# **ARTICLE: THE ENDANGERED SPECIES ACT: SEARCHING FOR CONSENSUS AND PREDICTABILITY: HABITAT CONSERVATION PLANNING UNDER THE ENDANGERED SPECIES ACT OF 1973.**

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**Highlight**

*Congress intended section 10(a) of the Endangered Species Act (ESA) to resolve conflicts between development groups and conservationists by allowing private parties to "take" listed species if the taking is consistent with a habitat conservation plan (HCP). Many in the private sector, however, are reluctant to commit the resources needed to develop an HCP unless they receive assurances that greater resource commitments will not be required in the future as additional species are listed. To promotoe HCPs and the goals of the ESA, the author proposes that section 10(a) focus on protecting not just a single species but the wider biological community.*

**Text**

**[\*605]** I. INTRODUCTION

Nearly two decades ago, Congress enacted the Endangered Species Act of 1973 (ESA) [[1]](#footnote-2)1 to conserve ecosystems "upon which endangered and threatened species depend." [[2]](#footnote-3)2 Described as the "pit bull of federal environmental statutes," [[3]](#footnote-4)3 the ESA has demonstrated **[\*606]** its ability to alter the behavior of the largest and most powerful institutions in the nation. Although the ESA has repeatedly demonstrated its political resilience, it is facing its greatest test since the U.S. Supreme Court held that a three inch fish could indeed stop a $ 100 million dam. [[4]](#footnote-5)4

The latest political test of the ESA's resilience is the product of expansive judicial interpretations of the ESA and the ESA's inevitable progression from the regulation of federal agency activities to the regulation of private and local governmental actions. In addition, the courts are demonstrating a willingness to enforce the provisions which require listing decisions to be based "solely" on scientific information, and which require critical habitat to be designated concurrently with the listing of a species "to the maximum extent prudent and determinable." [[5]](#footnote-6)5

Disputes concerning federal agency activities and interpretations of the section 7 consultation and critical habitat provisions dominated endangered species conflicts in the ESA's first decade. [[6]](#footnote-7)6 The ESA's second decade has seen a growth in disputes concerning section 9's application to private property. [[7]](#footnote-8)7 Section 9 prohibits the "taking" of any endangered species. This simple provision has become the latest weapon of federal and state wildlife agencies and the environmental community in the battle with private landowners and local land use agencies over endangered species protection.

In 1982, Congress established a mechanism to address the problem of the ESA's application to private property. The 1982 amendments included provisions for private parties to obtain a **[\*607]** permit allowing the incidental "take" of endangered and threatened species in accordance with a conservation plan. This provision has stimulated a number of "habitat conservation plans" (HCPs) across the United States. However, almost a decade after the adoption of this amendment, the HCP process is severely troubled.

Only a handful of HCPs have been approved since 1982. Several others have failed outright or have floundered in a seemingly endless attempt to reach consensus among disparate interest groups. There is growing environmental opposition to HCPs which sanction the loss of habitat, and calls for instituting a "no net loss" policy for endangered species planning efforts. Members of the biological community have cited the ESA's failure to stem the tide of extinction and have advocated a change in the statute to protect endangered ecosystems directly, rather than indirectly through the ESA's species protection provisions. [[8]](#footnote-9)8 The development community is growing increasingly frustrated with the length of time required to resolve endangered species conflicts through the HCP process and the inability of HCPs to remove legal risks associated with the subsequent listing of species not addressed in the HCP. There is also growing acknowledgment of the inequity of imposing the cost of endangered species conservation largely on the shoulders of development interests and their customers.

Section II of this Article explores the origin of the ESA's HCP provisions. Section III reviews several of the HCPs prepared to date. Section IV discusses the major legal and practical obstacles to the successful resolution of endangered species disputes through the HCP process. Finally, section V suggests a change in the direction of the HCP process from the protection of habitat for individual species to the conservation of biodiversity.

**[\*608]** II. LEGISLATIVE AND JUDICIAL ORIGINS OF HABITAT CONSERVATION PLANNING

*A. Legislative Origins of Section 9*

The ESA contains two primary provisions: section 7 and section 9. Section 7 requires federal agencies to insure that their actions are not likely to jeopardize the continued existence of endangered and threatened species and requires federal agencies to consult with either the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service, depending on the species involved. [[9]](#footnote-10)9 Section 7 also prohibits the adverse modification of the critical habitat of listed species by federal agency activities. [[10]](#footnote-11)10

Congress enacted section 9 of the ESA in 1973 as part of a comprehensive rewrite of federal endangered species legislation. [[11]](#footnote-12)11 Section 9 prohibits "any person" from "taking" an endangered species. [[12]](#footnote-13)12 Congress broadly defined the term "take" to mean: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." [[13]](#footnote-14)13 Despite ambiguous legislative history, [[14]](#footnote-15)14 in 1975, the FWS broadly defined the term "harm" to include acts which "significantly disrupt essential behavioral patterns." [[15]](#footnote-16)15

**[\*609]** The FWS's definition of "harm" created a significant overlap between section 7's habitat protection provisions and section 9's taking prohibition. Section 9, however, is much broader than section 7. While section 7 governs only federal agencies, section 9 applies to actions by "any person." Further, while section 7's focus is on actions which "jeopardize" the entirety of a species, section 9 prohibits the taking of a single member of a listed species. [[16]](#footnote-17)16

Notwithstanding the sweeping definition of "take" in the statute and in the regulations, the taking provision received scant attention during the congressional firestorm following the decisions of the Sixth Circuit Court of Appeals and the U.S. Supreme Court concerning the battle between the snail darter and Tellico Dam on the Little Tennessee River. [[17]](#footnote-18)17 If Congress did not comprehend the ESA's potential reach in 1973, it understood what it had wrought after the U.S. Supreme Court pronounced that

[i]t may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $ 100 million. . . . We conclude, however, that the explicit provisions of the **[\*610]** Endangered Species Act require precisely that result. [[18]](#footnote-19)18

Although *Tennessee Valley Authority v. Hill (TVA v. Hill)* triggered a legislative brawl on Capitol Hill in 1978 and 1979, causing significant amendments to section 4's species and habitat listing provisions and section 7's consultation components, section 9 emerged from the imbroglio unscathed.

Congressional reticence to amend section 9 derived in part from a reluctance to amend those portions of the ESA which had not triggered controversy. The only court to confront the application of the ESA's taking provisions prior to 1978 adopted a very limited reading of the reach of section 9. [[19]](#footnote-20)19

*B. On the Wings of the Palila: The Fall and Rise of Section 9*

While section 7 captured both Congress's and the judiciary's attention in the ESA's early years, section 9 has now emerged as a major force for wildlife conservation and as a major headache to the development community. Section 9's potential significance became clear with the 1979 Hawaii District Court and 1981 Ninth Circuit decisions in *Palila v. Hawaii Department of Land & Natural Resources (Palila I)* which held that section 9 not only prohibits actions that directly kill a member of a listed species, but also prohibits the modification of habitat under certain circumstances. [[20]](#footnote-21)20

In *Palila I,* the plaintiffs sought to enjoin a state sheep and goat game management program within the Palila bird's (*Psittirosta bailleui*) critical habitat. The district court found that the game management program had a destructive impact on the Palila's habitat. [[21]](#footnote-22)21 Referring to the then-existing regulatory definition **[\*611]** of "harm," the district court concluded that the game management program constituted a "taking" in violation of section 9. [[22]](#footnote-23)22 The Ninth Circuit upheld the district court decision. [[23]](#footnote-24)23

Subsequent to the Ninth Circuit decision in *Palila I,* the FWS proposed a modest amendment to the regulatory definition of the term "harm" in the ESA regulations. The FWS attempted to clarify that only habitat modifications that actually kill or injure wildlife would be subject to section 9 sanctions. [[24]](#footnote-25)24 As ultimately promulgated, however, the revised definition was little more than a grammatical change. [[25]](#footnote-26)25 Indeed, the preamble to the final rule emphasized that section 9 continued to apply to significant habitat modifications which injure or kill wildlife or individual members of a listed species. [[26]](#footnote-27)26 Despite attempts by the State of Hawaii to argue that the FWS redefinition should alter the holding in *Palila I,* the district court found that Hawaii's game management program also constituted "harm" under the 1981 redefinition of the term. [[27]](#footnote-28)27 The significance of the *Palila* cases cannot be over-emphasized. The decisions constitute an explicit recognition by the courts that section 9 prohibits significant habitat modification on non-federal land. A decade after the original district court decision, the *Palila* decisions remain the leading cases interpreting the section 9 "taking" provisions.

Other courts have followed the *Palila* decisions. One court enjoined the use of lead shot for waterfowl hunting because bald eagles became poisoned after eating waterfowl contaminated with lead shot. [[28]](#footnote-29)28 In *Defenders of Wildlife v. EPA,* the court restricted **[\*612]** registration of the above-ground use of strychnine because endangered species died after consuming strychnine bait. [[29]](#footnote-30)29 The latter decision is significant because the Eighth Circuit noted that the Environmental Protection Agency's (EPA's) registration of strychnine constituted a "taking" in violation of the ESA because "strychnine can be distributed only if it is registered." [[30]](#footnote-31)30 Thus, the Eighth Circuit has established a type of "but for" test to determine whether an action violates the taking provisions of section 9. [[31]](#footnote-32)31

In an even more far-reaching decision, the federal district court in *Sierra Club v. Lyng* held that Forest Service management practices in the red-cockaded woodpecker's forest habitat have adversely affected the endangered woodpecker and therefore constitute a "taking" in violation of the ESA. [[32]](#footnote-33)32 *Sierra Club v. Lyng* fundamentally alters Forest Service management practices by effectively prohibiting clear cutting within three-quarters of a mile of any active or inactive red-cockaded woodpecker colony site in Texas's national forests. The *Sierra Club v. Lyng* court adopted the holding in *Palila II* that proof of "harm" to the species does not require proof of death and emphasized that the decline in the woodpecker's population constituted evidence that Forest Service management practices had harmed the species. [[33]](#footnote-34)33

The decisions have created considerable confusion concerning the scope of section 9. The ESA and section 9's regulatory history suggest that the taking prohibition applies to actions which harm individual members of listed species and not simply to those actions that harm the entire species. The district court in *Palila II,* however, focused on the harm to the species' ability as a whole to recover rather than harm to individual Palila birds. [[34]](#footnote-35)34 In *Palila II,* **[\*613]** the district court stated that "[t]he key to the . . . definition is harm to the species as a whole. . . . If the habitat modification prevents the population from recovering, then this causes injury to the species and should be actionable under section 9." [[35]](#footnote-36)35 One commentator has argued that the focus on harm to the species as a whole will make it easier to establish unlawful takings because data on generalized population trends are more readily obtainable than documentation of actual injury or death to individual animals. [[36]](#footnote-37)36

In summary, the *Palila* decisions indicate that activities which modify habitat to an extent that essential behavioral patterns are disrupted or which result in a significant decline of the species' population constitute a "taking" under section 9. The district court in *Palila II* went further to suggest that actions which *prevent* the recovery of the species constitute "harm." [[37]](#footnote-38)37 The Eighth Circuit decision in *Defenders of Wildlife* suggests that agencies violate the ESA if they approve an action which, but for the approval, would not result in a taking. [[38]](#footnote-39)38

The *Palila* decisions have stimulated vigorous and, indeed, creative administration of section 9 by certain FWS offices. In California, the FWS has convinced a number of city and county officials that they will violate the ESA, and be subject to civil and criminal penalties, if the city or county approves development within the listed species' habitat. A typical letter from the FWS to one California city which proposed to zone property for development within the habitat of an endangered species stated the following:

Section 9 of the Endangered Species Act of 1973 . . . makes it unlawful for any person to take an endangered species without a permit. . . . Section 11 of the Act prescribes civil penalties of up to $ 10,000 . . . or imprisonment for up to one year, or both, for knowingly violating any provision of the Endangered Species Act. . . .

[W]e must advise you, unless you first secure a section 10(a) permit authorizing the incidental take . . . the approval and implementation of the proposed action may subject . . . city officials to investigations **[\*614]** by our law enforcement branch regarding potential violations of the Endangered Species Act. [[39]](#footnote-40)39

City council members listen when told that they may go to jail for approving a zone change, notwithstanding the considerable legal uncertainty as to whether the FWS would have the authority to prosecute a city official under the ESA for approving a development project in the habitat of an endangered species.

In late 1988, development activity on large sections of western Riverside County, California came to halt after the FWS sent city and county officials similar correspondence threatening legal action if the local governments approved development permits within the Stephen's kangaroo rat habitat. The threats had the desired effect, and local governments and the development community have initiated an HCP process to establish a network of regional reserves for the kangaroo rat. [[40]](#footnote-41)40

*C. The Congressional Response to Palila*

*1. The Section 7(o) Exemption*

Against the backdrop of the *Palila* decisions, in 1981, Congress began the painful process of reauthorizing appropriations for the ESA. Although the explicit purpose of the reauthorization process is to establish a recommended funding level for the endangered species program, the more important function is to force congressional oversight of the ESA's administration. In a Congress suffering an acute case of legislative paralysis, the reauthorization process provides an opportunity for congressional scrutiny of federal programs.

Congress responded to *Palila I* and *Palila II* with two amendments to the ESA in 1982. The amendments provide an opportunity for relief from the absolute ban on taking listed species. First, Congress amended the ESA to permit certain takings if they are in compliance with the terms and conditions set forth in an "incidental take statement" issued by the FWS as part of a section 7 biological opinion. [[41]](#footnote-42)41 Second, Congress amended section **[\*615]** 10(a) to authorize the issuance of a permit allowing incidental takings of listed species if the permit applicant submits a conservation plan satisfying the ESA's requirements. [[42]](#footnote-43)42

The FWS issues the incidental take statement as part of a section 7 biological opinion. The incidental take statement must: (1) specify the impact of the taking; (2) specify reasonable and prudent measures to minimize the impact; and (3) include terms and conditions that the federal agency or the permit applicant must comply with to implement the reasonable and prudent measures. [[43]](#footnote-44)43 Section 7(o), in turn, provides that activities in compliance with the terms and conditions of an incidental take statement "shall not be considered to be a prohibited taking of the species concerned." [[44]](#footnote-45)44 Thus, federal agencies and federal permit applicants can avoid a "take" under section 9 by consulting with the federal wildlife agency and complying with the terms and conditions set forth in the wildlife agency's biological opinion. [[45]](#footnote-46)45

**[\*616]** It is clear that the ESA and its implementing regulations contemplate a broad reach for the section 7 consultation process. Section 7 requires federal agencies to consult with the FWS with regard to "any action authorized, funded, or carried out by such agency. . . ." [[46]](#footnote-47)46 The regulations promulgated by the Departments of Interior and Commerce to implement section 7 broadly define the ESA's consultation requirements. The preamble to the section 7 regulations reflects this approach. "The Service cautions that all Federal actions including 'conservation programs' are subject to **[\*617]** the consultation requirements of section 7(a)(2) if they 'may affect' listed species or their critical habitats. . . . Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement. . . ." [[47]](#footnote-48)47

Thus, the section 7 regulations establish a very low threshold for the initiation of consultation on federal actions that may affect endangered species. Indeed, as stated above, the preamble to the regulations specifically provides that consultation is required for any possible effect -- even effects that may be considered beneficial or benign by the federal agency. The Departments of the Interior and Commerce specifically rejected comments on the proposed regulations which suggested that consultation only be required for adverse effects. [[48]](#footnote-49)48

Further, section 7 regulations broadly define the phrase "effects of the action." [[49]](#footnote-50)49 Courts have similarly interpreted the ESA's consultation requirements broadly. For example, in *Riverside Irrigation District v. Andrews* [[50]](#footnote-51)50 *(Riverside),* the Tenth Circuit affirmed the Corps of Engineers' determination that the indirect effects of dredge material deposited in a navigable waterway required an individual permit, rather than a "nationwide" permit under section 404 of the Clean Water Act. The plaintiffs had requested a nationwide permit to build an earthen dam on Wildcat Creek using fill and dredged material. Nationwide permits are issued by rule and require no individual permit application before **[\*618]** the discharge activity begins if certain criteria are met. One criterion is that the "discharge not destroy a threatened or endangered species as identified under the Endangered Species Act, or destroy or adversely modify the critical habitat of such species." [[51]](#footnote-52)51

The Corps determined that the water collected by the earthen dam for which the fill was used, would cause increased consumptive use of the water in Wildcat Creek. The increase in water use, and resulting reduction in water flows, would harm the whooping crane's habitat. The court held that these indirect effects of authorizing the discharge of dredge and fill material were enough to trigger section 7 of the ESA. [[52]](#footnote-53)52 The court in *Riverside* specifically rejected the plaintiffs' argument that the Corps should only consider the direct effects of the discharge and could not consider the indirect effects resulting from the increased consumption of water facilitated by the discharge. [[53]](#footnote-54)53

*Id.* (quoting National Wildlife Fed'n v. Coleman, 529 F.2d 359, 374 (5th Cir. 1976)).

**[\*619]** It has been argued that a permit or license applicant should not be able to take advantage of the section 7(o) exemption unless the federal agency retains continuing jurisdiction over the activity which results in the incidental taking. This argument, however, ignores the fact that any taking that does not comply with the incidental take statement constitutes a violation of the ESA and could trigger civil or criminal enforcement proceedings by the FWS. In any event, the FWS has established a procedure involving a contract with the permit applicant which ensures that the terms and conditions of a biological opinion are carried out by the private applicant in circumstances where the federal agency that triggered the section 7 consultation does not have continuing authority over the project.

For example, the provisions of section 7(o) were triggered pursuant to a section 7 consultation concerning a municipal landfill project in the City of San Jose. The Federal Highway Administration (FHA) requested a section 7 consultation before approving a highway interchange to serve the landfill. The FHA had no authority over the landfill project, and therefore could not independently enforce the terms and conditions of the biological opinion. As a solution, the owner and operator of the landfill agreed by contract to implement the terms and conditions of the biological opinion. [[54]](#footnote-55)54

The section 7(o) exemption, however, has one significant limitation; it can only be triggered through a section 7 consultation. Section 7 consultations, in turn, can only be initiated when there is some federal agency "action." Thus, in order for a private landowner to receive authorization to "take" a listed species under section 7(o), there must be some nexus between the proposed taking and a federal agency action. Typically, this nexus can be established by the need for a federal permit, such as a dredge and fill permit under section 404 of the Clean Water Act. [[55]](#footnote-56)55

Recently, however, the FWS and private parties have employed **[\*620]** inventive techniques to trigger section 7(o) provisions. As discussed, in one instance a private party triggered a section 7(o) exemption for a solid waste landfill project in a proposed endangered species' habitat through a section 7 consultation between the FWS and the FHA regarding a new highway interchange. Although the interchange did not directly impact the species' habitat, it provided access to the landfill which did impact the habitat. Another private landowner utilized section 7(o) provisions through a section 7 consultation on a federal right-of-way grant which provided access to the landowner's development project. [[56]](#footnote-57)56 The project included the habitat of the Stephens' kangaroo rat. At the landowner's suggestion, the Bureau of Land Management initiated a section 7 consultation to address the effect of the right-of-way grant and related development project on the species.

Section 7 has also been triggered for a cogeneration facility requiring a Clean Air Act Prevention of Significant Deterioration permit. In this instance, the section 7 nexus between the private proposed taking and a federal agency action was established because the cogeneration unit would provide electricity for the project's expansion, a portion of which was within the golden-cheeked warbler's habitat. [[57]](#footnote-58)57

Despite the creativity of private parties in finding a section 7 nexus, the foregoing examples remain the exception rather than the rule. In the vast majority of instances concerning endangered species on private property, there is no federal action to trigger section 7 consultation. In these instances, private parties are required to obtain a section 10(a) incidental take permit from the FWS.

*2. The San Bruno Mountain HCP and the Section 10(a) Amendment*

In addition to the section 7(o) exemption, the 1982 amendments to the ESA authorized the FWS to permit otherwise prohibited **[\*621]** takings "if such taking is incidental to, and not the purpose of the carrying out of an otherwise lawful activity." [[58]](#footnote-59)58 In order to obtain this "incidental take permit," the applicant is required to submit a conservation plan specifying (1) the impact of the taking, (2) steps to minimize and mitigate the impacts, (3) what alternatives to the taking the applicant considered and the reasons why the alternatives are not being utilized, and (4) other measures that the Secretary of the Interior (Secretary) may require. [[59]](#footnote-60)59

Before issuing the permit, the Secretary must find the following:

(1) the taking will be incidental;

(2) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(3) the applicant will ensure that adequate funding for the plan will be provided;

(4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(5) the measures, if any, required [by the Secretary] . . . will be met. [[60]](#footnote-61)60

Section 10(a) of the ESA grew out of a multi-year conflict between a proposed development project and two species of endangered butterflies. In early 1976, the local board of supervisors ended a decade-long dispute over the appropriate level of development at San Bruno Mountain on the San Francisco Peninsula in Northern California by requiring the landowner to dedicate two-thirds of the mountain as a park. [[61]](#footnote-62)61 Two weeks after the final conveyance of the property to the state parks foundation, the FWS proposed to list the callippe silverspot butterfly as an endangered species and to designate critical habitat on the mountain. [[62]](#footnote-63)62 The critical habitat proposal substantially overlapped all **[\*622]** of the remaining areas on the mountain designated for development by the County.

The proposed listing initiated a three-year planning process involving the environmental community, the landowners and developers, and local, state and federal agencies. After two years of intensive negotiation, the parties agreed on a habitat conservation plan which allowed the proposed development to proceed, but which also established a long-term program for the protection of the butterflies and several other species of concern. [[63]](#footnote-64)63

The San Bruno Mountain plan addresses the ecological community on the mountain as a single unit. Although the plan focused on the conflict between development and the preservation of the butterflies, the plan also sought to preserve the diversity of species and their habitat on the mountain. [[64]](#footnote-65)64 The plan reflected a conscious attempt by its drafters to anticipate and resolve any conflicts that might develop over other biological resources on the mountain.

Under the plan, private development becomes a source of funds for acquiring habitat and for funding the needed habitat management measures. [[65]](#footnote-66)65 The plan's drafters carefully selected sites for private development using criteria reflecting the biological requirements of the species on the mountain. The plan establishes rigorous procedures to ensure that any land development occurs in conformity with the plan. [[66]](#footnote-67)66

Two of the participants in the plan's development described its significant elements as follows:

1. *Protection of Open Space.* The plan preserves in open space 80 percent of the mountain; all but 2.7 percent of this total is preserved in an undisturbed condition. Approximately 90 percent of the habitat of the Mission Blue and Callippe Silverspot butterflies is protected under the plan.

2. *Diversity of Habitat Protected.* An essential feature of the plan is the preservation of the diversity of habitat on the mountain, including **[\*623]** hilltops and valleys, north- and south-facing slopes, grasslands, brush, and other habitats. The effort was to protect the butterflies by protecting the diversity of the mountain's ecological community.

3. *Protection During Construction Activities.* The implementing agreement includes detailed provisions regulating construction activities in the interest of wildlife on the mountain. The protections include monitoring of compliance with the plan by a "plan operator" under contract to the county, fencing of conserved habitat areas during grading, educational sessions, or "chalk talks," with the construction crews regarding the prohibitions in the plan, performance bond requirements, and liquidated damage provisions.

4. *Funding of Plan Activities.* The plan provides a source of permanent funding to carry out conservation activities through assessments (which will be imposed through recorded covenants and restrictions) that will raise approximately $ 60,000 per year, which is in addition to substantial, interim funding provided by the developers. The agreement provides that the permanent funding will be adjusted annually for inflation to insure an inflation-free source of funding. The level of ongoing private support for endangered species conservation is unprecedented.

5. *Ongoing Management of Public and Private Habitat.* The plan establishes the County as the ongoing manager of the habitat throughout the mountain and insures a uniformity of management within the various jurisdictional areas on the mountain. One of the key components of the plan is that it subjects both public and private activities within conserved habitat areas to the conservation principles enunciated in the plan. Thus, county and state parklands on the mountain are required to be managed in the interest of habitat conservation to the same extent as privately held habitat.

6. *Assurances to Private Sector.* The implementing agreement includes unprecedented provisions that assure the private sector landowners and developers that, except as specifically set forth in the agreement, no further mitigation or compensation will be required in the interest of wildlife or their habitat on the mountain.

7. *Miscellaneous Provisions.* The agreement includes a number of other detailed provisions governing amendments to the plan, procedures to address unforeseen circumstances, and detailed enforcement provisions. [[67]](#footnote-68)67

**[\*624]** Despite the consensus between the developer and the leading environmental group concerning the plan's terms, the plan suffered from the absence of any specific ESA provision authorizing the FWS to permit the incidental taking contemplated by the conservation plan. [[68]](#footnote-69)68 As a result, the plan's proponents sought, and in 1982 Congress adopted, an amendment authorizing the FWS to issue incidental take permits in accordance with the terms of an HCP. Section 10(a)'s legislative history indicates that the San Bruno Mountain HCP is the model for the ESA's new provision and is also the standard against which similar conservation plans will be measured. [[69]](#footnote-70)69 Significantly, the legislative history indicates that section 10(a) is intended to provide "long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan." [[70]](#footnote-71)70

The conference report to the 1982 amendments emphasized that the incidental take permits to be issued under section 10(a) would be a different breed of ESA permit. The conferees stated that section 10(a) requires "a unique partnership between the public and private sectors" and that "in order to provide sufficient incentives for the private sector to participate in the development of such long-term conservation plans . . . adequate assurances must be made to the financial and development communities that a section 10(a) permit can be made available for the life of the project." [[71]](#footnote-72)71 The conference report further indicated that the FWS was vested with discretion to issue permits of thirty years or more duration and that "in determining whether to issue a long-term permit . . . should consider the extent to which the conservation plan is likely to enhance the habitat of the listed species or increase the survivability of the species or its ecosystem." [[72]](#footnote-73)72

**[\*625]** Thus, section 10(a)'s legislative history specifically contemplates an agreement between landowners and the FWS including a covenant by the FWS that no additional mitigation measures for endangered species would be imposed except as contemplated by the approved HCP. This concept was central to the resolution of the San Bruno Mountain controversy. The FWS proposed to list the callippe silverspot butterfly after the landowner had conveyed much of the mountain to public agencies in order to resolve the long-standing environmental dispute over open space on the mountain. [[73]](#footnote-74)73 The landowner was extremely reluctant to give more land away and make the other commitments in the HCP without assurances from the public agencies that they would not seek additional mitigation in order to protect the species of concern.

After the enactment of the 1982 ESA amendments, the FWS approved the San Bruno Mountain HCP and issued a section 10(a) incidental take permit allowing the proposed land development projects to proceed. Immediately, a newly formed environmental group challenged the plan on both National Environmental Policy Act (NEPA) and ESA grounds. The district court and the Ninth Circuit Court, in *Friends of Endangered Species v. Jantzen (Friends)* rejected these challenges. [[74]](#footnote-75)74 The courts upheld the FWS's decision not to prepare an EIS regarding the HCP's approval because the FWS reasonably concluded that the project would have no adverse environmental consequences. [[75]](#footnote-76)75 The Ninth Circuit holding regarding the applicability of NEPA to HCPs is significant. The court concluded that even if the HCP "would not *completely* compensate for all adverse environmental impacts," an environmental impact statement was not required so long as significant measures are undertaken to mitigate the project's effects. [[76]](#footnote-77)76

Both the district court and Ninth Circuit also rejected challenges to the HCP based on the ESA. The plaintiffs challenged **[\*626]** the sufficiency of the FWS findings that "the permit applicant will minimize and mitigate the impacts of the taking 'to the maximum extent practicable'" and that "the taking will not appreciably reduce the likelihood of the survival of the species." [[77]](#footnote-78)77 The Ninth Circuit rejected this argument, extensively relying on legislative history which identified the San Bruno Mountain HCP as the model for section 10(a) permits. [[78]](#footnote-79)78

III. THE PROGENY OF SAN BRUNO MOUNTAIN: HABITAT CONSERVATION PLANNING UNDER SECTION 10(A)

The San Bruno Mountain HCP and the 1982 section 10(a) amendment have stimulated the development of a host of similar planning efforts. Although a significant number of HCPs have been initiated, only five section 10(a) permits have been issued as of January 1991. A number of HCP efforts have failed or have never been completed. The section discusses several HCPs that have been approved by the FWS or are well along in the section 10(a) process.

*A. The Coachella Valley Habitat Conservation Plan*

In 1986, the FWS issued a section 10(a) permit for an HCP for the fringed-toed lizard near Palm Springs, California. [[79]](#footnote-80)79 The HCP was precipitated by several FWS jeopardy biological opinions concerning development projects in the Palm Springs area. The San Bruno HCP served as a model for several aspects of the Coachella Valley HCP. Indeed the same biological consultant was used. However, unlike the San Bruno Mountain HCP, the Coachella Valley HCP only addressed a single species and focused almost exclusively on establishing reserves for the lizard rather than on detailing restrictions for development projects within the lizard's habitat.

Following are the Coachella Valley HCP's major elements:

1. The Coachella Valley HCP focused on establishing three reserves:

**[\*627]** a. The Coachella Valley Preserve of 13,030 acres, including 5,201 acres of fringe-toed lizard habitat;

b. the Willow Hole-Edom Hill Reserve (proposed as a BLM Area of Critical Environmental Concern) of 2,469 acres including 1,407 acres of habitat; and

c. the Whitewater Floodplain Reserve (established by the BLM) of 1,230 acres of habitat. [[80]](#footnote-81)80

2. The HCP contemplated that funding would be provided to acquire the Coachella Valley Preserve ($ 20 to $ 22 million) from several federal, state and private sources. [[81]](#footnote-82)81

3. The HCP provided that Riverside County and local cities would require development to contribute mitigation fees toward the acquisition of the Preserve. These fees, however, are relatively modest ($ 600 per acre until the sum of $ 7 million is collected, and $ 100 per acre thereafter until a total of $ 10 million is collected). The mitigation fee requirement is applied to 70,000 acres of historic lizard habitat. [[82]](#footnote-83)82

4. The Coachella HCP imposed relatively few restrictions on prior development beyond the mitigation fee requirement. Fifty-one thousand acres out of the 71,000 acre mitigation fee area are developable without any restriction beyond the mitigation requirement. Indeed, the most developable areas (south of Interstate 10) are completely free of development restrictions other than the mitigation fee.

Unlike the San Bruno Mountain HCP, the Coachella HCP did not include an agreement clearly setting forth the responsibilities of the agencies who are parties to the HCP. As a result, development projects within the Valley periodically receive demands by state and federal wildlife agencies for mitigation beyond the HCP's requirements.

*B. Delano Correctional Facility Habitat Conservation Plan*

In January 1990, the FWS approved a section 10(a) permit **[\*628]** for a state prison facility in Delano, California. [[83]](#footnote-84)83 Unlike the San Bruno and Coachella HCP, the Delano HCP was not the product of a consensus planning process orchestrated by a local government. The Delano HCP addressed a single project's impacts on three listed species: the San Joaquin kit fox, the blunt nosed leopard lizard, and the Tipton kangaroo rat. The Delano HCP demonstrates that under the right circumstances, a section 10(a) permit can be processed in a short period of time. The right circumstances in this instance included a single well-defined project, a single landowner, and the State of California's intense interest in constructing a new state prison to address the serious over-crowding problem in the State's correctional institutions. [[84]](#footnote-85)84

The Department of Corrections completed a state environmental impact report for the project in 1988, but the report did not identify the presence of any endangered species. Subsequent site surveys completed in early 1989, however, indicated the presence of Tipton kangaroo rats and blunt-nosed leopard lizards, and verified the presence of kit fox dens on the site. [[85]](#footnote-86)85 The HCP estimated that the project would result in a "take" on the 287-acre prison facility as well as on the areas planned for roads and utility lines. [[86]](#footnote-87)86 Based on the survey's results, the Department of Corrections initiated consultation with the FWS and prepared a conservation plan under section 10(a). The FWS approved the section 10(a) permit in record time. [[87]](#footnote-88)87

The HCP committed the Department of Corrections to the acquisition of 514 acres of habitat within an ecological reserve established by the California Department of Fish and Game (DFG), and required the Department of Corrections to establish a $ 154,000 endowment to maintain the acquired property. [[88]](#footnote-89)88 In addition, the HCP required the Department of Corrections to undertake a number of measures to mitigate the effects of construction **[\*629]** activities on the endangered species. [[89]](#footnote-90)89

*C. The* ***Kern*** *County Habitat Conservation Plan*

***Kern*** County, in California's Central Valley, has embarked on an ambitious program to provide for endangered species conservation in an area the size of New Jersey. ***Kern*** County is one of the largest counties in California. It includes a great diversity of wildlife habitat and other land, including the rich agricultural lands of the San Joaquin Valley, extensive grassland, the peaks of the southern Sierra Nevada and the Tehachapi Mountains, and the stark landscape of the Mojave Desert.

Although urban uses represent only a very small portion of ***Kern*** County, the County has experienced a significant number of disputes between private sector and environmental interests, including a growing number of disputes involving endangered species. These disputes primarily result from the conversion of natural lands in the San Joaquin Valley into agricultural lands -- conversions made possible by the state and federal governments' enormous investment in large water resource development and delivery projects. As a result, a number of species, such as the San Joaquin kit fox, previously ubiquitous throughout the Central Valley, are increasingly restricted to areas that have not been converted into intensive agricultural production. [[90]](#footnote-91)90

Over the last several years, various development projects in these remaining "natural" areas have been the subject of disputes with state and federal regulatory agencies. ***Oil*** development is a major economic activity in the County. Although ***oil*** and gas have been produced in ***Kern*** County since the early twentieth century, and the County includes some of the densest ***oil*** production facilities in the country, significant habitat remains in existing and future ***oil*** fields. The ***oil*** industry became a recurring target of regulatory demands for measures to compensate for impacts on endangered species. ***Oil*** exploration and production companies increasingly found that it was impossible to complete any major exploration or production without experiencing significant delays and costs due to the presence of endangered species in the area. **[\*630]** In addition, environmental agencies repeatedly demanded that the ***oil*** companies and the State Division of ***Oil*** and Gas prepare separate state environmental impact reports on every project within the habitat or suspected habitat of an endangered species. [[91]](#footnote-92)91

At the same time that these disputes were taking place, the environmental community, the FWS, and the Bureau of Land Management were seeking congressional appropriations to establish endangered species reserves in the San Joaquin Valley. They were also seeking to require ***oil*** industry contributions toward the acquisition of these reserves as a condition of project approval. The ***oil*** industry expressed a number of concerns about the agency and environmental community efforts, including: (1) the lack of assurances that establishing the reserves would reduce demands on the private sector for additional endangered species mitigation; (2) the absence of coordination between a variety of state and federal agencies' endangered species mitigation requirements; (3) overemphasis on acquisition and under-emphasis on the habitat value of private land; and (4) the inequitable concentration of endangered species mitigation costs on the ***oil*** industry. [[92]](#footnote-93)92

In 1987, the ***oil*** industry aired these concerns with the congressional Appropriations Committees. The industry assisted the Nature Conservancy in lobbying for congressional appropriations to establish the endangered species reserves. However, the ***oil*** industry also sought and obtained a congressional directive to the Bureau of Land Management and FWS that the acquisition program should be coordinated with a broader effort in the San Joaquin Valley in order to resolve endangered species disputes. [[93]](#footnote-94)93 The Senate Appropriations Committee directed the FWS to enter into a memorandum of understanding with the California DFG and others to coordinate endangered species needs in the San Joaquin Valley, and to prepare HCPs that specify the relationship of endangered species reserves to other endangered species issues such **[\*631]** as decisions to down-list or de-list the species. [[94]](#footnote-95)94 In response to these congressional directives, the County and the FWS called the many interests groups together to propose developing a county-wide endangered species element for the County general plan, [[95]](#footnote-96)95 and a habitat conservation plan for the San Joaquin Valley portion of the County -- the portion of the County subject to the most intense resource development pressures.

Following the San Bruno and Coachella models, the County formed a steering committee including the local, state and federal agencies, the environmental community, the building industry, the ***oil*** industry, the agricultural industry and other interests. The steering committee set about the difficult task of attempting to achieve consensus about the committee's goals and objectives. This process ultimately resulted in a memorandum of understanding which describes the program's purpose, its regulatory components, and its compliance with the ESA and the California Endangered Species Act. [[96]](#footnote-97)96

The memorandum of understanding was critical to reaching a consensus concerning the committee's purpose. One of the major problems with the HCP process is the fact that the various parties have different objectives, frequently resulting in a lengthy, drawn-out planning process. Unless there is a written understanding at the beginning of the process setting forth what the parties intend to achieve, there is a considerable risk that the effort will fail. Inevitably, the individual representatives of parties to the HCP process will change during the course of the effort. A written understanding of the HCP's objectives is critical to maintaining cohesiveness throughout these changes and to the endeavor's success.

**[\*632]** The process of developing the ***Kern*** County memorandum of understanding forced the parties to come to grips with their personal objectives, and more importantly, with the other parties' objectives. For example, much of the debate on the memorandum concerned the extent to which an HCP should eliminate project-by-project review of endangered species issues by regulatory agencies. Several industry groups had participated largely for the purpose of eliminating or greatly reducing project-by-project review. These groups argued that there was no reason to spend the time and resources to develop the HCP if the end product was business as usual. The DFG, in contrast, considered the HCP and endangered species element to be a great idea, provided that DFG retained discretion to block projects or to impose project-specific mitigation requirements. Out of this dialectic eventually grew an understanding that "it is the intent of the parties to eliminate project-by-project review of the effect of development activities on the [endangered species], to the full extent authorized by law, and to ensure that mitigation/compensation measures are not imposed beyond those detailed in the conservation plans for such development activities provided conditions under which the conservation plan was formulated have not significantly changed." [[97]](#footnote-98)97 Thus, before the process began the parties agreed to the primary objectives of the HCP effort. Although the memorandum's language reflects compromises by all concerned, there is a strong consensus that it accurately reflects the purposes of the process. The memorandum's effectiveness, however, will not truly be known until a draft HCP is prepared and the parties' precise obligations are identified in detail.

The parties executed the Memorandum of Understanding in April 1989. Since then, the steering committee has embarked on the difficult task of obtaining funding, hiring a consultant, developing a biological data base on which to ground the planning decisions, and obtaining consensus on the species to be addressed in the HCP and the general plan element.

Parallel to the efforts to develop an HCP for the Valley floor, the County, the City of Bakersfield, and a variety of other interests are also developing an HCP for the metropolitan Bakersfield area in and around the City of Bakersfield. [[98]](#footnote-99)98 The Bakersfield **[\*633]** HCP faces the unique problem of addressing endangered species issues in an urbanized environment. Because much of the land in the metropolitan Bakersfield area is already developed for urban, agriculture or ***oil*** development purposes, this HCP focuses on the need to acquire and enhance land for the species addressed in the plan. Rather than specifically identifying the land to be acquired under the plan, the HCP identifies potential reserves and then requires acquisition and enhancement activities to stay ahead of the incidental take that is occurring under the section 10(a) permit. This "pay-as-you-go" approach creates a type of mitigation bank and allows incidental take to occur in designated areas, as long as the mitigation criteria in the plan are being met. [[99]](#footnote-100)99

The HCP establishes two tests. On a cumulative basis, the proposed HCP requires: (1) that one acre of land must be enhanced for each acre of "open" but not natural land that is urbanized; or (2) that three acres of land must be enhanced for every one acre of "natural" land that is urbanized, whichever is greater. [[100]](#footnote-101)100 The plan maintains ongoing pressure on the plan's operators to meet these mitigation requirements by prohibiting any incidental take unless the cumulative mitigation totals meet or exceed the established criteria.

The Metropolitan Bakersfield HCP is funded through a $ 1000 per acre fee that is imposed on new development in the area. The HCP estimates that the fee will generate $ 537,000 per year which should be sufficient to finance the acquisition and enhancement of 300 to 800 acres per year. [[101]](#footnote-102)101

The Metropolitan Bakersfield plan represents an innovative approach to the unique conservation strategies required in urbanized areas. The pay-as-you-go approach, however, raises a number of difficult issues. For example, as drafted, the plan contains no mechanism to encourage individual landowners or developers to contribute to the implementation of the plan beyond paying the required fees. There needs to be a mechanism which encourages landowners to dedicate and enhance property for endangered species conservation without fear that the contribution will only serve to ensure some competitor's ability to develop its property. **[\*634]** This problem is inherent in any HCP which establishes a regional performance standard, but does not clearly provide how individual landowners can independently contribute to satisfaction of the regional goal and, at the same time, satisfy project-specific mitigation needs. One solution is the establishment of a credit system which reserves a portion of the available regional mitigation for private interests that provide additional or advance contributions to the regional conservation effort. These and a number of other issues are under discussion by the participants in the planning effort as of this writing.

*D. The Stephens' Kangaroo Rat Interim Habitat Conservation Plan*

The FWS listed the Stephens' kangaroo rat (SKR) as an endangered species in September 1988. [[102]](#footnote-103)102 The SKR's current range includes much of western Riverside County, California -- until the recent recession, the fastest growing region in the nation. The SKR's preferred habitat is relatively flat land with little or no vegetation; in short, the same areas that are well-suited for affordable housing construction. [[103]](#footnote-104)103 The process of listing the SKR took place with virtually no opposition. However, the listing shut down development in large portions of western Riverside County, triggering a firestorm of landowner and developer opposition. [[104]](#footnote-105)104

Riverside County responded by initating the preparation of a short-term, or interim HCP. The short-term HCP is designed to protect a significant portion of the SKR habitat from further development while a permanent HCP is being developed. Some incidental takes are permitted during this time. Originally scheduled to be completed in four to six months, the HCP's processing and approval lasted over two years. By its terms, the short-term HCP will expire two years after final approval. [[105]](#footnote-106)105

The short-term HCP identifies nine areas, totalling 74,667 acres, for potential designation and acquisition as SKR **[\*635]** reserves. [[106]](#footnote-107)106 It imposes a $ 1,950 per acre development fee for all grading projects within much of the SKR's historic range, whether or not SKR habitat is actually present. It stringently regulates development approvals within the study areas, and imposes a limitation on the acreage of occupied SKR habitat that can be developed outside of the reserve study areas during the two-year term of the section 10(a) permit. [[107]](#footnote-108)107 At the prodding of the environmental community, the short-term HCP provides that the section 10(a) permit is to be suspended if the cumulative amount of development of occupied SKR habitat exceeds the amount of occupied SKR habitat acquired and protected under the short-term HCP during any six month period. [[108]](#footnote-109)108

The establishment of the short-term HCP is a significant feat. The short-term HCP covers large portions of Riverside County, five cities, and thousands of property owners. The local agencies have all passed ordinances requiring developers to pay the mitigation fee and have also entered into a joint powers agreement establishing a joint powers agency to administer the program. [[109]](#footnote-110)109 Nevertheless, very significant, and perhaps insurmountable, hurdles remain.

Much of the remaining SKR habitat is on private property and on property owned by the Metropolitan Water District. Although the mitigation fee is estimated to raise $ 50 million, it will take many years to raise this amount. It is universally acknowledged that the cost of acquiring any substantial percentage of the SKR habitat within the reserve study areas will exceed that amount by several times. The development community in California, although accustomed to the highest development fees in the nation, is becoming increasingly resistant to the post-Proposition 13 phenomenon of imposing the lion's share of the infrastructure and environmental costs of new development on the development **[\*636]** community and ultimately on the new home buyer. [[110]](#footnote-111)110

The joint powers agency which administers the HCP is discovering that acquiring SKR habitat is more difficult, time consuming, and costly than originally projected. The joint powers agency has experienced considerable difficulty in negotiating voluntary acquisitions. It is now considering a condemnation strategy. It can be anticipated that condemnation proceedings will stimulate significant litigation concerning appraised values and the validity of condemning one person's property so that a developer somewhere else can grade the SKR's habitat. [[111]](#footnote-112)111

The Achilles heel of the SKR HCP, however, is the plan's single-species focus. With one exception, the County defined the SKR reserve study areas solely based on what it believed was the best remaining occupied habitat of the SKR. Although the study areas contain other habitat, their boundaries do not reflect any studied effort to protect biodiversity. SKR habitat is noted by the relative absence of biodiversity. Most participants in the SKR process are acutely aware that it makes little sense to spend tens **[\*637]** and perhaps hundreds of millions of dollars to protect the SKR from extinction if the money does not also protect other sensitive species that are likely to become endangered. Indeed, the FWS is currently considering two petitions to list the California gnatcatcher -- a species also found in western Riverside County, although generally not on lands occupied by the SKR. [[112]](#footnote-113)112 The gnatcatcher's listing will almost certainly require a complete reevaluation of the SKR program's goals and objectives.

*E. Other Habitat Conservation Plan Efforts*

The record of the last eight years is littered with failed or failing habitat conservation planning efforts. HCPs initiated for several species in Key Largo, Florida failed to reach resolution after years of effort. [[113]](#footnote-114)113 San Diego County has been pursuing a series of HCPs for the last five years to resolve conflicts concerning the least bell's vireo. Although much planning has gone into this effort, to date not a single section 10(a) permit has been issued and there appears to be a consensus that several of the vireo HCPs will never be completed. [[114]](#footnote-115)114

Efforts are underway on a long list of other conservation plans across the country, including a plan for the golden cheeked warbler *(dendroica chrysoparia),* the black-capped vireo *(vireo atricapillus),* five cave-dwelling invertebrates and several plants in Austin, Texas and its environs. [[115]](#footnote-116)115 Building on the models of earlier HCPs, the participants in the Austin Regional HCP formed a steering committee of agencies and interest groups and embarked on the difficult task of developing a feasible plan to protect the identified species. Unlike the HCP efforts in California, the Austin Regional HCP faces the additional obstacle of uncertain or nonexistent legislative authority for a mitigation fee **[\*638]** program and for a regional planning agency with authority to implement the HCP.

The Bay Checkerspot Butterfly Conservation Plan, approved by the FWS in 1986, is another example of HCP planning efforts, although the plan was prepared pursuant to section 7 rather than section 10. [[116]](#footnote-117)116 The Bay Checkerspot Butterfly Conservation Plan addressed the conflict between the development of a municipal landfill in the City of San Jose and a proposal by the FWS to list the bay checkerspot butterfly and designate critical habitat on the site of a new landfill in San Jose, California. [[117]](#footnote-118)117

**[\*639]** IV. MAJOR ISSUES AND LESSONS LEARNED

*A. The Multi-Species Dilemma*

Sooner or later, every habitat conservation plan effort faces the following major issue: should the plan be limited to listed species, or should it attempt to address the conservation needs of species which are not presently listed, but which may be listed in the future? One significant advantage an HCP has over a section 7 consultation is the opportunity to resolve land use conflicts for both listed and unlisted species at a regional level.

An HCP offers several distinct benefits to the wildlife agencies as well as to the environmental and developmental communities. First and foremost, HCPs address endangered species conservation issues on a region-wide basis. In contrast to the project-by-project approach of the section 7 consultation process, the HCP process envisions the comprehensive resolution of endangered species conflicts throughout significant components of the endangered species' range. All too often, it is simply not possible to address adequately endangered species problems on a single project basis.

The San Joaquin kit fox in California's Central Valley provides a good example. The kit fox ranges over thousands of square miles. The FWS listed the kit fox because of the loss of habitat -- due primarily to the conversion of the San Joaquin Valley to intensive agriculture development, serviced in large part by federal water projects. No single agency and no single development interest has the ability to address the kit fox problems in any significant portion of its range. The ***Kern*** County HCP offers the kit fox's survival by establishing a long-term, county-wide conservation program. From the development community's perspective, HCPs offer an opportunity to finally resolve endangered species issues and avoid multiple, successive and conflicting demands to mitigate the impact of development activities on endangered species.

HCPs work best where they can address the needs of all species that are likely to be listed as endangered or threatened within the identified planning area. Landowners are understandably reluctant to agree to significant land use restrictions to protect one species when the listing of a different species a year later will result in the imposition of new or different restrictions. This **[\*640]** is especially the case with regard to very large development projects that may require a decade or more of planning before construction is commenced. Yet, it is in the interest of endangered species conservation to encourage large landowners to commit to long-term habitat protection.

In adopting section 10(a), Congress specifically authorized HCPs to address unlisted species. The conference report on the 1982 amendments stated the following in this regard:

Although the conservation plan is keyed to the permit provisions of the Act which only apply to listed species, the Committee intends that conservation plans may address both listed and unlisted species.

In enacting the Endangered Species Act, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element. Although the regulatory mechanisms of the Act focus on species that are formally listed as endangered or threatened, the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species. This is consistent with the purposes of several other fish and wildlife statutes (e.g., Fish and Wildlife Act of 1956, Fish and Wildlife Coordination Act) which are intended to authorize the Secretary to cooperate with the states and private entities on matters regarding conservation of all fish and wildlife resources of this nation. The conservation plan will implement the broader purposes of all of those statutes and allow unlisted species to be addressed in the plan. [[118]](#footnote-119)118

The conference report also stated that in the event an unlisted species is subsequently listed, "no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act." [[119]](#footnote-120)119 The conference report indicated, however, that conservation plans should include provisions to address "unforeseen circumstances." [[120]](#footnote-121)120

The congressional statements reflect the situation surrounding the San Bruno Mountain HCP which precipitated the amendment **[\*641]** to section 10(a). The San Bruno Mountain HCP focused on conserving the grassland species on the mountain, principally the mission blue butterfly (a listed species) and the callippe silverspot butterfly (an unlisted species). [[121]](#footnote-122)121 Other sensitive species existed on the mountain, including the San Francisco garter snake and the host and nectar plants for the butterflies. Having given away two-thirds of the mountain to address local open space and environmental issues prior to the callippe silverspot's proposed listings, the landowner was decidedly unenthusiastic about the potential for additional restrictions in the event that the callippe silverspot or some other species on the mountain became listed in the future.

Addressing the conservation requirements of unlisted species, however, is not a simple task. Usually, less is known about unlisted species than about listed species. Therefore, considerable and time-consuming biological investigations may be required if an HCP is to address unlisted species. Biological studies by necessity delay the preparation of HCPs. Thus, a critical issue for any HCP process is the early identification of those species or biological communities that the plan is to address.

The Stephens' kangaroo rat HCP is a good example of the folly of focusing a long-term HCP on a single species. Acquiring the proposed Stephens' kangaroo rat reserves may cost several hundred million dollars, yet there is no assurance that public acquisition will protect other species in the area sufficiently to obviate listing under the ESA. The FWS is currently reviewing two petitions to list the California gnatcatcher which is generally not found in the habitat of the Stephens' kangaroo rat, but which is also found in western Riverside County. [[122]](#footnote-123)122 There is very little enthusiasm in the development community for the expenditure of the enormous resources necessary to protect the remaining Stephens' kangaroo rats only to turn around and confront the same problem after the California gnatcatcher is listed.

The fundamental problem with developing long-term multi-species conservation plans is that it is very difficult to predict which species may become listed in the future. Although the **[\*642]** ESA's fundamental purpose is to protect ecosystems, all of the regulatory mechanisms in the ESA are species-specific and are only triggered by the listing of individual species. For example, federal agencies' obligations under sections 7(a)(1) and 7(a)(2) are not triggered until a species is listed. [[123]](#footnote-124)123 Similarly, the ban on "taking" does not apply until the species is listed. [[124]](#footnote-125)124

The ESA needs to explicitly recognize the legitimacy of conservation plans which protect biodiversity. The ESA also needs to protect landowners against the legal and political turmoil associated with the listing of species not addressed in the plan, even if the plan does not protect every sensitive species and subspecies within the plan area. One noted conservation biologist has argued that the "single-species focus of the Endangered Species Act has not been especially successful in protecting functioning ecosystems." [[125]](#footnote-126)125 This commentator advocates a listing process that targets

individual species -- vertebrate, invertebrate, or plant -- that serve particular functions in an ecosystem: umbrella species; keystone species, whose roles in ecosystems are so important that their loss could precipitate a cascade of extinctions; and indicator species, which as subjects of monitoring schemes indicate the condition of their habitat or the status of other species in the same habitat. [[126]](#footnote-127)126

In order to implement this suggestion, it will be necessary to re-structure the listing process to reflect a conscious conservation strategy. Implementing a listing conservation strategy, however, is made difficult by the 1982 ESA amendments which severely restrict the FWS's discretion in the listing process and force the FWS to meet firm deadlines in reviewing private listing petitions. [[127]](#footnote-128)127

**[\*643]** Partly as a result of the 1982 amendments, the listing process has taken on an *ad hoc* quality which makes it very difficult for the FWS to use the listing process in any strategic manner to protect endangered ecosystems. The *ad hoc* nature of the listing process also makes it difficult for the FWS to develop conservation plans which provide assurances to the plans' private sector participants that additional mitigation measures will not be required if additional species are listed in the future.

*B. The Search for Certainty and Predictability*

The multi-species issue is related to another fundamental issue concerning HCPs: Whether agreements implementing the habitat conservation plan are enforceable. Section 10(a)'s legislative history indicates that Congress contemplated that a section 10(a) permit approval would also encompass the FWS's agreement not to impose additional mitigation, except as contemplated by the approved HCP. The conference report to the 1982 amendments stated the following in this regard:

The Committee intends that the Secretary may utilize this provision to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. [[128]](#footnote-129)128

Again, section 10(a)'s legislative history reflected the structure of the San Bruno Mountain HCP. [[129]](#footnote-130)129 The landowners and agency participants in the San Bruno Mountain HCP entered into an agreement which set forth the terms and conditions of the section 10(a) permit. The agreement included covenants by the public agencies that they would not impose additional mitigation measures beyond the terms of the agreement. [[130]](#footnote-131)130

The concept of a binding agreement with public agencies is **[\*644]** not new. There have been many attempts at obtaining greater certainty and predictability for long-term planning efforts in the environmental regulatory process, [[131]](#footnote-132)131 but there have been relatively few success stories. The courts in a number of states have expressed reservations regarding a public agency's authority in a permit or entitlement proceeding to enter into agreements restricting the future exercise of the agency's authority. [[132]](#footnote-133)132

**[\*645]** The implementing agreements under section 10(a) offer many of the same opportunities and present many of the same problems as California's statutory development agreements. Development agreements freeze land use regulations to those in effect at the time the agreement is approved in return for infrastructure funding and other commitments by the landowner. [[133]](#footnote-134)133 The section 10(a) agreements offer the promise of greater commitment by local governments and the private sector to funding endangered species conservation efforts. [[134]](#footnote-135)134 Substantial funding commitments will be necessary if the ambitious regional conservation plans currently in preparation are to succeed. Local governments and private parties will be justifiably reluctant to make the necessary financial and other commitments to endangered species conservation, unless they receive appropriate legal assurances that the rules enunciated in the HCP will not significantly change.

The more ambitious the conservation plan in its scope and longevity, the more difficult is this problem. The ***Kern*** County HCP, for example, is attempting to implement a conservation strategy for a variety of species and habitat types over hundreds of square miles. [[135]](#footnote-136)135 Much of the area to be addressed by the plan is undeveloped and is likely to remain undeveloped for a significant **[\*646]** time. The major landowners' willingness to contribute to the conservation plan's implementation in advance of a specific project proposal will depend in large part on the level of assurances provided by the regulatory agencies that the rules and policies set forth in the plan will not fundamentally be changed.

Although section 10(a) provides a good starting point for providing the assurances that are necessary to convince the private sector to commit to long-term endangered species conservation efforts, a number of difficult issues remain. For example, section 10(a) does not explicitly preclude the application of the section 7 consultation requirements to federal agency actions concerning development projects addressed in an HCP. Since many private activities entail the need for some federal agency approval, there is a risk that agreements reached in an HCP will be undone by a subsequent section 7 consultation. This is especially the case because under section 7 the federal action agency, not the FWS, makes the final determination whether the action is likely to jeopardize the continued existence of the endangered species. [[136]](#footnote-137)136 On the other hand, the courts have made it clear that the FWS's biological opinion is critical to this determination. [[137]](#footnote-138)137 This problem is alleviated since issuing a section 10(a) permit itself triggers a section 7 consultation and the FWS is required to issue a biological opinion regarding the permit's effect. Absent the development of significant new information, the FWS's biological opinion concerning the HCP provides some level of protection that the FWS will not reach a different conclusion regarding the activities contemplated by the HCP in the process of reviewing some future federal agency action under section 7.

An additional measure of protection could be obtained through the promulgation of a rule pursuant to section 4(d) of the ESA to implement the HCP. The effectiveness of this approach, however, may be limited. The Eighth Circuit has invalidated FWS regulations which permitted sport trapping of timber wolves **[\*647]** on the grounds that section 4(d) only authorized the directed taking of threatened species in very limited circumstances. [[138]](#footnote-139)138 The Eighth Circuit decision, however, can be distinguished because it only addressed "directed" takings and did not consider the clear congressional direction in the 1982 amendments to allow incidental taking of listed species pursuant to an acceptable conservation plan. [[139]](#footnote-140)139

*C. "No Net Loss": The End of HCPs?*

Habitat conservation plans, by definition, often involve some loss of endangered species habitat. If the proposed activity did not result in a "taking" under section 9, after all, there would be no need for a section 10(a) permit. It must be acknowledged that this notion is objectionable to some. They reason that if a species warrants protection under the ESA, the species' conservation will not be promoted by further reducing the available habitat. This concern is especially acute with regard to listed species that occupy a small percentage of their historic range.

Nevertheless, in many instances local government and the private sector will be unwilling to support conservation planning efforts unless the plan recognizes the legitimacy of other land uses. Recently, some members of the environmental community have suggested that the "no net loss" policy which has been articulated for wetlands under the Clean Water Act section 404 program should be applied to endangered species mitigation efforts. [[140]](#footnote-141)140 Unlike wetland restoration efforts, it is likely to be difficult or impossible to implement a "no net loss" policy for endangered species. Every HCP approved to date has involved some loss of habitat, at least on a temporary basis. Even the San Bruno Mountain HCP, which was identified by Congress as the "model" for section 10(a) plans, contemplated the loss of ten percent of **[\*648]** the habitat of the mission blue butterfly. The HCP rationalized this loss, in part, because the natural succession of the grassland habitat on the mountain, in the absence of the conservation plan efforts, would result in an even greater loss for the butterflies.

The obstacles to implementing a "no net loss" policy in the context of a multi-species HCP becomes even more vexing. A "no net loss" policy applied to the Stephens' kangaroo rat in Riverside County would almost certainly require converting coastal sage scrub communities, the habitat of the California gnatcatcher, into the minimal vegetation conditions favored by the Stephens' kangaroo rat. Such tradeoffs will be very difficult if an inflexible "no net loss" rule is imposed on HCP planning efforts.

*D. What Do You Do When You Don't Have a Plan? The Interim Decision Making Conundrum*

A noted environmental lawyer once posed the question -- what should the federal agencies do under section 7 when existing biological information is insufficient to render a definitive jeopardy or non-jeopardy determination? [[141]](#footnote-142)141 To that question, another can be added: What do you do until a plan is developed?

The development of any large scale HCP takes time. With the exception of the Delano Prison HCP, all of the HCPs approved to date have involved multi-year planning efforts. The length of time required to prepare an HCP is related to the number of interest groups affected by the plan, the need for significant biological studies to support the HCP's decisions, and the length of state and federal environmental impact processes. Even a relatively simple, single-species conservation plan can be expected to require more than a year of processing taking into account NEPA's requirements, the section 10(a) permit process, and local governmental processing requirements.

The time associated with HCP planning has forced a reevaluation of ESA mechanisms which permit certain activities to proceed while the plan is being developed. The mechanisms available under the statute are few and far between. [[142]](#footnote-143)142 As discussed above, **[\*649]** the provisions of section 7(b)(iv) and 7(o) apply to projects with a federal agency "nexus." [[143]](#footnote-144)143 In many cases, however, there is no section 7 "nexus." Even if there is, the federal action agencies are reluctant to trigger section 7 consultations for a private project out of fear that the FWS will require endangered species mitigation by the federal action agency.

There are other grounds for resistance to the use of the section 7 process. First, it is feared that special "deals" will be struck outside the public scrutiny of the HCP process. The HCP process, however, itself does not guarantee that *ad hoc* arrangements will not be made. [[144]](#footnote-145)144 Second, there is concern that the "reasonable and prudent measures" specified in the biological opinion will not fit into the conservation strategy ultimately adopted in the HCP. [[145]](#footnote-146)145

These concerns can be addressed by establishing an informal public review of the section 7 biological opinion. Recently, for example, the 3M Company submitted a section 7 consultation proposal concerning a 3M project affecting the golden-cheeked warbler habitat to the Austin Regional HCP Steering Committee. [[146]](#footnote-147)146 The Steering Committee directly addressed the concern about consistency with the pending conservation plan by establishing criteria to guide the Steering Committee's deliberations on submitted section 7 proposals.

Notwithstanding the legitimacy of the stated concerns regarding section 7 consultations conducted during the HCP process, there is substantial evidence that section 7 consultations can be used to promote or "jump start" a pending HCP by quickly establishing a foundation for the regional conservation program. The largest and best quality block of Stephens' kangaroo rat habitat protected since the species' listing occurred pursuant to a **[\*650]** section 7 consultation. [[147]](#footnote-148)147 The 3M Company's section 7 proposal resulted in the acquisition and protection of a key parcel of golden-cheeked warbler habitat that will greatly promote the pending HCP's objectives. [[148]](#footnote-149)148

The Stephens kangaroo rat Interim HCP broke new ground in establishing an "interim" conservation plan while a permanent plan is being developed. [[149]](#footnote-150)149 The two years required to develop the short-term HCP, however, demonstrates that the section 10(a) permit process is not well-suited to efficient interim decision making.

An efficient system is needed to make conservation decisions on activities that are proposed while an HCP is pending. One solution is to amend the ESA to authorize a section 7 consultation to resolve endangered species disputes while the long-term conservation plan is being prepared, even in the absence of a federal "nexus." A planning framework would need to be established to ensure that individual conservation decisions are consistent with the HCP's overall objectives.

*E. HCP Processing Problems: The Limits of Consensus Planning*

One lesson to be learned from the HCP efforts to date is that the time needed to develop an HCP is directly proportionate to the number of interest groups participating in the process. The landscape is littered with failed or failing HCPs that involved large numbers of participants. [[150]](#footnote-151)150 This is especially true when the HCP process operates on a consensus approach.

The need for good biological information also presents an obstacle to rapid development of an HCP. Typically, relatively little detailed information concerning a listed species' habitat is available at the time of listing. As a result, the first exercise in any planning process is to develop this information. The development of the San Bruno Mountain HCP, for example, was preceded by two full years of detailed biological studies.

**[\*651]** Even in instances where a good deal is known about the species, it is difficult for HCP planning decisions to be made efficiently because the biological community has not developed a well-accepted model for the application of biological data to conservation strategy decisions. All too often, decisions are delayed by demands for "more data" without a good understanding as to how the additional information will be applied in the decision-making process. Recently, the biological community has begun to focus on this problem and to suggest applying scientific methods to the HCP process. [[151]](#footnote-152)151

In addition, the NEPA process can add a year or more to the time required to obtain a section 10(a) permit. The FWS's issuance of the section 10(a) permit is a federal action which triggers NEPA compliance either through an environmental assessment (EA) or an environmental impact statement (EIS). [[152]](#footnote-153)152 The only court to address NEPA's application to section 10(a) permits upheld the FWS's decision to prepare an EA rather than an EIS. [[153]](#footnote-154)153 Even an EA, however may entail substantial delays. It is difficult to initiate any NEPA analysis until the outlines of the HCP are sufficiently defined to permit analysis of the HCP's effects. Typically, this occurs relatively late in the process. Furthermore, in many cases it will be necessary to prepare an EIS in order to protect the plan from avoidable litigation risks.

Many of the problems with the HCPs which have floundered or failed are traceable to the inherent difficulty in achieving consensus among a large number of disparate interest groups. Any **[\*652]** complex HCP effort should begin with the premise that complete consensus may not be achievable. Ultimately, the appropriate regulatory agencies may have to make hard choices associated with balancing the concerns of competing interests. The FWS, in particular, must appreciate that it cannot simply act in a neutral capacity and decline to act until *all* of the local interests indicate that they are now willing to support a plan.

There are some steps that can be taken in order to enhance the likelihood of a successful consensus planning effort:

1. The objectives of the planning process need to be clearly understood at the outset, and should be articulated in a written memorandum.

2. The number of participants in the planning process should be kept to a minimum, consistent with biological and political constraints.

3. The size of working groups should be limited so that constructive dialogue and debate is possible. Working groups should focus their efforts on major planning issues and avoid involvement in day-to-day procedural issues.

4. Biological information should be developed with a specific purpose and objective in mind. Expensive and time-consuming biological investigations should not be conducted unless there is a clear understanding as to how the results of the investigation will be considered in the decision-making process.

5. Deadlines for "deliverables" and for completing particular components of the process should be set and met. Delay causes frustration with the process and creates the risk that critical participants will move on to other endeavors. Agency personnel tend to move from assignment to assignment, resulting in a loss of continuity in the planning process.

6. Political support for the effort should be developed and maintained at all relevant levels of government.

7. Working groups should be led by individuals that have the group's confidence and who are effective in facilitating group discussions.

8. The FWS should appoint individuals with HCP experience to assist in the planning process. Several of the HCPs have suffered from the absence of experienced participation by the state and federal resource agencies.

**[\*653]** V. A PROPOSED NEW DIRECTION FOR HCP PLANNING: THE CONSERVATION OF BIODIVERSITY

*A. Authorize the Use of Section 7 Consultations by Private Parties*

Habitat conservation plans are an excellent vehicle to address endangered species issues on a broad scale. They are generally not well-suited to the resolution of endangered species issues at the project level or in small geographic areas. The section 10(a) permit process is simply too cumbersome to address efficiently and to resolve endangered species concerns raised by a single project or by activities in a limited area.

Private parties that are required to obtain some form of federal agency approval can take advantage of the "incidental take" provisions of section 7(b)(4) and 7(o) of the ESA. But private parties that lack any federal "nexus" cannot do so. There is no good reason why all private parties should not be afforded the same opportunity to resolve issues through the section 7 consultation process. The critical question should be whether the private entity has committed to the necessary conservation measures to satisfy the ESA's substantive requirements. It is likely that private parties will be more willing to contribute resources to endangered species conservation if they know that an efficient mechanism is available to them to insure their compliance with the law.

As mentioned above, it may be appropriate to adopt special rules governing section 7 consultations initiated by private parties while a regional HCP is being developed. These rules should address the need for consistency with the conservation strategy proposed in the draft HCP, and the need for coordination with the proponents of the regional plan.

Experience with the use of the section 7 process to date strongly suggests that individual section 7 consultations can be positive contributors to the successful development and implementation of regional HCP efforts. Section 7 consultations have been used in Riverside County, ***Kern*** County and Austin, Texas to "jump start" pending conservation plans by establishing significant protection for the species in advance of the HCP's final approval. There is general consensus by the participants in these HCP planning efforts that the conservation measures implemented through the section 7 process in these instances substantially **[\*654]** contributed to the ongoing regional efforts to protect the species through the regional HCP process.

*B. Revise Section 10(a) to Focus On the Conservation of Biodiversity*

The experience with the HCP process to date strongly indicates that changes are necessary if the concept is to survive. A fundamental tension exists between the single species focus of the ESA regulatory system and the practical and biological need for HCPs to address listed and unlisted species. Put simply, the HCP provisions of the ESA are doomed to failure unless the plans are effective, not only in resolving current disputes regarding effects of development on listed species, but also in resolving disputes concerning species not yet listed.

There is a tendency to forget that the ESA's purpose is protection of ecosystems, and that the single-species regulatory mechanisms of the Act are a means to that end. Although section 10(a)'s legislative history makes it clear that HCPs are authorized to address unlisted species, there are significant practical problems associated with preparing a conservation plan which adequately considers the needs of species that are not yet listed, and about which typically very little is known. One solution to this dilemma is to shift section 10(a)'s focus from the protection of individual species to the protection of the ecosystems upon which they depend. The limitations of using the ESA's single species system to protect biodiversity is eloquently described by one commentator:

First we must dispense with the simplistic notion that endangered species can be preserved if we just have more protected natural areas. The world does not have enough parks, refuges, and nature preserves to protect more than a small fraction of the currently recognized endangered species. . . .

We also need to augment the current "one at a time" strategy of recovery and rehabilitation of endangered species. We need a more encompassing strategy for conserving biological diversity -- a strategy whose long-term success depends on conservation actions that protect genetic resources, sustain population viability of all species, perpetuate natural biological communities, and maintain a full range of ecological processes while meeting human needs. The customary approach of deciding what must be preserved and segregating **[\*655]** it from the rest can have only limited results. It reflects a siege mentality that derives from the doom and gloom rhetoric on extinctions and biological diversity. The future need not be that hopeless. But it will be if conservationists do not learn to be more effective in achieving their goals in more and larger areas of land and water, and in ways compatible with other human uses for those lands. [[154]](#footnote-155)154

One starting point for implementing the foregoing philosophy would be to amend section 10(a) to move the ESA away from the conservation of habitat for individual species to the conservation of biological communities. As an example, rather than establishing a reserve system in Riverside County for the Stephen's kangaroo rat, the plan would focus mechanisms to conserve and manage a diversity of habitat types, including the coastal sage scrub communities utilized by the California gnatcatcher and other species.

Section 10(a) emphasizes the minimization of taking individual species. For example, section 10(a) requires the conservation plan to specify the taking's impact and steps to minimize and mitigate the taking. [[155]](#footnote-156)155 Thus, the entire thrust of section 10(a) is on the incidental taking of individual species and conservation plans which minimize such taking. A restructured section 10(a) should focus conservation plans on biodiversity within the plan area.

In order to ensure private sector support that is critical to the HCP efforts on private property, it will be necessary to provide legal assurances that development activities will not be subject to new or additional mitigation requirements to protect species listed in the future beyond the requirements of the conservation plan. The model for this approach could be the development agreement concept which provides for freezing the regulatory rules in effect at the time the agreement is approved. [[156]](#footnote-157)156 The FWS's approval of the HCP would freeze the rules then in place under the ESA. Thus, if an additional species in the HCP area were listed in the future, section 7 and 9 provisions would not apply with regard to that species for activities that are carried out in accordance with the terms of the HCP.

**[\*656]** This approach would not prevent listing and protecting species under the ESA for areas not covered by an approved HCP. It would simply allow conservation plans that protect biodiversity to provide adequate assurances to the private sector that the conservation rules and standards enunciated in the HCP will not be altered by subsequent listing decisions.

Inherent in this suggestion is the realization that the conservation of biodiversity will require a financial commitment that cannot be provided by the public sector alone. Private sector contributions to endangered species conservation far surpass the federal endangered species budget. The mitigation fee imposed by local government as part of the Stephen's kangaroo rat interim habitat conservation plan is designed to raise approximately $ 50 million. The entire annual FWS endangered species budget is $ 30 million. [[157]](#footnote-158)157 It is clear that this relatively paltry amount cannot begin to address the problem. Given the reality of an annual $ 300 billion federal deficit and similar fiscal problems at the state and local governmental level, it is doubtful that the public sector contribution to endangered species conservation will increase dramatically.

The private sector has significant land and financial resources, but will be unwilling to commit them to the task unless the ESA allows for reasonable tradeoffs of development and conservation. They will also be unwilling to commit the necessary resources unless they receive adequate assurances that the covenants in the conservation plan can be enforced against the public sector parties and will not be undone by the subsequent listing of additional species.

The ESA's legislative history strongly suggests that changes of the kind proposed here will not come easily. It can be anticipated that the environmental community will have reservations about legislative suggestions that sanction "tradeoffs" and that impose limitations on the stringent application of sections 7 and 9. But if the ESA is truly to conserve ecosystems, the Act must allow for the evolution of new statutory and regulatory mechanisms to accomplish this noble purpose.

Environmental Law

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**End of Document**

1. 1 16 U.S.C. §§ 1531-1543 (1988). [↑](#footnote-ref-2)
2. 2 *Id.* § 1531(b). [↑](#footnote-ref-3)
3. 3 Address by Donald Barry, Majority Counsel, House of Representatives, Comm. on Merchant Marine and Fisheries, Am. Bar Assoc. Section on Nat. Resources, Energy and Envtl. Law, Workshop on Endangered Species (Apr. 6, 1990). [↑](#footnote-ref-4)
4. 4 Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) *(TVA v. Hill).* [↑](#footnote-ref-5)
5. 5 Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988); 16 U.S.C. § 1533(b)(1)(A) (1988), Northern Spotted Owl v. Lujan, 758 F. Supp. 621 (W.D. Wash. 1991); 16 U.S.C. § 1533(a)(3) (1988) (holding that the Fish and Wildlife Service abused its discretion in not designating critical habitat concurrently with the listing of the northern spotted owl). In *Northern Spotted Owl v. Hodel,* the court rejected the Fish and Wildlife Service's (FWS's) determination that listing the northern spotted owl was not warranted. Citing the testimony of several biologists concerning the threat to the species, the court ordered FWS to provide an analysis that the listing of the owl was not warranted. The FWS subsequently listed the owl as a threatened species, triggering a national debate over the ESA. [↑](#footnote-ref-6)
6. 6 16 U.S.C. § 1536. [↑](#footnote-ref-7)
7. 7 *Id.* § 1538. [↑](#footnote-ref-8)
8. 8 Noss, *From Endangered Species to Biodiversity,* in BALANCING ON THE BRINK OF EXTINCTION 227 (K. Kohm ed. 1991) [hereinafter BALANCING ON THE BRINK]; Salwasser, *In Search of an Ecosystem Approach to Endangered Species Conservation,* in BALANCING ON THE BRINK, *supra* at 247. [↑](#footnote-ref-9)
9. 9 16 U.S.C. § 1536(a)(2). [↑](#footnote-ref-10)
10. 10 *Id.* [↑](#footnote-ref-11)
11. 11 For a discussion of the history of the ESA, see M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW II 370-417 (1977); D. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 19-24 (1989). [↑](#footnote-ref-12)
12. 12 16 U.S.C. § 1538 (1988). The ESA also authorizes the Secretary of the Interior to apply the taking prohibition to "threatened" species. *Id.* § 1533(d). With very few exceptions, the FWS has elected to apply the takings ban to threatened species. The courts have severely restricted the FWS's authority to authorize directed takings of threatened species unless the taking is necessary for the species' "conservation." *See, e.g.,* Sierra Club v. Clark, 577 F. Supp. 783 (D. Minn. 1984) (invalidating FWS regulations which permitted limited sport trapping of timber wolves in Minnesota on grounds that ESA only authorizes directed takings of threatened species in extraordinary circumstances where population pressures cannot be relieved), *aff'd in part, rev'd in part on other grounds,* 755 F.2d 608 (8th Cir. 1985). [↑](#footnote-ref-13)
13. 13 16 U.S.C. § 1532(19). [↑](#footnote-ref-14)
14. 14 *See* BEAN, *supra* note 11, at 396-97. [↑](#footnote-ref-15)
15. 15 50 C.F.R. § 17.3 (1975), which defined the term "harm" to mean: [A]n act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harm." [↑](#footnote-ref-16)
16. 16 *See* 46 Fed. Reg. 54,749 (1981). [↑](#footnote-ref-17)
17. 17 Hill v. Tennessee Valley Auth., 419 F. Supp. 753 (E.D. Tenn. 1976), *rev'd,* 549 F.2d 1064 (6th Cir. 1977), *aff'd,* 437 U.S. 153 (1978). The U.S. Supreme Court in *TVA v. Hill* held that § 7(a)(2) of the ESA prohibited the completion of the Tellico Dam on the Little Tennessee River because it would eradicate the snail darter, a species of perch. This decision triggered a several year-long battle with many amendments to the ESA offered by members of Congress. In 1978, 1979, and 1982, Congress adopted significant amendments to the ESA, including an opportunity for exemptions from the ESA's requirements after review by a cabinet-level committee informally known as the "God Committee." The God Committee did not grant an exemption to the Tellico project, but Congress subsequently exempted the project from the ESA through a rider on a water and power appropriation bill. Appropriations for Water and Energy Development, Pub. L. No. 96-69, 93 Stat. 437, 449-50 (1979). Subsequent to the congressional exemption, additional populations of the snail darter were discovered. The exemption process has only been used on two occasions, including the snail darter case. For a discussion of *TVA v. Hill* and the resulting public controversy, see Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences,* 19 U. MICH. J.L. REF. 805 (1986). For a discussion of the 1978 and 1979 amendments to § 7, see Erdheim, *The Wake of the Snail Darter: Insuring the Effectiveness of Section 7 of the Endangered Species Act,* 9 ECOLOGY L.Q. 629 (1981). [↑](#footnote-ref-18)
18. 18 TVA v. Hill, 437 U.S. 153, 172 (1978). [↑](#footnote-ref-19)
19. 19 Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976) (affirming trial court determination that construction of Meramec Park Lake Dam by the Corps of Engineers did not violate § 9 because of the dam's effect on the Indiana bat, an endangered species). [↑](#footnote-ref-20)
20. 20 Palila v. Hawaii Dep't of Land & Nat. Res., 471 F. Supp. 985 (D. Haw. 1979), *aff'd,* 639 F.2d 495 (9th Cir. 1981) *(Palila I).* [↑](#footnote-ref-21)
21. 21 Palila I, 471 F. Supp. at 990. [↑](#footnote-ref-22)
22. 22 Id. at 995. [↑](#footnote-ref-23)
23. 23 Palila I, 639 F.2d at 495. [↑](#footnote-ref-24)
24. 24 46 Fed. Reg. 29,492 (1981) (codified as amended at 50 C.F.R. § 17.3 (1990)) (proposed June 2, 1981). [↑](#footnote-ref-25)
25. 25 The revised definition of "harm" is as follows:

    "Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

    50 C.F.R. § 17.3 (1989). [↑](#footnote-ref-26)
26. 26 46 Fed. Reg. 54,748 (1981). [↑](#footnote-ref-27)
27. 27 Palila v. Hawaii Dep't of Land & Nat. Res., 649 F. Supp. 1070 (D. Haw. 1986), *aff'd,* 852 F.2d 1106 (9th Cir. 1988) *(Palila II).* [↑](#footnote-ref-28)
28. 28 National Wildlife Fed'n v. Hodel, 23 Env't. Rep. Case (BNA) 1089 (E.D. Cal. 1985). [↑](#footnote-ref-29)
29. 29 882 F.2d 1294, 1295 (8th Cir. 1989). [↑](#footnote-ref-30)
30. 30 Id. at 1301. [↑](#footnote-ref-31)
31. 31 In contrast to *Defenders of Wildlife v. EPA,* the district court in California held that outer continental shelf ***oil*** and gas lease sale activities did not constitute a "taking" in violation of § 9. California ex rel. Brown v. Watt, 520 F. Supp. 1329, 1387-88 (C.D. Cal. 1981). [↑](#footnote-ref-32)
32. 32 694 F. Supp. 1260, 1261 (E.D. Tex. 1988), *aff'd in part, rev'd in part,* Sierra Club v. Yeutter, No. 88-6041 (5th Cir. Mar. 4, 1991) (LEXIS, Genfed library, USAPP file). [↑](#footnote-ref-33)
33. 33 694 F. Supp. at 1266. [↑](#footnote-ref-34)
34. 34 Palila v. Hawaii Dep't of Land & Nat. Res., 649 F. Supp. 1070, 1075 (D. Haw. 1986). [↑](#footnote-ref-35)
35. 35 Id. at 1082. [↑](#footnote-ref-36)
36. 36 ROHLF, *supra* note 11, at 65. [↑](#footnote-ref-37)
37. 37 Palila II, 649 F. Supp. 1070, 1082 (D. Haw. 1986) *aff'd,* 852 F.2d 1106 (9th Cir. 1988). [↑](#footnote-ref-38)
38. 38 Defenders of Wildlife v. EPA, 882 F.2d 1294, 1296 (8th Cir. 1989). [↑](#footnote-ref-39)
39. 39 Letter from Gail Kobetich, Field Supervisor, Sacramento FWS, to Peter Chamberlin, Sand City Planning Dir. (Nov. 28, 1986). [↑](#footnote-ref-40)
40. 40 *See infra* notes 102-112 and accompanying text. [↑](#footnote-ref-41)
41. 41 Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, §§ 4(b)(4), 4(o), 96 Stat. 1411, 1418, 1421 (codified at 16 U.S.C. §§ 1536(b)(4), 1536(o) (1988)). [↑](#footnote-ref-42)
42. 42 *Id.* § 10(a), 96 Stat. at 1422 (codified at 16 U.S.C. § 1539(a)); *see infra* note 60 and accompanying text. [↑](#footnote-ref-43)
43. 43 16 U.S.C. § 1536(b)(4). [↑](#footnote-ref-44)
44. 44 *Id.* § 1536(o). [↑](#footnote-ref-45)
45. 45 There is some uncertainty regarding the reach of § 7(o) and whether permit applicants can comply with § 9 by complying with the terms of the incidental take statement in the absence of the issuance of a federal permit. Section 7(o)'s legislative and regulatory history does not, on its face, limit application of the § 7(o) exemption to situations in which the federal agency action which triggered the § 7 consultation is approved by the federal permitting agency. The preamble to the § 7 regulations states the following with regard to the § 7(o) exemption:

    If an agency action receives a "no jeopardy" biological opinion, or if the Federal agency adopts any reasonable and prudent alternative provided in a "jeopardy" biological opinion, then the action may proceed in compliance with section 7. An incidental take statement will be provided with the biological opinion when the activity may incidentally take individuals of a listed species but not so many as to jeopardize their continued existence. If the action proceeds in compliance with the terms and conditions of the incidental take statement, then any resulting incidental takings are exempt from the prohibitions of section 4(d) or 9 of the Act. No permit is required of the Federal agency or any applicant in carrying out the action, as one commentator contended. *The biological opinion, plus the incidental take statement, operate as an exemption under section 7(o)(2) of the Act.* However, this exemption is limited to actions taken by the Federal agency *or* applicant that comply with the terms and conditions specified in the incidental take statement. Compliance with these terms and conditions is mandatory to qualify for the exemption from section 4(d) or 9 of the Act. 51 Fed. Reg. 19,926, 19,953 (1986) (emphasis added).

    This language suggests that the exemption from the § 9 prohibition applies without regard to whether the federal agency has approved the permit which triggered the § 7 consultation. The italicized language indicates that the exemption applies once the biological opinion is issued. Typically, a biological opinion is issued before the federal permitting agency approves the project. Further, the preamble states that "no permit is required of the Federal agency or any applicant. . . ." In addition, the preamble indicates that the exemption "is limited to actions taken by the Federal agency *or* applicant." Thus, it can be strongly argued that the § 7(o) exemption applies even in those circumstances in which the federal permitting agency does not issue the federal permit, but the permit applicant nevertheless proceeds with its project.

    The legislative history to § 7(o), which was added by Congress in the 1982 amendments to the ESA, also implies that the § 7(o) exemption applies as long as the taking is in compliance with the terms and conditions set forth in the biological opinion. It does not matter if the federal permitting agency approves the permit or whether the applicant proceeds to take advantage of the benefits of the federal permit which triggered the § 7 consultation.

    The House of Representatives Committee on Merchant Marine and Fisheries report on the 1982 amendments stated the following with regard to the § 7(o) exemption:

    The Purpose of section 7(b)(4) and the amendment to section 7(o) is to resolve the situation in which a federal agency *or* a permit or license applicant has been advised that the proposed action will not violate section 7(a)(2) of the Act but the proposed action will result in the taking of some species incidental to that action -- a clear violation of section 9 of the Act which prohibits any taking of a species. The Federal Agency or permit or license applicant is then confronted with the dilemma of having a biological opinion which permits the activity to proceed but is, nevertheless, proscribed from the incidental taking any species even though the incidental taking was contemplated in the biological opinion and determined not to be a violation of section 7(a)(2). The Committee intends that such incidental takings be allowed provided that the terms and conditions specified by the Secretary to minimize the impact of the takings are complied with.

    H.R. REP. NO. 567, 97th Cong., 2d Sess., pt. 1, at 26, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2807, 2826 (emphasis added). [↑](#footnote-ref-46)
46. 46 16 U.S.C. § 1536(a)(2). [↑](#footnote-ref-47)
47. 47 51 Fed. Reg. 19,926-01 (1986). [↑](#footnote-ref-48)
48. 48 *Id.* [↑](#footnote-ref-49)
49. 49 The definition is as follows:

    "Effects of the action" refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

    51 Fed. Reg. 19,926 (1986). [↑](#footnote-ref-50)
50. 50 758 F.2d 508 (10th Cir. 1985). [↑](#footnote-ref-51)
51. 51 Id. at 511. [↑](#footnote-ref-52)
52. 52 Id. at 512. The court discussed the indirect effect of the reservoir's construction on the endangered species' habitat:

    No one claims that the fill itself will endanger or destroy the habitat of endangered species or adversely affect the aquatic environment. However, the fill that the Corps is authorizing is required to build the earthen dam. The dam will result in the impoundment of water in a reservoir, facilitating the use of the water in Wildcat Creek. The increased consumptive use will allegedly deplete the streamflow, and it is this depletion that the Corps found would adversely affect the habitat of the whooping crane.

    The Endangerment Species Act does not, by its terms, enlarge the jurisdiction of the Corps of Engineers under the Clean Water Act. However, it imposes on agencies a mandatory obligation to consider the environmental impacts of the projects that they authorize or fund. As the Supreme Court stated in *TVA v. Hill:*

    One would be hard pressed to find a statutory provision whose terms were any plainer than those of § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded or carried out* by them do not jeopardize the continued existence" of an endangered species. . . .

    Id. at 511-12 (citations omitted) (emphasis in original). [↑](#footnote-ref-53)
53. 53 Id. at 512. The court held as follows:

    However, the Corps is required, under both the Clean Water Act and the Endangered Species Act, to consider the environmental impact of the discharge that it is authorizing. To require it to ignore the indirect effects that result from its actions would be to require it to wear blinders that Congress had not chosen to impose. The fact that the reduction in water does not result "from direct federal action does not lessen the appellee's duty under § 7 [of the Endangered Species Act]." The relevant consideration is the total impact of the discharge on the crane. [↑](#footnote-ref-54)
54. 54 Conservation Agreement By and Between Waste Mgmt. of California, Inc., City of San Jose and FWS (June 2, 1986). [↑](#footnote-ref-55)
55. 55 33 U.S.C. § 1344 (1988). The consultation requirement of § 7 applies to any action "authorized, funded, or carried out" by a federal agency. 16 U.S.C. § 1536(a)(2) (1988). [↑](#footnote-ref-56)
56. 56 Memorandum from Acting Field Supervisor, Laguna Niguel Field Office, to Area Manager, Indio Resource Area, Bureau of Land Management (May 31, 1989). [↑](#footnote-ref-57)
57. 57 *See* Letter from Robert Short, Field Supervisor, FWS, to Norman Thomas, EPA (Oct. 24, 1990). [↑](#footnote-ref-58)
58. 58 Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 6(1)(a)(1)(B), 96 Stat. 1411, 1422 (codified at 16 U.S.C. § 1539(a)(1)(B) (1988)). [↑](#footnote-ref-59)
59. 59 16 U.S.C. § 1539(a)(2)(A). [↑](#footnote-ref-60)
60. 60 *Id.* § 1539(a)(2)(B). [↑](#footnote-ref-61)
61. 61 For a discussion of the San Bruno Mountain Controversy, see Marsh & Thornton, *San Bruno Mountain Habitat Conservation Plan,* in MANAGING LAND USE CONFLICTS 114 (D. Brower & D. Carol eds. 1987). [↑](#footnote-ref-62)
62. 62 43 Fed. Reg. 28,938-45 (1978). [↑](#footnote-ref-63)
63. 63 San Bruno Mountain Area Habitat Conservation Plan (1982) (available at some FWS offices) [hereinafter San Bruno Mountain HCP]; FWS, Dep't of the Interior, Federal Fish and Wildlife Permit (Mar. 4, 1983). [↑](#footnote-ref-64)
64. 64 San Bruno Mountain HCP, *supra* note 63, pt. IV, at 1-7. [↑](#footnote-ref-65)
65. 65 *Id.* pt. V, at 4-7. [↑](#footnote-ref-66)
66. 66 *Id.* at 7-11. [↑](#footnote-ref-67)
67. 67 Marsh & Thornton, *supra* note 61, at 124-25 (italics in original). [↑](#footnote-ref-68)
68. 68 The parties had considered but rejected the idea of implementing the plan through regulations promulgated pursuant to § 4(d) of the ESA. *See infra* note 144 and accompanying text. [↑](#footnote-ref-69)
69. 69 H.R. REP. NO. 835, 97th Cong., 2d Sess. 31, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2807, 2831. [↑](#footnote-ref-70)
70. 70 *Id.* at 30, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 2830. [↑](#footnote-ref-71)
71. 71 *Id.* at 31, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 2831. [↑](#footnote-ref-72)
72. 72 *Id.* [↑](#footnote-ref-73)
73. 73 43 Fed. Reg. 28,938-45 (1978). The FWS first proposed listing the callippe silverspot butterfly on July 3, 1978. The FWS then withdrew the proposal on March 6, 1979 in response to ESA amendments changing the procedures for designating critical habitat. On March 28, 1980, the FWS re-proposed listing the butterfly. However, in June of 1980, the FWS allowed the listing to expire. *See* San Bruno Mountain HCP, *supra* note 63, pt. II, at 3. [↑](#footnote-ref-74)
74. 74 589 F. Supp. 113 (N.D. Cal. 1984), *aff'd,* 760 F.2d 976 (9th Cir. 1985). [↑](#footnote-ref-75)
75. 75 760 F.2d at 976. [↑](#footnote-ref-76)
76. 76 Id. at 987 (italics in original). [↑](#footnote-ref-77)
77. 77 Id. at 982. [↑](#footnote-ref-78)
78. 78 *Id.* [↑](#footnote-ref-79)
79. 79 51 Fed. Reg. 15,702 (1986). [↑](#footnote-ref-80)
80. 80 Coachella Valley Fringe-toed Lizard Habitat Conservation Plan (1985) (available at some FWS offices) [hereinafter Fringe-toed Lizard HCP]; 51 Fed. Reg. 4540 (1986). [↑](#footnote-ref-81)
81. 81 Fringe-toed Lizard HCP, *supra* note 80; 51 Fed. Reg. 4540 (1986). [↑](#footnote-ref-82)
82. 82 Fringe-toed Lizard HCP, *supra* note 80; 51 Fed. Reg. 4540 (1986). [↑](#footnote-ref-83)
83. 83 Endangered Species Conservation Plan Proposed State Correctional Facility Near Delano ***Kern*** County, California (1989) (available at some FWS offices) [hereinafter Delano HCP]. [↑](#footnote-ref-84)
84. 84 *Id.* [↑](#footnote-ref-85)
85. 85 *Id.* at 1. [↑](#footnote-ref-86)
86. 86 *Id.* at 4. [↑](#footnote-ref-87)
87. 87 The permit was approved in January 1990. Memorandum of Agreement By and Between California Department of Corrections, California Department of Fish and Game and U.S. Fish and Wildlife Service (Jan. 9, 1990). [↑](#footnote-ref-88)
88. 88 Delano HCP, *supra* note 83, 85, at 14. [↑](#footnote-ref-89)
89. 89 *Id.* [↑](#footnote-ref-90)
90. 90 *See* U.S. Fish and Wildlife Service, San Joaquin Kit Fox Recovery Plan 25 (Jan. 31, 1981). [↑](#footnote-ref-91)
91. 91 The state equivalent of the National Environmental Policy Act, the California Environmental Quality Act, requires public agencies to prepare environmental impact reports for discretionary approvals that have a significant effect on the environment. CAL. PUB. RES. CODE §§ 21100, 21150 (West 1986). [↑](#footnote-ref-92)
92. 92 A Proposal Regarding the Protection of Endangered Species in the Southern San Joaquin Valley (undated). [↑](#footnote-ref-93)
93. 93 S. REP. NO. 100-165, 100th Cong., 1st Sess. 10 (1987). [↑](#footnote-ref-94)
94. 94 *Id.* [↑](#footnote-ref-95)
95. 95 Under California law, general plans establish policies governing long-term development of a community zoning and other development approvals are required to be consistent with the general plan. *See* CAL. GOV'T CODE §§ 65,300-307 (West 1983 & Supp. 1991). [↑](#footnote-ref-96)
96. 96 Memorandum of Understanding by FWS, U.S. Bureau of Land Management, California Dep't of Fish and Game, California Energy Comm'n, California Dep't of Conservation, Div. of ***Oil*** and Gas and the County of ***Kern*** to Establish a Program for the Conservation of Species of Concern in ***Kern*** County (Apr. 17, 1989). The California Endangered Species Act generally parallels the ESA. Significantly, however, the California statute does not include the terms "harm" and "harass" in the definition of take. *See* CAL. FISH & GAME CODE §§ 86, 2050-2098 (West Supp. 1991). [↑](#footnote-ref-97)
97. 97 *Id.* at 6. [↑](#footnote-ref-98)
98. 98 Metropolitan Bakersfield Habitat Conservation Plan (1991). [↑](#footnote-ref-99)
99. 99 *Id.* [↑](#footnote-ref-100)
100. 100 *Id.* at 93. [↑](#footnote-ref-101)
101. 101 *Id.* at 53-54. [↑](#footnote-ref-102)
102. 102 53 Fed. Reg. 38,465 (1988). The Stephens Kangaroo Rat's scientific name is *Dipodomys stephensi.* [↑](#footnote-ref-103)
103. 103 Id. at 38,466. [↑](#footnote-ref-104)
104. 104 N.Y. Times, July 1, 1990, at 32, col. 1. [↑](#footnote-ref-105)
105. 105 Short-Term Habitat Conservation Plan for the Stephens' Kangaroo Rat (Apr. 6, 1989) (available at FWS offices in Portland, Oregon and Washington, D.C.). [↑](#footnote-ref-106)
106. 106 *Id.* at 40. [↑](#footnote-ref-107)
107. 107 *Id.* at 59. [↑](#footnote-ref-108)
108. 108 Implementation Agreement By and Between the FWS, the County of Riverside, the Cities of Perris, Lake Elsinore, Riverside, Moreno Valley and Hemet, and the Riverside County Habitat Conservation Agency, § IV.A(7) (Aug. 1, 1990). [↑](#footnote-ref-109)
109. 109 *See, e.g.,* Riverside County, Cal., Ordinance 663.5 (Nov. 14, 1988). California law authorizes local agencies to jointly exercise common powers through a joint powers authority. CAL. GOV'T CODE §§ 6500-6571 (West Supp. 1991). [↑](#footnote-ref-110)
110. 110 It certainly could be argued that the SKR mitigation fee runs afoul of the U.S. Supreme Court decision in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), which held that a Coastal Commission requirement to provide lateral beach access as a condition to a coastal development permit was a taking in violation of the U.S. Constitution. The Court held that the required easement for passage along the coast adjacent to the residential property did not "substantially advance" legitimate state interests and that there was an insufficient "nexus" between the lateral access condition and the state interests advanced as justification for requiring the permit. Id. at 837. The SKR mitigation fee could violate the *Nollan* nexus requirements because it applies to all property within the fee area regardless of whether there is any SKR habitat on the property. For a discussion of the law of development impact fees, see Stroud, *Legal Considerations of Development Impact Fees,* in DEVELOPMENT IMPACT FEES 83 (A. Nielson, ed. 1988). [↑](#footnote-ref-111)
111. 111 There is considerable doubt whether the joint powers agency can establish that there is a sufficient "public purpose" for the condemnations to pass constitutional muster. The Supreme Court did, however, sustain the constitutionality of the Hawaii Land Reform Act which established a condemnation scheme whereby title in real property is taken from lessors and transferred to lessees in order to reduce the concentration of land ownership. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). The Court stated that "[r]edistribution of fees simply to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power."

     Id. at 243. Whether the condemnations to carry out the SKR program are constitutional is likely to turn on whether the courts characterize the SKR program as intended primarily to conserve the SKR or to authorize the incidental taking of the SKR. [↑](#footnote-ref-112)
112. 112 Memorandum from William E. Martin, Acting Regional Dir., Region I FWS, to the FWS Dir. (Jan. 15, 1991) (90 day finding on petition to list the California gnatcatcher as endangered). The California gnatcatcher's scientific name is *Polioptila californica californica.* There is considerable uncertainty and dispute regarding the taxonomic status of the gnatcatcher. [↑](#footnote-ref-113)
113. 113 *Key Largo Plan Would Trim Development by Three-Fourths,* UPI (Feb. 4, 1990). [↑](#footnote-ref-114)
114. 114 Bell, *Pay the Piper is Least Bell's Vireo's Costly Song,* Los Angeles Times, Dec. 1, 1988, Pt. 2, at 1, col. 3. [↑](#footnote-ref-115)
115. 115 Tilton & Johnson, *Austin Regional Habitat Conservation Plan,* ENDANGERED SPECIES TECHNICAL BULLETIN, Jan. 1990, at 1. [↑](#footnote-ref-116)
116. 116 Bay Checkerspot Butterfly Conservation Plan (1986) (available at some FWS offices) [hereinafter Bay Checkerspot HCP]. [↑](#footnote-ref-117)
117. 117 The following are the significant elements of the Bay Checkerspot Conservation Plan:

     1. Unlike previous HCPs, the Bay Checkerspot Plan used a combination of authorities under § 7 and § 10 of the ESA. The landfill operator could not apply for a § 10 permit because the species had not been listed. The HCP constituted the terms and conditions of a nonjeopardy biological opinion on a Federal Highway Administration action concerning the project. The Conservation Agreement (which implements the plan) provides that the plan is also intended to operate as an HCP under § 10 in the event that the species is listed.

     2. The Conservation Plan focuses on the interim protection and management (for a term of 15 years) of the highest quality bay checkerspot habitat. Under the Conservation Plan, Waste Management agreed to lease 350 acres in addition to the 800 acres already under its control and to manage the entire 1050 acre parcel to optimize habitat conditions for the bay checkerspot.

     3. In addition, Waste Management agreed to establish and fund a trust ($ 50,000 per year for 10 years) to provide funding for a variety of restoration and enhancement activities set forth in the HCP (most notably, restoration of the habitat in the landfill as the development of the landfill progresses).

     4. The Conservation Plan is implemented through a Conservation Agreement between Waste Management, the City of San Jose and the FWS which provides for a review of the success of the restoration and enhancement program in 15 years (coterminus with the lease of the highest quality habitat). The Conservation Agreement restricts the ability of the FWS to impose additional mitigation requirements except as specifically provided in the Agreement.

     *See* Thomas Reid Associates, D. Murphy, R. Thornton, and N. Matteoni, Kirby Canyon Landfill Project: Conservation Plan for Bay Checkerspot Butterfly *Euphydryas Editha Bayensis* (July 15, 1985) (submitted by City of San Jose and Waste Management of Calif., Inc.) (available at FWS offices in Sacramento, California and Portland, Oregon). [↑](#footnote-ref-118)
118. 118 H.R. REP. NO. 97-835, 97th Cong., 2d Sess. 30, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2860, 2871. [↑](#footnote-ref-119)
119. 119 *Id.* [↑](#footnote-ref-120)
120. 120 *Id.* at 31, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 2872. [↑](#footnote-ref-121)
121. 121 *Brisbane Approves Habitat Amendment,* Business Wire, Dec. 11, 1990. [↑](#footnote-ref-122)
122. 122 *See supra* note 112 and accompanying text. The SKR HCP study areas, however, do include considerable gnatcatcher habitat. [↑](#footnote-ref-123)
123. 123 16 U.S.C. § 1536(a) (1988). [↑](#footnote-ref-124)
124. 124 *Id.* § 1536(a). [↑](#footnote-ref-125)
125. 125 Murphy, *Invertebrate Conservation,* in BALANCING ON THE BRINK, *supra* note 8, at 193 (citations omitted). [↑](#footnote-ref-126)
126. 126 *Id.* at 192 (citations omitted). [↑](#footnote-ref-127)
127. 127 Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, §§ 2(b)(1)(A), 2(b)(3), 96 Stat. 1411, 1411, 1412 (codified at 16 U.S.C. §§ 1533(b)(1)(A), 1533(b)(3) (1988)). In response to the widespread perception that Secretary of the Interior James Watt's administration had deliberately slowed the listing of species, Congress amended the ESA in 1982 to require that listing determinations be made "solely" on the basis of the best scientific and commercial data available, and to impose deadlines on the review of private petitions to list species.

     H.R. REP. NO. 567, 97th Cong., 2d Sess. 11-13, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2807, 2811-12. [↑](#footnote-ref-128)
128. 128 H.R. REP. NO. 835, 97th Cong., 2d Sess. 31, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2860, 2872. [↑](#footnote-ref-129)
129. 129 *See supra* note 118 and accompanying text. [↑](#footnote-ref-130)
130. 130 *See supra* notes 63-64 and accompanying text. [↑](#footnote-ref-131)
131. 131 In one noteworthy case, a five-year effort to develop a special Area Management Plan to resolve environmental issues at Grays Harbor, Washington foundered on the inconsistency of the plan's objectives with the procedural requirements of federal environmental legislation. *See* N. EVANS & WASHINGTON SEA GRANT PROGRAM, THE SEARCH FOR PREDICTABILITY, PLANNING AND CONFLICT RESOLUTION IN GRAYS HARBOR, WASHINGTON (1980). The Grays Harbor plan collapsed in part because the EPA determined that the plan could not be used as a basis to issue § 404 Clean Water Act permits for development activities contemplated by the plan because the EPA's § 404(b)(1) guidelines did not permit authorization in advance for fill or discharge into aquatic areas, but required case-by-case determinations. *Id.* at 84. [↑](#footnote-ref-132)
132. 132 *See, e.g.,* Vermont Dep't of Pub. Serv. v. Massachusetts Mun. Wholesale Elec. Co., 151 Vt. 73, 86, 558 A.2d 215, 222 (1989).

     The California Supreme Court, for example, held in *Avco Community Developers v. Southern Coast Regional Commission* that governmental entities may not contract away future exercises of the police power. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied,* 429 U.S. 1083 (1977). *Avco* and its progeny stand for the proposition that in California there is no "vested right" to develop until the developer has incurred substantial construction costs in reliance on the issuance of a building permit or its equivalent. In California, the building permit typically is issued many months or years after the major discretionary approvals for a development project.

     The California legislature responded to the late vesting principle enunciated by *Avco* by enacting two separate pieces of legislation which attempt to statutorily "vest" development rights earlier than issuance of the building permit. CAL. GOV'T CODE §§ 65,864-65,869.5 (West 1983). One statute authorizes local agencies to enter into development agreements which freeze zoning and other land use regulations when the development agreement is approved. CAL. GOV'T CODE § 65,866. The other statute authorizes local governments to approve "vesting tentative" subdivision maps which are intended to freeze the rules applicable to subdivision approvals when the tentative subdivision map is approved. *Id.* § 66,498.1-.8 (West Supp. 1991). Other states have adopted similar statutes. *See, e.g.,* FLA. STAT. ANN. §§ 163,3220-3243 (West 1990).

     Hundreds of development agreements and vesting tentative maps have been approved in California since this legislation's enactment, but the California courts have still not provided guidance regarding the extent to which the agreements are effective in blunting the late vesting rule enunciated in *Avco. See* Curtin & Skaggs, *Legal Issues and Considerations,* in DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS 130 (1989).

     The California development agreement statute responded to the tremendous growth in exactions imposed on the development community in California after the passage of Proposition 13 in 1978. CAL. CONST. art. XIII A. For a discussion of the use of development fees to pay for the costs of growth in California, see Barneby, *Paying for Growth: Community Approaches to Development Impact Fees,* in DEVELOPMENT IMPACT FEES, *supra* note 110. Proposition 13 greatly restricted local government's ability to increase property taxes, therefore the local governments increasingly relied on fees and assessments on new development to pay for a wide variety of public facilities. Fulton, *Developer Fees Buy Improvements, But Home Buyers Pay,* Los Angeles Times, Oct. 8, 1989, at Real Estate 1, col. 4. Not surprisingly, as local government increasingly turned to the development industry to pay for public improvements, the development community sought greater assurances that local government would not change the rules applicable to future project approvals once the commitment to provide the public improvement is made. [↑](#footnote-ref-133)
133. 133 CAL. GOV'T CODE §§ 65,864 to 65,869.5 (West 1983); *See supra* note 132. [↑](#footnote-ref-134)
134. 134 *See, e.g.,* Bay Checkerspot HCP, *supra* note 116. [↑](#footnote-ref-135)
135. 135 Memorandum of Understanding by FWS, U.S. Bureau of Land Management, California Dep't of Fish and Game, California Energy Comm'n, California Dep't of Conservation, Div. of ***Oil*** and Gas, and the County of ***Kern*** to Establish a Program for the Conservation of Species of Concern in ***Kern*** County (Apr. 17, 1989). [↑](#footnote-ref-136)
136. 136 National Wildlife Fed'n v. Coleman, 529 F.2d 359 (5th Cir. 1976). [↑](#footnote-ref-137)
137. 137 To a great extent, in deciding whether the federal action agency has complied with the substantive mandate of § 7, the courts have deferred to the FWS's conclusions in the biological opinion. *See* Cabinet Mountains Wilderness v. Peterson, 17 Env't Rep. Cas. (BNA) 1844, 1851 (D.C. Cir. 1982) (approving exploratory mining activities, as modified pursuant to a FWS biological opinion, within the grizzly bear's habitat); Friends of Endangered Species v. Jantzen, 760 F.2d 976 (9th Cir. 1985). [↑](#footnote-ref-138)
138. 138 Sierra Club v. Clark, 577 F. Supp. 783 (D. Minn. 1984), *aff'd in part, rev'd in part,* 755 F.2d 608 (8th Cir. 1985). *See supra* note 12. [↑](#footnote-ref-139)
139. 139 755 F.2d 608 (8th Cir. 1985). [↑](#footnote-ref-140)
140. 140 The "no net loss" policy for wetlands is enunciated in Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines. 54 Fed. Reg. 51,319 (1989). The EPA and the Corps of Engineers acknowledged, however, that the "no net loss" goal may not be "feasible, nor practicable" in all individual permit decisions. *Id.* [↑](#footnote-ref-141)
141. 141 Houke, *The "Institutionalization of Caution" Under Section 7 of the Endangered Species Act: What Do You Do When You Don't Know?* 12 Envtl. L. Rep. (Envtl. L. Inst.) 15,001 (1982). [↑](#footnote-ref-142)
142. 142 *See supra* notes 41-53 and accompanying text. [↑](#footnote-ref-143)
143. 143 16 U.S.C. §§ 1536(b), (o) (1988). [↑](#footnote-ref-144)
144. 144 The Stephens Kangaroo Rat Interim HCP, for example, eliminated a significant area of SKR habitat from the reserve study areas to prompt the City of Riverside to join the HCP effort and adopt the SKR mitigation fee. Short-term Habitat Conservation Plan for the Stephens' Kangaroo Rat (Mar. 16, 1990) (available at some FWS offices) [hereinafter SKR HCP]. [↑](#footnote-ref-145)
145. 145 Endangered Species Act, 16 U.S.C. § 1536(b)(4)(ii) (1988) (The Secretary may allow an incidental take of a listed species under § 7 if the action meets certain conditions including necessary "reasonable and prudent measures."). *See supra* notes 43-45 and accompanying text. [↑](#footnote-ref-146)
146. 146 3M Austin Center Environmental Program (Sept. 10, 1990). [↑](#footnote-ref-147)
147. 147 *See* Letter from Robert Short, FWS, to Norman Thomas, EPA (Oct. 24, 1990). [↑](#footnote-ref-148)
148. 148 3M Austin Center Environmental Program (Sept. 10, 1990). [↑](#footnote-ref-149)
149. 149 *See* SKR HCP, *supra* note 144. [↑](#footnote-ref-150)
150. 150 *See, e.g., supra* note 113 and accompanying text. [↑](#footnote-ref-151)
151. 151 D. MURPHY & B. NOON, INTEGRATING SCIENTIFIC METHODS WITH HABITAT CONSERVATION PLANNING: RESERVE DESIGN FOR THE NORTHERN SPOTTED OWL (forthcoming). The authors suggest that conservation planning efforts should be guided by traditional scientific methods of testing falsifiable hypotheses concerning available conservation strategies. Population viability models are also likely to take on increasing importance in the development of HCPs. Dr. Michael Gilpin of the University of California, San Diego, has recently released a population model concerning the SKR to assist in the design of the SKR reserves. These computer models offer the ability to quantitatively test common biological assumptions. Although the uncertainties inherent in the many assumptions in these models are significant, the models are a visually powerful tool and are likely to influence significantly HCP processes. [↑](#footnote-ref-152)
152. 152 *See generally* National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370a (1988). [↑](#footnote-ref-153)
153. 153 Friends of Endangered Species v. Jantzen, 760 F.2d 976 (9th Cir. 1985). *See supra* notes 74-76 and accompanying text. [↑](#footnote-ref-154)
154. 154 Salwasser, *In Search of An Ecosystem Approach to Endangered Species Conservation,* in BALANCING ON THE BRINK, *supra* note 8, at 248-49. [↑](#footnote-ref-155)
155. 155 16 U.S.C. § 1539(a) (1988). [↑](#footnote-ref-156)
156. 156 *See supra* note 132 and accompanying text. [↑](#footnote-ref-157)
157. 157 Campbell, *The Appropriations History,* in BALANCING ON THE BRINK, *supra* note 8, at 135. [↑](#footnote-ref-158)