GRAY AND GREEN: PLANNING FOR ADVANCE MITIGATION

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Introduction

Congress revised the Endangered Species Act of 1973 in 1982, adding a new section 10 that was intended to ameliorate the courts' increasingly strict interpretation of section 9, which essentially prohibits any action—public or private—with the potential to impair the survival of listed species or their habitat.[i] By authorizing the issuance of "incidental take" permits, Congress would allow otherwise lawful development to occur, but only if its impacts were to be mitigated by a long-term habitat conservation plan (HCP). Initially, the regulated community made relatively little use of this new mechanism, largely owing to its novelty and apparent complexity. During the Clinton administration, however, Secretary of the Interior Bruce Babbitt embellished section 10 by the addition of a "no surprises" policy, offering assurances that, even under changed circumstances, HCP permittees would be excused from the adoption of additional conservation measures. This new rule opened the floodgate to much broader acceptance of HCPs, which now protect more than 48 million acres nationwide.[ii] No HCP is more ambitious than the *multiple* species habitat conservation plan (MSHCP), currently being implemented in western Riverside County, California.

The Western Riverside County Multiple-Species HCP (MSHCP)

The Board of Supervisors in Riverside County, California, voted in 1999 to embark upon the most comprehensive application yet of habitat conservation planning. The Supervisors were unlikely advocates for an ambitious, costly, multiple-species program. In their 12-year-old attempt to meet state and federal mitigation requirements for a single species, the Supervisors had expended $42 million to acquire and protect 41,000 acres of Stephens' kangaroo rat habitat. The politically conservative Board became objects of public derision for their costly efforts to comply with the ESA. How did the Supervisors come, then, to "double down" on their investment in wildlife habitat, embracing multiple-species ecosystem planning as a preferred alternative to relentless confrontation with the state and federal resource agencies over protection of 146 rare, threatened and endangered species of plants and animals?

Riverside County, stretching 200 miles from its western boundary with Orange County to the border with Arizona on the Colorado River, is home to more than two million inhabitants, which number may reach three million by 2020. Until the economic downturn of 2008, construction activity accounted for as many new homes annually, some 15,000, as were being built elsewhere throughout the state. Both in economic activity (39th) and the size of its population (35th), Riverside County ranks ahead of many states. The popular appeal of this "Inland Empire" is attributable to its affordable housing; open, arid landscape with striking desert and mountain topography; and—in the western sector—reasonable proximity to the job-rich Los Angeles basin. Supervisors reasoned in 1999 that this continuing rapid pace of development, including the requisite transportation and utility infrastructure, would lead inevitably to loss of habitat and resulting conflict with state and federal species protection requirements.

In this sense, the Riverside Supervisors addressed a dilemma that confounds planners across the south and southwest: species endemism occurs in precisely those Sunbelt states where population pressures are growing most rapidly. By one account, species abundance is demonstrably greatest in those states (California, Florida, Arizona, and Texas) that have recently sustained the strongest rate of population growth. Many jurisdictions in those states

along the sprawling Interstate 10 corridor have adopted expansive HCPs to reconcile development impact with species and habitat protection. In U.S. Fish and Wildlife Service (FWS) Regions 2, 4 and 8, corresponding roughly to the species-rich Sunbelt zone, more than 25 million acres are now subject to 544 HCPs.[3] Indeed, although the ESA was not conceived in 1973 as a tool for regional land use planning, it is now by default in many instances the legal framework that best meets that need. The FWS acknowledges that "HCPs are evolving from a process primarily to address single projects to broad-based landscape-level planning to achieve long-term biological and regulatory goals."[4]

Thus, despite dissatisfaction with the outcome of its single-species kangaroo rat experience, the Riverside Board adopted a multiple-species strategy, moving to develop and implement an HCP that would ultimately provide coverage for 146 species of plants and animals on 500,000 acres of protected habitat in the western sector of the county. But the Supervisors made a further commitment to comprehensive planning in the form of the Riverside County Integrated Project (RCIP), which combines the Multiple Species Habitat Conservation Plan (MSHCP) with General Plan and Transportation Plan components. Together, they are intended to provide a "Blueprint for Tomorrow" that integrates housing, transportation, and conservation planning on the 1.26 million acre expanse of western Riverside County.

The land acquisition element is especially ambitious. To mitigate for take of multiple species and their habitat, and thus to qualify for an Incidental Take Permit under section 10 of the Endangered Species Act, the County and 14 participating municipalities are committed to perpetual protection of 500,000 acres, or nearly 40 percent of the MSHCP planning area. By meeting these habitat acquisition goals, the county and municipal governments could proceed with other elements of their integrated plan, including housing and infrastructure, without concern that these otherwise lawful development activities would result in civil or criminal liability for violations of the Endangered Species Act. Of the total to be protected, 347,000 acres were already in public ownership at the time of plan adoption, leaving 153,000 acres of privately-owned land to be acquired for plan purposes. It was agreed that the cost of this remaining acreage—to be selected from "cells" identified by resource agencies as high-quality habitat for “covered” species—would be shared equally by developers, local government, and state and federal governments. Anticipated sources of revenue included contributions from developers within the reserve, which is mandatory, development fees or exactions, and appropriated funds from state and federal programs for the conservation of natural resources. Land acquisition was to proceed at a pace roughly equivalent to the rate of development, so that adverse impacts of development would be ameliorated as they occur.

Have these ambitious goals been met? Today, eleven years after plan adoption, the Western Riverside County Regional Conservation Authority (WRCRCA) reports that it has made substantial progress toward achievement of its land acquisition objectives under the MSHCP. Of the 153,000 acres to be acquired, 45,663 acres have been permanently protected, at a total cost of more than $450 million. Examining this data closely, however, it becomes apparent that local government has borne most of the land acquisition burden, and that private developers have made a relatively small contribution. In reviewing these data, WRCRCA and Riverside County have become concerned that land acquisition costs over the life of the plan will greatly exceed the original estimate. If additional county funds are needed to complete the plan, they assume, its benefits will have also to be reassessed and justified, including an analysis of whether infrastructure elements of the integrated project were more readily accomplished when buffered by a habitat conservation plan. To answer these questions of projected costs and anticipated benefits, the WRCRCA had earlier commissioned a study by the Rand Corporation.

The Rand study, "Balancing Environment and Development: Costs, Revenues and Benefits of the Western Riverside County Multiple Species Habitat Conservation Plan," was published in late 2008.[5] It is the most exhaustive cost-benefit assessment of an HCP since the adoption of section 10 in 1982, and underscores the difficulty of sustaining a 75-year commitment to habitat and species conservation in the face of ever-changing ecological, economic, and political

circumstances. Foremost, the Rand study estimates the cost of completing land acquisition for the MSHCP to be $4.2 billion, a staggering sum by any measure and roughly twice the 2003 estimates. Though only 107,000 acres remain to be acquired, the cost of each acre is estimated to be $36,000, or more than four times the average price per acre of habitat acquired thus far. Clearly, early purchases have occurred in remote, less accessible (and therefore less costly) areas within the reserve. Developers who could do so chose not to build within the reserve, thus avoiding the additional costs of mitigation. Even though housing prices have fallen precipitously in Riverside County since Rand data was compiled, the price of undeveloped land has remained relatively stable. Rand concludes that the least expensive habitat has already been acquired and that future land acquisition costs will rise inexorably.[6]

Rand also addressed the other question of great concern to WRCRCA and Riverside County: can the increased cost of the MSHCP be justified in terms of its contribution to improved infrastructure and mobility within the county? Although planners acknowledge the benefits of habitat protection, they also chose to adopt the MSHCP and its California state-level counterpart, Natural Communities Conservation Planning, in order to facilitate development. "Overall," Rand reported, "the findings on the MSHCP's impact on the permitting process for road transportation projects are encouraging."[7] In other words, reliance on this HCP to meet obligations of federal and state endangered species laws, in lieu of species- and project-specific compliance, have resulted in less cumbersome (and time consuming) permitting processes for highway construction during the 75-year life of the ITP. Costly, protracted lawsuits were avoided as well. In rapidly growing Riverside County, these are important benefits. The County's own data confirm this hypothesis: some twenty-five transportation improvements are today under construction within the Plan area, at an estimated total cost of $2.2 billion. All have been benefited from advance mitigation of environmental impacts under the MSHCP, and not one of the twenty-five has been delayed by environmental litigation.

Nonetheless, the projected expense of MSHCP completion has cast doubt on its continued viability. Given the depressed state of government finances at all levels, the prospects for large land acquisition expenditures are uncertain, at best. MSHCP proponents argue that its value to the county in terms of enhanced mobility must be demonstrated anew. If this can be done, and new sources of funding identified, completion of the MSHCP is a reasonable prospect. Remarkably, the strong coalition of environmentalists, planners, government officials, and development interests that opted initially for the MSHCP remain committed to the concept. They argue that the plan must be revised, however, if it is to survive changes in the planning and economic environment that have occurred since MSHCP and RCIP were first proposed in 1999.

In addition to tackling the projected shortfall in revenue for land acquisition, plan proponents have argued for revisions of the plan itself, in order to reflect the realities of a new geopolitical landscape. While they remain committed to large-scale habitat protection, as originally contemplated, proponents question whether Riverside citizens will tax themselves to complete the plan unless there is acknowledgement that other elements of the RCIP—including transportation infrastructure—have failed to keep pace. Unforeseen population growth spilling over from the Los Angeles basin has stressed the existing transportation infrastructure, and additional corridors planned as early as 1999 for a 75-year time horizon may no longer suffice to meet projected needs. Population and traffic densities have grown so abruptly, in fact, that mass transit may now be a viable option in some areas of the county.

And the MSHCP, limited by statute in its consideration of impacts to species and habitat, has failed to engender truly comprehensive environmental planning and permitting.[8] This deficiency is notable with regard to permits for impacts to wetlands and jurisdictional waters of the United States, which, under section 404 of the Clean Water Act, are issued by the U.S. Army Corps of Engineers. Not only must the Corps consult with the FWS pursuant to section 7 of the Endangered Species Act concerning endangered species impacts, even when Corps permittees have already secured a species-specific Incidental Take Permit, but the Corp itself has been urged to complete a corresponding Special Area Management Plan to expedite the issuance of section 404 permits in western Riverside County. As noted

in the Rand study, "When the MSHCP was adopted, it was hoped that a special area management plan (SAMP) would be developed that resulted in an area-wide dredge-and-fill permit under CWA, much like the MSHCP does for the incidental take permit required under ESA."[9] Nor was provision made in the MSHCP for the causes and effects of climate change, which are now expected to significantly alter assumptions about the performance of native ecosystems. California has recently enacted SB 375, which seeks to limit emissions of greenhouse gases through development of "sustainable" regional growth plans.[10] Under SB 375, metropolitan regions like Riverside County will be required to demonstrate that transportation and housing plans curtail sprawl while contributing to improved air quality. Little wonder that RCIP proponents are seeking "adaptive management" of a sort, to better integrate multimedia permitting requirements with those of the MSHCP and to bring the plan into closer conformity with the rapidly changing social, environmental, and economic milieu of western Riverside County.

A more recent study by the authors of the earlier Rand report, Prof. Martin Wachs of the University of California, Los Angeles, and his colleague, Jaimee Lederer, confirms that the project delivery benefits of MSHCPs are not limited to Riverside County. Despite the high transaction costs which afflict most HCP proponents, they, too, enjoy the benefits of enhanced infrastructure "project delivery." As in Riverside County, other jurisdictions nationwide are meeting their ESA obligations through reliance on HCPs while facilitating the development of much-needed new infrastructure. The stringent conditions of their ITPs assure that such projects will not jeopardize the survival of threatened species, while making possible the type of landscape-scale conservation which has become a hallmark of MSHCPs.[11]

Congress has recently recognized these benefits of MSHCPs as a means by which to integrate species conservation and infrastructure development. Because Riverside County and other MSHCP sponsors have encountered an funding shortfall due to the recent recession, when income from mitigation fees declined precipitously, they have asked the federal government for access to low-interest loans and loan guarantees. Borrowed capital could be used, they argue, to acquire habitat at recession-era prices, to be repaid upon restoration of the pre-recession revenue stream. The Congress responded positively to this request in its enactment last year of the Water Infrastructure Finance Innovation Act (WIFIA), which provides loans and loan guarantees for the acquisition of HCP habitat. This year, Congress will consider a corresponding amendment of the Transportation Infrastructure Finance Innovation Act (TIFIA).

Next: Advance Mitigation on a Landscape Scale

An important consequence of increased reliance on habitat conservation plans has been the growth in number and sophistication of mitigation strategies, especially those which recognize the advantages of large-scale conservation *in anticipation* of the need to offset the adverse impacts of projected development. Riverside's RCIP is an early case in point: its MSHCP is intended to account for the environmental consequences of transportation development through 2079. Though its forecasts may not prove to have been entirely accurate, as noted, there can be no question that the conservation benefits are far greater than if the County had sought to address ESA requirements as they arose on the single-species, project specific model. Under the Clean Water Act, project proponents are required to compensate for impacts to wetlands through on- or off-site replacement of wetlands on a ratio acceptable to the U.S. Army Corps of Engineers, or to require the restoration or creation of wetlands in cases where comparable biological values could not be attained through replacement.[12] Although environmentalists initially opposed endangered species and wetlands mitigation because it was thought to facilitate development that might otherwise be thwarted completely, there is now general recognition that, when properly applied, off-site mitigation can result in a net gain of species conservation and wetlands values, both in quantity and quality, over conventional site-specific requirements. Mitigation "banks" have been established by environmental entrepreneurs under supervision of

resource agencies to prospectively protect large areas from which "credits" are sold to developers, as needed to mitigate for impacts of a particular project.

The generally successful experience with mitigation and conservation banks in facilitating implementation of the Endangered Species Act and in meeting other environmental mandates has given rise to interest in the wide array of "eco-system services," in addition to functional attributes of wetlands and terrestrial habitat, that might be bought and sold to meet regulatory requirements. This trend, coupled with governments' growing recognition that landscape-scale conservation could thus be achieved with the participation of landowners and private capital, augers well for collaborative conservation in the years ahead.

[Portions of this paper were previously published as a chapter by Mr. Wheeler and Ryan M. Rowberry in *Endangered Species Act: Law, Policy and Perspectives* (American Bar Association, 2010).]

Notes

1. 16 U.S.C. § 1539(a)(2)(A).
2. *See* Conservation Plans and Agreements Database, U.S. Fish and Wildlife Service
3. Id.
4. U.S. Fish and Wildlife Service, Endangered Species Program
5. Lloyd Dixon et al., Balancing Environment and Development: Costs, Revenues, and Benefits of the Western Riverside County Multiple Species Habitat Conservation Plan (2008).
6. Id. at 19-20.
7. Id. at xxi
8. Id. at 135.
9. Id.
10. See S.B. 375, ch. 728 (Cal. 2008), available at http://www.arb.ca.gov/cc/sb375/sb375.htm.
11. Jaimee Lederman and Martin Wachs, Transportation and Habitat Conservation Plans: Improving Planning and Project Delivery While Preserving Endangered Species (2004).
12. *See* 33 U.S.C. § 1344.