Is the Southern California Approach to Conservation Succeeding?

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INTRODUCTION

In the Spring of 1993, at about the time President Clinton was stepping in to settle the bitter contest in the Pacific Northwest over spotted owls and ancient forests, the newly appointed Interior Secretary, Bruce Babbitt, was making arrangements with the State of California to jointly test a new approach to wildlife conservation that would mark a dramatic departure from past practices. The moment was right for an experiment. It was evident to the Clinton Administration from the experiences in the northwest and elsewhere that the Endangered Species Act's (ESA)1 triage approach to protecting the nation's biological diversity was often more effective at perpetuating conflict than species. It was also evident that the ESA's flexibility and potential for innovation had never been fully explored and that, through creative administration of the Act, far more effective responses to species conservation challenges could be achieved.

Secretary Babbitt was intrigued by the approach to species conservation embraced by California through its newly-enacted Natural Community Conservation Planning (NCCP) program.2 Unlike the ESA, the NCCP approach aimed to preserve biodiversity by focusing

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on the needs of whole ecological systems and their range of inhabitants, rather than on individual species. The NCCP program contemplated an unusual collaboration among disparate interests—government officials, environmentalists, land developers, community groups—to engage in the development of plans that would assure long-term sustainability of the region's ecosystems and avert further decline of resident species. This approach held out the prospect of resolving species conservation issues while diminishing confrontation by reconciling the competing demands of environmental quality and development.

The proving ground would be Southern California, where the rapidly expanding boundaries of suburbia had driven a number of species to the last corners of their coastal sage scrub habitat. Among them was the California gnatcatcher, a small songbird whose precarious existence was seen as symptomatic of the large scale deterioration of the coastal zone ecosystems. Secretary Babbitt had decided that the gnatcatcher should receive the protection of the ESA. But rather than rely on the conventional processes of the Act, the Secretary, by special rule, deferred to the NCCP process to provide for the conservation of the songbird and the other besieged inhabitants of the region. The Secretary recognized that, by crossbreeding the ESA with the NCCP Act, many of the ESA limitations could be overcome and that a model for fundamental change in biodiversity preservation would be in the making.

Today, five counties in Southern California participate in the NCCP/ESA hybrid process and are at various stages in developing plans that ultimately will produce a system of interconnected wildlife preserves stretching over 6,000 square miles from Los Angeles to

3. The U.S. Fish and Wildlife Service estimates that approximately 90% of the coastal sage scrub habitat has been lost in the five county region of southern California. See U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants: Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher (Dec. 10, 1993) [hereinafter Special Rule].

4. See id. The special rule for the California gnatcatcher was promulgated pursuant to the Secretary's authority under section 4(d) of the ESA. Section 4(d) provides the Secretary with the flexibility to issue any regulations he deems necessary to conserve species listed as threatened. See 16 U.S.C. § 1533(d) (1997).

5. The linkage between the ESA and the NCCP Act necessitated an unusual partnership between the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG) (collectively referred to in this essay as the "wildlife agencies"). Throughout the southern California planning efforts, USFWS and CDFG have operated, on most matters, as integrated organizations, collaborating on the development of policies and presenting a unified voice in discussions with the participating interests.

6. The counties of Orange, San Diego, Riverside, San Bernadino, and Los Angeles have entered into memoranda of understanding with the U.S. Fish and Wildlife Service and the California Department of Fish and Game to develop plans pursuant to the ESA and NCCP program.
Mexico. The first results of the experiment—the Orange County Central-Coastal Plan and the San Diego County Multiple Species Conservation Program (MSCP) plan—are at or near completion. These pilot plans have drawn considerable national attention and have garnered the praise of environmentalists and developers alike. Secretary Babbitt has described the plans as marking "the beginning of a new chapter in American conservation history."

Some observers of the Southern California experiment, however, have questioned whether the plans are adequately equipped to put into practice the concepts that originally spurred their development and to ultimately succeed at their mission. Although it will be some years before it is known whether the plans have been successful at sustaining the biodiversity of the Southern California ecosystems, the plans faithfully incorporate the concepts that inspired their creation and offer a potent response to a difficult environmental challenge. They are unprecedented in breadth and scale, unique in approach and technique, and unsurpassed in their capacity to protect wildlife and natural habitats and to harmonize environmental and economic goals for the region. Moreover, they provide detailed blueprints for other urbanizing communities intent on undertaking similar efforts to preserve biological diversity and natural open space.

The results of the Southern California experiment will also factor heavily into the debate as Congress considers revisions to the ESA in the months ahead. The San Diego and Orange counties' planning efforts have shown that the ESA can work and that its flexible provisions can achieve imaginative and comprehensive solutions to the challenge of species conservation. The accomplishments of the Southern California program have also shifted the tenor of much of the dis-

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7. The San Diego MSCP involves the participation of the City and County of San Diego and ten other jurisdictions and covers a 900 square mile area (582,243 acres) in the southwestern portion of the county. See Multiple Species Conservation Program, MSCP Plan Revisions (Dec. 1996) [hereinafter MSCP Plan]. The MSCP plan will create a 171,900 acre preserve system comprising twenty-five different habitat types. See id. The preserve will provide for the conservation of eighty-five plant and animal species. See id. Both the City of San Diego and the unincorporated county have approved the MSCP plan (on March 18, 1997 and October 22, 1997, respectively). It is expected that other jurisdictions will take action on the plan in the upcoming months.

The Orange County Central-Coastal plan covers approximately 325 square miles (208,000 acres) and encompasses nine jurisdictions. See County of Orange Environmental Management Agency et al., Draft: Central and Coastal Subregion Natural Community Conservation Plan/Habitat Conservation Plan (Dec. 7, 1995) [hereinafter Central-Coastal Plan]. The plan will establish a 37,378 acre preserve sufficient to ensure the conservation of thirty-nine plants and animal species. See id. The Central-Coastal plan was approved by Orange County on April 16, 1996.

8. Terry Rodgers, City Affirms Plan to Save Area Wildlife Interior Secretary Calls Large-Habitat Action Magnificent, SAN DIEGO UNION-TRIBUNE, March 19, 1997, at A1. Secretary Babbitt also made remarks to this effect in a speech given at the signing event for the Orange County Central-Coastal plan on July 17, 1996.
cussion over ESA reauthorization away from shrill calls for radical rewrite, if not complete repeal, to thoughtful dialogue about moderate amendments designed to codify the field-tested concepts of the regional planning approach.

I
THE CONCEPTS UNDERLYING THE SOUTHERN CALIFORNIA APPROACH

The Endangered Species Act is not well suited to protect entire ecosystems or resolve species-driven conflicts over the use of the land. Rather, the Act is designed to rescue species on the verge of extinction.\(^9\) Indeed, the law itself sends the final signal that the level or manner of resource use cannot be sustained without extinguishing a particular species, and it imposes strict measures to protect the species.\(^{10}\) Not surprisingly, when the ESA comes into play, opportunities to accommodate other interests are usually severely limited. Species heading for trouble, on the other hand, must wait until their circumstances become sufficiently dire to warrant protection under the Act. Until then, the species is fair game. In effect, the ESA sets in motion a reactive, rather than an anticipatory, process. It is a device for crisis management, not crisis avoidance.

The Southern California approach to conservation transcends these limitations. The approach is designed to head off ecological crisis and economic tumult by planning in advance for broad swaths of the natural landscape. It looks beyond the needs of a few species, focusing instead on the preservation of entire ecosystems, not just discrete parts, and on communities of species, not just those already imperiled. It does so by establishing conservation priorities on the basis of habitat rather than species. By setting aside habitat important to

\(^9\) The stated purpose of the ESA is to conserve ecosystems, yet the Act's processes focus only on the protection of "endangered species" ("in danger of extinction throughout all or a significant portion of its range") or "threatened species" ("likely to become an endangered species in the foreseeable future. . . ."). 16 U.S.C. §§ 1532(6), (20) (1997). The Act does not provide direct measures to ensure that ecosystems or unlisted species are conserved.

\(^{10}\) The ESA prohibits the take (i.e. harassment, harm, pursuit, hunting, shooting, wounding, killing, trapping, capture, or collection) of species listed as endangered or threatened. The Act, however, includes provisions for the "incidental take" of listed species pursuant to permit. 16 U.S.C. § 1532(19) (1997). Under section 10 of the ESA, for instance, a private landowner is permitted to proceed with a measure of development or land use that unintentionally impinges on a protected species' habitat in exchange for a long-term habitat conservation plan (HCP) outlining steps that will offset the impact on the species. 16 U.S.C. §§ 1539(a)(1)-(A)-(B), (a)(2) (1997). Under the plan, the landowner is required to carry out development in a manner that both minimizes the effect on the species and mitigates those effects. Similar permitting procedures are set out in section 7 of the Act for public projects that impact listed species. 16 U.S.C. §§ 1536(g)-(o) (1997).
the sustenance of numerous species, the thinking goes, future decline of the biological health of an area can be averted.

The approach also adds greater rationality to the conservation planning process. The project-by-project nature of the ESA regime means that habitat conservation plans (HCP) are often developed in isolation, with judgments about the rules of development made in a piecemeal, ad hoc manner. Consequently, it is often impossible to know how pieces fit together and whether preservation opportunities have been optimized. By looking at the total ecological picture, on the other hand, conservation needs can be better assessed, patterns and relationships more accurately portrayed, and biological hot spots readily identified. As a result, preserves can be shaped in ways that maximize their capacity to maintain the workings of natural systems and sustain biodiversity across ecosystems.

Conservation planning on a regional level also moderates the impact of regulatory requirements on the economic concerns of an area, thereby reducing the potential for conflict between environmental and developmental interests. Again, by evaluating conservation needs on a broad scale, opportunities to find room for accommodation of other interests increase, as does the potential for reaching a sensible and appropriate balance of uses on the land. The comprehensive nature of regional conservation planning further provides land developers with the advantage of far greater certainty and predictability in their planning and land acquisition decisions. Addressing the needs of multiple species up-front means that landowners can be spared the obligation (and surprise) to do so later. That is, if species covered by a plan are later listed under the ESA, landowners are relieved of any additional conservation requirements and are assured that development plans can proceed unimpeded.

Finally, the regional planning approach encourages the integration of wildlife protection objectives into the regulatory processes of local government. Under the approach, primary responsibility is placed in the hands of participating jurisdictions to devise and implement species conservation measures. The approach recognizes that decisions about the use of the land are best left to local government, and that the tools of local land-use planning, unavailable to the federal and state governments, are ideally suited for wildlife protection. In effect, the preservation of habitat equates to the protection of open space by local government through land-use regulation. Consequently, the role of the federal and state governments is limited to setting standards, monitoring and enforcing performance, and providing technical and financial assistance.
II

HOW ARE THESE CONCEPTS REFLECTED IN THE PLANS?

A. Preserving Ecosystems and Their Inhabitants

The reach of the San Diego County and Orange County plans extends well over a thousand square miles, crossing jurisdictional boundaries and covering landscapes of remarkably diverse ecological features disfigured by helter-skelter urban sprawl. Not surprisingly, this is a landscape rife with species in dire straits; indeed, more endangered and threatened plants and animals are found in this region than any other place in the lower forty-eight states. To have taken steps to reverse this trend on a project-by-project, incremental basis would, at best, have resulted in marginally successful outcomes. With the visionary, far-reaching planning efforts undertaken by San Diego and Orange counties, chances have been greatly enhanced that the coastal ecosystems of Southern California will be sustained over the long term.

The exercise of planning for these ecosystems, however, required a strong foundation of scientific understanding of the complex ecological processes that define the coastal region. Science provided the credibility for the approach and the basis upon which the plans could ultimately withstand rigorous scrutiny. Proceeding without a sound scientific base would have doomed both the experiment and perhaps many of the intended beneficiaries of the program. Moreover, such folly would have been particularly misguided given the limited opportunities for mid-course corrections in the urbanizing landscape of San Diego and Orange counties, where land not designated for preservation was certain to be consumed by development.

An initial step in developing a scientifically credible program was the creation of an independent review panel of nationally known conservation biologists to evaluate the task at hand and recommend a framework to guide the development of the plans. The panel’s “conservation guidelines” established threshold requirements for a biologically defensible process, including standards for data collection, preserve design, and adaptive management. The criteria prescribed by the panel assured that the planning efforts stayed on course and provided the state and federal wildlife agencies with an additional gauge to measure the sufficiency of the plans.


Meanwhile, an extensive and perpetually growing database was being created that would assist in understanding the regional landscape. Through the use of geographic information systems, an increasingly sharp picture of the region was being formulated, depicting the relationships among geographic, geologic, biologic, and man-made features. Maps derived from this database revealed how biological resources were distributed. This information, such as the type, quantity and quality of natural communities, the whereabouts of species, the location and size of corridors, linkages and core areas, was clarified for the first time. By overlaying these biological resource maps on maps reflecting land ownership patterns and ongoing and potential land uses, gaps between areas under existing protections and those vulnerable to loss became apparent. Biologists then could begin to make determinations about which areas would need to be protected to accomplish certain conservation objectives. Without the benefit of a comprehensive view of the regional landscape, the necessary elements of a sustainable preserve system—such as size, location, configuration, species mix and distribution—would have been very difficult, if not impossible, to ascertain.

A reliable portrayal of the biological resources in relationship to political and private property boundaries was also critical in devising strategies that would make implementation possible. With a detailed understanding of the relationship between patterns of development and biological requirements, each participating jurisdiction could make determinations about the regulatory approaches and land-use mechanisms that would be best suited to building a preserve system. The regional perspective also allowed planners to maximize, to the extent appropriate, use of public lands and minimize reliance on private lands in the design of the preserves.

Notwithstanding the strong biological basis for the preserve designs, the San Diego County and Orange County plans anticipate that ongoing tinkering within the preserves may be necessary. Unlike standard HCPs, the MSCP and Central-Coastal plans include a process to ensure that the overall biological health of the preserve systems is monitored on a constant basis and that management activities are responsive to changing conditions. As part of the agreements to implement the plans, the participating jurisdictions are obligated to set up preserve-wide adaptive management and monitoring programs that they will jointly administer in coordination with the federal and state wildlife agencies. These activities will provide early warnings
of any decline in preserve function and assure a rapid response to these unforeseen circumstances.

The management and monitoring activities will also produce a flow of information that will enable the scientific community to pinpoint the most pressing research and data gathering needs. The scientists and researchers will likewise provide the feedback necessary to land managers as they carry out their tasks. A group of researchers, planners, and managers, under the leadership of the Biological Resource Division (BRD) of the U.S. Geological Survey, regularly gathers to help identify research and data gaps. This group has been working to engage the scientific community in designing and undertaking projects that will advance the efforts of preserve managers.14

B. Minimizing Impacts on Economic Interests

The listing of the California gnatcatcher as a protected species might have led to a showdown over the fate of the last remnants of the undisturbed landscape of Southern California. Conditions were ripe for conflict; the relentless tide of development rolling through the coastal sage scrub ecosystem threatened to trigger a rapid fire succession of species listings capable of bringing development to a grinding halt. But confrontation never occurred. Instead, the planning efforts in San Diego and Orange counties proceeded with the participation and backing of private landowners and environmentalists alike, who both acknowledged that ecosystem-based planning offered the prospect for a better way to resolve endangered species issues than conventional species-driven approaches. Indeed, the broad show of support for the final plans provided confirmation that the regional planning approach had succeeded at reconciling the goals of environmental protection and urban growth.

Landowners and developers had several incentives to participate in the program, but most enticing was the certainty afforded by the plans. With the opportunity to resolve local, state, and federal endangered species issues once and for all, regional conservation planning

14. The research program supporting the NCCP process was formally initiated through the adoption of the Conservation Guidelines. Based on a review of existing literature and an evaluation of the proposed plan areas, the Scientific Review Panel (SRP) identified research and study needs for the program. The BRD subsequently assumed the role of directing selected research efforts that reflected the priorities established by the SRP. As a result, significant new research has been conducted by state and federal agencies, universities and research institutions and conservation organizations over the past several years. In September 1996, BRD and others convened a conference to present and review the results of much of this research. Through BRD’s efforts, researchers and scientists are closely collaborating with land managers, planners and policymakers to assure that research efforts are aligned with programmatic needs.
made good business sense, even if these assurances meant assuming obligations for species and habitats not yet under the protection of state or federal ESA. Certainty meant that risk of serial species listings, particularly as it might affect project planning and financing arrangements, could be greatly reduced. Without this certainty, landowners would have seen little value in participating in a comprehensive conservation program, and instead would have retreated to the defensive and confrontational posture of the past.

Because of the extraordinary conservation benefits gained through the San Diego County and Orange County plans, the wildlife agencies offered an unprecedented package of assurances to participants. The first part of the package consists of what has become known as the Secretary's "No Surprises" policy, a policy designed to provide finality to landowners who have prepared adequate habitat conservation plans. Under the policy, landowners and jurisdictions with properly functioning plans are assured that a "deal is a deal" and that no additional mitigation or land-use restrictions for species covered by the plans will later be imposed on them, even if the needs of the species change over time. In the event of such unforeseen circumstances, the federal and state governments assume the responsibility for undertaking any additional measures that may become necessary to conserve these species.

The wildlife agencies further sweetened the deal by extending the "No Surprises" policy to habitat types that will receive a heightened level of protection as defined by a set of conservation standards outlined in the plans. Under the so-called "habitat-based" assurances, landowners are relieved of any further responsibility to undertake conservation measures for any species, targeted by the plans or not, that is dependent on the covered habitat types. Again, the obligation falls on the wildlife agencies to take any further steps necessary to provide for the conservation of these species.


16. The No Surprises policy does not limit or constrain the U.S. Fish and Wildlife Service or any other agency from taking additional actions, at their own expense, to protect or conserve a species covered by the plans. This means that USFWS can intercede on behalf of a species at any time. USFWS has at its disposal a variety of tools to ensure that the needs of species affected by extraordinary circumstances are adequately addressed, including agency-funded habitat acquisitions, land exchanges, management techniques, species relocation, and habitat restoration and enhancement. Moreover, the No Surprises policy in no way precludes the USFWS from asking a permittee to voluntarily undertake additional actions on behalf of affected species.
In addition to increased certainty, the development community benefits from the streamlining of the complex of local, state, and federal regulatory processes. The MSCP and Central-Coastal plans successfully collapse an array of regulatory requirements and procedures into a single, unified process. Appropriate mitigation for impacts on biological resources are established through a single plan, rather than through a series of disjointed processes independently derived by the different levels of government to achieve similar objectives.

As a result of the San Diego County and Orange County plans, landowners satisfy the requirements of the federal and state ESA and related environmental review processes under NEPA and CEQA, as well as local regulations protecting biologically sensitive areas. Ordinarily, landowners make their way through a labyrinth of regulatory processes to secure approvals and permits necessary to proceed with projects impacting important resources. Development projects proposed in the San Diego and Orange county plan areas, however, follow a far leaner process of review. No separate conservation plans are necessary to satisfy federal and state endangered species laws; instead, projects are reviewed directly by local government to determine their consistency with the larger plans. Furthermore, the program reduces the extent of environmental documentation necessary to meet NEPA and CEQA requirements. For instance, as local projects move through the CEQA process, developers can, to varying degrees, utilize the program-level environmental impact report, thereby cutting cost and delay generally associated with the preparation of environmental studies.


18. During the preparation of the plans, most landowners could move forward with development plans without the obligation to follow the usual procedures of the state and federal endangered species laws. Instead, the special rule issued by Secretary Babbitt established an interim process that allowed for the loss of up to five percent of the coastal sage scrub habitat prior to final plan approvals, provided the loss was not inconsistent with achieving program goals. See Special Rule, supra note 3. Projects could therefore proceed uninterrupted, provided that areas essential to the preserve system remained safeguarded.


20. The participating jurisdictions in Orange and San Diego counties, as well as the affected development and environmental communities, have found the “one-stop shopping” concept desirable enough to urge the integration of the section 404 program of the Clean Water Act with the NCCP framework. The recent decision of the Army Corps of Engineers and the Environmental Protection Agency to restrict the conditions under which the nationwide permitting process is available has prompted discussions about the feasibility of addressing wetlands protection on a comprehensive basis through the NCCP/HCP planning processes.
C. Shifting Authority to Local Government

Finally, the Southern California plans dramatically redefine the relationship among local, state, and federal governments in carrying out the task of protecting wildlife. The regional planning approach created a framework for the federal and state wildlife agencies to move beyond the conventional "command and control" regulatory style, and vested local government with the authority to arrive at their own solutions to the challenge of species conservation. In San Diego and Orange counties, conservation objectives will now deeply influence local land-use planning and zoning decisions.

The participating jurisdictions in San Diego and Orange counties each devised approaches to plan implementation tailored to fit its particular needs. In the MSCP, for instance, several different techniques are being utilized to build the preserves. Some jurisdictions have drawn "hard lines" delineating precisely where development and preserve areas will be. These hard lines reflect agreements reached up-front among landowners, jurisdiction, and the wildlife agencies on project design and mitigation requirements. Jurisdictions have also established "soft line" areas where both conservation and development will occur at levels predetermined by the plans, but where issues such as project configuration will be worked out through the local approval process consistent with criteria set out beforehand. Yet still, some jurisdictions have drawn no lines at all; rather, the rules of development are defined by detailed local ordinances that include built-in incentives designed to steer mitigation efforts to areas of high biological value.

Regardless of approach, local governments are the chief decisionmakers. The state and federal governments play primarily an oversight, advisory, and enforcement role in the process. The plans developed by the counties were reviewed by the wildlife agencies to ensure compliance with the standards and guidelines of the NCCP program and the requirements of state and federal endangered species laws. If the conditions of the approved plans are ever breached, the wildlife agencies can reassert control and resume project-by-project permitting under the state and federal ESA.

The federal and state agencies further participate in the programs by assisting the counties in implementing their plans. In addition to providing technical advice on biological considerations and judgments on the sufficiency of plans under endangered species laws, the federal and state governments contribute to the acquisition, management and research needs of the plans. To that end, they have enrolled much of their regional land holdings in the NCCP programs and, in
some circumstances, have agreed to acquire additional lands to help create the preserve systems.\(^\text{21}\)

III
WHAT'S NEXT?

The regional planning approach to conservation is succeeding in Southern California, but the question remains as to the extent to which the approach will be adopted in other regions of the country. For the approach to work elsewhere, states must have or be willing to adopt wildlife protection laws sufficient to enable the Federal Government to delegate responsibility for the development, implementation, and enforcement of conservation measures mandated by the ESA. State and local governments must also be willing to assume the responsibility. Carrying out a regional planning effort requires enormous commitment to the goals and the process of preserving biodiversity.

In weighing the advantages of the Southern California approach, however, other communities and state governments need only to look at the substantial return to Orange and San Diego counties from their commitment to the program. The environmental and economic benefits gained by these counties should alone suffice to lure prospective participants. But perhaps equally compelling to other local and state governments will be the opportunity to join in a successful experiment in federalism, to test an approach to reinventing government that strengthens their hand in determining how best to resolve environmental issues. It is becoming increasingly apparent that the most notable triumph of the San Diego and Orange county efforts was not only in assuring the preservation of a region's biological heritage, but in laying out a course of action for other communities.

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21. Under the MSCP, the federal and state governments have enrolled 36,510 acres of existing public lands (including lands held by the Bureau of Land Management and the Fish and Wildlife Service) in the preserve system and will manage and monitor those lands in perpetuity for species and habitat protection. In addition, the federal and state agencies will jointly contribute half of the approximately 27,000 acres slated by the plan to be acquired by public means. See MSCP Plan, supra note 7.

In Orange County, the federal and state governments have agreed to assist in funding the Central-Coastal plan's adaptive management program. In addition, the U.S. Marine Corps has agreed to transfer high value habitat areas of the El Toro Air Station to the Department of the Interior for inclusion in the preserve system. See Central-Coastal Plan, supra note 7.