The Endangered Species Act, Goal 5 and Local Land Use: Endangered Species Come to Town

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Oregon's comprehensive land use planning system and the Endangered Species Act are the same age (both born in 1973), but they met only recently. Since the listing of Oregon salmon and steelhead populations in 1998 and 1999, state and local land use planning and the ESA have begun to engage. This presentation outlines ESA considerations in local land use planning, the role of the Goal 5 process, local government responses, and issues in determining how this relationship may evolve.

1. Introduction

For some time, Endangered Species Act (ESA) issues in the Northwest were rural issues. Spotted owl and marbled murrelets live in the national forests. The effects of the Snake River salmon listings are felt primarily above Bonneville Dam. By and large, those of us living in cities, at least here in the Northwest, have been able to watch ESA controversies from a distance.

Now it is our turn. In 1998 and 1999, several fish species were added to the ESA lists, and their habitats (rivers) run right through Oregon's most populated cities and counties. We are at the early stages of learning what it may mean. The experience from other parts of the country may help, but the ESA will play differently here because we have different species, problems and opportunities, including through Oregon's Goal 5 and local land use planning. This presentation outlines the requirements, tools and strategies that come to bear on these subjects, and discusses issues that arise in trying to make them work together.

2. The ESA

The ESA assigns two agencies, the U. S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), responsibility for determining whether a species is in danger of extinction. If extinction appears likely, the species is listed and its critical habitat is designated. The ESA protects listed species in a variety of ways:

a. "Take" of ESA species

Unless and until the Pacific Coast salmon listings change,[1] it is unlawful to "take" listed species (basically, harm any member of the species) or harm their critical habitat without a

[1] In September, 2001, a federal court overturned a NMFS listing of Oregon Coast coho salmon in a case called *Alsea Valley Alliance v. Evans*, 2001 U.S. Dist. LEXIS 14443 (D. Ore.) (Sept. 10, 2001). The basic holding of the case is that when the agency identifies a distinct population segment, or ESU, it cannot list only part of it; it must list the whole population segment, or nothing. The ruling

take (16 USC § 1536(b)(4)). Incidental take statements can insulate projects from ESA liability (16 USC § 1536(o); *see Ramsey v. Kantor,* 96 F.3d 434 (9th Cir. 1996)).

- If the biological opinion finds jeopardy or adverse modification, NMFS or FWS must identify a reasonable and prudent alternative that is within the action agency's authority, would accomplish the agency's purpose, and would avoid jeopardy or adverse modification.

Given the possibility of take liability, a project developer may want to address ESA issues in a section 7 consultation. Section 7 consultations can shield projects from ESA take liability, and because consultations are time-limited, they can be attractive routes to ESA compliance. Indeed, some developers engineer a "federal nexus" for section 7 purposes by structuring projects to require federal approval. If the project is expected to pose jeopardy to the species, this may be a risky calculation. But for some projects, section 7 offers an appealing path to ESA compliance.

Section 7 consultations may cover more than just a single project. The ESA agencies have done programmatic consultations that document ESA compliance for specified categories of work. NMFS has done programmatic consultations with the Forest Service on certain routine actions (e.g., painting campground equipment), to establish protective conditions for actions that may have adverse effects (e.g., replacing road culverts) and establish triggers for more intensive consultation. Similarly, NMFS's "15 category" biological opinion, issued to the Corps of Engineers in March 2001, covers a range of Corps-permitted activities (erosion control, utility lines, road construction, boat ramps, stream and wetland restoration, and others) deemed not to pose jeopardy if certain protective steps were taken. Reportedly, the agency is exploring more programmatic consultation opportunities.

c. Critical habitat designation

It is worth noting the growing pressure on FWS and NMFS to designate critical habitat for listed species. The ESA requires NMFS and FWS to designate critical habitat, i.e., habitat that is essential for the conservation of the species, except where it is not "prudent" to designate, critical habitat is not determinable, or designation would not benefit the species. Critical habitat may include unoccupied habitat if it is essential to the species' recovery. Any action that would destroy or adversely modify critical habitat is prohibited absent a special exemption. Because Congress thought designation would have economic impacts, the ESA requires the Services to evaluate economic impacts and exclude any area for which the benefits of designation are less than the benefits of exclusion.

NMFS and FWS have long taken the view that critical habitat designation adds little or nothing to the protection afforded species in section 7 jeopardy determinations. In section 7 "jeopardy" judgments, the Services determine whether a proposed action would "appreciably reduce" the likelihood that the species will survive and recover in the wild. For critical habitat, section 7 requires the Services to determine whether a proposed action would

advancing a positive agenda. If anything warrants state and local activism to address ESA requirements, it is the chance to avoid these consequences, and this has led to a number of non-federal ESA initiatives.

(i) Habitat conservation planning for non-federal projects under Section 10

Section 10 of the ESA addresses non-federal activities that affect listed species. Section 10 allows these activities to incidentally take species after a habitat conservation program ("HCP") is approved. The habitat conservation planning process is patterned on a mid-1970s California real estate development called the San Bruno Mountain project, which started out as a classic conflict between development and species conservation. Ultimately, the project produced a negotiated solution that minimized the loss of habitat for mission blue butterflies. *See* M. Bean, et al., *Reconciling Conflicts Under the Endangered Species Act: the Habitat Conservation Planning Experience* 52-65 (1991). In section 10, Congress used this experience as a model.

Section 10 allows the ESA agencies to issue an incidental take permit for a non-federal activity if: (1) an HCP minimizes and mitigates the impacts of any taking "to the maximum extent practicable;" (2) the applicant insures that adequate funding for the plan will be provided; and (3) the taking will not reduce the likelihood that the species will survive and recover in the wild. 16 USC § 1539(a). *See* R. Thornton, "Searching for Consensus and Predictability: Habitat Conservation Planning under the Endangered Species Act of 1973," 21 *Envtl L.* 605 (1991), and "Habitat Conservation Plans: Frayed Safety Nets or Creative Partnerships," 16 *Nat. Resources & Envt.* 94 (2001). The fact that a developer has a section 10 permit, however, does not necessarily satisfy a federal agency's duty to consult under section 7 (although the section 7 consultation will likely be simplified). *See Natural Resources Defense Council v. U. S. Dep't of Interior*, Order Granting Motion for Voluntary Remand at p. 36 (USDC, Cent. Cal., CV 99-5246 SVW (CTx), June 11, 2002).

Interest in the HCP process has ebbed and flowed. In the first ten years of the program (1983-1992), 14 incidental take permits were issued and the process was regarded as a complex, expensive and balky. The pace picked up under Secretary Babbitt, who made a more pragmatic HCP process a priority, "transforming a statute that was originally designed as a species-by-species 'emergency room' regulatory tool or safety net into a comprehensive vehicle for regional multi-species habitat planning in collaboration with state and local governments, private landowners and other interest groups." G. Frampton, "Ecosystem Management in the Clinton Administration," 7 *Duke Envtl L. & Pol'y* 39, 40 (1996). The Administration's most significant innovation was a "No Surprises" Rule to encourage private parties to protect species in exchange for increased economic and regulatory certainty. The rule provides that: "no additional land use restrictions or financial compensation will be required of the permit holder with respect to species covered by the permit, even if unforeseen circumstances arise after the permit issued indicating that additional mitigation is needed for a given species covered by the plan." 63 *Fed. Reg.* 8859-8873 (Feb. 23, 1998) and 50 CFR pt. 17.

would be deemed not to "take" listed gnatcatchers. 50 CFR § 17.41(b). Pending full elaboration and approval of NCCP programs as HCPs, incidental take of the species would be allowed in jurisdictions that were actively engaged in planning, and where take is consistent with NCCP conservation guidelines.

From such beginnings, a collection of broad-scale HCP surrogates are having a significant impact on development in Southern California. The San Diego Multiple Species Conservation Program (MSCP), for example, commits the City of San Diego to permanently preserve 52,012 acres of land, most of which are publicly-owned. To secure private land, the City commits to negotiate private land open space arrangements, implement environmentally sensitive land regulations, and acquire land with public funds. The elements of the San Diego program include an MSCP Plan, which establishes a planning framework and guidelines for preparation of individual subarea plans in the MSCP planning area; an Implementing Agreement between the City of San Diego, the Fish and Wildlife Service, California Department of Fish and Game; municipal and county development ordinances and regulations ensuring conformance with the MSCP; and a reporting system that identifies habitat loss and conservation within subareas. Under the Implementing Agreement, San Diego is authorized to establish conservation banks, in which lands in excess of mitigation requirements may be used either as mitigation for an owner's subsequent development projects, or sold to other developers. *See* U. S. Fish and Wildlife Service, California Department of Fish and Game and City of San Diego, *Implementing Agreement to Establish a Multiple Species Conservation Program ("MSCP") for the Conservation of Threatened, Endangered and Other Species in the Vicinity of San Diego, California*, para. 9.13-9.14, p. 22. In return for its commitments, the City will have an approved, 50-year HCP and incidental take permit whose coverage the City may extend to participating land owners. *See* Implementing Agreement at pp. 11-12, 32-34, 42-43.

In the Northwest, NMFS 4(d) rules have established some of the basics for an analogous framework for conservation planning, albeit only for salmon and steelhead. The NMFS rules explicitly provide 4(d) protection for Washington timber practices consistent with the Washington Forest and Fish agreement, and for certain activities in Oregon. The rules also invite state- and community-based plans to address ESA requirements in other areas. Under this aspect of the NMFS rules, municipal, residential commercial, and industrial development will be deemed not to violate "take" restrictions if they are undertaken pursuant to municipal ordinances and plans that NMFS approves. *See* 50 CFR § 223.203(b)(12). The rules create a mechanism by which local governments may prepare conservation and development plans and submit them to NMFS, which NMFS will judge in light of twelve general considerations. These considerations include such things as whether the plan:

> ensures that development will avoid inappropriate areas such as unstable slopes, wetlands, areas of high habitat value, and similarly constrained sites; ... provides adequately protective riparian area management requirements to attain or maintain PFC

3. Statewide Goal 5 and Local Land Use Planning

Oregon's Goal 5 is concerned with the conservation of open space and the protection of natural and scenic resources (OAR 660-015-000(5)). The Goal 5 planning process is concerned with numerous resources including riparian corridors, wetlands, and wildlife habitat areas, all of which can be important habitats for ESA species. The Goal 5 rule sets up a decision making protocol for jurisdictions to determine how to protect these resources. OAR 660-23-000, et. seq.

a. Goal 5 basics

The Goal 5 protocol has three "giant" steps, each of which consists of many "baby" steps. The "giant" steps: (1) an inventory of the quality, quantity and location of specific Goal 5 resources to determine if there are conflicting uses for each resource site (OAR 660-23-030); (2) an analysis of economic, social, environmental and energy consequences of conflicting uses (OAR 660-23-040); and (3) an implementation plan (OAR 660-23-050).

(i) The inventory.

The inventory process consists of four steps: the collection of information about the resource, the determination of the adequacy of the information, the determination of the significance of the resource, and the adoption of a list of identified significant resources.

(ii) Economic, social, environmental and energy ("ESEE") analysis.

The rule provides that the ESEE should be neither "lengthy nor complex," but should give a "clear understanding of the decisions reached by the local government." The ESEE process consists of four steps: identifying conflicting uses, determining the scope of the impact from the proposed use or protection, analysis of the ESEE consequences of protection or non-protection and finally, a decision regarding what form of program to adopt.

(iii) Programs to achieve the goal.

The final "giant" step in the Goal 5 process is an implementation program – establishing ways to achieve the goal, using "clear and objective" standards for the protection or the use of resource sites.

These basic steps mask the complexity the Goal 5 process. Not only are the decisions technically difficult, but local governments have learned through unfortunate experience that the decision making process is "political" and fraught with controversy. Nonetheless, the Goal 5 Rule provides a vehicle in which local jurisdictions can respond to ESA requirements. Some of the possibilities and complexities can be seen in the City of Portland's emerging ESA strategy.

federal ESA matrices and tools. The characterization of biological communities is set up to use ESA recovery planning goals along with other information.

(iii) Code amendments

One of the primary implementing mechanisms for watershed recovery is the "Healthy Portland Streams" program. The program extensively amends provisions of the City of Portland zoning code, primarily the City's "Environmental Zones" provisions contained at PCC 33.430 and the provisions for "Environmental Review" contained at PCC 33.828 (the "e-zones"). The amended e-zones are intended to encourage gradual enhancement and restoration over time in areas where those actions will significantly contribute to a healthy stream or wetland system.

(iv) Targeted programs

Soon after the ESA listings, the City commissioned a study to identify areas where City programs or activities may pose particular problems for listed species. Programs (such as Healthy Streams) were developed to address these problems. In some cases, such as road maintenance, the City may ask the federal ESA agencies to recognize these initiatives in special 4(d) rules.

4. Do Goal 5 and the ESA Match Up?

It is appealing to suppose that the Goal 5 process can readily address ESA requirements, provide broad ESA coverage, and avoid the necessity for federal intrusion into developed communities. However, the discussion so far shows more mismatches than fits between Goal 5 and the ESA:

a. Geographic focus.

In the standard approach to Goal 5 implementation, a single jurisdiction surveys resources in its own corner of the world, makes judgments about how to protect them, and draws bright lines on a map to implement these judgments. At each point, local ethics, economics and politics influence judgments and ultimately shape the degree of protection. This is a path Portland may take, and it is a credible path given the lack of a broader, regional or subbasin recovery strategy. This approach would tend to minimize ESA conflicts in Portland, provide more tools for protecting species, and through its assessment template, give the City a relatively good analytic and regulatory base from which to respond to ESA developments if and when they emerge.

In contrast, for wide-ranging species such as salmon, ESA issues are often cross-jurisdictional, almost intrinsically so. Habitat conditions in the Upper Willamette affect fish that will travel through the Portland Harbor, and conditions in the Portland Harbor affect fish that will return to spawn in the Upper Willamette. Recovery actions need to be coordinated in

criteria need to be nested in a larger plan that intelligently lays out criteria for different areas. At present, this larger context is missing and there is none on the near horizon.

5. Are there ways to bridge these gaps?

There are many ways to realign these mismatches and increase local initiative in ESA planning and administration. Indeed, recalling Dan Tarlock's characterization of the NCCP program, which spawned the Southern California HCPs: "a vague formulation of an idea on a slim statutory basis with a high potential for ineffectiveness," it is probably less a question of law than political will.

Oregon's land use planning system has flexibility to develop a framework for ESA compliance. Goal 5, for example, does not specifically provide for cross-jurisdictional approaches, but it also does not prevent them. Portland could join with other jurisdictions, coordinate Goal 5 resource assessments across jurisdictions, and develop coordinated programs (perhaps an HCP or ESA 4(d) plan) that protect and connect good habitat and direct development to areas with low habitat value, in a manner consistent with federal recovery planning. Indeed, the Northwest Power Planning Council's subbasin planning process is in the early stages of organizing an effort along these lines regionally. Whatever the shape and sponsor, such programs could help re-shape federal ESA implementation to ease the way for urban development where the biological consequences are minor, and support and fund greater efforts to protect and reconnect biologically important habitats.

The problems, however, are practical and political. To make such a vision work, someone needs to:

- coordinate multiple state, local and federal jurisdictions;
- develop a biologically appropriate framework for ESA issues in a developed setting;
- deal with the politics of limiting development on a broad scale; and
- address the equity aspects of allocating species conservation burdens that for biological reasons tend to fall differently in different areas.

This is a tall order. There is no one institution able to handle it readily, and few local governments are accustomed to dealing with these kinds of problems at all. This may explain why programs like those in Southern California are the exception rather than the rule, and why ESA recovery planning is typically a federal initiative.

The City of Portland approach, developing a sophisticated assessment process with which to identify potential ESA problems and design mitigation, coupled with programs targeted at particularly important problems, may be a more practical alternative. It is also capable of fitting into a broader recovery planning framework if one emerges.

There are no easy answers to whether it makes sense for local jurisdictions to take initiative in this area or to wait for others to act. Moreover, these are not either-or choices. In some situations, it may make sense simply to watch recovery planning. In others, local governments may use Goal 5 and other tools to anticipate ESA requirements without taking a head-first plunge into an HCP or 4(d) plan. In some, the plunge may make sense. The only certainty is that ESA choices will be made by someone, and they will have an important effect on cities, counties and species.

both areas, and all the points in between, if they are going to be effective. Thus, local planning needs to nest in a plan developed for the larger landscape.

b. Clarity of standards.

Goal 5 calls for "clear and objective standards" in local implementation plans, and this kind of approach typically calls for relatively bright-line determinations of resource categories and regulatory measures. Even Goals 5's "safe harbors," which allow "optional course[s] of action that satisf[y] certain requirements under the standard process," OAR 660-023-0020(2),[3] can rely on cut-and-dried devices such as standard set-backs from fish-bearing lakes and streams. *See* OAR 660-023-0090(5).

ESA judgments do not often lend themselves to clear, objective criteria and bright-line distinctions. No definitive science tells us how habitat conditions across the landscape interact to support species. Ecosystems are complex and dynamic, and ecological science is more akin to economics or weather prediction than chemistry or physics. If we seek to manage for certain ecological functions, which the ESA does, we are aiming at a blurry target that moves unpredictably. Consider the lynchpin in National Marine Fisheries Service evaluation of the habitat needs of salmon, the concept of "properly functioning conditions." Salmon require "the sustained presence of natural habitat-forming processes in a watershed (e.g., riparian community succession, bedload transport, precipitation runoff pattern, channel migration) that are necessary for the long-term survival of the species through the full range of environmental variation." National Marine Fisheries Service, *The Habitat Approach: Implementation of Section 7 of the Endangered Species Act for Actions Affecting the Habitat of Pacific Anadromous Salmonids* p. 6 (August 26, 1999). The generality of this standard is problematic, but given the lack of definitive scientific information on species, habitat and other ecological relationships, a broad standard that allows flexibility to adjust development and conservation needs may be preferable to rigid codes.

c. Accommodating density

In general, Oregon land use planning tends to focus development in urban areas to avoid sprawl. Thus, Goal 5 and the system generally put a positive value on increased urban density in order to preserve open space and natural resources. This in itself would seem to make sense under the ESA.

However, the criteria that have been developed to make ESA habitat judgments in section 7 consultations were first developed for unpopulated areas such as national forests. They may be adapted to different landscapes, but in general they value natural habitat functions. Thus, without a broader context, a proposal to develop habitat in an urban area is almost by definition problematic. In order to fit with land use planning assumptions, these

[3] Not to be confused with the ESA safe harbor policy, 64 FR 32717 (June 17, 1999), which provides incentives for landowners to restore habitat.

b. The City of Portland program

(i) The goal

The City of Portland's River Renaissance program, which includes a wide variety of governmental and regulatory programs to protect riparian resources within the City of Portland, is of central importance. River Renaissance Protections are not limited to the Willamette River, but include all of the tributaries to the Willamette River as well as other water bodies within the city limits. The City of Portland program is far-reaching, as demonstrated by its proposed comprehensive plan Goal 8 relating to the environment:

> "Maintain and improve the quality of Portland's air, water, and land resources, and protect neighborhood and business centers from detrimental noise pollution. Sustain, and where necessary restore, the City's interconnected network of natural lands, open space, and waterways and sustainable building practices that protect native species and ecological processes, reduce habitat fragmentation and threats to bio-diversity, and improve the quality of life for people."

The amendments to the goal (underlined above) are proposed by the City of Portland as a product of its Goal 5 decision making process. The City's comprehensive plan has many policies and objectives that respond to this goal. Each of those policies and objectives express the City's intent to do more than just comply with the requirements of the ESA, but to go further.

The City is also considering a salmon recovery strategy to coordinate efforts across bureaus. The coordination effort includes a "Framework for a Portland Recovery Plan," and watershed assessments that should provide a common base of assessment for other key City programs – the Endangered Species Act Program, the Clean River Plan, the River Renaissance, the Stormwater Program, Land Acquisition, Culvert Replacement, and the River Recreation Master Plan.

(ii) Watershed assessment and planning

The City's proposed template for watershed assessment categorizes watersheds in terms of primary indicators of watershed health: human development (e.g., percentage of impervious surface area, percentage of intact riparian area, stormwater and sewer outfalls), water quantity (flow), water quality (temperature, TMDL factors, toxics), physical habitat, and biological communities. Scientific aspects of the program are reviewed by an independent panel of scientists to ensure the work incorporates the latest scientific information and uses the information in a scientifically defensible way. The template is well designed to accommodate ESA considerations. The physical habitat parameters include both qualitative factors aimed at identifying larger-scale patterns and connections and at a finer scale, habitat values based on

> [properly functioning conditions[2]] around all rivers, estuaries, streams, lakes, deepwater habitats, and intermittent streams; ... includes adequate provisions for landscaping with native vegetation to reduce need for watering and application of herbicides, pesticides, and fertilizer; ... includes adequate provisions to prevent erosion and sediment run-off during.

50 CFR § 223.203(b)(12)(I)(A-L).

The rules have been challenged in court, but have held up in the early going. *See Washington Env. Council v. National Marine Fisheries Service*, 2002 WL 511479 (W.D. Wash. 2002).

e. Recovery planning

Section 4 of the ESA requires the ESA agencies to develop recovery plans, essentially blue prints for the actions needed to get species off the ESA list. Recovery plans must include: (1) objective, measurable goals for removing the species from the list; (2) a comprehensive description of actions need to achieve this goal; and (3) an estimate of the cost and time required to carry out these actions. In the Northwest, NMFS is treating the first step – establishing recovery goals – as a largely technical exercise, performed by Technical Recovery Teams for different geographic areas, and steps two and three as largely policy-driven, developed in consultation with state, local, regional, tribal, and private entities, and complementing ongoing conservation planning. NMFS has established a Recovery Science Review Panel to oversee scientific aspects of recovery planning across the region. To give local plans in the Interior Columbia Basin a rough recovery target, NMFS has provided interim abundance and productivity targets for ESA salmon and steelhead.

The NMFS recovery planning effort anticipates relying on regional, state and local planning where effective planning efforts are underway. In the Columbia River Basin, for example, the agency has indicated an intention to rely on subbasin plans developed by the Northwest Power Planning Council. There is no obvious reason why the same could not be the case for community-based plans developed under the NMFS 4(d) rule for municipal, residential, commercial and industrial development, or why 4(d) plans could not nest in larger plans like the Council's.

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[2] The rule defines properly functioning conditions as "the sustained presence of a watershed's habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation." 50 C.F.R. § 223.203(b)(12)(iii). The concept is key to NMFS' ESA habitat evaluations, and is further explored in National Marine Fisheries Service, *The Habitat Approach: Implementation of Section 7 of the Endangered Species Act for Actions Affecting the Habitat of Pacific Anadromous Salmonids* (August 26, 1999).

The pace of HCPs picked up in the mid-1990s, when 179 permits were issued, including a number of large landscape-scale permits. In the Northwest, NMFS is implementing four completed HCPs that cover about 2 million acres in Washington State, and another dozen or so HCPs, ranging in size from 100 to 215,000 acres are under development.

The future of the HCP process is unclear. There are unresolved issues regarding the enforcement of this assurance against the government, *see* Thornton, "Contractual Ecosystem Management Under the Endangered Species Act: Can Federal Agencies Make Enforceable Commitments," 26 *Ecology L. Q.* 489 (1999), and the rule was modified in 2000 to allow revocation of a permit "as a last resort in the narrow and unlikely situation in which an unforeseen circumstance results in likely jeopardy to a species covered by the permit." 65 Fed. Reg. at 6918 (Feb. 11, 2000). Some commentators see a slackening pace in HCPs, attributed to stringent conservation standards, complexity in plans, lack of public funding, uncertainty about the future of the Babbitt reforms, and opposition from some parts of the environmental community. *See* R. Thornton, *supra*, 16 *Nat. Resources & Envt.* at 95.

(ii) Section 4(d) rules and community-based planning

Another of Secretary Babbitt's innovations was the use of so-called 4(d) rules to build a bridge over ESA "take" liability for communities that develop comprehensive habitat protection programs for listed species. The approach first emerged in California, where a state law, the Natural Community Conservation Act of 1991, provided a framework for voluntary state and local planning to protect sensitive ecosystems from development, which Dan Tarlock describes as "a vague formulation of an idea on a slim statutory basis with a high potential for ineffectiveness." D. Tarlock, "Fred Bosselman as a Participant-Observer Lawyer: The Case of Habitat Conservation Planning," 17 *J. Land Use & Envtl L.* 43, 47 (2001). The NCCP program also could make up for many of the ESA's short-comings, however. It is capable of looking at ecosystems broadly, rather than focusing narrowly on individual species; it can address species conservation issues proactively instead of waiting until species are too far gone to help; and it is premised on more local government control over the ESA process. *See* M. Ebbin, "Is the Southern California Approach to Conservation Succeeding?" 24 *Ecology L. Q.* 695 (1997).

The first test of the idea that the NCCP and the ESA could work together was in the coastal shrub-steppe habitat of Southern California, which a songbird called the California gnatcatcher calls home. With the looming prospect of an ESA listing, state and federal agencies spent three years developing an initial NCCP program for the gnatcatcher's shrub-steppe ecosystem, starting with a high-level science panel, intensive data gathering and mapping to identify, protect and connect important wildlife habitat, and focus development in areas where it would do least harm. The Secretary rewarded these efforts by listing the gnatcatcher as "threatened" rather than "endangered" and adopting a special "4(d)" rule that supported the joint program. Where the ESA forbids all "take" of endangered species, section 4(d) of the Act allows the Secretary to craft narrower take rules for threatened species. Babbitt's gnatcatcher 4(d) rule specified that activities consistent with the NCCP program

"appreciably diminish" value of critical habitat for survival and recovery? In the Services' view, there is little or no difference between these two judgments, and so they have put a low priority on designating critical habitat.

However, the courts have rejected the Services' view and in several opinions have not only required the Services to proceed with critical habitat designations, but also insisted that the two section 7 judgments – one regarding "jeopardy" and one regarding adverse modification of critical habitat – are significantly different.

In response, the Services, which do not have detailed, site-specific information on which to base designations, tend to over-designate critical habitat to be sure they are not short-changing listed species. These broad designations prompt litigation from developers based both on the lack of site-specific data and economic analysis.

Economic analysis has become a significant issue for the Services, and may lead to narrower critical habitat designations. The ESA requires the Services to evaluate economic impacts and exclude areas for which the benefits of designation are less than the benefits of exclusion. While the Services have carried out these analyses, they have taken the view that the economic impacts are minimal because critical habitat designation adds so little protection beyond that afforded by other aspects of the ESA. Last year, the 10th Circuit rejected this approach in, and ordered the FWS to "conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes." *New Mexico Cattle Growers v. U. S. Fish and Wildlife Service,* 248 F.3d 1277, 1285 (10th Cir. 2001).

Several questions about these critical habitat developments are important to real estate and land use development. One is practical: if the Services put a higher priority on critical habitat designation, will the Services' section 7 backlogs, already considerable, grow? It is hard to see how there can be any but a positive answer to this question, and this may mean that section 7's usefulness as a shield from ESA "take" exposure for real estate and land use development will diminish. A second question is legal: if, as some courts insist, section jeopardy and adverse modification decisions are significantly different, what form will that difference take? If the Services' view of the significance of critical habitat is repudiated, are we entering a period when determining the question will become a litigation cottage industry?

d. Non-federal avenues for ESA compliance

The metaphors that are used to describe the ESA – the 800-pound gorilla, the pit bull of environmental laws, and others – are indicative of the ESA's power. Yet, this power as often as not leads to stalemate rather than species recovery, for obvious reasons. Where federal permits or funding are required for private development, the section 7 consultation process adds new and unfamiliar procedural requirements with standards that are unclear and science that is fragmentary. Processing delays, already considerable, grow, as does the prospect of ESA citizens' suits. These are all negative influences, slowing local initiatives rather than

federal permit. ESA enforcement against non-federal actions is infrequent, but the penalties can be severe: knowing violations involving "threatened" species can lead to as much as a $12,000 civil penalty and a criminal penalty of up to $25,000 and up to six months' imprisonment. *See* 16 USC § 1538(a)(1)(B). Any equipment used to aid unlawful take may be seized and is subject to permanent forfeiture.

Direct liability for allowing "take" of listed species is one source of concern for cities and counties. State and local agencies have been held liable for allowing activities that take species, *see Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 (1998), and *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231 (11th Cir. 1998), *cert. denied*, 526 U.S. 1081 (1999). Habitat modification that actually harms listed species can constitute take. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687 (1995). Liability of this kind may seem remote, particularly for mobile species like salmon, but "take" claims can be filed by citizens (16 USC § 1540(g)(3)(A)), and statutory fines and attorneys' fees may be awarded (16 USC § 1540(4)). For controversial developments, the ESA's take prohibition can be an opponent's weapon.

b. Federal consultation to determine jeopardy under section 7

A federal agency proposing an action that may affect listed species must consult with FWS or NMFS under section 7 of the ESA to ensure that the action doesn't jeopardize listed species or adversely modify habitat designated as critical. This consultation process is the source of much of the ESA's regulatory muscle. The consultation process generally involves these steps:

- When a federal agency is considering an action (the "action agency"), it will usually consult informally with NMFS or FWS to see whether ESA issues may be involved, and whether there is a way to avoid or mitigate adverse effects to avoid problems;
- Formal ESA consultation begins when the action agency identifies a proposed action, asks NMFS or FWS to consult on it, and submits a biological assessment (its own assessment of how the proposed action will affect the species and critical habitat and whether the effects are adverse). The consultation process is time-limited and is supposed to take no more than 135 days from the time a biological assessment is ready (16 USC § 1536(a)(2)).
- NMFS or FWS reviews the biological assessment and writes a biological opinion saying whether the effect proposed action is likely to jeopardize listed species or adversely modify critical habitat. If the conclusion is that the project will adversely affect the species or habitat but not jeopardize survival and recovery, NMFS or FWS will prepare an "incidental take statement" identifying the extent to which the project will incidentally take listed species and specifying measures to minimize

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does not invalidate any listing pending appeal, but its effects are substantial. The same issue is involved in almost all of the Pacific salmon listings, and NMFS is reviewing 23 of 25 Pacific salmon listings and its hatchery policy. The review was originally expected to conclude by the Fall of 2002, but now is delayed.