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# The National Natural Landmark Program: A Natural Areas Protection Technique for the 1980s and Beyond

*Russell A. Cohen\**

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## I

## INTRODUCTION

One of the major consequences of the growth and development of the United States has been a substantial and for the most part deleterious impact on the natural environment. Because of the seemingly limitless supply of natural resources thought to exist in America, however, there was little public concern about mitigating the often wasteful and harsh character of human activities on the land until the latter part of the nineteenth century. At that time, an effort was made by the federal government to preserve some semblance of America's primeval character by setting aside portions of the public domain for the benefit of present and future generations.

The creation and expansion of the national park and forest systems have helped to protect a significant part of our nation's natural legacy. In addition, the efforts of other public agencies at all levels of government, as well as private conservation organizations, have contributed a good deal to maintaining some areas in a relatively undisturbed natural condition.

However, these and other programs have failed to adequately stem the tide of continued deterioration of the nation's natural environment. Destruction of natural habitat has led to an acceleration of species extirpation and extinction, thus decreasing the natural diversity that plays an important role in ecological stability and contributes to the quality of life. There remains a crying need to protect the myriad elements of natural diversity, the wide variety of organisms and other natural features that are a vital and irreplaceable part of America's heritage.<sup>1</sup>

The traditional method of protecting natural areas has been through land acquisition and management by an appropriate governmental agency (e.g., acquisition of rookery sites by the United States Fish and Wildlife Service). Although acquisition is still seen to be the primary land protection device, it is vulnerable to several criticisms, among which are its great expense<sup>2</sup> and the bur-

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*Conservation Easements*, 10 *CAP. U. L. REV.* 731 (1981). The author wishes to gratefully acknowledge the assistance and support he received from Professor Earl Finbar Murphy in the preparation of this article.

1. P. HOOSE, *BUILDING AN ARK: TOOLS FOR THE PRESERVATION OF NATURAL DIVERSITY THROUGH LAND PROTECTION* 4-5 (1981).

2. W. BROWN & M. AUER, *NEW TOOLS FOR LAND PROTECTION: AN INTRODUCTORY HANDBOOK* 1 (1982). In addition, there is currently a public attitude (especially prevalent in the West, where the Sagebrush Rebellion is in full swing) that too much land is already in public ownership.

den of managing acquired land.

In spite of the acquisition of many significant natural areas in the past, the fact remained that many sites possessing important natural history and diversity qualities (e.g., endangered species habitats, virgin forests, fossil beds) continued to be damaged. In many cases, the damage occurred through sheer ignorance of the facts that important natural diversity elements were present and that suitable alternative courses of action were available. A program was needed that would identify these sites and bring their natural features to the attention of those who had or may in the future have control of how the sites would be used, before the features were irreparably altered.

Realizing that acquisition of all nationally significant natural areas by the federal government was neither feasible nor desirable, the Director of the National Park Service under President Kennedy, Conrad Wirth, submitted a proposal for the creation of a "National Registry of Natural History Landmarks" in March of 1962.<sup>3</sup> Secretary of the Interior Stewart Udall approved the proposal in May of 1962. The name was changed to the National Natural Landmark Program in 1965 to avoid confusion with the Park Service's historic landmark program.<sup>4</sup>

The primary goal of the National Natural Landmark Program (NNLP or Program) is to identify and encourage the preservation of representative samples of all the major ecosystem types and geological features in the United States. It is the only federal program that systematically inventories the entire country and makes comparative judgments so that the best remaining examples of the nation's natural features may be recognized, regardless of ownership status.<sup>5</sup>

Thus, the NNLP has the potential for slowing the destruction of nationally significant natural areas by calling attention to them, hopefully in time to utilize that knowledge in land-use decision-making. The fact that the NNLP covers privately owned as well as public lands is a unique feature which enables the federal government to promote natural diversity preservation regardless of

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3. NATIONAL PARK SERV., U.S. DEP'T OF THE INTERIOR, NAT'L REGISTRY OF NATURAL LANDMARKS HANDBOOK, ch. 1, at 1 (1966) [hereinafter cited as NAT'L REGISTRY OF NATURAL LANDMARKS HANDBOOK].

4. NATIONAL PARK SERV., U.S. DEP'T OF THE INTERIOR, SITES ELIGIBLE FOR THE REGISTRY OF NATIONAL LANDMARKS: A PROGRAM TO PROMOTE THE CONSERVATION OF SITES OF HISTORIC SIGNIFICANCE 23 (1965).

5. National Natural Landmarks Program Final Procedures, 45 Fed. Reg. 81,184 (1980) [hereinafter cited as NNLP Final Procedures].

where important sites are located and who owns them. It is also a somewhat controversial aspect of the NNLP, especially among development interests.

The purpose of this article is to scrutinize and evaluate the objectives and accomplishments of the NNLP, focusing particularly upon the Program's effect on private landowners and its political acceptability with the current Administration and the general public. The next section reviews the history, procedure, and current status of the NNLP. Part III looks at the effect, both real and imagined, of landmark designation of privately owned land and other consequences of the Program's operation. Part IV discusses the various suggestions that have been made to enhance the effectiveness of the NNLP, including several unsuccessful legislative attempts, and compares the NNLP to similar registration programs operating in Arkansas, Maine, and Ohio. The final section considers the future role the Program could play in the preservation of America's natural heritage, taking into account the current attitudes of its administrators and their superiors, the U.S. Congress and the public.

The changing political climate and economic slowdown of the country have taken a heavy toll on federal conservation programs, including the NNLP. Nevertheless, I believe that it may be a good time to reappraise the NNLP in the light of the current situation. I think the Program has the potential to bridge the gap caused by the federal government's temporary (I hope) abdication of responsibility for the preservation of natural diversity. The remaining portion of the article should show to what extent that opinion is justified.

## II

### HISTORY, PROCEDURE AND CURRENT STATUS OF THE NNLP

#### A. Statutory Authority and Objectives

The NNLP was established in 1962 by an administrative order of the Secretary of the Interior and has never been expressly authorized by statute.<sup>6</sup> However, the National Park Service staff obtained an opinion of the Solicitor General in 1964; the Solicitor General felt that the Secretary was acting within the scope of his

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6. Telephone interview with James M. ("Mike") Lambe, Esq., Division of New Areas, National Park Serv. (Dec. 11, 1981).

authority.<sup>7</sup> He based his opinion on a phrase contained in section 1 of the Historic Sites, Buildings and Antiquities Act which authorized the Secretary to designate and protect "objects of national significance."<sup>8</sup> Final regulations for the NNLP went into effect in December of 1980 and are now codified in Title 36, section 1212 of the Code of Federal Regulations.

The original objectives of the NNLP were as follows:

- (1) to encourage the preservation of sites significantly illustrating the geological and ecological character of the United States;
- (2) to enhance the education and scientific value of sites preserved;
- (3) to strengthen cultural appreciation of natural history; and
- (4) to foster a greater concern for the conservation of the Nation's natural heritage.<sup>9</sup>

## B. NNLP Procedure

The NNLP is an example of a land protection device that is

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7. *Id.*

8. Ch. 593, § 1, 49 Stat. 666 (1935) (codified at 16 U.S.C. § 461 (Supp. 1982)). The NNLP's statutory authority was also challenged in comments to their interim regulations (*see supra* note 4). The NNLP staff's response was that even though the program has never had an organic act, "since 1962 the Congress has recognized the importance of the natural landmarks program by including specific references to 'national natural landmarks' in several recent laws": the National Park System General Authorities Act of 1970, 16 U.S.C. §§ 1a-5 (Supp. 1982), the 1976 Mining in National Parks Act, 16 U.S.C. § 1908 (Supp. 1982) (both discussed *infra*), and the National Parks and Recreation Act of 1978, 16 U.S.C. §§ 1a-5, which authorized \$1.5 million for monitoring the welfare and integrity of landmarks. NNLP Final Procedures, *supra* note 5, at 81,186-87.

9. R. GOODWIN & W. NIERING, INLAND WETLANDS OF THE UNITED STATES, EVALUATED AS POTENTIAL REGISTERED NATIONAL LANDMARKS at vii (1971) [hereinafter cited as INLAND WETLANDS]. A modified version of these objectives is listed in the draft of the new NNLP handbook:

- (1) systematically and comprehensively identify areas that illustrate the ecological and geological diversity of the United States;
- (2) ensure that such areas are considered early in public and private planning efforts to facilitate well informed planning and decisionmaking and to avoid inadvertent damage;
- (3) encourage and enhance preservation of the educational and scientific values of significant natural areas;
- (4) foster a wider interest and concern in the conservation of the Nation's natural heritage; and
- (5) encourage understanding and appreciation of natural history.

NATIONAL PARK SERV., U.S. DEP'T OF THE INTERIOR, NATURAL LANDMARKS PROGRAM HANDBOOK—DRAFT at 1-1 (1981) [hereinafter cited as NATURAL LANDMARKS PROGRAM HANDBOOK—DRAFT]. The effect of this modification would be to restate the NNLP objectives in a manner that would more closely resemble the actual operation of the Program.

usually referred to as a recognition or designation program. Most recognition programs work in the following manner: important areas are identified by scientists, the owners of the identified sites are then notified of the natural features located on their properties, and an attempt is made to persuade the landowners to husband the elements of natural diversity.<sup>10</sup>

The NNLP has used a five-step procedure to recognize and designate natural areas.

(1) To provide a logical and scientific basis for the selection of Natural Landmarks, the NNLP is undertaking a series of "theme studies."<sup>11</sup> The themes are derived from broad categories of ecological and geological phenomena (such as eastern barrier islands or boreal forests). Regional study teams, usually consisting of scientists that are recognized experts in the particular theme study topic and under contract to the Park Service, strive to classify and describe all the significant natural history phenomena within a physiographic province and also make recommendations as to which sites appear to be of Natural Landmark caliber.<sup>12</sup> The information in these theme studies is largely based on secondary sources and tends to be quite general in nature.<sup>13</sup>

(2) Each potential Natural Landmark recommended in the theme studies receives an on-site evaluation by a scientist from a local university in order to further clarify whether the site appears to meet "national significance" standards.<sup>14</sup>

(3) The on-site evaluation report is then reviewed within the Park Service by a team of three scientists, also recruited from the

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10. P. HOOSE, *supra* note 1, at 52-58. Other recognition programs are discussed in Part IV, *infra*, on suggested improvements to the NNLP. See *infra* note 150 for a definition of natural diversity elements.

11. The idea of the theme study approach for natural area preservation originated in a 1969 memorandum from Secretary of the Interior Walter Hickel to National Park Service Director George Hartzog. 1 THE NATURE CONSERVANCY, PRESERVING OUR NATURAL HERITAGE 25 (1976) [hereinafter cited as 1 PRESERVING OUR NATURAL HERITAGE]. See also INLAND WETLANDS, *supra* note 9 (an example of an NNLP theme study that was actually published).

12. 1 PRESERVING OUR NATURAL HERITAGE, *supra* note 11, at 286.

13. 1 G. WAGGONER, EASTERN DECIDUOUS FOREST at xiv (1975).

14. A site meets national significance standards if it "possesses exceptional value or quality in illustrating or interpreting the natural heritage of the Nation and is an essentially unspoiled example of natural history." 1 PRESERVING OUR NATURAL HERITAGE, *supra* note 11, at 286. Contracts for on-site evaluation usually involve the evaluation of several similar areas at the same time so that a comparison may be made which will help the evaluator in his decision as to which sites are of "national significance." *Id.* at 287.

academic community.<sup>15</sup>

(4) If the reviewers approve the evaluation report, it is sent to the Secretary of the Interior for his endorsement. At that point, the site is designated as a National Natural Landmark (NNL) and is added to the National Registry of Natural Landmarks list.<sup>16</sup>

(5) The final step consists of the NNLP staff contacting the landowner, whether public or private, informing him of the NNL designation and asking him to enter into an agreement (called an "owner agreement")<sup>17</sup> to manage the site in a manner that will prevent the deterioration of its nationally significant values. If the landowner signs an owner agreement to that effect, he receives a certificate and plaque from the Park Service in recognition of his voluntary participation in the NNLP.<sup>18</sup>

Departures are occasionally taken from the above procedure. For example, it is NNLP policy that anyone can suggest that a particular site be considered for NNL status;<sup>19</sup> the NNLP office in Washington has "Suggested Natural Landmark" forms for this purpose. Thus, the theme studies generate most, but not all, of the potential natural landmark sites for the evaluators.

Once designated, a natural landmark is not removed from the Registry of National Natural Landmarks unless it is determined that: (1) the values that had qualified an NNL for designation in the first place have been lost or destroyed; (2) an error in professional judgment has been made; or (3) there exists substantial failure to follow the NNLP procedures.<sup>20</sup>

Most of the procedural steps involved in landmark designation outlined above have been attacked for various reasons, both by conservation and development groups and by private landowners.

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15. NATURAL LANDMARKS PROGRAM HANDBOOK—DRAFT, *supra* note 9, at 4-6. The original procedure had the evaluator's reports submitted to a committee of the Advisory Board on National Parks, Historic Sites, Buildings and Monuments (a procedure that is used for historic landmarks), but such a tremendous backlog resulted (1700 evaluation reports) that Heritage Conservation and Recreation Service Director Chris Delaporte changed the procedure in January of 1979. Delaporte, *Progress and Prospect: A Report on the National Landmarks Program*, NATIONAL PARKS AND CONSERVATION MAG., Mar. 1980, at 21, 21-22.

16. NATURAL LANDMARKS PROGRAM HANDBOOK—DRAFT, *supra* note 9, at 5-2.

17. For a copy of such an agreement, see Appendix and *infra* note 170.

18. NAT'L REGISTRY OF NATURAL LANDMARKS HANDBOOK, *supra* note 3, ch. 2, at 1.

19. NATURAL LANDMARKS PROGRAM HANDBOOK—DRAFT, *supra* note 9, at iii.

20. 36 C.F.R. § 1212.8 (1980). The removal of NNL status is further discussed in Part III.



These criticisms and the NNLP's response to them are set out in the following Parts.

### C. Current Status of the NNLP

As of January, 1981, the National Park Service and the Department of the Interior listed 537 National Natural Landmarks.<sup>21</sup> Of these, approximately 175 are under whole or partial federal ownership. State and local governments control 183 sites, leaving 170 sites, about one-third of the total, in some form of private ownership.<sup>22</sup> The following table shows a breakdown of these private sites according to type of owner and whether or not an owner agreement was signed.

REGISTERED>NNLs ON PRIVATE LANDS<sup>23</sup>

Type of owner	w/ owner agreements		w/o owner agreements		Total	
	# of NNLs	Acres	# of NNLs	Acres	# of NNLs	Acres
1. Conservation groups	32	56,603	2	3,126	34	59,729
2. Individuals	26	7,464	68	106,605	94	114,069
3. Corporations	25	16,140	17	133,226	42	149,366
4. Individuals & Corp.	51	23,604	85	239,831	136	263,435
TOTAL	83	80,207	87	242,957	170	323,164

The data contained in the fourth row (the sum of the figures in the second and third rows) are the most relevant for this article, since they show the extent to which the NNLP is used to designate lands that are not held by or on behalf of the public; this is also one of the more controversial aspects of the Program. Note the relative unwillingness of private individuals to enter into owner agreements with the NNLP as compared to corporations and conservation organizations. This unwillingness may be related to the various fears landowners have expressed as to the negative effects of>NNL registration (discussed in the next section).

The budget of the>NNLP has remained basically the same, with small increases to account for inflation. The Program's fiscal 1981 budget was \$775,000,<sup>24</sup> about two-thirds of which went to the preparation of theme studies, with the rest being almost evenly

21. 3 THE NATURE CONSERVANCY, PRESERVING OUR NATURAL HERITAGE 62 (1981) [hereinafter cited as 3 PRESERVING OUR NATURAL HERITAGE].

22. *Id.*

23. *Id.*

24. Telephone interview with Frank Ugolini, Chief, Division of Natural Landmarks, National Park Service (Oct. 9, 1981).

divided between evaluator contracts and NNLP staff.<sup>25</sup> The staff consists of five full-time professionals and three support positions. In addition, personnel from the Park Service's eight Regional Offices assist in the administration of the Program.<sup>26</sup>

Now that the basic procedures and structure of the NNLP have been outlined, the remainder of the article will examine it in more detail to determine its effect on private landowners and its actual value in preserving what remains of the nation's natural diversity.

### III

#### EFFECT OF THE NNLP ON THE USE OF PRIVATELY OWNED LAND

The most distinctive aspect of a recognition program such as the NNLP, as compared with other land protection techniques, is its lack of legal consequences. Registration does not affect the ownership of the site; neither does it restrict the uses to which the property may be put.<sup>27</sup> The owner agreements are not required for registration, and are terminable by either party immediately upon notice to the other.<sup>28</sup> The NNLP merely seeks to inform landowners of their control of a very valuable natural feature, and to persuade them to manage their land in a manner that does not harm the feature.

Nonetheless, as was illustrated in Part II, there appears to be some resistance by private landowners to full participation in the NNLP. This resistance occurs because many owners of eligible

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25. *Id.*

26. *National Heritage Policy Act of 1979: Hearings on S. 1842 Before the Subcomm. on Parks, Recreation and Renewable Resources of the Senate Comm. on Energy and Natural Resources*, 96th Cong., 2d Sess. 415 (1980) (answers of the Department of the Interior to additional questions) [hereinafter cited as *Nat'l Heritage Policy Act Hearings*]. The NNLP staff has been buffeted by the winds of political change in recent years. The staff was moved from Washington to Denver in 1978 upon the transfer of the NNLP from the Park Service to the newly created Heritage Conservation and Recreation Service (HCRS). Then, when HCRS was reabsorbed into the Park Service in January, 1981 by order of former Interior Secretary James Watt, the NNLP staff (depleted by defections to other Park Service functions remaining in Denver) was moved back to Washington. In the meantime, HCRS (now National Park Service) regional offices have been put in jeopardy due to budget cuts. It is still uncertain to what extent the delegated functions will be undertaken by the regional offices after the dust clears from the elimination of HCRS. Interview with Frank Ugolini, *supra* note 24. The role that politics has played in the area of natural-heritage preservation is discussed in greater detail in the parts that follow.

27. HERITAGE CONSERVATION & RECREATION SERVICE, U.S. DEP'T OF THE INTERIOR, PUB. NO. 33, THE NATIONAL NATURAL LANDMARK PROGRAM (1980) (brochure) [hereinafter cited as THE NNLP BROCHURE].

28. 1 PRESERVING OUR NATURAL HERITAGE, *supra* note 11, at 291.

sites fear registration will adversely affect their property. These concerns are enumerated and discussed below.

(1) Some landowners fear that NNL status will result in increased federal regulation, which will reduce the usability and marketability of their holdings.<sup>29</sup> It is true that the designation of private land as an NNL triggers operation of several federal statutes. However, as shown below there is little likelihood that these statutes would have a significant adverse effect on an NNL owner.

The designation of a site as an NNL may bring the following statutes into play:

(a) Section 8 of the General Authorities Act of 1970, as amended, directs the Secretary of the Interior to submit an annual report to the Congress identifying all landmarks (both historic and natural) which exhibit known or anticipated damage or threats to their nationally significant values.<sup>30</sup> This listing may bring about at least two actions. First, the endangered landmarks may be considered for acquisition by the Park Service.<sup>31</sup> In those cases in which the Park Service chooses to acquire and the landowner sells or donates the land willingly, the landowner will have little to complain about. (If, however, he is unwilling to part with the property, the Park Service could invoke its eminent domain power.) Second, if the list of endangered landmarks is publicized, it could lead to an outpouring of public sympathy for a particular landmark and spark a local effort to stop whatever activity is putting the natural feature in danger.<sup>32</sup> If the landowner himself was engaged in that activity he might be enjoined by a court, denied necessary development permits, have his property condemned by the local government, etc. It should be pointed out, however, that these actions do not directly result from the operation of the NNLP; in fact, they could result upon the discovery that any nationally significant natural area was threatened.

(b) Section 9 of the Mining in the National Parks Act of 1976 requires that whenever the Secretary of the Interior finds that a landmark may be irreparably lost or destroyed by any surface mining activity, the Secretary shall notify the person conducting

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29. 3 PRESERVING OUR NATURAL HERITAGE, *supra* note 21, at 13.

30. 16 U.S.C. § 1a-5 (Supp. 1982); NNLP Final Procedures, *supra* note 5, at 81,185.

31. *Id.* This annual list of threatened NNLs has been favorably received by federal agencies, and it has contributed somewhat to the increased protection of those threatened NNLs under federal control. Interview with Frank Ugolini, *supra* note 24.

32. Of course, this may happen even if a site is not a registered NNL.

the activity, submit a report to the Advisory Council on Historic Preservation, and request the Council's advice regarding means to mitigate or abate such activity.<sup>33</sup> This act's popular name is a trifle misleading: section 9 is not restricted to units of the National Park System, but applies to all national natural and historic landmarks regardless of ownership or control.<sup>34</sup>

The substantive effect (if any) that this provision has on the use of private land is uncertain, especially under the current Administration. Even if the National Park Service regional offices charged with monitoring the landmarks within their bailiwicks do recommend the invocation of section 8 of the General Authorities Act to the NNLP staff, which then passes the information along to the Secretary,<sup>35</sup> there is no guarantee that the Secretary will follow the recommendation. Given the Reagan Administration's predilection for resource development, it is unlikely that it will regard section 8 with any particular favor. Furthermore, the Mining in the National Parks Act requires only that the Secretary notify the person doing the mining that his activity threatens a National Landmark, inform the Advisory Council on Historic Preservation about the mining and ask for its advice;<sup>36</sup> there is no statutory requirement (or authorization, for that matter) that the Secretary take steps to mitigate or abate mining activity which threatens National Landmarks on private land.

(c) Section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA) requires that an environmental impact statement (EIS) be prepared for all major federal actions which would have a significant effect on environmental quality.<sup>37</sup> Each regional office of the Park Service is responsible for reviewing EISs for their impact on National Landmarks; this review includes a simple map check of plotted landmarks.<sup>38</sup> If an action requiring

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33. 16 U.S.C. § 1908 (Supp. 1982); NNLP Final Procedures, *supra* note 5, at 81,185.

34. NATURAL LANDMARKS PROGRAM HANDBOOK—DRAFT, *supra* note 9, at 7-4. The National Park System includes virtually all Federal property administered by the National Park Service. It consists not only of the National Parks such as Yellowstone and Yosemite but also the National Seashores, Lakeshores, Recreation Areas, Grasslands, Monuments, Historic Parks and Sites, Scenic Rivers, Scenic Trails and Parkways. National Natural Landmarks, on the other hand, are not *per se* considered part of the National Park System but are nonetheless covered by § 9 of the Mining in the National Parks Act.

35. *Id.* at 7-4 & 7-5.

36. NNLP Final Procedures, *supra* note 5, at 81,185.

37. 42 U.S.C. § 4321 (1976 & Supp. V 1981).

38. 3 PRESERVING OUR NATURAL HERITAGE, *supra* note 21, at 61.

the preparation of an EIS may have an impact on an NNL, this would be disclosed and considered in an adequately prepared EIS.<sup>39</sup>

However, the mere presence of an NNL is not enough to render any activity within or adjacent to it a "major Federal action"; before an EIS would be required, additional federal actions would have to be involved.<sup>40</sup> The frequency of situations requiring an EIS is debatable. Some argue that most private landowners are unlikely to conduct any activities on their land that would involve the federal government to such a degree that an impact statement would be required.<sup>41</sup> Others, especially development interests that have been shell-shocked from the substantial burden of environmental regulations imposed on them during the past dozen years, are afraid that something as minimal as Federal Housing Administration or Veterans Administration loan guarantees could, in combination with NNL status, help environmentalist pressure groups delay needed projects for years.<sup>42</sup>

The actual likelihood of NEPA's applicability lies somewhere between these viewpoints. To reiterate, the NNLP has no direct connection to the possible imposition of an EIS requirement. Re-

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39. 1 PRESERVING OUR NATURAL HERITAGE, *supra* note 11, at 291.

40. *Nat'l Heritage Policy Act Hearings*, *supra* note 26, at 416 (answers of the Department of the Interior to additional questions).

41. Telephone interview with Janet McMahon, staff member, Maine Critical Areas Program, Office of State Planning (Dec. 10, 1981).

42. See, e.g., *The Natural Diversity Act: Joint Hearings on S. 1820 Before the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works, and the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess. 275-76 (1978) (statement of John F. Hall, National Forest Products Association) [hereinafter cited as *Natural Diversity Act Hearings*]. Section 10(d) of the Natural Diversity Act states that no United States agency shall make loans, grant licenses, or engage in any other type of action which would harm the natural diversity elements present at any site entered in the registry. *Id.* at 23. Examples of EISs involving NNLs, some of which have resulted in fairly hot battles, include the following: (i) a proposed Corps of Engineers dam threatening a 15-acre, university-owned natural landmark known as Allerton Park in Illinois; (ii) a proposed federal highway which threatened a state-owned NNL, Volo Bog, in Indiana; (iii) another proposed highway in the state of New York which was supposed to pass over the Moss Island Natural Landmark and be braced in the best glacial potholes in North America; and (iv) a proposed power line which was to cross a geological NNL in Colorado known as the Slumgullion Earth Flow, 3 PRESERVING OUR NATURAL HERITAGE, *supra* note 21, at 61. Environmental activists have successfully used NNL status to stop development projects in a few instances, Frank Ugolini could not think of one situation in which an NNL has been destroyed where an environmental review process (such as NEPA) was brought into play. Interview with Frank Ugolini, Chief, Division of Natural Landmarks, National Park Service (Dec. 9, 1981).

gistration as an NNL adds no significance to a natural feature as compared to one that has been determined to be of national significance through independent means.<sup>43</sup> For example, a site that has been shown by a state natural heritage program to contain a critical endangered species habitat would be given the same weight in an EIS as would a similar site that had been registered as an NNL.

In summary, then, there does not appear to be a significant regulatory aspect to the NNLP per se; in addition, the two federal statutes that do have a direct connection to the NNLP will not, in most instances, place any limits on the marketability of a privately owned NNL or the uses to which it may be put.

(2) Many private landowners fear that the designation of their property as an NNL will diminish its value. Some have even argued that this diminution in value is so great that it amounts to a "taking of private property without just compensation," in contravention of the Fifth Amendment to the United States Constitution.<sup>44</sup>

This argument also proves to be without significant justification. Since the designation of a site as an NNL is not accompanied by a change in ownership or imposition of protective land-use regulations or restrictions of any other kind, there should be virtually no change in property values resulting from the designation.<sup>45</sup> A study conducted by the Maine Critical Areas Program (a natural areas registry similar to the NNLP) in 1979 failed to show any decrease in the value or marketability of sites due to their designation as critical areas.<sup>46</sup> In fact, there is some evidence that the opposite may be true in certain situations, as where the natural significance of the parcel is such that the government or private conservation groups desire to acquire the site from the owner where no one had expressed interest in purchasing before.<sup>47</sup>

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43. P. HOOSE, *supra* note 1, at 57-58. The same is true for the protection afforded by § 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536 (Supp. 1982) (regulations pertaining to interagency cooperation). This provision would come into play wherever a species listed as endangered is present, regardless of whether or not the site is a registered NNL.

44. P. HOOSE, *supra* note 1, at 58.

45. *Nat'l Heritage Policy Act Hearings*, *supra* note 26, at 414 (answers of the Department of the Interior to additional questions).

46. P. HOOSE, *supra* note 1, at 58.

47. *Id.* at 16. It should be noted that an NNL designation does not preclude the use of a site as a commercial attraction. In fact, there are special provisions in the NNLP Handbook that allow for the designation of commercial sites as natural landmarks if certain additional criteria relating to tastefulness of the development

The issue of whether the designation of a site as an NNL could be so unduly burdensome to the landowner as to constitute an unconstitutional taking does not appear to have been litigated. However, it may be instructive to examine a recent constitutional challenge to the Park Service's similar National Historic Landmark Program<sup>48</sup> to help predict the likely outcome of a suit involving the NNLP.<sup>49</sup>

The claim that section 106 of the 1966 National Historic Preservation Act, as well as the other statutory protection afforded properties on the National Register of Historic Places, constituted a taking without just compensation was unsuccessful in the recent case of *Historic Green Springs, Inc., v. Bergland*.<sup>50</sup> The case involved a dispute between the Department of the Interior, a local historic preservation group, and the operators of several vermiculite mines. The mines had been forced to partially curtail their operations as a result of the creation of a National Historic Dis-

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and truthfulness in advertising and promotion are met. Thus, NNL status does not preclude the landowner from developing his or her property as a tourist attraction and deriving a reasonable economic use from the site, if he or she can do it without destroying the natural or geologic feature. (The only certain consequence of destroying the feature would be removal of NNL status—there is nothing the NNLP itself could do to stop the destruction.) NAT'L REGISTRY OF NATURAL LANDMARKS HANDBOOK, *supra* note 3, ch. 3, at 2-3.

48. Several lawsuits have been brought alleging that placing property within the National Register of Historic Places violates the Fifth Amendment's just-compensation requirement. That claim has apparently not made much headway in court. THE NATURE CONSERVANCY, *THE PRESERVATION OF NATURAL DIVERSITY: A SURVEY AND RECOMMENDATIONS* at A1-18 (1975); 3 *PRESERVING OUR NATURAL HERITAGE*, *supra* note 21, at 13.

49. It should be mentioned at this point that although the Natural and Historic Registers have many characteristics in common, there is one additional layer of protection afforded federal historic landmarks that has not been extended to natural landmarks. That protection is set out in § 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470(f) (Supp. 1982), which provides that

[t]he head of any Federal agency having direct or indirect jurisdiction over proposed Federal or federally assisted undertaking in any state and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation . . . reasonable opportunity to comment with regard to such undertaking.

Part IV discusses several legislative proposals that would have, *inter alia*, applied § 106-type protection to natural landmarks in addition to the "no prudent and feasible alternative" test set out in § 4 of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f) (1976) (requires planning to protect public lands, parks, refuges, etc., which are traversed by transportation lines).

50. *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839 (E.D. Va. 1980).

tract around the town of Green Springs, Virginia. The plaintiffs argued, among other things, that the presence of the District had a chilling effect on business and development in Louisa County and that the economic injuries to Green Springs landowners inherent in the Interior Secretary's actions must be compensated by the government.<sup>51</sup>

The court defined the taking issue as "whether those actions 'force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" <sup>52</sup> In determining whether the activities of the government constituted a taking, the court considered all the circumstances of the case.

The court held that even though the Interior Department's actions subject Green Springs property to the purview of federal statutes which may restrict the future use of such property, possibly leading to an abatement of the mining operation by the federal government, "this degree of interference with land use does not constitute a taking without just compensation."<sup>53</sup>

Thus, since it appears unlikely that a violation of the Fifth Amendment will be found to result from listing private property on the National Register of Historic Places, it is more unlikely to be found in the case of the Registry of National Natural Landmarks, since, as was indicated above,<sup>54</sup> the federal protection afforded natural landmarks is not as extensive as that given to historic landmarks.

(3) Another complaint frequently expressed by development interests in general, as well as by private landowners who are reluctant to participate in the NNLP, is that privately owned lands can be and are designated as NNLs without the landowner's consent, sometimes even in spite of his active opposition.<sup>55</sup>

This happens to be the current policy of the NNLP. Response to the complaint rests on a belief that a change in that policy would undermine the objectives of the Program:

If the integrity of the National Natural Landmarks Program is to be maintained, decisions to designate areas as landmarks must concentrate on scientific comparison and evaluation of inherent natural

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51. *Id.* at 848-49.

52. *Id.* at 849, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

53. *Id.* at 849. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), reached a similar result (a city may restrict development of individual historic landmarks as part of a program to preserve them without effecting a taking).

54. *See supra* note 49.

55. NNLP Final Procedures, *supra* note 5, at 81,188.



values. Clearly, no systematic, scientific inventory of important natural features, as embodied in the National Registry of Natural Landmarks, can be considered comprehensive if it includes only resources of consenting owners.<sup>56</sup>

Thus, owners of sites listed on the National Registry of Natural Landmarks may not necessarily demonstrate a commitment to protect the area's nationally significant values.<sup>57</sup> A private landowner whose property is designated as an NNL without his consent may nonetheless use his property in any way he desires or sell it without significant difficulty because of the lack of legal consequences arising from designation.<sup>58</sup> However, if the NNLP antagonizes many landowners with its "designation notwithstanding consent" policy, it may actually hurt overall protection goals of the Program while preserving the integrity of its inventory, and may have a harder time trying to persuade the landowners to cooperate with the Program. This dilemma is discussed in greater detail in Part IV.

(4) A fourth worry that landowners have often expressed is that NNL designation will lead to widespread public knowledge of the site and its natural features, resulting in marauding hordes of curiosity seekers and other trespassers, turning the property into a "public" park, invading the landowner's privacy and subjecting him to all kinds of liability.<sup>59</sup> In addition, some landowners may not appreciate unauthorized inspection of their lands for "elements of natural diversity" by agents of the federal government.

The issue of how much publicity is to be given natural landmarks and to whom and in what fashion that publicity may be made is not directly addressed in the NNLP Final Regulations.<sup>60</sup> However, both NNLP Handbooks<sup>61</sup> contain a considerable discussion of publicity, and the Program appears to be quite sensitive to publicity concerns. The current NNLP policy makes "minimum publicity" status available for any designated NNL if either of two conditions are met: (a) the landmark contains fragile and/or dangerous features that make it unsuitable for public use: e.g., caves, quaking bogs, eagle nests, etc.; or (b) the

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56. *Id.*

57. *Id.*

58. THE NNLP BROCHURE, *supra* note 27.

59. 3 PRESERVING OUR NATURAL HERITAGE, *supra* note 21, at 61.

60. *See supra* note 5.

61. *See supra* notes 3 & 9.

landmark's owner(s) are unwilling or unprepared to accept public use which they feel could result from a public announcement.<sup>62</sup> The effect of "minimum publicity" status is that specific reference to the name and location of an NNL with that status is not included in any press release.<sup>63</sup> The annual National Registry of Natural Landmarks listing includes the name but not the exact location of the landmark. "Minimum publicity" is marked on the NNL records of those sites qualifying for it, and administrators exercise care in providing specific information on the sites to individuals and organizations that request it.<sup>64</sup>

This policy enables any private landowner to obtain minimum publicity status for the portion of his property that is a designated NNL, thereby significantly reducing the likelihood that the natural features of his property will become a public attraction. However, some landowners will be skeptical of the public's ability to distinguish between a privately owned site that has been officially recognized as nationally significant by the government and one that is in public ownership. Others fear that the expenditure of public funds on the NNLP will cause the public to feel it has an equitable right to use private lands designated by the Program.<sup>65</sup> The NNLP staff does not respond directly to these concerns except to say that its interest is in identifying and protecting NNLs only, not in making them available for public use,<sup>66</sup> and that it will try to keep specific information on the location of the landmark from falling into the wrong hands.<sup>67</sup>

On the other hand, publicity may assist the NNLP staff by arousing public concern for natural landmarks that may be threatened with destruction.<sup>68</sup> This delicate problem is addressed again in Part IV in connection with owner agreements.

The issue of evaluators coming onto private land to determine whether it qualifies for NNL status has been directly addressed by the NNLP regulations. Under section 1212.4(b)(2) of the Final Regulations, "owner permission is required before [NNLP] repre-

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62. NATURAL LANDMARKS PROGRAM HANDBOOK—DRAFT, *supra* note 9, at 5-5.

63. *Id.* at 5-6.

64. *Id.*

65. *Nat'l Heritage Policy Act*, *supra* note 26, at 359 (statement of the American Forestry Association).

66. P. HOOSE, *supra* note 1, at 53.

67. Interview with Frank Ugolini, *supra* note 24.

68. Telephone interview with Laura Loomis, staff member, National Parks and Conservation Association (Jan. 6, 1981).

sentatives [may] enter onto the land."<sup>69</sup> This means that an owner could effectively keep NNLP evaluators off his property by refusing to grant them permission to make an on-site investigation. However, it is implicitly possible that a site could be designated an NNL without an on-site inspection, if, for example, the nationally significant natural feature could be sufficiently observed from abutting land or if studies of the property had been made before the current owner acquired the parcel. Thus, a private landowner may not be able to prevent the designation of his land as an NNL by denying evaluators permission to enter.

These are the most common fears private landowners have expressed concerning the NNLP. It is reasonably safe to say that, in the main, these fears are groundless; the designation of their property as an NNL is unlikely to significantly encumber use, value, or marketability and should result in a minimal increase in the degree of public visitation to the site. The obvious next question, "Well, then what *does* NNL designation accomplish?" will be discussed in the next section of the article.

In addition to the concerns of individual landowners, development interests express a certain amount of anxiety about NNLP operations; for example, they question the standards used to determine what sites are of "nationally significant" status.<sup>70</sup> Ironically, these same standards are criticized by some members of the conservation community.<sup>71</sup> These broader issues involving the NNLP, in addition to suggested improvements in the Program, are addressed in Part IV.

#### IV

##### SUGGESTED IMPROVEMENTS IN THE NNLP

This Part looks at the means by which the NNLP seeks to preserve nationally significant ecological and geological phenomena and compares the Program to several other natural areas registry systems. The final portion of this Part is devoted to a discussion of several Congressional attempts to beef up the NNLP and a partial explanation of why the attempts were unsuccessful.

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69. 36 C.F.R. § 12124(b)(2) (1980).

70. *See supra* note 65.

71. Telephone interview with Hardy Weiting, National Office, The Nature Conservancy (Dec. 10, 1981).

A. Owner Agreements<sup>72</sup>

The last section illustrated that the NNLP has few, if any, legal teeth. The designation of an area as a natural landmark in no way affects the ownership of the site and does not dictate the type or intensity of activity that may be undertaken in a landmark.<sup>73</sup> The NNLP has no authority or funds to regulate or acquire registered or unregistered lands nor can it threaten uncooperative landowners with sanctions or condemnation.<sup>74</sup>

In effect, since the NNLP has no stick to brandish, its approach has to be all carrot.<sup>75</sup> It must induce the owners of registered lands to refrain from activities that would endanger the elements of natural diversity located there. The major device used to accomplish this objective is the owner agreement. In return for his or her revocable promise to protect the NNL's nationally significant values, the landowner receives a certificate and a plaque to be placed at the site which commemorate the altruistic gesture.<sup>76</sup> The agreement contains no other promise or concession by the landowner.<sup>77</sup>

The owner agreement may be terminated by either party upon notice to the other. The agreement also automatically terminates upon the transfer of ownership of the site.<sup>78</sup> Since the owner agreement does not convey an interest in the registered property, it does not run with the land to bind future owners of the site.<sup>79</sup> In fact, the owner agreement is probably not legally binding between the immediate parties because of the ability of either to terminate

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72. A copy of a sample NNLP owner agreement is reproduced in the Appendix to this article.

73. NNLP Final Procedures, *supra* note 5, at 81,184.

74. *National Heritage Policy Act Hearings*, *supra* note 26, at 97 (statement of Robert L. Herbst, Assistant Secretary for Fish, Wildlife and Parks, Department of the Interior); *id.* at 414 (answers of the Department of Interior to additional questions). Interview with Frank Ugolini, *supra* note 24.

75. P. HOOSE, *supra* note 1, at 52.

76. I G. WAGGONER, *supra* note 13, at xiv.

77. *See supra* note 72.

78. NATURAL LANDMARKS PROGRAM HANDBOOK—DRAFT, *supra* note 9, at 6-3. However, termination of an owner agreement does not necessarily cause the removal of the site from the National Registry of Natural Landmarks. 1 PRESERVING OUR NATURAL HERITAGE, *supra* note 11, at 291. Unfortunately, getting the landowner to sign an owner agreement and setting generous boundaries for the NNL may not guarantee the safety of the elements sought to be protected. Factors such as the lowering of water tables, acid rain, and animals that migrate off the site cannot really be mitigated even by the most considerate landowner.

79. NNLP Final Procedures, *supra* note 5, at 81,188.

it at will.<sup>80</sup>

In addition, the consideration involved in the agreement is more symbolic than real. In exchange for the certificate and plaque, the landowner gives a stewardship promise which is more a moral than a legal commitment. The awards remind the landowner of his or her ethical duty to safeguard the natural values from serious disturbance.

The NNLP staff feels that owner agreements and awards, where they have been used, help supplement the degree of protection afforded a site by placing it in the National Registry of Natural Landmarks. Private landowners are often pleased to hear that there is something of nationally significant ecological or geological value on their property, and are usually amenable to managing the site in an appropriate fashion.<sup>81</sup>

It may be possible, however, to enhance the protective effect of owner agreements. Several alternative strategies are available, some of which are currently being used in connection with other natural area registration programs.

One alternative would be to put more substantive material into the owner agreement that would render it legally binding and/or would delegate to the government greater responsibility for safeguarding the natural elements. For example, the Ohio Natural Landmark Program, started in 1977 and modeled largely after the federal program, tries to incorporate a right of first refusal into its owner agreements.<sup>82</sup> This provision consists of an offer to purchase the property at a price equivalent to any acceptable bona

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80. There is a possibility, as yet unrecognized by the administrators, participants, and critics of the NNLP, that the owner agreements could be more legally binding than previously thought. For example, if the agreement required the landowner to notify the Park Service of his intention to terminate it before termination became effective, his use of the property in a fashion that damaged the site's nationally significant values without providing that notice could be held to be a violation of the owner agreement. (Note, however, that the notice requirement is contained in the NNLP regulations only and is not in the sample owner agreement produced in the Appendix; the notice provision would have to be set out in the agreement to be enforceable.) This liability would depend on whether a court felt that the plaque and certificate were sufficient consideration to render the landowner's stewardship promise binding, and whether the Park Service could prove that damage resulted from the landowner's failure to provide notice of termination.

81. Interview with Frank Ugolini, *supra* note 24.

82. Telephone interview with Stephen Goodwin, Staff Director, Division of Natural Areas and Preserves, Ohio Department of Natural Resources (ODNR) (Dec. 11, 1981). It may be necessary for ODNR to provide some monetary consideration in addition to the certificate and plaque in order to ensure that the right of first refusal is binding.

fide offer made to the owner by a third party. Neither party has anything to lose from a right-of-first-refusal provision. The owner usually does not care who purchases his property as long as a good price is obtained. The government gains the advantage of being notified in case the property is to change hands. Even if it cannot or chooses not to buy, it can put that notice to good use by employing other land protection devices to secure the site's natural values, including having the new owner agree to a right of first refusal.<sup>83</sup>

Other clauses in an owner agreement could provide additional protection for>NNLs. For example, a provision might grant permission to>NNLP employees or agents to periodically visit the site to ensure the continued integrity of its natural values, or might permit the government, at its own expense, to restore the area to its full health should it be found that the natural values were in danger.<sup>84</sup>

However, there is a clear tradeoff between the legal force of an owner agreement and the willingness of the owner to sign it. The major reason that the>NNLP and other registries that utilize owner agreements have been able to get so many landowners to cooperate is largely the lack of legal consequences flowing from the agreement. The>NNLP staff should be careful not to jeopardize this by making the owner agreement too detailed or filling it with legal jargon.<sup>85</sup>

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83. 3 PRESERVING OUR NATURAL HERITAGE, *supra* note 21, at 13. An example of a registry program with the contents of an owner agreement set out by the statute is § 7 of the Mississippi Natural Heritage Law of 1978 (MISS. CODE ANN. §§ 49-5-141 to -157 (Supp. 1981)), which provides for a right of first refusal in addition to a 30-day notice period before termination. MISS. CODE ANN. § 49-5-153. ME. REV. STAT. ANN. tit. 5, § 3314(4) (West 1964 & Supp. 1982) (repealed in 1979) required owners of sites listed on the state Critical Areas Registry to notify the Office of State Planning of any proposed alteration in the use or character of the site at least 60 days before the alteration.

84. P. HOOSE, *supra* note 1, at 64. Mr. Hoose also suggests inserting a clause that would absolve either party to the owner agreement from liability for injuries incurred by persons visiting the property. This may be a good idea for state-level registries, but since the law relating to liability of landowners for personal injuries varies considerably from state to state, it would probably be unwise to insert such a clause in the>NNLP owner agreement. The>NNLP's original owner agreement contained a clause that permitted "reasonable access for realizations of educational and scientific purposes." NAT'L REGISTRY OF NATURAL LANDMARKS HANDBOOK, *supra* note 3, ch. 2, at 1. This provision was usually waived at the landowner's request, and is no longer in>NNLP's sample agreement. I think a more limited access provision such as suggested above would be acceptable to landowners and should be written into the agreement.

85. P. HOOSE, *supra* note 1, at 53. Since the purpose of the owner agreement is to

Another factor that may enhance the effectiveness of the owner agreement would be to condition NNL registration upon landowner approval. Even though the resulting National Registry of Natural Landmarks would be an incomplete list of the nation's nationally significant ecological and geological phenomena (since the sites owned by uncooperative landowners would not be included), the landowners who did choose to participate might be more receptive to the Program than under the current policy.<sup>86</sup> The landowner would feel like a full partner in the NNLP and would not feel coerced into signing an owner agreement with NNL designation a reality.<sup>87</sup>

## B. Publicity

Related to the topic of owner agreements and owner approval of registration is the issue of how much publicity to give these activities. As was pointed out in the last section, NNL publicity could lead to either increased risk of damage to the landmark or an increased amount of public concern for its protection, or both. The effect of widespread public knowledge of a particular site's status as an NNL would largely depend upon the kind of ecological or geological feature that was located on the site. For example, the presence of bald eagles or a grove containing rare orchids

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engender a spirit of stewardship in the landowners, a good tactic would be to strengthen that part of the registration process that would enhance that spirit. For example, anything that increases the landowner's feeling of pride in the nationally significant status of his or her property is apt to boost its security. This could be done by making the plaque and certificate especially attractive and official-looking; the signature of a notable person, such as the Director of the Park Service, the Secretary of the Interior, or even the President, could lend a seal-like solemnity to the agreement. In addition, the presentation of an owner agreement to the landowner via a personal visit would probably be more effective than the NNLP's current policy of including an owner agreement with the letter informing the landowner that his property has been designated an NNL.

86. A compromise system, involving the use of multiple registries, is discussed later in the article, *see infra* notes 165-66 and accompanying text.

87. An example of a purely voluntary system is the Oregon Natural Heritage Act, which contains several protections of landowners' rights, including the prerequisite of landowner approval before a property is placed on the registry of natural areas. In addition, the bill prohibits entering information that has been obtained through unlawful trespass into the natural heritage data bank. *Nat'l Heritage Policy Act Hearings, supra* note 26, at 301 (statement of Wayne Rifer, Oregon Natural Heritage Program Director). In contrast, the Maine Critical Areas Program does not seek the landowner's permission before conducting an on-site evaluation and has encountered little negative reaction to this policy. Interview with Janet McMahon, *supra* note 41. Perhaps this disparity could be partially explained by philosophical differences between Eastern and Western landowners.

could stimulate public visitation as well as arouse local public sentiment for preservation. On the other hand, a natural landmark harboring a rare form of moss or lichen is unlikely to attract any but the most dedicated botanists to the site, and is also unlikely to generate much public support for its protection.

Thus it appears that a policy concerning publicity should be flexible enough to vary according to the nature of the landowner and the type of feature located within the NNL. When in doubt, it would probably be safer to come out on the side of less publicity.

The current NNLP policy is sensitive to this problem as well as to the degree of publicity to accompany the presentation of the certificate and plaque to landowners who sign the owner agreement. It should be remembered that the important thing to publicize in a plaque presentation is the landowner's altruism and concern for conservation, not his or her property.<sup>88</sup> Although NNLP staff members realize that plaque presentations are a good way to advertise their Program and to promote concern for natural areas preservation at the local level, they are careful not to publicize the presentation ceremony unless the landowner requests it and the site will not suffer undesired consequences as a result.<sup>89</sup>

### C. Monitoring and Management Assistance

The functional activities of the NNLP are supposed to include periodic monitoring of the NNLs to determine the condition of their nationally significant values, and offers of management assistance to local public and private landowners to help fulfill the owner agreement's promise to prudently manage the sites. Unfortunately, due to the Program's relatively young age, small staff, and miniscule budget, these activities have received very little attention.<sup>90</sup> The NNLP continues to focus on identifying and evaluating potential landmarks. Once that is done, the remainder of NNLP functions should primarily be handled by the Park Service's eight regional offices.<sup>91</sup> But these offices have not yet recovered from the Park Service's absorption of the Heritage

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88. P. HOOSE, *supra* note 1, at 53. It may be somewhat difficult in some situations to publicize the person and not the property. (In a small town, for example, most people would know exactly where the cooperating landowner lived.)

89. Interview with Frank Ugolini, *supra* note 24.

90. *Id.*

91. *Id.*



Conservation and Recreation Service.<sup>92</sup> Because of budget cuts it is somewhat doubtful that the regional offices will be able to take up responsibility for certain NNLP functions in the future.

Yet this is an aspect of the program that needs attention. It is very important that NNLP employees or agents contact each NNL owner in person or by telephone at least once per year to show that the NNLP is still going strong and is sincerely interested in the preservation of the site's nationally significant values.<sup>93</sup> At this point, the NNLP should repeat its offers of management assistance and should be prepared to help landowners draft management plans or suggest other sources of assistance. Without periodically "freshening the glue" that created the landowner's moral obligation to protect the natural values of the site, there is a danger that the landowner or his or her successor will forget the national significance of the property and act in contravention of the NNLP's purposes.

In addition, when monitoring visits to the NNL are made, monitors should stress the NNLP's desire to help the landowner exercise proper stewardship of the site rather than creating the impression that monitors are "inspecting" compliance with the NNLP's regulations.<sup>94</sup>

To improve the quality of monitoring and to better provide management assistance to NNLs, the NNLP has begun contracting out these responsibilities to state natural areas preservation programs.<sup>95</sup> For example, the NNLP has a "gentleman's agreement" with the Maine Critical Areas Program to monitor the NNLs in that state; this enables a much greater amount of personal visitation with NNL owners than the NNLP staff is capable of on its own. Other examples of cooperative agreements include: a pilot scientist monitoring project using university professors, many of whom volunteer their services to the Program; the use of Boy Scout troops to monitor certain NNLs with the consent of the landowner; and an agreement with the Soil Conservation Service to monitor eight or nine NNLs as a pilot project.<sup>96</sup> These agreements with state programs and private individuals may play an even more crucial role in the future if the Park Service's regional

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92. *Id.*

93. P. HOOSE, *supra* note 1, at 56.

94. NAT'L REGISTRY OF NATURAL LANDMARKS HANDBOOK, *supra* note 3, ch. 6, at 6.

95. This step has been officially labeled the Natural Landmark Patron Program. NATURAL LANDMARKS PROGRAM HANDBOOK—DRAFT, *supra* note 9, at 7-5 & 7-6.

96. Interview with Frank Ugolini, *supra* note 24.

offices are incapable of assuming their partial responsibility for the operation of the NNLP.

#### D. Integrity of the Data Collection Process

A major component of the NNLP consists of identifying potential NNLs and determining which sites are of "national significance."<sup>97</sup> This process purportedly will eventually result in a comprehensive list of the nation's most significant natural areas.<sup>98</sup>

The NNLP's means of selecting NNLs have met with some criticism, however, both from conservationists and development interests. Both parties believe that in choosing sites worthy of NNL status the NNLP staff relies upon scientific criteria that lack rigor and allow too much discretion.

Conservation organizations such as The Nature Conservancy see several problems with the NNLP's selection process. First of all, the theme studies and evaluator reports are basically "dead" data; they sweep a physiographic region or site once for elements of natural diversity at a given point in time and then are not periodically updated to keep up with changing conditions.<sup>99</sup> Second, since only one scientist performs the on-site evaluations, there is a good chance that subjective impressions will permeate the subsequent report, possibly leading to the designation of sites for other than scientific reasons. For example, if the scientist played on a particular site as a child, he may present a biased view of the importance of the site in his evaluation report. Third, since the evaluation reports are nearly always reviewed by individuals who do not have an opportunity to personally inspect the sites discussed in the evaluation reports, these individuals must necessarily rely upon the evaluator and concur with his recommendations unless they are clearly erroneous.<sup>100</sup> Development interests have expressed some concern about the lack of clear limits to the type and number of areas that may be designated as NNLs. As noted ear-

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97. See *supra* note 14 for a definition of this term.

98. The NNLP studies also serve to inform the National Park Service about the potential additions to the National Park System. NATURAL LANDMARKS PROGRAM HANDBOOK—DRAFT, *supra* note 9, at 2-6.

99. Telephone interview with William Chandler, Legislative Liaison, The Nature Conservancy (Dec. 11, 1981).

100. Interview with Hardy Weiting, *supra* note 71. The NNLP recognizes this danger of the evaluators' personal opinions creeping into the report; however, they are merely required to separate their opinions from the facts and to identify them as such. NAT'L REGISTRY OF NATURAL LANDMARKS HANDBOOK, *supra* note 3, ch. 5, at 4.

lier, they are afraid the NNLP policy of permitting anyone to suggest that a certain area be considered for NNL status would allow "ecofreaks" to obstruct or delay the construction of important resource development projects such as strip mines or power plants.<sup>101</sup> They are also concerned that there is nothing in the NNLP regulations which establishes an absolute ceiling on the total number of sites designated as NNLs or acreage covered by the designation.<sup>102</sup> Lastly, they have criticized the Program's definition of "nationally significant"<sup>103</sup> as overbroad, since it allows the designation of ecological or geological sites that are "outstandingly typical" and does not limit NNL status to truly unique areas.

Thus both conservation and development interests share a belief that the properties listed in the National Register of Natural Landmarks may not be restricted to the best examples of the country's natural heritage. The Nature Conservancy favors an alternative natural diversity identification scheme known as the Natural Heritage Program.<sup>104</sup> This program, now operating in twenty-six states and in the region covered by the Tennessee Valley Authority, consists mainly of a manual file and computer data bank that contain records of the location of all the elements of natural diversity within a particular state.<sup>105</sup> The programs are all on a standardized software package developed by the Conservancy in the early 1970s. The programs are originally funded with the assistance of the Conservancy and the federal government, but are eventually operated and supported completely by state government.

Natural Heritage Programs have several advantages over the NNLP's data collection system. First, the Natural Heritage data base is constantly being updated and improved by the addition of new information, whereas the NNLP studies are one-time deals. Second, the Natural Heritage staff can afford to be more system-

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101. See *supra* text accompanying note 17.

102. *Nat'l Heritage Policy Act Hearings*, *supra* note 26, at 123-24 (testimony of Alaska Senator Ted Stevens).

103. NATURAL LANDMARKS PROGRAM HANDBOOK—DRAFT, *supra* note 9, at ii. The NNLP's response to this criticism is that the Program's objective is to identify and designate the best examples of the full range of geological and ecological characteristics that comprise America's natural areas; this includes the registration of areas that best represent a type of feature that is common. NNLP Final Procedures, *supra* note 5, at 81,186.

104. Interview with Hardy Weiting, *supra* note 71.

105. Elements of natural diversity are the presence within a state of rare or endangered plant or animal species and their habitats, and unique or representative ecosystems.

atic and careful in its studies, since it has much less ground to cover than does the NNLP.<sup>106</sup> This means that a higher proportion of Natural Heritage data can be derived empirically than is possible with the NNLP. Finally, since Natural Heritage Programs are concerned only with identification and not recognition and registration of elements of natural diversity, there is less opportunity for subjective factors to creep into the process of determining "nationally significant" status.<sup>107</sup> It is not within the power of the Natural Heritage staff to determine which parcels deserve protection.

Given the apparent advantages of Natural Heritage Programs over the theme-study approach, the NNLP has informally begun to tap the information contained in state Natural Heritage and other similar programs for use in its operation.<sup>108</sup> However, there continues to be a considerable amount of data on occurrence of natural diversity elements available at the state level that is not examined by the NNLP. This results in duplicative studies and/or the basing of designation decisions on less than the most data available.<sup>109</sup> The federal government, supported by The Nature Conservancy and several state natural areas programs, spon-

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106. Interview with Hardy Weiting, *supra* note 71.

107. *Id.* See *supra* note 100 and accompanying text. This is not to say that the NNLP has no advantages over Natural Heritage Programs. For instance, a state Natural Heritage Program may indicate that a certain type of plant species is extremely rare in the state and commit resources to protect it, while the NNLP, having the benefit of a larger view, would probably notice that the plant was quite common in two neighboring states and conclude that preservation of the first state's population was not imperative. The states that have both Natural Heritage Programs and state-level natural areas registries use the Natural Heritage data more or less exclusively to determine which sites qualify for inclusion on the registry. For example, the Ohio Natural Landmark Program maintains a close relationship with the state's Natural Heritage Program, while the Arkansas Natural Heritage Commission, which administers both a data base and a registry, continues to obtain the locations of some potential registry areas from non-Natural Heritage Program sources (although the Commission does make a check of all proposed sites using the Heritage Program data). The Arkansas law calling for the establishment of a registry of natural areas is contained in § 9-1409(f) of the Arkansas Statutes. An interesting provision in this statute is contained in the last sentence of subsection (f): "the [Natural Heritage] Commission shall have no regulatory jurisdiction over lands or interests therein not actually acquired for the natural-areas system." ARK. STAT. ANN. § 9-1409(f) (1970). Making a clear distinction between the registry and regulation programs probably helped the bill pass and is a good response to private landowner concerns that registry status will lead to increased regulation. Interview with Stephen Goodwin, *supra* note 74; telephone interview with William Shepherd, Environmental Coordinator, Arkansas Natural Heritage Commission (Dec. 10, 1981).

108. Interview with Frank Ugolini, *supra* note 24.

109. *Nat'l Heritage Policy Act Hearings*, *supra* note 26, at 435.

sored an attempt to improve this informal link by Congressional action. The various legislative proposals that resulted are discussed in the next section.

#### E. Legislative Proposals to Improve Natural Diversity Identification and Protection

The original proposal to enhance the NNLP was made in 1966, before the creation of state Natural Heritage Programs. It was then, just after the passage of the Historic Preservation Act of 1966, that some of the Park Service staff suggested that an amendment to the Act be drafted which would afford NNLs the same status and protection as properties listed in the Register of National Historic Places.<sup>110</sup> Another option was to propose a new law specifically for that purpose.<sup>111</sup>

The Park Service had just finished drafting a bill that would accomplish the above objective when the Nixon Administration took over. Given the Nixon Administration's policy of restricting the expansion of federal government activity, the idea of legislative improvements to the NNLP was placed on the back burner until another Democratic administration came into office.<sup>112</sup>

Early in 1977, two events occurred that led to the most recent proposals to pass federal legislation in the natural heritage area. The first was the creation of the National Heritage Task Force in President Carter's May 2 environmental message to Congress. The Task Force, composed of many historic and natural-areas preservation experts in the public and private sectors, was charged with the responsibility of drafting National Heritage legislation within 120 days.<sup>113</sup>

The second event was the introduction of H.R. 8650, the Natural Diversity Preservation Act, in the House of Representatives.<sup>114</sup> Sponsored by Rep. Keith Sebelius (R-Kansas), the bill was designed to make the preservation of the elements of natural diversity for primarily scientific purposes a major objective of the federal government, and to encourage the states to establish natu-

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110. Interview with Mike Lambe, *supra* note 6.

111. *Id.*

112. *Id.*

113. *Nat'l Heritage Policy Act Hearings*, *supra* note 26, at 1; interview with Mike Lambe, *supra* note 6.

114. *Preservation of Natural Diversity: Hearing Before the Subcomm. on Nat'l Parks and Insular Affairs of the House Comm. on Interior and Insular Affairs*, 95th Cong., 1st Sess. 3 (1977) [hereinafter cited as *Preservation of Natural Diversity Hearings*].

ral areas protection programs.<sup>115</sup> Two provisions of the bill merit mention here. Section 302(c) contained the following protection for properties listed in the Registry:

No department or agency of the United States shall, for any Registry entry classified as 'international' or 'national', or for any Registry entry which has ever received direct Federal funding for purposes of protecting its resource integrity, assist by loan, grant, license, or otherwise any undertaking or action which would violate the standards of protection identified for Registry entries as developed and administered pursuant to section (a) of this section. [Section (a) provides that protection standards shall be developed by the Office of Ecological Reserves, itself created in § 201(a).]<sup>116</sup>

Section 402(b)(2) of the Act provides the following alternative action if a state chooses not to establish a natural areas protection program:

In instances where for reasons of lack of interest or funds or other reasons, a state fails to participate . . . local units of government and/or private entities . . . may participate in or operate the program needed in the state [and qualify for the federal funds allocated for that purpose]. . . .<sup>117</sup>

Although the testimony concerning the bill was generally favorable, the bill merely added more bureaucracy and made no attempt to integrate or absorb preexisting federal programs relating to natural areas, including the NNLP. H.R. 8650 died in committee.

A second attempt to legislate in this area was introduced in the Senate in the second session of the 95th Congress. The Natural Diversity Act (S. 1820) was, interestingly, co-sponsored by Senators Jesse Helms and Strom Thurmond of South Carolina, among others; its chief sponsor was the late Senator Lee Metcalf of Mon-

115. *Id.* at 5.

116. *Id.* at 12. Because this provision left the setting of protection rules to agency discretion, it was not popular with development interests who feared the discretion would be abused.

117. *Id.* at 67. This provision or one like it was not included in the next two bills to be discussed in this section. It is an interesting idea that deserves further consideration, especially when a program such as natural diversity preservation, which ideally should be operating in all 50 states, provides only for voluntary state participation. Another possible alternative provision could be something akin to § 110 of the Clean Air Act of 1970 which states that "The [Federal] Administrator . . . shall . . . prepare . . . an implementation plan . . . for a state, if—(A) the state fails to submit an implementation plan. . . ." 42 U.S.C. § 7410(c)(1)(A) (Supp. 1982). In other words, the federal government could design and implement a state-level natural areas inventory and registration program if a state failed to come up with one within a reasonable period of time.

tana.<sup>118</sup> S. 1820 was similar in many respects to its predecessor; it had the advantages of tighter drafting and a focus on supporting state natural heritage programs with a minimal amount of new federal bureaucracy.

Another difference between the two bills was in the provision affording protection for registered sites:

Section 10(d). No agency of the United States shall take any action or assist any undertaking by loan, grant, license, or other action which would adversely impact or destroy the element or elements of natural diversity present at any site entered on the registry.<sup>119</sup>

This clause scared many pro-development parties, who testified that the bill "could and would be used as a tool for those intent upon the extension of federal land-use controls over private lands."<sup>120</sup> Others stated: "[t]he need for further legislation to protect 'natural diversity' is questionable in view of other legislation providing for environmental regulation at the federal, state and local levels. . . . We are creating such an extensive patchwork of protected areas and resources that they are beginning to overlap to the extent that vital major energy facilities like power plants and transmission lines cannot be licensed and constructed. . . ."<sup>121</sup>

Ironically, the testimony that apparently killed S. 1820 was not offered by a developer but rather by Chris Therral Delaporte, the Director of the newly-created Heritage Conservation and Recreation Service, one of the products of the National Heritage Task Force. Mr. Delaporte requested that action on S. 1820 be deferred until the Carter Administration's natural heritage legislation was submitted to Congress.<sup>122</sup> Thus, a bill that showed considerable promise when introduced and which, with a modification of section 10(d), might have passed, had to be abandoned because the President was not behind it.

Instead, the Administration introduced its own version of natural heritage legislation, named the National Heritage Policy Act of 1979 (S. 1842), in September of that year. The hearing on the bill did not take place until April of 1980.<sup>123</sup> The objective of the bill

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118. *Natural Diversity Act Hearings, supra* note 42, at 7.

119. *Id.* at 23.

120. *Natural Diversity Act Hearings, supra* note 42, at 307 (statement of the Associated General Contractors of America).

121. *Preservation of Natural Diversity Hearings, supra* note 114, at 183-84.

122. *Natural Diversity Act Hearings, supra* note 42, at 168 (statement of Chris T. Delaporte, Heritage Conservation and Recreation Service Director).

123. *Nat'l Heritage Policy Act Hearings, supra* note 26, at 1. The drafting history of this bill is interesting and somewhat indicative of how political considerations in-

was reminiscent of the original legislative proposal made during the 1960s—to bestow on>NNLs the same status as the sites listed in the National Register of Historic Places.

S. 1842 also provided additional protection for natural and historic landmarks. Section 204 of the National Heritage Policy Act was virtually identical to section 106 of the 1966 Historic Preservation Act; it required the head of any federal agency to consider the effect of the agency's activities on properties eligible for or included in the Natural or Historic Registers, and to afford the Council on Heritage Conservation (which replaces the National Parks Advisory Board) a reasonable opportunity to comment.<sup>124</sup> Section 205 extended a greater degree of protection for natural and historic landmarks that are deemed to be of "national significance." According to section 205:

Prior to the approval of any Federal undertaking which may adversely affect any natural or historic landmark, the head of any Federal agency shall determine that no prudent and feasible alternative to such undertaking exists, shall, to the maximum extent possible, take such planning and actions as may be necessary to minimize harm to such Landmark, and shall afford the Council on Heritage Conservation a reasonable opportunity to comment on the undertaking. . . .<sup>125</sup>

This "no prudent and feasible alternative" language is essentially the same as that contained in section 4 of the 1966 Department of Transportation Act, which was given substantive force in the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe*.<sup>126</sup> S. 1842 also contained provisions that offered financial

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fluence the formation of legislation. After President Carter made his National Heritage pronouncement in May of 1977, the Park Service was a bit confused as to what kind of program the President had in mind. The Service examined various Georgia statutes and discovered that the state has a registry of natural areas. As it turned out, the Carter Administration was not aware that a registry program existed at the national level in the>NNLP at the time the National Heritage Task Force was created. The Administration decided to push ahead with new legislation anyway for several reasons, including providing the justification for the existence of HCRS and saving face for the President by producing substantive results from his 1977 pronouncement. Interview with Mike Lambe, *supra* note 6.

124. *Nat'l Heritage Policy Act Hearings*, *supra* note 26, at 14-15.

125. *Id.* at 15.

126. 401 U.S. 402 (1971). Even though this provision applies only to federal actions, development interests testifying against the bill felt that since the federal government is now involved at least indirectly in most uses of private land, the provisions of § 205 would apply to them. (Note that § 4 of the Department of Transportation Act of 1966 only applies the "prudent and feasible alternative" test to federal actions on publicly held land, 49 U.S.C. § 1653(f) (1976).)



assistance to the creation and operation of state Natural Heritage programs.<sup>127</sup>

There was some sentiment expressed that S. 1842 was in reality an organic act for the Heritage Conservation and Recreation Service (HCRS), although Assistant Secretary of the Interior Robert Herbst denied this allegation. (HCRS had been created by orders of President Carter and Interior Secretary Cecil Andrus without Congressional approval.)<sup>128</sup> An examination of S. 1842 would support such a contention. The NNLP had been transferred from the Park Service to HCRS along with the historic preservation programs, but there was no statutory connection between the two.

Like its predecessors, the National Heritage Policy Act was doomed to a brief and fruitless existence. Its failure to pass is attributable to several factors. First, development interests put up considerable resistance. The same groups that testified against the Natural Diversity Acts came out in force against S. 1842.<sup>129</sup> They were especially concerned about the application of section 204 to sites that were merely eligible for landmark designation, and the section 205 "prudent and feasible alternative" rule, both of which could result in substantial impairment of private land and resource development.<sup>130</sup> Another frequently expressed complaint was that a privately owned site could be placed on the register and be entitled to sections 204 and 205 protection without the landowner's consent.<sup>131</sup>

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127. *Nat'l Heritage Policy Act Hearings* § 201(f), *supra* note 26, at 8-9.

128. McCarthy & Cortner, *Preservation Roadblocks: The National Heritage Program Could Fizzle*, WESTERN WILDLANDS, Winter 1980 at 6-7 [hereinafter cited as *Preservation Roadblocks*].

129. *See supra* notes 120 & 121 and accompanying text.

130. *Nat'l Heritage Policy Act Hearings*, *supra* note 26, at 14-15; *id.* at 322 (statement of Jerry L. Haggard, Member, Public Lands Committee, American Mining Congress):

If it is not the purpose of legislation such as S. 1842 to remove more and more lands from resource production, it certainly has that effect. . . . And such legislation as this is too frequently misused by the always present opponents of any resource development in attempts to prevent the development. All of these effects of such legislation impose increasing costs upon our taxpayers, consumers, economy and strength of our nation.

131. *See, e.g., Nat'l Heritage Policy Act Hearings*, *supra* note 26, at 350 (statement of John F. Hall, National Forests Products Association). Another interesting but far-fetched argument was put forth by John C. Thompson, Manager, Land and Forest Resources, Georgia-Pacific Corp., representing the National Association of Manufacturers. He felt that the passage of the Act would actually hurt the operations of The Nature Conservancy in its negotiations with private landowners. *Id.* at 343-44. (William Chandler, testifying in support of S. 1842, denied this allegation in subsequent

The second factor in the failure of the National Heritage Policy Act was the unstable relationship between the various public and private historic preservation and natural-diversity preservation groups involved in drafting and lobbying for it. Conservation and historic-preservation groups have held different viewpoints on federal legislation before. For example, the 1977 Amendment to the Tax Reform Act of 1969 required preservation easements to be perpetual in duration in order to be deductible under section 170 of the Internal Revenue Code, as was recommended by The Nature Conservancy, whereas historic-preservation groups favored the preexisting thirty-year-term requirement.<sup>132</sup> A group called the American Heritage Alliance was formed specifically for the purpose of bringing the historic and natural groups together to provide unified support for the bill, but the two groups could not agree on the exact nature of the legislation they wanted.<sup>133</sup>

By far the biggest negative influence on the National Heritage Policy Act, however, came from the changing political climate.<sup>134</sup> By the time the hearing on S. 1842 was held, the fifty-two American hostages were going into their sixth month of captivity in Iran, the President was dealing with a domestic budget crisis, and the mood of the country had taken a sharp turn to the right. Pro-development senators such as Senator Domenici of New Mexico, who could only manage sheepish opposition to the earlier natural-diversity bills, now led the charge of the increasingly swelling ranks calling for an end to "needless" environmental programs. The Carter Administration, the source of S. 1842, was forced to withdraw its active support of the legislation because of its preoccupation with more pressing problems, and the bill was never reported out of committee.<sup>135</sup>

It certainly appears that the NNLP and related proposals have taken more than their share of lumps from both sides during the past few years. A large portion of that difficulty is directly attribu-

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testimony.) I believe that Mr. Thompson's ulterior motive was that since The Nature Conservancy is a private organization, it is incapable of regulating the use of private land as the government can. (I should point out as an aside here that private organizations can and have set up and operated natural registry programs; the Brooks Bird Club in West Virginia is an example of such an organization. 3 PRESERVING OUR NATURAL HERITAGE, *supra* note 21, at 57.)

132. Small, *The Tax Treatment of the Donation of Easements in Scenic and Historic Property*, 9 ENVTL L. REP. (BNA) 50009, 50012-13 (1979).

133. Interview with Hardy Weiting, *supra* note 71.

134. *Preservation Roadblocks*, *supra* note 128, at 7.

135. *Id.*

table to the foibles of politics, an accepted fact of life in Washington, D.C.

Yet almost nowhere in the hearings on any of the three bills discussed above was there testimony disparaging the existing NNLP or the concept of compiling an inventory of the best examples of nationally significant ecological and geological phenomena. The NNLP continues to function despite the unsuccessful attempts to establish it by statute.

## V

### CONCLUSION

The remaining issues to be addressed in this article are the following: (1) the extent to which the NNLP and similar registries at the state level have proved to be effective in preserving elements of natural diversity and the various limits to that effectiveness; (2) the means available to improve the effectiveness of the NNLP and to make it conform with the Reagan Administration's policies.

#### A. Effectiveness of the NNLP

Given its extremely modest budget and staff,<sup>136</sup> the NNLP has made significant contributions to the identification and recognition of ecological and geological objects of national significance.<sup>137</sup> The major protective force of the Program appears to be that it points out important natural areas for the benefit of other programs. For example, the preparation of environmental impact statements under NEPA has been helped considerably by the NNLP, which furnishes data on any NNLs that would be adversely affected by the proposed action.<sup>138</sup> The probability that an NNL would be damaged has been a valuable negotiating tool for conservationists, who have used that fact to justify the importance of the natural feature located on the site and to exact mitigating measures from the federal government or federally assisted developers.<sup>139</sup>

In addition, The Nature Conservancy and other private conser-

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136. 1 PRESERVING OUR NATURAL HERITAGE, *supra* note 11, at 296.

137. See *supra* text accompanying note 8. As of January 1982, the NNLP staff knew of only two instances where natural landmarks had been negatively affected to the point of losing their inherent natural integrity. 3 PRESERVING OUR NATURAL HERITAGE, *supra* note 21, at 59-60.

138. 1 PRESERVING OUR NATURAL HERITAGE, *supra* note 11, at 297.

139. Interview with Frank Ugolini, *supra* note 24.

vation organizations use the information generated by the NNLP to assist them in setting priorities for natural area acquisition efforts.<sup>140</sup> The NNLP continues to be the only federal program that identifies and recognizes nationally significant natural areas on non-federally owned land.

The extent to which designation of a privately owned site as an NNL actually influences the landowner not to develop his property has not yet been determined. It is a difficult concept to quantify because of the large number of factors that determine how private property is used. For example, an NNLP landowner may be cooperative with the Program because he or she knows the owner agreement is probably not binding and that the development pressure creating a market for the land is still a few years off. Or it could be that the landowner was already aware of the nationally significant natural feature and had chosen to protect it, notwithstanding its NNL designation. Registries operating at the state level have had similar difficulty determining the effectiveness of their programs.<sup>141</sup>

It is difficult for a registry program to produce hard data justifying the expenditure of public funds for registration purposes as compared to other land protection techniques. For instance, a land acquisition program can reveal how many acres it secured for how many dollars; in addition, the land protected is more or less available for passive recreation by the public unless it is an extremely sensitive natural area. Benefits accruing to the public from the NNLP, on the other hand, are much less evident; for example, NNL sites are often unknown or inaccessible to potential passive recreationists. Nonetheless, it is important for registry programs to gather as much substantive proof as they can muster to show that the program is actually accomplishing its objectives, especially around appropriations time.<sup>142</sup>

In spite of its successes, the effectiveness of the NNLP is handicapped by several factors, some of which are capable of correction, others of which are probably inherent in the program.

At least three problems arise from the fact that the NNLP has been traditionally understaffed and underfunded. First, as was mentioned previously, the integrity of the data used to determine what sites are worthy of NNL status is somewhat suspect because

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140. 3 PRESERVING OUR NATURAL HERITAGE, *supra* note 21, at 59.

141. Interview with Bill Shepherd, *supra* note 107.

142. Perhaps bringing in a few happy owners of designated NNLs to testify at the appropriation hearing would help in this regard.

of the lack of funds available to conduct detailed scientific investigations in every situation in which investigation is necessary.<sup>143</sup> Second, there has been almost no money or staff time available for landowner contact, or for monitoring and management assistance, all of which are vital to maintaining whatever beneficial influence was bestowed by the NNL designation.<sup>144</sup> Finally, while the Park Service has notified federal agencies of landmark locations, it has not, on a systematic basis, distributed landmark information to decisionmakers in state and local governments to ensure that NNLs are not adversely impacted by state, local, or private development proposals.<sup>145</sup> Whether or not the Park Service's regional offices will be able to help out the NNLP national office in these matters will not be known until the dust settles from the absorption of Heritage Conservation and Recreation Service.<sup>146</sup>

Two of the NNLP's problems could not be ameliorated by injecting more funds and employees into the Program. The first is the lack of any appreciable legal protection for NNLs.<sup>147</sup> Due to political concessions and botched attempts at legislation, NNLs do not even qualify for the limited protection afforded properties on the National Register of Historic Places by section 106 of the 1966 Historic Preservation Act.<sup>148</sup> Since the presence of legal protection may make NNL designation more unpalatable to landowners, however, it may be wise to provide for any legal protection in a program distinct from the NNLP.<sup>149</sup>

This leads to a discussion of the second problem inherent in the NNLP. One of the best uses of registry programs is as one of many weapons in the arsenal of available land-protection techniques. For example, the staff of state registries such as those in Ohio and Arkansas is composed of the same individuals that man-

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143. 1 PRESERVING OUR NATURAL HERITAGE, *supra* note 11, at 296; interview with Hardy Weiting, *supra* note 71.

144. *Developments and Varied Problems Threaten 117 Natural Landmarks*, NAT'L PARKS AND CONSERVATION MAG., Mar. 1979, at 20. The National Parks and Conservation Association (NPCA) has been one of the most outspoken supporters of the NNLP, and has helped to publicize both the Program itself and the various natural and historic landmarks designated under it, especially those that are threatened with destruction. Interview with Frank Ugolini, *supra* note 24.

145. 3 PRESERVING OUR NATURAL HERITAGE, *supra* note 21, at 61.

146. Interview with Frank Ugolini, *supra* note 24.

147. 1 PRESERVING OUR NATURAL HERITAGE, *supra* note 11, at 297.

148. *See supra* note 49.

149. P. HOOSE, *supra* note 1, at 57.

age the state nature preserves system.<sup>150</sup> Thus, when a state natural diversity inventory (usually a Natural Heritage Program) indicates that a particular parcel has important natural qualities, the state employee can introduce to the private landowner the full panoply of land protection devices available.<sup>151</sup> The registry technique is usually relied upon to keep a foot in the door with landowners who are unwilling to part with any interest in their land at the present time. In the meantime, the landowner is periodically reminded of the natural significance of his property by the certificate on his wall and check-up calls from the registry staff.<sup>152</sup>

Unfortunately, because of the sheer magnitude of the federal bureaucracy, it is much more difficult for the NNLP to be integrated with all the other agencies and programs engaged in natural areas protection in a manner similar to that described above. While the HCRS was in operation, there was a fair amount of coordination between the staff members that handled NNLP matters and those involved with other land protection techniques.<sup>153</sup> However, I doubt that the NNLP could be incorporated to such an extent into other federal land protection programs that it could be successfully used as a "foot in the door" device in negotiations with private landowners.

#### B. Improving the Effectiveness of the NNLP

Accepting the proposition that the aforementioned shortcomings of the NNLP do not outweigh its potential benefits, what means are available to improve its effectiveness and to make the Program more appealing to the current powers that be in the Interior Department?

The possibility of passing any legislation to bolster the NNLP appears to be quite remote for the foreseeable future. Resource-

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150. Interviews with Stephen Goodwin, *supra* note 82, and Bill Shepherd, *supra* note 107.

151. These devices include the acquisition of a fee simple or conservation easement through purchase, bargain sale or outright gift (called dedication in some states), leases, remainders, management agreements, and rights of first refusal. While many of these techniques (including registration) are relatively weak in themselves, when used in conjunction with other devices they can have a fairly strong cumulative effect. 3 PRESERVING OUR NATURAL HERITAGE, *supra* note 21, at 7.

152. See *supra* note 150.

153. Interview with Frank Ugolini, *supra* note 24. Perhaps a system of 50 state natural-diversity registries could eventually replace the NNLP. The states may be the best location for registries in the long run. But, since less than half the states have them now, and it will be several years, if at all, until all states have them, the NNLP is needed to fill in the gaps.

development interests currently have the upper hand in Congress and the Interior Department;<sup>154</sup> not only are new environmental programs highly unlikely to be approved, but existing programs such as the Land and Water Conservation Fund are in danger of extinction.<sup>155</sup> Under the current policies of the Interior Department, each new legislative proposal is carefully scrutinized for its regulatory effect on land use, both real and potential, leading to the rejection of even moderate programs that involve a minimum amount of regulation (such as the NNLP).<sup>156</sup>

If, however, this situation should change (e.g., if the Reagan Administration becomes more amenable to compromise or the state of the economy improves to such an extent that Congress could concern itself with other matters), it may be worthwhile to draft legislation that would help to correct some of the NNLP's current problems. Of the three unsuccessful legislative attempts discussed in the last chapter, the Natural Diversity Act (S. 1820)<sup>157</sup> would probably be the best starting point because it emphasized federal assistance to state natural heritage programs, a concept that is quite compatible with President Reagan's New Federalism. One change in S. 1820 would clearly have to be made, however: section 10(d), which bars agency action jeopardizing the elements of registered sites, would have to be considerably weakened or removed altogether, due to the current political climate.<sup>158</sup>

One potential difficulty that was not adequately addressed by S. 1820 or the National Heritage Policy Act (S. 1842) was what should be the appropriate response of the federal government to states that choose not to set up their own natural diversity programs.<sup>159</sup> Any move to relocate the responsibility for natural diversity identification and protection to state governments should be accompanied by some provision for uncooperative states (e.g., by legislation that requires states to establish such programs or requires the federal government to set one up for them). Otherwise, the transfer may create some potentially disastrous gaps in

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154. Interview with Hardy Weiting, *supra* note 71.

155. Interview with William Chandler, *supra* note 99.

156. Interview with Mike Lambe, *supra* note 6.

157. *See supra* note 42.

158. *See supra* text accompanying note 119.

159. *Nat'l Heritage Policy Act Hearings*, *supra* note 26, at 416 (answers of the Department of the Interior to additional questions): states are not required to participate, but participation and cooperation reduce the cost to the federal government of administering the program and allow the sharing of responsibility.

natural areas protection.<sup>160</sup>

Fortunately, new legislation is probably not necessary to make changes to the NNLP.<sup>161</sup> In order to "sell" the NNLP to the current powers in the Interior Department so that adequate staff and funding are provided to it, the NNLP staff will have to show how the Program conforms to Administration policy. The Program already has several attributes that the Reagan Administration should approve of:<sup>162</sup> the NNLP is a relatively inexpensive program that does not remove any land from private ownership or control, does not in itself impose any restrictions on land use, and relies heavily on the voluntary participation and cooperation of private landowners.

In addition, the following changes could be made in the NNLP that should render it even more acceptable to the Administration:

(1) Make sure that the sites designated as NNLs are strictly limited to areas that are indubitably of the highest quality and national significance. Two changes in the current Program may help in this regard:

(a) obtain the data for basing the determination of NNLs from the more accurate State Natural Heritage Program data banks, where possible;<sup>163</sup> and

(b) establish some ceiling for the maximum total number and/or acreage of sites to be eventually designated as NNLs.

(2) Emphasize the fact that not only does the NNLP identify ecological features of national significance, it also identifies and recognizes sites that are determined not to be of national significance,<sup>164</sup> thus giving development interests a "green light" to proceed with their undertakings.

(3) Make the designation of sites as NNLs wholly conditional upon owner approval. The latter two suggestions could both be accomplished by a single change in the NNLP. Instead of putting the major emphasis of the Program on the National Registry of Natural Landmarks listing, the Program could switch to a system of three lists. The first would be a National Registry of Natural Landmarks consisting solely of sites designated with the owner's

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160. See *supra* note 117.

161. Interview with Mike Lambe, *supra* note 6.

162. Interview with Frank Ugolini, *supra* note 24.

163. This is already being done to some extent with the Maine Critical Areas Program. Interview with Janet McMahon, *supra* note 41.

164. *Natural Diversity Act Hearings*, *supra* note 42, at 107-08 (statement of Dr. Ronald J. Fortney, West Virginia Heritage Trust Program); Kassler, *Preserving Our Natural Heritage*, NAT'L PARKS AND CONSERVATION MAG., July 1980, at 23.



approval; the second would be a complete and comprehensive listing of all the sites in the nation determined to be nationally significant (the old National Registry of Natural Landmarks listing). The third list (which already exists but is not published) would consist of those sites considered for but not determined to be eligible for NNL status.<sup>165</sup>

This multiple-listing strategy would have the following ramifications. The new policy conditioning NNL designation on owner approval would defuse a large proportion of the criticism levelled at the NNLP by development interests as well as increase the likelihood of NNL owner participation in and support for the Program. Meanwhile, the problem of an incomplete listing is avoided by using the second "national significance" list to provide information to other federal, state and local agencies for environmental impact statement preparation and other similar purposes. The second and third lists could be consulted by developers who are seeking a safe location for a new project.<sup>166</sup>

Some modest steps had already been taken to inform former Secretary of the Interior Watt and his assistants about the merits of the NNLP. For example, one of the NNLP staff members recently showed a slide presentation about the Program to the National Park System Advisory Board, the opinion of which Secretary Watt appeared to value highly.<sup>167</sup> The National Park and Conservation Association is seeking a member of the Advisory Board who was sufficiently impressed with the NNLP presentation to put in a good word for it with the Interior Secretary.<sup>168</sup>

### C. Final Thoughts

Now that the accomplishments and shortcomings of the NNLP have been thoroughly presented, it is time to make a final evalua-

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165. The three-list system would probably increase the complexity of administering the NNLP but if properly implemented, would not create an unmanageable burden. For example, a single file containing all sites could be maintained, with a simple numerical, alphabetical or color code distinguishing the three classes of sites. The Maine Critical Areas Program has used the multiple list system with some success. Interview with Janet McMahon, *supra* note 41.

166. Of course, the mere fact that an area is not on a potential or registered natural landmark list does not automatically indicate that the site is ecologically insignificant. Natural-diversity elements may be present but undiscovered and their rarity unknown. Nevertheless, getting a "green light" from the natural landmark list is a prudent step for the developer of any proposed project that may substantially alter a site's natural qualities.

167. Interview with Laura Loomis, *supra* note 68.

168. *Id.*

tion of the Program. Despite the recent retrenchment of environmental programs at the federal level, the fact remains that the elements of America's natural diversity continue to be negatively impacted, largely through inadvertence. It is more important than ever that this damage be mitigated as much as is consistent with the careful, orderly, and rational development of the nation's natural resources. The NNLP can fulfill an important role in this regard by identifying and recognizing nationally significant natural areas, hopefully in time to prevent their accidental destruction.

In addition, the work of the NNLP is especially important at the present time. It can help bridge the gap created by the federal government's partial abdication of responsibility for natural areas protection by assuming the tasks not included in state Natural Heritage and registry programs. Ideally, the Reagan Administration will recognize that fact and lend its support to the NNLP.

## VI

## APPENDIX

LANDOWNER AGREEMENT<sup>169</sup>

The Secretary of the Interior has recently informed me that he has designated \_\_\_\_\_ name of site \_\_\_\_\_, which is owned by \_\_\_\_\_ name of owner \_\_\_\_\_, a National Natural Landmark. I understand that this designation does not affect my ownership of the area nor is there any expectation that the general public will be encouraged to visit the area.

Being aware of the high responsibility to the nation that goes with the ownership and the use of a property which has outstanding value in illustrating the natural heritage of the United States, I agree to protect, use, and manage this site in a manner which prevents the destruction or deterioration of its nationally significant values. I also agree to consult periodically with representatives of the National Park Service about any concerns or problems in managing the area, or any changes in the natural values.

Upon receipt of this agreement/registration letter, I understand that I will receive a certificate showing that the site is now a Registered Natural Landmark and that a bronze plaque will be provided for appropriate display at the site.

If for any reason these conditions cannot continue to be met, it is agreed that Registered Natural Landmark status for this site shall cease and that until such status is restored by the Secretary of the Interior, neither the Registered Natural Landmark certificate, plaque, nor other indication of Registered Natural Landmark status will be displayed.

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 Owner's Signature

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 Date

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169. This is the agreement used by the National Park Service, as supplied by Frank Ugolini, Chief, Division of Natural Landmarks, National Park Service.