Nonprofit Environmental Organizations and the Restructuring of Institutions for Ecosystem Management

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INTRODUCTION

Today, nonprofit organizations such as watershed associations and land conservation groups play increasingly complex and powerful roles in brokering and implementing arrangements to achieve ecological goals. Through networks of new "partnership" and "collaborative governance" agreements with government agencies and commercial enterprises, nonprofit organizations have become key figures in coordinating transactions to resolve conflicts over exploitation and conservation of natural resources.¹ This growing role of nonprofit organizations may be

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seen as a manifestation of important changes in the structure of environmental decisionmaking.

This Article examines the shifts in nonprofit roles and their institutional implications, with a focus on the connections to federal regulatory programs protecting water quality, wetlands, and wildlife habitat, outside the federal lands. It concludes that nonprofit organizations may often provide important transformative frameworks for integrating fragmented management of landscapes and waterways, assembling resources to achieve environmental goals, and weaving together economic activities and the maintenance of ecological processes in site-specific ways. Not all nonprofit organizations will work effectively to restore and maintain ecologically viable natural systems, however, and the increasing reliance on nonprofit organizations raises important issues concerning institutional design and accountability.

I. THE EVOLVING ROLES OF NONPROFIT ORGANIZATIONS

A. Established Roles of Nonprofit Organizations

The United States has long relied on nonprofit organizations to provide public goods of all sorts. When governments and for-profit entities have failed to meet perceived collective needs, the laws regarding nonprofit organizations, including tax exemptions, have encouraged the formation of groups that bypass majoritarian legislative processes and profit-making incentives of the market to meet those needs.


3. In this paper I focus on formally-organized nonprofit organizations that are subject to a "nondistribution constraint" under the laws of the state where they are formed, preventing distribution of profits to the persons who control the enterprise (such as members or directors). See Henry Hansmann, Economic Theories of Nonprofit Organization, in The Nonprofit Sector, supra note 2, at 27, 28. The discussion here consequently does not reach a broader spectrum of less formally organized vol-
In the environmental arena, nonprofit organizations have traditionally served three key functions. First, nonprofit organizations have represented environmental interests as litigators and advocates through participation in judicial and administrative proceedings and legislative lobbying. Nonprofit organizations have ensured that nongovernmental standpoints are considered in government decisionmaking, and that legal requirements are enforced even when government agencies fail to act. Second, nonprofit organizations have owned and protected parks, preserves, and conservation easements. Charitable stewardship of property held for environmental purposes has gained nationwide significance through the growth and proliferation of land trusts. Third, nonprofit organizations such as universities, and increasingly, groups like the Nature Conservancy, have performed scientific research and disseminated scientific information.
In various ways, these roles have rested implicitly on the perceived independence of nonprofit organizations from both governmental control and profit-making influences. As litigators and advocates, nonprofit organizations contend in an adversarial manner with other parties, while government decisionmakers choose among opposing positions.\textsuperscript{7} In their roles as landowners, nonprofit organizations rely upon the autonomy and exclusionary powers granted by property laws. And as scientific researchers, nonprofit organizations seek to adhere to notions of neutrality, rationality, and objectivity, insulated from political and economic bias.\textsuperscript{8} Each of these functions of nonprofit organizations in the environmental field conforms with a vision of relatively autonomous private organizations and government agencies, reaching independent decisions and conducting their interactions largely within the frameworks of formal government proceedings and arms-length bargains.

As discussed below, however, recent efforts in the administration of environmental law designed to support cooperative arrangements have produced important shifts in the autonomy and focus of nonprofit organizations. Particularly in the context of ecosystem and watershed management projects, the nonprofit functions just described have become increasingly embedded in a web of relationships with other organizations. A partial merging of roles has occurred, extending the influential scope of nonprofit organizations while simultaneously eroding their autonomy.

\textbf{B. Changing Relationships Between Nonprofit Organizations and Other Entities}

\textit{1. Connections Between Nonprofit Organizations and Government Agencies}

Nonprofit organizations receive assistance, cooperation, and funding from government agencies for an increasingly varied ar-

\textsuperscript{7} See Jody Freeman, \textit{Collaborative Governance in the Administrative State}, 45 UCLA L. REV. 1, 18-21 (1997) (summarizing key aspects of the interest representation and civic republican models of administrative law).

\textsuperscript{8} While scientific knowledge can be seen as contingent and embedded in political frameworks, maintenance of the perceived boundary between the rational criteria of "science" and the biases of "policy" has been central to the role of organizations that conduct scientific research. See SHEILA JASANOFF, \textit{The Fifth Branch}: \textit{Science Advisers as Policymakers} 14 (1990).
ray of ecosystem-oriented projects. At the federal level, the executive branch’s directives to “reinvent government” have boosted agencies’ efforts to support, cooperate with, and rely upon nonprofit enterprises. The forms of coordination include


Environmental non-profit organizations are growing in importance in terms of cooperative activity with all levels of government. NGOs [nongovernmental organizations] can serve as entities to mix public and private donations to support particular governmental goals. . . .The potential use of NGOs to pursue quasi-governmental environmental activities in lieu of governments, or on their behalf, is growing. NGOs constitute a logical place for governmental out-sourcing for technical, resource management, training and other work.

Id. While references to nonprofit activities in policy statements often appear in conjunction with broader discussions of ways to involve all “stakeholders” in decision-making and to encourage “citizen,” “public,” and “community” participation in collaborative efforts, the focus on supporting and relying upon formally-organized nonprofit organizations to achieve government goals appears more clearly in funding announcements. E.g., U.S. EPA & DEPT. OF AGRICULTURE, EPA-840-R-98-001 CLEAN WATER ACTION PLAN: RESTORING AND PROTECTING AMERICA’S WATERS 81 (1998) [hereinafter CLEAN WATER ACTION PLAN] (calling for Watershed Assistance Grants to nonprofit organizations as part of President Clinton’s Clean Water Initiative); 63 Fed. Reg. 45,156 (1998) (limiting funding of nongovernmental groups under the Sustainable Development Challenge Grants Program to incorporated nonprofit organizations).
encouragement of community organizing,\textsuperscript{11} technical support for volunteer sampling programs,\textsuperscript{12} grants for environmental projects,\textsuperscript{13} and coordination of government land acquisition programs with those of nonprofit organizations.\textsuperscript{14}

Partnerships between fish and wildlife agencies and nonprofit organizations, pooling funding and expertise in order to preserve and manage habitat, have provided models for more elaborate endeavors.\textsuperscript{15} One conspicuous trend in habitat management is the increasing connection between partnership arrangements and government regulatory programs. The extensive interaction of federal, state, and local governments with the Nature Conservancy in the development of habitat conservation plans under the Endangered Species Act has exemplified the increasingly communicative and collaborative relationships between government agencies and nonprofit organizations.\textsuperscript{16} Like-


\textsuperscript{13}. \textit{See, e.g. Office of Water, U.S. Env't. Protection Agency, EPA-841-B-97-008, Catalog of Federal Funding Sources for Watershed Protection (1997). Federal funding to nonprofit organizations often passes through state agencies. \textit{See, e.g. Bureau of Resource Protection, Massachusetts Dept. of Env't. Protection, Grant and Loan Programs: Opportunities for Watershed Protection Planning and Implementation (1998) (including funding opportunities available to nonprofit organizations, authorized by the federal Clean Water Act but administered by the Massachusetts DEP in coordination with the state's watershed initiatives).}

\textsuperscript{14}. \textit{See Land Conservation Through Public/Private Partnerships, supra note 1.}

\textsuperscript{15}. \textit{James A. Tober, Wildlife and the Public Interest: Nonprofit Organizations and Federal Wildlife Policy (1989). See also, Reauthorizing the National Fish and Wildlife Foundation to Help the Conservation of Our Fish and Wildlife Resources by Forging a Partnership of Private, Public, and Nonprofit Organizations: Hearing Before the Subcomm. on Env't and Natural Resources of the House Committee on Merchant Marine and Fisheries, 103rd Cong., 1st Leg. Sess. (1993).}

\textsuperscript{16}. \textit{E.g., Timothy Beatley, T. James Fries, and David Braun, The Balcones Canyonslands Conservation Plan: A Regional, Multi-species Approach, in COLLABORATIVE PLANNING FOR WETLANDS AND WILDLIFE: ISSUES AND EXAMPLES 75 (Douglas R. Porter &

While such cooperation and support heightens the visibility and influence of nonprofit organizations, it also enhances the ability of government agencies to address matters that lie beyond their direct control. The federal government faces important legal and practical limitations on its ability to achieve environ-
mental goals unilaterally. Even though federal inquiry and concern may focus on problems of nonpoint source pollution, loss of biodiversity, and reductions in instream flows, federal agencies lack the coercive powers and funding necessary to revamp local uses of lands and waters through unilateral regulation or purchase.8 State agencies also face legal and political obstacles to the effective management of environmental problems that arise on private lands or within the traditional ambit of local zoning controls.9 In short, the ability of government agencies to identify and understand ecological problems has far exceeded governmental capacity to formulate and impose solutions through the exercise of coercive authority.

Governmental support for nonprofit organizations is an indirect means of dealing with environmental problems in the face of these limitations on resources and jurisdiction. By building capacity in the nonprofit sector, administrative agencies empower allies to address difficult problems in areas where government regulatory powers are limited or fragmented. This support magnifies the effect of government policies by drawing on nongovernmental resources, including the expertise of staff and volunteers and the monetary benefits of nonprofit tax breaks.

2. Connections Between Nonprofit Organizations and Developers

At the same time that the ties with government agencies have grown, nonprofit organizations have built affiliations with


for-profit enterprises. Here, too, we find new kinds of funding arrangements and cooperative agreements. Most conspicuously, nonprofit organizations have become ecological consultants and land managers. They assist owners and developers in meeting legal obligations under environmental laws and in reconfiguring commercial activities to avoid regulatory obstacles. These roles may involve long-term joint arrangements for gathering information and adjusting activities in light of findings.

Such collaborative arrangements entail tighter, more elaborate mutual coordination of for-profit and nonprofit activities than the traditional donations of funds by corporations to charitable endeavors. They also entail levels of trust and ongoing exchanges of information that differ from settlement agreements reached through adversarial proceedings. Nevertheless, these arrangements do tend to emerge against a backdrop of government implementation and enforcement of prohibitions on environmental damage. Indeed many of the most elaborate "collaborative" arrangements are not merely expressed through contracts, but are also incorporated in government-issued permit conditions that define the developer's responsibilities to avoid, minimize and mitigate environmental impacts.

The tripartite arrangements among owners/developers, government agencies, and nonprofit organizations result in a significant new deference to, and reliance upon, nonprofit organiza-

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20. See John C. Sawhill, Creating Biodiversity Partnerships: The Nature Conservancy's Perspective, 20 ENVTL. MGMT. 789, 790-91 (1996) (identifying several key motivations for partnerships between industry and the Nature Conservancy, including mitigation of impacts required as a condition of government permits for development, planning of projects so as to avoid government review, and a desire to make charitable contributions of money or services.)


22. See Breckenridge, Reweaving the Landscape, supra note 1, at 408-410 (discussing the nature of ongoing coordination in partnership arrangements).

23. Typically, the nonprofit role fits within the "regulatory space" that is created when government requirements allow an escape from strict prohibitions on development by means of mitigation projects, purchase of tradable development rights, or other tradeoffs. A wide range of such mechanisms is explored in Dana Clark & David Downes, What Price Biodiversity? Economic Incentives and Biodiversity Conversion in the United States, 11 J. ENVTL. L. & LITIG. 9 (1996).

tions in formulating projects and making adjustments in ecosystem management activities. In essence, both government agencies and developers are looking to nonprofit organizations to mediate the relationship between economic and ecological functions by conceiving, communicating, brokering, and implementing site-specific solutions well in advance of formal government proceedings to compel acquiescence. While these transactions are partially motivated by the threat of government coercion, they reflect a degree of anticipatory planning and ongoing interaction between nonprofit and commercial enterprises that would have seemed quite unusual only a few years ago.

II.

SOME THOUGHTS ON THE GROWING RELIANCE ON NONPROFIT ORGANIZATIONS

What motivates these contractual and quasi-contractual transactions and the growing reliance on nonprofit organizations in the environmental arena? What are the effects of these alliances on the roles and behaviors of nonprofit organizations, government agencies, and for-profit entities? Does the dependence on nonprofit organizations serve the public interest? What differences among nonprofit organizations might influence the attainment of ecological goals? These questions are complex and have not received the detailed attention that they deserve in ecosystem policy making. Below, I outline some key aspects of these relationships that invite further inquiry and analysis.

Studies of organizations suggest several possible reasons for the proliferation and strengthening of nonprofit enterprises. Writers who focus on the economics of institutional design observe that groups may create or hire nonprofit enterprises to "fill the gap" when the majoritarian processes of government and the market fail to provide desired collective goods. Nonprofit organizations can be more innovative, experimental, and flexible than the bureaucratic organizations of government. Even when commercial enterprises offer competing services, purchasers may see nonprofit firms as more trustworthy because of the legal constraints on distribution of profits. In addition, nonprofits can mobilize resources not available to governments or for-profit en-

25. See Hansmann, supra note 3, at 28 (discussing the "public goods theory" of the economic role of nonprofit organizations).
26. See Douglas, supra note 4, at 46-49 (summarizing political theories of diversity and experimentation among nonprofit organizations).
27. See Hansmann, supra note 3, at 29 (summarizing the "contract failure theory" of nonprofit organizations).
Enterprises as a result of the subsidies they receive, particularly tax exemptions.

All of these themes offer some plausible explanations for the expanding roles of nonprofit organizations in the context of ecosystem and watershed partnerships. Both private donors and government agencies are searching for organizational means to "fill the gaps" and provide collective goods that government regulatory controls and markets have failed to provide. These goods include expertise in the monitoring and management of ecosystems in circumstances where trustworthiness is important and oversight may be difficult. Nonprofit firms may be better able than governments to experiment, conceive innovative management measures, and adapt their activities to changing conditions in site-specific ways. Their tax-exempt status, and their ability to assemble volunteers, likewise attract other organizations as collaborators. Through partnership agreements, government agencies and for-profit firms can, in essence, gain access to subsidized resources for addressing their own goals.

Beyond these straightforward ideas about the acquisition of services by government and private actors with clearly defined structures and fixed goals, however, lie additional possibilities involving more complex dynamics. We must not overlook the likelihood that nonprofit organizations are in part creating the institutional conditions that enhance their own role, even as other organizations are influencing the shape and orientation of nonprofit enterprises, and that the boundaries between nonprofit organizations and other entities are changing as a result of the relationships cultivated in the course of joint projects and contractual arrangements.28

This perspective, drawing on organizational theories about interactions between organizations and their environments in

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28. See Lester M. Salamon, Partners in Public Service: Government-Nonprofit Relations in the Modern Welfare State 8 (1995) (arguing that the relationship between government and nonprofit organizations "may consequently not be one of superior and dependent, but one of interdependence"). The interdependence of nonprofit organizations and other entities in an evolving institutional context presents challenging problems for structured analysis, as Peter Dobkin Hall has noted in his essay The Nonprofit Sector in the Postliberal Era:

[We are forced by political and economic realities to abandon the rhetoric of sectoral independence and philanthropy and to investigate those sensitive and often obscure regions of sectoral interdependence and interpenetration. Doing this requires in turn an abandonment of unidisciplinary approaches to organizational behavior, for such approaches invariably contain implicit premises about organizational and individual rationality which have little bearing on the realities of institutional life.

Hall, Inventing the Nonprofit Sector, supra note 2, 85, 113.
“open” systems, resonates with themes in the growing policy literature on adaptive management. That literature suggests that ecologically-perceptive human institutions, like the ecosystems they address, will be fluid, dynamic, adaptable, and organized at multiple, connected scales. More specifically, they will be structured through different kinds and sizes of organizations that are semi-autonomous but highly interactive and open to information and influence from other sources. Through “loosely coupled” arrangements among people and organizations, these institutions will be resilient in the face of surprises in the environment, achieving a dynamic stability while accommodating change. This line of argument rests on recent understandings about cognition and learning in organizations. More broadly, it rests on hypotheses concerning the applicability of complex systems theory to the dynamics of human organizations as they interact with each other and with the ecosystems to which they belong.

Under this view, nonprofit organizations are valuable to society as bridging or mediating bodies that make the overall structure of relationships among actors more complex, interconnected, and adaptable to changes in the broader environment.


33. One way that nonprofit organizations serve a bridging role is by employing staff or having members and affiliates who participate in community networks of relationships reaching beyond their role in the organization. John C. Sawhill, The Good-Neighbor Policy, NATURE CONSERVANCY, January/February 1998, at 5, 6 (em-
By collaborating and interacting with other organizations, they create channels for the flow of information, structures for decisionmaking, and forums for deliberation that may in turn induce alterations in the organization and orientation of the participants. Nonprofit organizations may become more influential actors as a result of the interactions that they have helped to launch, even as they become less autonomous and more closely linked to other entities.3

Seen as a process of complex reciprocal interactions, capacity-building in the nonprofit sector has important political and social implications. In the growth of nonprofit enterprises, we see the creation of new governance structures that are an extension of legal mechanisms for addressing conflicting claims to ecosystems. Are these governance arrangements equitable and wise? The adaptive management literature takes an essentially optimistic view, suggesting that the networking of nonprofit with other organizations can produce innovation, adaptability, and enlightened decisionmaking. According to this literature, nonprofit organizations will bridge the jurisdictional and property boundaries that stand in the way of ecologically sound decisions and provide the intermediary political and cultural processes for achieving needed transitions.35 Other theorists point more pessimistically to the possibility that nonprofit organizations may become increasingly similar to the government and for-profit entities to which they are linked, thus losing their semi-autonomous or “loosely coupled” status. These writers predict

phasisizing the importance of becoming “part of a place, trusted and accepted locally”). In addition, nonprofit organizations readily serve as forums for political interactions and negotiations among the individuals who are associated with it in various ways. Nonprofit organizations have no single set of “owners,” and organizational governance depends on creating means for resolving disagreements among members, staff, donors, and officers and directors. (“[S]ince a firm that has numerous owners must employ some form of collective choice mechanism through which those owners can exercise control, all such firms necessarily have a strongly governmental, or political, character.” HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 4 (1996).

34. “Using our preserve portfolio and scientific knowledge as a point of departure, we have an opportunity to reach out to a wide new group of partners and to amplify our impact many times . . . . Perhaps most important, the Conservancy needs to learn to relinquish a degree of control to achieve a larger end.” John C. Sawhill, Turning Outward, NATURE CONSERVANCY, March/April 1998, at 5.

35. See generally, LANCE H. GUNDERSON, et al., Barriers Broken and Bridges Built: A Synthesis, in BARRIERS AND BRIDGES, supra note 30, at 489, 527 (“Throughout the case studies the emergence of nongovernmental groups (NGOs) or epistemic communities . . . . has formed critical bridges, which appear to fill gaps in existing institutional hierarchies and serve as conduits or media for information flow . . . . [They] create and enhance connections that are otherwise lacking in the traditional management institutions.”). See also Ankerson & Hamann, supra note 10, at 525.
the emergence of rigid bureaucratic structures that provide less
democratic decisionmaking, less flexibility, less innovation, and
less responsiveness to diverse public interests.\(^{36}\)

Both perspectives may offer some kernels of truth about the
promises and dangers of increased reliance on nonprofit organi-
izations to achieve solutions to ecological problems. The non-
profit form of organization alone provides no substantive guar-
antee that ecological goals will be pursued, that boundaries will
be transcended, or that benefits will be widely distributed. Non-
profit organizations, however, do offer promising possibilities for
innovative endeavors in self-organization.\(^{37}\) While some non-
profit organizations may work to entrench existing interests and
contravene broader conceptions of the public good, others will
surely spawn innovative and equitable forums for adapting hu-
man commercial endeavors to ecosystem functions. Nationwide
equality in "ecosystem services" will not necessarily be the im-
mediate result of tying government and corporate resources to
local, place-based nonprofit initiatives, but government and cor-
porate policies on funding and assistance could be key factors in

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36. The tendency of nonprofit organizations to become increasingly professional-
ized, bureaucratic, and similar to government or for-profit enterprises on which they
depend has been extensively studied outside the environmental field; the lessons
learned are worth noting here. See e.g., STEVEN RATHGEB SMITH & MICHAEL LIPSKY,
that government contracting for welfare services has made nonprofit providers more
rule-bound and business-like, but less responsive to community needs); Paul J. Di-
Maggio & Walter W. Powell, The Iron Cage Revisited: Institutional Isomorphism and
Collective Rationality in Organization Fields, in THE NEW INSTITUTIONALISM IN
ORGANIZATIONAL ANALYSIS 63 (Walter W. Powell & Paul J. DiMaggio eds., 1991) [here-
inafter NEW INSTITUTIONALISM]; John W. Meyer & Brian Rowan, Institutionalized Or-
ganizations: Formal Structure as Myth and Ceremony, in NEW INSTITUTIONALISM 41
(discussing possible explanations for why organizations become less adaptable and
diverse as their relationships with their environment become more institutionalized);
Evelyn Brody, Agents Without Principals: The Economic Convergence of the Nonprofit
and For-Profit Organizational Forms, 40 N.Y.L. SCH. L. REV. 457 (1996); ALAN WARE,
BETWEEN PROFIT AND STATE: INTERMEDIATE ORGANIZATIONS IN BRITAIN AND THE UNITED
STATES 257 (1989). See also Knauer, supra note 10, at 974-99 (raising questions
about the equity and social justice implications of nonprofit organizations created by
government).

37. Timothy Duane's thoughtful analysis of the importance of a local commu-
nity's "social capital" in fostering collaborative ecosystem management provides
helpful insights in considering the ability of nonprofit organizations to represent or
interact with other groups, including local communities. See Timothy P. Duane,
Community Participation in Ecosystem Management, 24 ECOLOGY L.Q. 771 (1997). See
also Elinor Ostrom & Gina Davis, Nonprofit Organizations as Alternatives and Com-
plements in a Mixed Economy, in NONPROFIT ORGANIZATIONS IN A MARKET ECONOMY:
UNDERSTANDING NEW ROLES, ISSUES, AND TRENDS 23 (David C. Hammack & Dennis R.
Young eds. 1993) (recommending a multi-tier mixed public-private economy that
fosters experimentation with nonprofit endeavors).
helping to build the capacity of local nonprofit organizations on a widespread basis.

As nonprofit organizations gain increasing influence in the management and allocation of natural resources, taking on functions that are both more governmental and more entrepreneurial, questions of accountability and fairness are bound to arise. Under what circumstances do we approve of the non-majoritarian aspects of nonprofit control? When do we believe that such organizations will help to develop and disseminate more profound understandings of the public interest, ultimately transforming the broader institutional landscape in a beneficial way? And when, by contrast, do we condemn deference to nonprofit organizations as a form of capture by special interests? How much control should governments exercise over nonprofit organizations in order to foster good outcomes? These are questions that highlight the importance of gaining better understandings about the internal workings of nonprofit organizations in the environmental field, and the factors that influence their interactions with other organizations. As nonprofit organizations acquire prominent roles in the creation and implementation of new arrangements for the governance of ecosystems, their organizational structures and decisionmaking processes themselves become matters of national ecological policy.

38. See Burton A. Weisbrod, The Future of the Nonprofit Sector: Its Entwining with Private Enterprise and Government, 16 J. POLY ANALYSIS & MGMT. 541 (1997) ("The growth of nonprofit sectors throughout the world is thrusting nonprofits into the central debate over the organization of society. Until now, the nonprofit sector has benefited from being small and largely out of sight. Success has changed this, with growing demands for accountability.").

39. Cf. Freeman, supra note 7, at 21-33 (setting forth a normative model of collaborative governance that would encompass enhanced roles for nonprofit organizations).