term initiatives, and their willingness to undertake sustainable practices (e.g. research), ultimately their incentives to conserve. An element of inconsistency is evident in that the terms of agreement for non-consumptive use may be waived at the agency's discretion. These less stringent measures for non-consumptive use are by no means justifiable, given that such uses also have their impacts on species and ecosystems, depending on the frequency and intensity of use. Such a differential standard at agency discretion is open to abuse and must be streamlined.

3.1.2.5 Section 84: Termination and variation of management agreement

This section specifies the conditions for termination of management agreements, as for example, a breach of the agreement. The agency further retains the discretion "to withdraw specific wildlife user rights where it considers such action necessary for purposes of protection, conservation and management of biodiversity" or where a C W A breaches the terms and conditions of agreement in relation to a specific user right. The section outlines procedure for user right termination as thirty days notice to C W A, the right of the C W A to appeal to the Minister for Tourism and Wildlife, who should determine the appeal within thirty days of receipt. The suspension of user rights pending a decision is accompanied by financial penalties, imprisonment or both for those who contravene this requirement. A blanket penalty is imposed for both consumptive and non consumptive utilization; while individuals are liable to up to five years imprisonment, a fine of up to KShs.50 000 or both. Again the bill provides that where a C W A is dissolved its assets and liabilities will be distributed in accordance with its constitution, by-laws or any written law, or the management agreement.

The proposed law provides for excessive agency discretion in the termination/variation of management agreements. Apart from the breach of contract, other "necessary" actions for protection of biodiversity have not been specified. The agency thus has ample scope to manipulate and interpret this section to suit its needs. A blanket penalty for consumptive and non consumptive activities in the event of contravention of section is inconsistent with the differential fines imposed by previous sections (78). By including within official wildlife legislation procedures for C W A dissolution and procedures for the distribution of assets and liabilities in the

event of CWA dissolution, the proposed wildlife law once again overextends itself. Procedures for such an eventually is the preserve of the CWA constitution, as drafted and prescribed by its members. Additionally, while the law indicates that such procedure may be observed as defined in the KWS-CWA management agreement, the management agreement does not in any way provide for the distribution of assets and liabilities. This provision is inconsistent and way in excess of the mandate of the KWS.

3.1.2.6 Section 85: Establishment of the Zonal Wildlife Association

Sections 85 (1) and (2) provide that the director, after consultation with relevant authorities may declare an area an "ecological conservation zone"where he is "satisfied" that such an area constitutes an "essential ecosystem necessary" for the conservation of biodiversity. In such an area the director shall establish a Zonal Wildlife Association corresponding in jurisdiction to the said area. This section prescribes the composition of the ZWA as two representatives from each CWA, two local authority representatives, and ex-officio members representing the Ministries of agriculture, lands, water development, environment & natural resources and a Service representative appointed by the director. The ZWA may nominate five persons with "necessary" expertise in biodiversity conservation for the better carrying out of its mandate.

The non-definition of terms such as "relevant authorities" and "ecological conservation zone" raises many questions with direct implications for implementation. For example, the extent of the ecological conservation zone, and how to determine the boundaries, who the relevant authorities are and their roles. The composition of the ZWA, as proposed, cuts across the different stakeholders and land managers. It recognizes the sliding scale of jurisdiction and complementary land management mandates between KWS and other government agencies. By requiring the development of such a forum, the proposed bill shall enhance integrated planning, management and consultations among relevant parties with direct relevance to land management. Wildlife conservation in Kenya has been undermined by conflicting agency mandates, and uncoordinated land planning and management. By requiring the formation of a ZWA, the proposed bill provides an excellent opportunity to enhance biodiversity conservation at

ecosystem scales. However the provision does not specify the level of the government officers, a detail likely to influence the ability of each to make relevant commitments.

3.1.2.7 Section 86: Functions of the Zonal Wildlife Association

Section 86 (1) provides a broad mandate for the ZWA as: co-ordination of community wildlife activities within the zone; technical, scientific and financial support for CWA biodiversity conservation activities; resolution of disputes between and within CWAs; facilitate reduction of human wildlife conflict; advise CWAs on appropriate land use practices; liaise with the service , the National Wildlife Association (next section) and other partners in biodiversity conservation. Sections 86 1e. and If. have particular significance for biodiversity conservation:

1e. "to identify the essential biodiversity necessary to maintain viable representative biomes, ecosystems, habitat, species, populations and their genetic diversity and advise the service accordingly"

1b. "to identify the biodiversity of primary concern within the ecosystem, as well as processes which create, maintain and threaten it and advise the Service accordingly."

While the overall principal behind the obligations are clear, it is an overly ambitious task for a group of such composition. Frequently government officers are not equipped with the capability for conducting detailed research as implicated by this requirement. The task is more of a national goal that requires input at the national level from research institutions and universities rather than five government land resource management institutions. This provision should thus be restructured to explicitly include research institutions and their role formally into the law. The use of unspecified wording as "essential", "viable", "representative", "biodiversity of primary concern" constrains the application of the law. For these obligations to be fulfilled there must be a very clear definition of terms and guidelines to enable the team implement it. Although this section obligates the ZWA to provide support, including financial, to the CWA, the proposed law does not provide for a mechanism to accomplish this.

3.1.2.8 Section 87: Establishment of National Wildlife Association

This section of the bill proposes the establishment of an NWA, which will comprise of two representatives from each CWA, one representative form each ZWA, five representatives from non-governmental and scientific communities appointed by the Director, two representatives from the local authorities, and one Service representative. The function of the NWA include: coordination of CWA activities; recommending to the Director the withdrawal of use rights granted to CWAs; creating a forum for national debates on biodiversity issues; policy lobbying; maintaining a database of existing CWAs; and public education.

The NWA serves a policy advisory function for community wildlife conservation. While these functions are necessary, it is disturbing that the bill allows the NWA to recommend the withdrawal of user rights granted CWAs. Criteria upon which the NWA should base such a decision have not been outlined. In addition, there is no provision allowing NWA to recommend the granting of user-right to prospective CWAs. This inconsistency is confusing/irrational. The final requirement: "to undertake any other function necessary for the effective carrying out of its mandate" is not clear, and should either be specified or deleted.

3.1.2.9 Overview of Part VII provisions

This part of the legislation signifies an important step towards providing a legal framework for the integration of communities into biodiversity conservation. It is a confirmation of government commitment towards a more equitable distribution of costs and benefits of wildlife. However, by not providing clear standards upon which decisions can be based, for example in the termination of management agreements, the bill confers discretionary powers to the Director of KWS and the agency. Similarly, the proposed bill confers excessive control to the KWS and its director over the activities of the CWAs. For example, the Director is able to influence the internal workings of the CWAs, such as the distribution of benefits upon CWA dissolution, the membership of CWAs, among others. This may be important in the early stages of CWA development, but may lead to conflict particularly in instances where the CWA may need to take independent decisions.

The ambiguous and highly qualified language of the bill's provisions do not command a concise and consistent interpretation, and thus do not articulate enforceable standards.

Consequently the implementation is likely to face considerable challenge. The Community wildlife conservation portion of this proposed law fails to provide adequate support for the bill's preambular goals and objectives.

The proposed three-tiered structure for effecting community based programs represents a partitioning of interests, capabilities and responsibility designed to interactively support and complement effort at the various levels. The C W A occurs at a local level, and functions as the resource management component; the Z W A provides technical expertise through the various governmental and non-governmental membership; while the National Wildlife Association serves a policy and outreach function. This should enhance efficiency in the devolution of rights and responsibilities, in mobilizing partnerships, in identifying threats to biodiversity and incentives to conserve it, while also enhancing the co-ordination of activities. The burden on K W S, which cannot be everywhere all the time, is lifted.

The composition of the Zonal Wildlife Association reflects the much needed cross-sectoral cooperation in land planning and management if long-term returns from wildlife are to be secured. Wildlife is but one use for land, and often comes into direct conflict with agriculture and plantation forestry. The Z W A provides an excellent forum for promoting dialogue for ecosystem level conservation initiatives.

Arguably, the procedural inclination of this part of the bill is a direct response to challenges and issues encountered by community conservation in Kenya, in particular the pilot projects. The aspects of licensing, registration, and coordination provided the greatest challenge to K W S' implementation of pilot community conservation programs. This was due to the limited resources available to the agency, the expansive nature of wildlife, and the need to respond rapidly to conflict situations and complications due to conflicting mandates of government institutions. The bill attempts to streamline the procedures in order to result in an efficient and effective devolution of rights and responsibilities.

In sum the legal provisions of the bill do not provide adequate substantive support to the overall goal of conserving biological diversity, but rather provides a strong procedural backing to the intentions expressed in the preambular paragraphs.

Since challenges to the bill are inevitable, it is prudent to re-consider the substantive provisions and examine way of improving their clarity. I have already suggested several possibilities, but it is important to examine similar programs such as the HCP provisions of the ESA, to determine whether they can provide solutions to such ambiguities. Alternatively, it might also be that ambiguities are inherent in the definition of legal frameworks that attempt to address conflicts between private and public use of resources; or those which attempt to more equitably re-distribute the costs and benefits of wildlife conservation between private parties and the public.

3.2 Section 10 of the Endangered Species Act

Section 10(a) 1(B) exempts any taking, if such taking is incidental to and not the purpose of, the carrying out of an otherwise lawful activity. It then sets forth the elements of an HCP, and require that the Secretary of the Department of Interior (hereafter Secretary) authorizes incidental take permits to applicants only after the applicant's submission of a Habitat Conservation Plan (HCP). The conservation plan must specify: the likely impact of the taking; steps the applicant will take to minimize and mitigate such impacts; the funding available for implementation; alternative actions to the taking that the applicant considered and why the applicant is not utilizing these alternatives; and "such other measures that the Secretary may require as being necessary or appropriate for the purposes of the plan." 16 U.S.C 1539 (a) 2 (A).

The Secretary, after notice and comment, is authorized to issue an incidental take permit if he finds that: the taking will be incidental; that the applicant will to the "maximum extent practicable", minimize and mitigate the impacts of such taking; that the applicant will ensure that adequate funding for the plan will be provided; that the taking will not "appreciably reduce the likelihood of the survival and recovery" of the species in the wild; and that the measures, if any, required under paragraph (A) above are met 16 U.S.C. 1539 (a) (2) (B) (1994). The Secretary may then issue a permit with "such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with." Finally, the Secretary can revoke a permit if he finds that

the permitee is not complying with the terms and conditions of his permit 16 U.S.C. 1539(a)(2)(C).

Section 10 of the ESA provides a mechanism to permit the incidental take of federally listed species by private and non-federal entities. As presented, it defines a three-phase process comprising the HCP development phase, which involves establishing the likely impacts of the take and actions that would mitigate such take. Secondly, it defines a permit processing phase during which the permit is reviewed as per the criteria presented in (2)(B). Finally, a post-issuance phase when the permitee implements the elements of the HCP. These procedural obligations not only standardize the requirements of HCP application, but they also indicate the responsibilities of the applicants and the Secretary regarding the entire planning process. They present a logical articulation of expected behavior of the different parties, and provide a method for enhancing the accountability of the parties involved.

However, despite a very clear procedure, the substantive provisions of this section do not articulate clear standards and obligations of the applicant and the state. The Secretary, for instance, is vested with sweeping discretionary powers as far as the permit approval process is concerned. In the HCP development phase, section (2)(A)(iv) allows the secretary to specify, in addition to the criteria presented, any other measures that he/she may require as being "necessary" or "appropriate" for the purpose of the plan. The "other" measures are not specified. Additionally, the heavily qualified wording do not impose clear standards upon which the secretary's decisions can be based, but rather greatly undermine the authority of the section.

Similarly, standards expressed in (2)(B) (ii) and (iv) are vague. The qualifiers "maximum extent practicable" and "minimize and mitigate", require interpretation. Equally significantly, there is no clue as to how "appreciably" reducing the likelihood of survival and recovery of a species can be determined. While it is appreciated that the broad language used in this section may serve a useful purpose in keeping avenues open for the discussion and development of HCPs (in order to suit the diversity and uniqueness of different HCPs), the need for clear and consistent standards is crucial. Ambiguous statements are subject to diverse interpretations, will not promote consistent application, and undermine the implementation and enforceability of the law.

Examination of Congressional reports provide a clarification for several of the ambiguities cited. Congress intended the use of language as defined in Section 7 (a)(2) to apply in the secretary's determination of whether a taking will "appreciably" reduce the "likelihood" of survival and recovery of a species in the wild. Such action should not jeopardize the continued existence of the species. This section commands a section 7 consultation, with the agency as the responsible party. Section 10(a) thus reinforces the consultation requirement with respect to incidental take permits by requiring a non-jeopardy finding as a precondition for the issuance of a permit (H.R. Conf. Rep. No. 835, 97th Cong. 2d Sess. 30, 1982).

By authorizing HCPs, Section 10 (a) by implication authorizes habitat destruction. The requirement that the applicant "to the maximum extent practicable mitigate and minimize" (16 U.S.C. 1539 (a)(2)(B) such impacts communicates Congressional concern with the habitat detsruction implicated by HCP development. Unfortunately practicable measures are not defined, while mitigation measures and minimization have not been described or quantified. The measures envisaged not to reduce species survival and recovery are at best speculative. Once again, specific mitigation standards have not been offered for a process with far-reaching implications. Surprisingly, the FWS HCP-handbook further retracts from this provision by not requiring HCPs to be consistent with species recovery nor to conduct activities that will benefit species (USFWS/NMFS, 1996). HCPs are permitted to promote species decline for as long as they do not cause jeopardy! This lack of requirement for species recovery contradicts Section 4, which articulates species recovery obligations. It violates the ESA duty to promote recovery, and contravenes the purpose of Habitat Conservation Plans. Congressional reports indicate an intent consistent with species recovery: "the Secretary..... should consider the extent to which the conservation plan is likely to enhance the habitat of the listed species or increase the long-term survivability of the species or its ecosystem" (H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 30, 1982).

With regard to assurances to HCP participants, Congress reports reveal an element of tension. Congress intended that "any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances" (H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 30, 1982). This recognizes that "circumstances and information may

change over time and that the original plan might need to be revised." In contrast to this statement, Congress also promised that "in the event that an unlisted species addressed in an approved plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed" (H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 30, 1982). This confusing and contradictory language has the effect of fostering uncertainty.

3.2.1 Overview of Section 10

Section 10 provides clear guidelines for the incidental take permitting process. It also legitimizes public involvement in the process, by requiring a notice and comment procedure. It however fails to provide a petition mechanism through which applicants denied incidental take permits can contest the Secretary's decision. Although the section requires that impacts of take be assessed and mitigated, it leaves certain crucial questions unanswered. For example, what level of habitat conservation is required; how much habitat loss is acceptable, and how to determine the amount of habitat conservation necessary or desirable. Then again, the question of whether the conserved habitat areas set aside under the HCP shall be viable over the long term. By allowing development to proceed, there is a risk that HCPs may end up forming habitat islands, the long term viability of which is uncertain, particularly in the face of incompatible land uses on adjacent lands. Thus HCP requirements need to impose stringent controls on adjacent land use activities in order to ensure the viability of habitat preserves. In addition, the statute is silent on the interim period during which applications are under consideration. Since the HCP process is protracted and lengthy, the statute needs to address the interim period because during this time landowners may continue facing economic constraints due to the ban on takings.

Section 10 provides the Secretary with immense discretion. It keeps the standards for HCP approval open, rendering it amenable to subjective variation in interpretation and implementation depending on who is in charge. This broadness in a critical decision making section provides scope for manipulation by environmentalists and developers alike. It is subject to abuse by people who want to use it as a weapon to accomplish their particular political or economic agenda. Legal safeguards are needed to ensure that HCPs contain appropriate management prescriptions and enforcement mechanisms.

4.0 Comparison between HCPs and Kenyan Community Conservation Programs

The development of both programs has been motivated by a need to balance and distribute the costs and benefits of wildlife/species conservation/preservation between private and public entities. While in Kenya the conflict is between subsistence communities living adjacent to protected areas, in the US conflict is largely the result of large scale development projects and their impacts on listed species and their critical habitats. In both cases wildlife species threaten the socio-economic well being of private landowners. In Kenya, this threat is more direct and takes the form of crop and property destruction, as well as the loss of life or limb. In the U.S. the threat is less direct and presents itself through restrictions on development imposed by the legal protection of endangered and threatened species.

The nature of the resource has determined different utilization opportunities and influenced the actual incentives designed to offset costs and promote benefits. Majority of species used within Kenya's utilization programs are charismatic megafauna with a high touristic value, and considerable demand for products e.g. hides, skins, game meat. Of the listed species in the US, few can be said to have such economic value. Also the takings clause of the ESA severely restricts the range of potential economic uses to which such species can be put.

Both programs value the contribution of partnerships (with private parties, environmentalists, other governmental institutions) to the solution of conservation problems, and have made wide use of memoranda of understanding agreements to fill major policy or legislative gaps. Also, legal provisions for both programs emphasize the signing of binding, legal contracts (management or implementation agreements), which define the obligations of all parties. These agreements serve to assure the government agencies that the applicant will implement his/her obligations. To the landowner, who will likely make substantial financial investments, the legal contract is an assurance that the government will not renege on its obligations, thus making the venture a worthwhile financial investment.

In both the ESA and the draft wildlife bill, the legal regimes supporting program implementation are predominantly procedural. They are clear on what steps must be followed prior to an applicant receiving an incidental take permit, or a CWA being granted use rights. The substantive components in both are weak, characterized by ambiguous and discretionary

language. Consequently, both laws confer immense discretion to the director/secretary and the mandated agency. For example, Kenya's draft bill section 82(1) allows the agency to withdraw CWA user rights "where it considers such actions **necessary."** In section 85(1) it allows the director to declare an ecological conservation area where he is **"satisfied"** that such an area constitutes an essential ecosystem. Other sections allow the director to influence CWA member recruitment, the distribution of assets and liabilities upon CWA dissolution and to waive conditions of management agreements for non-consumptive use. In prescribing the contents of a Habitat Conservation Plan, section 10 (2)(a)(i) qualifies thus: "any such other measures that the secretary may require as being **necessary** or **appropriate."** In section 10(2)(B), the secretary will issue permits after he receives "such other assurances as he **may require."** Further, the incidental take permit shall contain "such terms and conditions as the secretary **deems necessary** or **appropriate."** Reporting requirements are similarly qualified, while the secretary has the powers to revoke a permit if he finds that the permitee is not complying with the terms.

The highly qualified language confers upon the director/secretary and agency tremendous discretion. It does not allow for consistency in statute implementation, and does not provide an objective measure by which agency decisions can be measured. The terms necessary, appropriate, satisfied can be interpreted in different ways by different people, thus no uniform standards are articulated here. Then again, the amount of control vested in the director/secretary and agency is immense, particularly where withdrawal of permits are concerned. In Kenya, this control is further manifested by the ability of the director to influence the CWA member recruitment, as well as resource sharing in the event of CWA dissolution. Both the ESA-HCP provisions and Kenya's community conservation provisions are articulated in discretionary language, and vest control in the agency. In Kenya it may signify an inherent unwillingness on the part of the state to relinquish the traditional control it has exercised over the management and conservation of wildlife resources. Such reluctance could possibly arise out of uncertainty by the government on the adequacy and effectiveness of transferring the management of a public resource to private entities; a step it must however take to secure the survival of wildlife on private land. More significantly, the high economic value of wildlife and wildlife products to the national economy may motivate this reluctance. In the U.S. however, ambiguous statutory

standards may help agencies cede management control to the private sector as exemplified by the Clinton/Babbitt administration's HCP interventions over the past four years. Indeed, such ambiguities reflect the delicate balance that governments must exercise when attempting to achieve equitable distribution of the costs and benefits of wildlife conservation between public and private parties, and between current and future generations. The highly qualified and ambiguous language leaves both governments' options open.

An important distinction between the legal provisions for HCPs and community conservation in Kenya is that the former are focused towards promoting single species conservation, while the latter are directed towards a broader ecosystem-scale conservation as a strategy to achieve biological diversity conservation. In Kenya this effort is evident in the three-tiered structure (CWA, ZWA, NWA) which, when combined, address concerns at ecosystem scales. The HCP mandate, on the other hand, is focused on the incidental take of individual species, and formulates plans which minimize such taking. While the legislative history of section 10 (a) authorizes HCPs to address unlisted species and their ecosystems, there are practical problems of preparing plans for unlisted species (many of which are little known). In order to realize the purpose of ESA (which is to conserve ecosystems), and to bring into effect the hints at ecosystem conservation inherent in Section 10(a), section 10(a) should be restructured. I suggest an amendment of this section, to incorporate ecosystem conservation. Such an amendment should provide an explicit statutory framework that defines the key elements of ecosystem conservation. However, the single species approach remains critical, particularly in cases where the species in question is either essential to the functioning of the ecosystem, or is representative of a unique taxonomic group.

The HCP requires public review of proposed plans via notice and comment and publication in the federal register. This allows greater involvement of concerned citizens and independent scientists, and will likely lead to more objective decisions, and the incorporation of up to date information for HCP development. Kenya's draft bill does not incorporate a provision for public involvement at such a level. This introduces a risk that CWAs may be approved, when in fact they do not provide adequate protection or conservation measures. The draft bill should incorporate a notice and comment procedure, published in the Kenya Gazette, in order to

increase the amount and level of public participation to ensure that better management is incorporated into the elements of the management agreement. This will also introduce a system to check against the development of CWAs behind the scenes.

Kenya's proposed bill attempts to provide direct positive incentives to landowners to conserve wildlife species on their land, by granting private landowners use rights. By defining the type of use rights (non-consumptive vs consumptive), the bill further attempts to maintain land use compatibility between protected areas and the conservation areas. The conservation areas managed by CWAs are adjacent and contiguous with national parks and reserves; it is thus important that land use outside the park is compatible with wildlife species conservation. By providing the CWAs with use rights (income generating uses), and by defining the range of permissible rights, the bill creates positive economic incentives for the communities to conserve wildlife on their land. Since communities derive direct economic benefits from wildlife, they will recognize the value of having wildlife on their land , and will strive to conserve in order to maintain the stream of benefits. In contrast, HCPs have been widely criticized for allowing substantial habitat destruction without appropriate consideration of species' long term survival needs, posing significant risks to both listed and unlisted species (Kostyack, 1997). In addition, HCPs do not do a very good job of equitably distributing the cost and benefits of species conservation, since considerable funding for HCP activities originate from private funding sources (Beatley, 1994). The costs and benefits are still skewed against private landowners, and other opportunities for balancing this concern must be sought. The same system of incentives promoted by Kenya's CWA provisions can be developed and built into the HCP process. O'Keefe (1994) and Turner and Rylander (1997), propose a series of voluntary incentive programs which could provide economic incentives that encourage the conservation of natural habitat. For example, provision of tax credits for long-term maintenance of natural habitats on private land. The Conservation Reserve Program, Wetlands Reserve and Forest Stewardship Incentive programs are examples of programs that have been run by USDA and USFS, along which similar programs could be modeled. Sugg (1994) observes that protecting what habitat remains for a listed species might ensure against further decline, but it may not be counted on to bring about recovery. He recommends strategies such as those effected by Defenders of Wildlife

who, to pave the way for the re-introduction of the wolf on Montana and Wyoming, instituted a program to pay landowners for each litter of wolf pups they raise on their land. Kinch (1994) suggests additional options to include: the just compensation of takings, adopt-a-species programs, and ecotourism. These proposals are very similar to Kenya's CWAs provisions, which provide direct economic incentives to landowners. Devolution of rights to use wildlife outside protected areas to the people is highly desirable, but likely to meet considerable challenge in the United States. For instance, the Lacey Act, which outlaws interstate commerce in native wildlife, would have to be repealed. Although the "no surprises" policy could be considered as a form of positive incentive, I deliberately do not consider it as such for two reasons. First, the benefits, in the form of the governments fiscal restraint are not directly from the species, its products or reservation of its undisturbed habitat. Land development is allowed under the HCP programs, and the no surprises policy only comes into play in the case of additional species listing; the policy simply prevents additional burdens on the developer in the event of such listing. The benefits to landowners are indirect. Secondly, as opposed to the incentive programs present in Kenya or those conducted under the auspices of the USDA and USFS, the HCPs allow substantial habitat transformation. For an incentive to be considered as positive, it should derive directly from the species or maintenance of its habitat.

A key difference is the presence of a no surprises policy in the US-HCPs, whereas in Kenya the reverse is true- the right of the agency to impose new restrictions on the CWAs depending on species' status, and the agency's right to conduct its own routine checks and monitoring of CWA wildlife populations. This provision keeps the options for adopting future innovations open to KWS and strongly supports KWS adaptive management strategies. Although the ESA-no surprises policy is crucial for enlisting landowner-developer participation and support for endangered species conservation, it appears to make a major concession to landowners, and places a tremendous strain on the already burdened FWS. Under the no-surprises policy, developers do not have the incentive to comprehensively address species requirements, since the government cannot come back and demand further financial or land contributions in the event that an unlisted species gets listed, even if the plan is ineffective. The HCP provisions should thus mandate a monitoring component that would enable the Fish and

Wildlife Service determine whether a plan is maintaining the status of the addressed species and to make adjustments as need arises. More importantly, I think that safeguards must be built into HCPs to ensure that HCPs provide long term benefits. I propose a restructuring of the nos-surprises policy, so that it requires landowners to contribute a percentage of costs in the event a species resident on their land is listed. The proportion of payment or contribution could be pegged to the effectiveness or efficiency of HCP management. Management effectiveness could be based on whether the HCP has consistently implemented its management targets, and whether any shortcoming in management could have precipitated species decline and triggered the listing.

CONCLUSION

The history of endangered species protection in the United States and wildlife conservation in Kenya suggest a spirited search for ideal legal arrangements to ensure the conservation of these species, particularly on private land. After decades of trying to protect wildlife or endangered species with threats and decrees, government authorities and environmentalists have realized that conservation is essentially a development-oriented imperative. It necessitates the development of incentives to promote sustainable utilization of resources, and more importantly, a balancing between private and social costs of conservation.

The analysis of the substantive and procedural legal provisions (for conservation on private land in both Kenya and the U.S). provided in this account, together with the historical dimensions described, point towards two central themes common to both nations, and possibly to global conservation efforts. These are: the importance of integrating conservation with land use planning, and the need for substantive clarity and specificity in the formulation of legal standards.

In both countries, intense land use pressures and conflicts prompted a re-evaluation of existing approaches to wildlife conservation. These conflicts precipitated the need to balance costs and benefits of species conservation on the one hand, and the costs to landowners and economic developers on the other i.e. public benefits versus private costs. If land use planning efforts incorporated a comprehensive wildlife/endangered species assessment, and attempted to provide a compatible arrangement in which different land uses are harmonized, then the conflict

that necessitated the development of HCPs and CWAs would have been prevented. Such plans would divert agriculture and other developments away from areas rich in endangered/threatened or wildlife species, and would serve as a basis for long term land protection programs. I believe that effective land use planning and growth management provides a mechanism for reducing or eliminating conflicts. If this had been observed during the course of economic development, then conflicts resulting in the formation of HCPs and CWAs would have been prevented. Both the U.S. and Kenya should mandate the preparation of local and general land use plans. In Kenya, such an approach is gaining currency amongst agencies mandated with the management of natural resources. The proposed wildlife legislation, policy framework and working plans acknowledge the need for land use compatibility. In the wildlife sector, this is exemplified by current wildife utilization programs in areas adjacent to national parks, and more importantly by the draft bill's proposal to develop CWAs. In the U.S., the idea of promoting land use compatibility is exemplified by the USFS and USDA incentive programs. Opportunities for incorporating such incentive programs to protect threatened and endangered species should be investigated under the HCP.

Both statutes confer discretionary powers to the Director/Secretary and implementing agencies. The ambiguous, qualified language in both fall short of prescribing clear substantive standards to guide agency action. Although both are concerned with preventing species or biodiversity loss, they raise additional concerns: the definitions of ecosystem; definition of sustainable; the extent of habitats to protect species; the appropriate number, size and configuration of conservation areas. While ill-defined standards reflect the legislature's intention of delegating management details to agency expertise, in order to give the agency flexibility to respond/adapt to unforeseen circumstances, I think that the opportunity for harm is as high as that for good. Such delegation presumes that, first, the agency will act to promote the public interest; and second, that there exist adequate checks to guard against arbitrary and capricious agency decisions. In the United States, notice and comment procedures and judicial review may serve to limit agency discretion. However, it should be noted in many cases the judicial system has deferred to agency decisions. In Kenya, the agency is exposed to immense political pressure; the judiciary's independence is debatable; and opportunity for public involvement is restricted. The

system of checks and balances are appreciably diminished. Under such circumstances, I recommend that the legislature define tighter, more precise standards not only to limit agency discretion, but to provide clear, unambiguous interpretation. This is important to ensure a consistent, enduring application of the law.

Similarities of both statutes, for example the need for legal contracts, indicate intrinsic requirements for the development and maintenance of collaborative programs between communities and agencies. The differences indicate opportunities for learning, borrowing and inter-change of ideas. The separation of both nations in time (economic time), and space is trivial, but the principles and applications of wildlife conservation are important, and very similar.

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