

# The Endangered Species Act and Its Role in Land Use Planning: Lessons Learned from the Pacific Northwest

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## I. INTRODUCTION

The Endangered Species Act (ESA) is one of the most ambitious environmental statutes to emerge from the remarkably active federal environmental agenda of the 1970s. The act incorporates two lofty objectives: preventing the disappearance of fragile species and conserving the habitat on which such species rely. There is a current effort to use this decades-old environmental statute to address global environmental issues such as climate change, as exemplified by the recent listing of polar bears as a threatened species. Additionally, significant efforts have been made toward using local land use tools, arguably the most parochial and closely held prerogatives of municipal governments, to implement ESA goals. Thus, the ESA can exemplify the adage, “Think global, act local.” Nevertheless, efforts to integrate the ESA with local land use planning tools have not been easy, nor have they been entirely successful.

By analyzing a decade of legal experimentation in the Pacific Northwest, this paper explores the challenges and successes of integrating federal and local laws aimed at protecting fragile species. Specifically, this paper will examine the intersection of local land use planning and the ESA’s unique action-forcing sections in the context of the ESA listing of salmonid species in Washington State. The lessons learned from this case study include the need for consensus-driven action; the importance developing a strong scientific base; the challenge of creating politically appealing, but sufficiently protective, permitting processes; the ineffectiveness of municipal take liability; and the need for a willingness to engage in complex litigation.

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## II. BACKGROUND ON LOCAL LAND USE

Although the term “land use” has a variety of connotations, for purposes of this paper land use may be described as “governmental regulation (both judicially and legislatively initiated) of the use of real property, including substantive and procedural regulations.”<sup>1</sup> The scope of activity of the members of the American Bar Association’s Land Use and Zoning Committee may exemplify the breadth of land use law, which includes issues of project entitlement, municipal land use regulation, and zoning matters.<sup>2</sup>

Land use agencies at the international, federal, state, and local levels typically implement the goals of land use planning through the use of programmatic documents that address a planning horizon of many years.<sup>3</sup> More specifically, local land use planning involves those plans prepared by counties or cities, often referred to as comprehensive plans. The content and regulatory effects of the comprehensive plans are governed by state law, but states generally provide a range of discretion to local governments regarding the use of comprehensive plans.<sup>4</sup>

In addition to establishing multi-year land use plans, local governments often manage land use permitting. The permitting requirements for project siting, construction, and operation may include a variety of licenses, permits, or approvals. Although agencies at the national, state, and local levels all have unique permitting authorities, this article focuses on permits issued by counties and cities. These local land use permitting measures include clearing, grading, conditional use, shoreline, and construction permits, as well as such actions as variances, subdivisions, and industrial or commercial site plans.

The primary limitations on the government’s ability to regulate the use of private property are found in federal and state constitutions. Further, state statutes may also specifically limit local governments’ exercise of police powers used to regulate private property.

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1. This definition is borrowed from the American Bar Association’s Section of Real Property, Trust and Estate Law. See ABA: Section of Real Property, Trust and Estate Law Land Use and Zoning Committee, <http://www.abanet.org/dch/committee.cfm?com=RP230000> (last modified June 22, 2010).

2. *Id.*

3. See, e.g., Wash. Rev. Code § 36.70A (2010) (providing a twenty year time period for Washington State).

4. Washington State law, for example, requires specified fast growing counties and the cities within them to adopt comprehensive plans, but makes such planning optional for counties where growth has been slower. Compare Wash. Rev. Code § 36.70A.040(1) (2010) (plans are mandatory), with Wash. Rev. Code § 36.70A.040(2) (2010) (plans are optional).

### III. ESA FRAMEWORK

The ESA provides various mechanisms, many closely linked to land use, that protect listed species. Although the ESA provides clear prohibitions on some activities that take or threaten to take a listed species, case law has made the ESA's bright line rules considerably less clear. The following section will explain the framework, benefits, and limitations of the most commonly implemented tools for protecting listed species under the ESA, including incidental take prohibition, consultations, incidental take exemptions, incidental take permitting and habitat conservation plans, and recovery planning.

#### *A. ESA Section 9: Incidental Take Prohibition*

Once a species is listed as endangered, Section 9 of the ESA prohibits the taking of the species.<sup>5</sup> The term "take" includes injuring the endangered species as well as damage to its habitat.<sup>6</sup> State and local governments, like any other person or entity, can be held liable for take of a listed species caused by the government's direct actions. Thus, local government activities such as road construction and maintenance or the operation of wastewater treatment plants are subject to the ESA's take prohibition and liability.<sup>7</sup>

The law is less clear, however, as to whether a state or local government can be held liable for a takings violation that results from a private party's use of public property in a manner allowed by the local government. In *United States v. Town of Plymouth*, a federal district court issued an injunction prohibiting the town of Plymouth from allowing private off-road vehicles to drive on a municipal beach unless precautions were taken to protect endangered shore birds.<sup>8</sup> Similarly, in *Strahan v. Coxe*, the First Circuit Court of Appeals issued an injunction against the state of Massachusetts to prevent the licensing of private gillnet and lobster pot fishing that caused injury to endangered northern right whales.<sup>9</sup> Additionally, in *Loggerhead Turtle v. Volusia County*, the Ele-

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5. 16 U.S.C. § 1538 (2006).

6. 50 C.F.R. § 222.102 (2010) (National Marine Fisheries Service Harm Rule), 50 C.F.R. § 17.3 (Fish and Wildlife Service Harm Rule), both defining "harm," as used in definition of "take," to include significant habitat modification or degradation which "actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering."

7. BARBARA J. CAIRNS ET AL., *ENDANGERED SPECIES ACT HANDBOOK: FOR LOCAL GOVERNMENTS IN WESTERN WASHINGTON* 11–12, available at [http://www.lltk.org/sites/default/files/publications/LLTK\\_ESA\\_Handbook.pdf](http://www.lltk.org/sites/default/files/publications/LLTK_ESA_Handbook.pdf) [hereinafter *ESA LOCAL GOVERNMENT HANDBOOK*].

8. 6 F. Supp. 2d 81 (D. Mass. 1998).

9. 127 F.3d 155 (1st Cir. 1997).

venth Circuit Court of Appeals ruled that a county ordinance regulating artificial beach lighting could be the basis for an ESA violation.<sup>10</sup>

In all of the cases mentioned above, the courts held that governmental regulatory acts could cause a taking of a listed species. In *Loggerhead Turtle*, the court emphasized that the regulatory entity being challenged maintained exclusive control over an activity that allegedly took protected species and purported to legalize an activity that allegedly violated the ESA.<sup>11</sup> The National Oceanic and Atmospheric Administration (NOAA), and the National Marine Fisheries Service (NMFS) have taken the position that local governments may be liable for taking under such circumstances.<sup>12</sup>

While a range of activities are prohibited by the mandates of the ESA, whether state and local governments have an affirmative obligation to regulate activities that otherwise are not prohibited has not been deeply litigated. At least one court, the First Circuit Court of Appeals in *Strahan*, took great care to distinguish the case from one where a state is forced to use its regulatory scheme to implement the ESA's taking prohibition. In this respect, the court's ruling in *Strahan* is consistent with the United States Supreme Court's ruling in *New York v. United States*, which held that Congress could not constitutionally compel a state to enforce a federal law.<sup>13</sup>

In nearly all the cases deciding the issue of a local government's potential liability under the ESA for regulatory activities, the courts reach their decisions by examining the question of causation. A person or entity, including a state or local government, can violate the ESA indirectly through an act or omission that in some way causes a take. But the issue of liability may most often turn on whether the taking would have occurred without the government's act or omission and whether the taking was a foreseeable consequence of the act or omission. Ultimately, the party alleging a violation will have the burden of proving that the government's action constitutes a taking.<sup>14</sup>

### B. ESA Section 7: Consultations

Section 7 of the ESA creates a general rule that instructs federal agencies to consult with the listing agency—either the U.S. Fish and

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10. 148 F.3d 1231 (11th Cir. 1998).

11. *Id.* at 1251.

12. National Oceanic and Atmospheric Administration & National Marine Fisheries Service, A Citizens Guide to the 4(d) Rule for Threatened Salmon and Steelhead on the West Coast 6 (2010), available at <http://www.nwr.noaa.gov/ESA-Salmon-Regulations-Permits/4d-Rules/upload/4d-Citizens-Guide.pdf> [hereinafter NMFS Guide to the 4(d) Rule].

13. 505 U.S. 144 (1992).

14. ESA LOCAL GOVERNMENT HANDBOOK, *supra* note 7, at 11–12.

Wildlife Service (FWS) or NMFS (collectively, “the Services”)—prior to engaging in an activity that may have potential impacts on a listed species.<sup>15</sup> The threshold question in Section 7 of the ESA is whether there is some form of federal involvement, such as permitting or funding, that triggers the consultation process. If there is federal agency involvement, then consultation is generally required. A federal agency is subject to Section 7’s consultation requirements when any activity it authorizes, funds, or carries-out may affect a listed species or designated critical habitat, or is likely to jeopardize a proposed listed species or destroy or adversely modify a proposed critical habitat.<sup>16</sup> Common activities subject to Section 7 consultation include projects requiring federal permits, such as Army Corps of Engineers’ dredge and fill permitting under Section 404 of the federal Clean Water Act, and projects receiving federal funds, such as road construction and transportation funding.<sup>17</sup>

Many projects that require local land use permits may also be subject to ESA Section 7 consultation.<sup>18</sup> For instance, local project such as road construction and park maintenance often receive federal funding, thereby triggering the possibility of Section 7 consultation. Because most road projects contain a high degree of similarity, NMFS and FWS have encouraged local governments to develop batched or programmatic consultations.<sup>19</sup> Programmatic consultations are based on a single type of activity that will occur when conducting multiple projects that result in similar impacts.<sup>20</sup> Programmatic consultations can be used to create a single set of standards that each successive project can meet before proceeding. The goal behind programmatic consultations is to establish a checklist approach rather than a time-consuming and costly individual consultation of each project.<sup>21</sup>

#### *C. ESA Section 4: Incidental Take Prohibitions and Exemptions for Threatened Species*

Section 4(d) of the ESA authorizes the Services to apply the take prohibition to threatened, rather than endangered, species through admin-

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15. 16 U.S.C. § 1536 (2006).

16. *Id.*

17. ESA LOCAL GOVERNMENT HANDBOOK, *supra* note 7, at 35.

18. *Id.* at 38–39.

19. See U.S. FISH & WILDLIFE SERVICE SACRAMENTO FISH & WILDLIFE OFFICE, Programmatic Consultations, [http://www.fws.gov/sacramento/es/programmatic\\_consultations.htm](http://www.fws.gov/sacramento/es/programmatic_consultations.htm) (last modified Oct. 28, 2008).

20. *Id.*

21. David M. Ivester & Christian L. Marsh, *Renewable Energy: Streamlining Review Under NEPA and the ESA*, 42 No. 2 ABA Trends 12 (2010).

istrative rules that incorporate full Section 9 protections.<sup>22</sup> However, a Section 4(d) rule can also effectively provide incidental take protection for specified activities so long as the rule as a whole provides for the conservation of the species. Section 4(d) rules can be either simple or complex. Generally, a simple 4(d) rule merely prohibits take of a species.<sup>23</sup> In contrast, a complex 4(d) rule descriptively outlines how activities such as road construction, land use, and storm-water programs must function in order to be exempt from ESA takings liability.<sup>24</sup>

NMFS actively encouraged state and local governments and Indian tribes to initiate conservation programs that could be incorporated into or recognized through 4(d) rules. For example, NMFS's salmonid 4(d) rule identifies several existing state, local, and tribal conservation programs as exceptions to the take prohibition.<sup>25</sup> These include certain habitat restoration programs, the Oregon Department of Transportation's routine road maintenance program, and the Portland Parks and Recreation Department's pest management program. NMFS's salmonid 4(d) rule also establishes criteria for evaluating potential additional conservation programs that could be identified in the rule as exemptions from the take prohibition.

In addition to incorporating state, local, and tribal conservation programs, NMFS may use a 4(d) rule to authorize activities conducted in compliance with certain approved regulatory programs that provide adequate protection for listed species. Examples in NMFS's salmonid 4(d) rule include certain federal, state, and tribal fisheries management regulatory programs and Washington forest practices regulations under the 1999 Forests and Fish Report. Again, the rule provides criteria for approving additional regulatory programs, including municipal ordinances and plans governing residential, commercial, and industrial development.

Through the 4(d) rule process, the Services may also provide non-regulatory guidance regarding activities likely to constitute the take of a listed species.<sup>26</sup>

#### *D. ESA Section 10: Incidental Take Permitting and Habitat Conservation Plans*

Another tool within the ESA that allows for the protection of species alongside consistent and flexible state and local land use plan-

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22. 16 U.S.C. § 1533 (2006).

23. See generally Daniel J. Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues For the Next Thirty Years*, 34 *Envtl. L.* 483 (2004).

24. See NMFS Guide to the 4(d) Rule, *supra* note 12, at 20.

25. 65 *Fed. Reg.* 42,422, 42,423 (July 10, 2000).

26. See 64 *Fed. Reg.* 58,910, 58,928–29 (Nov. 1, 1999).

ning is Section 10.<sup>27</sup> This section allows the Services to issue incidental take permits pursuant to the applicant's submission of a habitat conservation plan (HCP).<sup>28</sup> HCPs are negotiated between the applicant and the Services, and are comparatively more detailed, time-consuming, and expensive than an incidental take statement issued for Federal agencies through a consultation with the Services under Section 7.<sup>29</sup>

Although the process for implementing HCPs may be relatively complicated, a major benefit of HCPs is that they can be tailored to a variety of circumstances, providing long-term stability through the "No Surprises" policy.<sup>30</sup> The "No Surprises" policy provides at least some long-term certainty in exchange for actions that conserve the listed species.<sup>31</sup> For example, under the "No Surprises" policy, if changed circumstances require additional conservation and mitigation measures that were not accounted for in the original HCP, then the Services must seek consent from the holder of the incidental take permit in order to incorporate the new conservation and mitigation measures into the HCP.<sup>32</sup>

In the Northwest, the investment friendly "No Surprises" policy of the HCP process has led to the adoption of HCPs covering large private timber holdings.<sup>33</sup> Local governments have also capitalized on the stable implementation of ESA policies through HCPs. For example, two large cities, Tacoma and Portland, negotiated HCPs for their water supply activities.<sup>34</sup>

### *E. Recovery Planning*

A more species-centered approach to implementing the conservation goals of the ESA is outlined in Section 4(f).<sup>35</sup> Section 4(f) directs the listing agencies to develop and implement recovery plans for the "conservation and survival" of each listed species, unless the Secretary

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27. 16 U.S.C. § 1539(a) (2006).

28. *Id.*

29. Compare 50 C.F.R. § 17.22(b)(1)–(3) (2010) (outlining the requirements for incidental take permitting), and 16 U.S.C. § 1536(b)(4) (2006) (outlining the procedure for approval of incidental take by a Federal agency).

30. See 50 C.F.R. § 17.22(b)(4)–(5) (2010).

31. *Id.*

32. *Id.*

33. *E.g.* Incidental Take Permit 1220 to Plum Creek Timberlands 1 (Nat'l Marine Fisheries Serv., 2001) (permitting multi-species take pursuant to an HCP that covers 150,000 acres of industrial timberlands in the Cascade Mountains of Washington for 50 years).

34. See Implementing Agreement for the Tacoma Water Habitat Conservation Plan for the Green River, Washington Municipal Water Supply 4 (Nat'l Marine Fisheries Serv., 2001); Implementing Agreement by and between City of Portland, Oregon, Water Bureau and National Marine Fisheries Service 1 (Nat'l Marine Fisheries Serv., 2009).

35. See 16 U.S.C. § 1533(f) (2006).

of Interior or Commerce “finds that such a plan will not promote the conservation of the species.”<sup>36</sup> The goal of recovery plans is to return the listed species to a point at which protection under the ESA is no longer required.<sup>37</sup> A species may be removed from the list on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.<sup>38</sup>

The ESA identifies three main components of a recovery plan and requires an agency to provide: (1) a description of site-specific management actions necessary to achieve the goals of conservation and survival, (2) objective, measurable criteria to determine whether the species can be removed from the list, and (3) estimates of the time and cost required to carry out those measures needed to achieve both incremental improvements and the plan’s ultimate goal of ensuring conservation and survival of the listed species.<sup>39</sup> The contents of a recovery plan are used for guiding recovery efforts and Section 7 consultations, and also for determining whether a take has occurred.<sup>40</sup> Agencies must provide an opportunity for public comment before a new or revised recovery plan is adopted.<sup>41</sup>

Although the ESA requires the development and implementation of recovery plans, the actions identified in a recovery plan do not appear to be judicially enforceable and have been characterized as discretionary. For example, in a suit challenging the National Park Service’s refusal to close a campground identified in a recovery plan as a threat to listed grizzly bears, a Federal District Court held that the Secretary of Interior had a duty to implement the plan only to the extent that “he reasonably believes that it would promote conservation.”<sup>42</sup> Similarly, the Eleventh Circuit has emphasized that Section 4(f) “makes it plain that recovery plans are for guidance purposes only.”<sup>43</sup>

Even if recovery plans only define the contours of the implementation of the ESA’s goals, the use of recovery plans has, nonetheless, contributed to coordination between federal authorities and state and local governments. Although the ESA does not require state or local gov-

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36. *Id.*

37. *See id.*

38. 16 U.S.C. § 1533(b)(1) (2006).

39. 16 U.S.C. § 1533(f) (2006).

40. *See* Interim Endangered and Threatened Species Recovery Planning Guidance 1.3–2 (Nat’l Marine Fisheries Serv., 2010), available at <http://www.nmfs.noaa.gov/pr/pdfs/recovery/guidance.pdf> (explaining that recovery plans “should provide a context and framework for guiding implementation of the other provisions of the ESA.”).

41. 16 U.S.C. § 1533(f) (2006).

42. Nat’l Wildlife Fed’n v. Nat’l Park Serv., 669 F. Supp. 384, 389 (D. Wyo. 1987).

43. Fund for Animals, Inc. v. Rice, 85 F.3d 535, 547 (11th Cir. 1996).

ernments to participate in recovery planning,<sup>44</sup> local governments and planning efforts played a significant role in developing the recovery plan approved for Puget Sound chinook salmon.

#### IV. THE INTERPLAY OF ESA TOOLS AND LOCAL LAND USE PLANNING AND PERMITTING: NORTHWEST SALMON CASE STUDY

The state and local governments' response to the endangerment listing of Northwest salmon species provides a unique case study of the interplay between local land use planning and permitting functions and the federally implemented ESA tools. State and local authorities responded to the listing of salmon species in a variety of ways, including attempting to develop land use regulations that would qualify for exemptions to prohibitions on take, collaborating with the Federal government in the development of a recovery plan, and trying to implement ESA protections through shoreline management.<sup>45</sup> Ultimately, even the use of state law alone to implement the goals of the ESA has faced challenges.<sup>46</sup>

The state and local governments' responses to the salmon listing provides valuable insight for other governments that are searching for effective responses to listings in their regions. This value stems, in part, from the fact that Northwest authorities have tried virtually every tool provided by the ESA to respond to the Northwest salmon listings.<sup>47</sup> In their response efforts, state and local governments sought to utilize a broad range of local land use planning mechanisms, including comprehensive plans, local permits, and shoreline permits. Many local governments were involved in the responses because the salmon listings affect an expansive area, extending across several jurisdictions.<sup>48</sup>

Although the ESA listing alone initiated governmental responses, public and political support for reversing the species' decline was bolstered by the fact salmon were the species listed—one of the most iconic species in the Northwest.<sup>49</sup> In addition to being influenced by public and political pressure, the state and local governments had reason

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44. See 16 U.S.C. § 1533(f) (2006).

45. See Press Release, King County, Tri-County Delivers Salmon Recovery Plan to Feds (June 20, 2000), available at <http://your.kingcounty.gov/exec/news/2000/062000.htm> (last visited May 30, 2011).

46. See *Citizens' Alliance for Property Rights v. Sims*, 187 P.3d 786 (Wash. Ct. App. 2008).

47. See King County, *supra* note 45.

48. Taken together, the listings affect large parts of Washington, Oregon, Idaho, and northern California. See Nat'l Marine Fisheries Serv., Northwest Salmon Recovery Domains, <http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Index.cfm> (updated Nov. 4, 2010).

49. See King County, *supra* note 45 (quoting Snohomish County Executive Bob Drewel, "I'm proud that the Pacific Northwest knows what's important and that we're willing to work together to save those things that make our region unique.").

to be concerned about possible take liability for their regulatory activities.<sup>50</sup> The following subsections illustrate four examples of ways in which local governments and the Services attempted to integrate local land use planning and ESA tools to protect Northwest salmon.

#### *A. Tri-County Model 4(d) Proposal*

As discussed above, the Services may issue take prohibitions and exemptions under Section 4(d) of the ESA.<sup>51</sup> In June 2000, NMFS issued its Section 4(d) rule for chinook salmon.<sup>52</sup> Under the rule, NMFS imposed a take prohibition effective on January 8, 2001.<sup>53</sup> In addition to prohibiting the take of the chinook salmon the rule also established criteria for evaluating local proposals, including land use plans and permitting regulations for limited exemptions or “take limits.”<sup>54</sup> Due to the newly promulgated take prohibition, local governments began drafting language to comply with and seek exceptions to the new rule.

King, Pierce, and Snohomish Counties, collectively known as “Tri-County,” led an intensive four-year effort that attempted to develop land use and other regulations that would qualify for the take exemptions.<sup>55</sup> Under the proposal, local governments could submit implementing ordinances to the Services for approval to implement the take limitation.<sup>56</sup> The Tri-County proposal included three early-action elements and three long-term elements.<sup>57</sup> The three early-action elements were land management, storm-water management, and regional road maintenance.<sup>58</sup> Of the early-action elements, the land management element is the most germane to this discussion and has been described as follows:

Land Management: The Land Management program has both planning and regulatory aspects. The planning element calls for counties to have model comprehensive plan policies to ensure that impacts of land use practices on salmon habitat are considered when local governments make land use decisions. The

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50. The grounds for concern may have stemmed from the holding in *Loggerhead Turtle*, *supra* note 10.

51. 16 U.S.C. § 1533(d) (2006).

52. 50 C.F.R. § 223.102 (2010); *See also* Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units, 65 Fed. Reg. 42,422, (July 10, 2000) (codified at 50 C.F.R. 223).

53. Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units, 65 Fed. Reg. 42,422, (July 10, 2000) (codified at 50 C.F.R. 223).

54. *See id.*

55. *See* King County, *supra* note 45 (noting that cities, Indian tribes, business interests, and environmental groups participated in this effort)..

56. *See id.*

57. *Id.*

58. *Id.*

regulatory aspect requires local governments to give more intense scrutiny to development proposals located within the Management Zone, areas adjacent to water bodies that support salmon. Any development within Management Zone areas must be done in a way that preserves essential biological functions for salmon. Local governments can give landowners an option to follow standard development regulations that protect salmon habitat or to do a site-specific habitat evaluation with mitigation requirements that are tailored to the individual site.<sup>59</sup>

This description demonstrates the ambitious goal of importing ESA protections into the most fundamental land use and permitting functions of local governments. Namely, the Tri-County proposal would have required counties to consider impacts on salmon habitat when making land use decisions and to scrutinize development proposals to prevent impacts to salmon habitat.<sup>60</sup>

In addition to the three early-action elements, the proposal also included three long-term actions. The three long-term actions were watershed planning, adaptive management, and recovery funding.<sup>61</sup> In particular, the watershed planning effort had significant ties to land use planning. A key to the effort was to develop a conservation plan with the goal of establishing “longer term actions that contribute to the future health and sustainability of salmon.”<sup>62</sup> As discussed below, the long-term planning effort subsequently evolved into the state and local involvement in the establishment of a recovery plan.<sup>63</sup>

Out of the six main elements of the Tri-County proposal, the Services only approved the road maintenance proposal.<sup>64</sup> Regardless, much of the work that went into the Section 4(d) effort was actually implemented by individual local governments under their local planning authorities or through the Shared Salmon Strategy Recovery Plan as discussed below.<sup>65</sup>

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59. Jackie Kim, King County Dep’t of Dev. and Envtl. Servs., Comments to the January 2001 Four Creeks UAC meeting (Jan. 8, 2001), Retyped by Marc Uhlig, *available at* [http://www.fourcreeks.org/menu-about/about\\_minutes/2001\\_01\\_08\\_DDES\\_ESA.html](http://www.fourcreeks.org/menu-about/about_minutes/2001_01_08_DDES_ESA.html).

60. *Id.*

61. *Id.*

62. *Id.*

63. See SHARED STRATEGY FOR PUGET SOUND, A SHARED STRATEGY FOR RECOVERY OF SALMON IN PUGET SOUND 2 (2002) *available at* <http://www.sharedsalmonstrategy.org/files/SharedStrategyDraft9.25.02.pdf>.

64. Press Release, King County, Tri-County ESA Partnership Highlights Successes; Completing Final Salmon Recovery Plan (Jan. 4, 2001), *available at* <http://your.kingcounty.gov/exec/news/2001/0104011.htm>.

65. See *id.* and SHARED STRATEGY FOR PUGET SOUND, *supra* note 62.

*B. The Shared Salmon Strategy and the Development of a Community Endorsed Recovery Plan*

As discussed above, the ESA requires the Services to adopt a recovery plan for a listed species.<sup>66</sup> The development and implementation of recovery plans under the process outlined in the ESA is typically agency-driven and focuses on federal actions.<sup>67</sup> Nevertheless, in Washington, a unique effort emerged to develop a recovery plan for listed salmon species in the Puget Sound Region. This effort, dubbed the Shared Salmon Strategy, involved a collaborative planning process between Federal agencies, state governments, local governments, tribal governments, businesses, and environmental stakeholders.<sup>68</sup>

The Shared Salmon Strategy was built from individual watershed plans that were implemented prior to the ESA salmon listings. The Shared Salmon Strategy further developed during the Tri-County ESA Section 4(d) process and was completed after the Section 4(d) process.<sup>69</sup>

Upon completion, the Shared Salmon Strategy utilized existing regulatory processes to formulate a more comprehensive regional salmon recovery strategy.<sup>70</sup> Furthermore, by expanding upon the significant stakeholder participation inherent in the previous watershed plans, the Shared Salmon Strategy sought the endorsement of “people living and working in the region, including farmers, timberland owners, fishermen, developers and other interests directly affected by salmon recovery actions.”<sup>71</sup> The Shared Salmon Strategy was ultimately submitted to NMFS for approval and was incorporated into the finalized recovery plan for Puget Sound chinook salmon.<sup>72</sup>

In summary, although the federal agency amended the Shared Salmon Strategy in order to incorporate feedback from public comments, the community-developed Shared Salmon Strategy established the backbone of the ESA-mandated recovery plan.<sup>73</sup> The Shared Salmon Strategy exemplifies the possibility for involvement of state and local constituencies in the realization of the ESA’s goals.

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66. 16 U.S.C. § 1533(f) (2006).

67. *See id.*

68. SHARED STRATEGY FOR PUGET SOUND, AN INTRODUCTION TO THE SHARED STRATEGY 1, available at <http://www.sharedsalmonstrategy.org/files/Intro%20to%20SSPS.pdf>.

69. *See id.* at 2.

70. *Id.*

71. *See id.* at 1.

72. NAT’L MARINE FISHERIES SERV., FINAL SUPPLEMENT TO THE SHARED STRATEGY’S PUGET SOUND SALMON RECOVERY PLAN 1 (2006), available at <http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Puget-Sound/upload/PS-Supplement.pdf>.

73. *See id.*

### C. Shoreline Permitting and the Shoreline Guidelines Update

Shoreline permitting presents a variation on the classic local land use permitting presented above. Since the enactment of the Coastal Zone Management Act (CZMA) in 1972,<sup>74</sup> permitting projects in shoreline areas have had local, state, and—in certain situations—federal dimensions.<sup>75</sup>

For instance, in 1995, the Washington State Legislature directed the Washington Department of Ecology (Ecology) to update the Shoreline Guidelines that govern the content of local Shoreline Master Programs (SMPs).<sup>76</sup> Pursuant to the policies expressed in the Shoreline Management Act<sup>77</sup> (SMA), the Shoreline Guidelines provide statewide standards for local governments to follow when drafting SMPs.<sup>78</sup>

Given the complexities of permitting shoreline projects, the rule making for the Shoreline Guidelines was hotly contested.<sup>79</sup> Local governments, environmental organizations, tribes, businesses, and ports all participated actively in the rule making process.<sup>80</sup> Finally, in 2003, the legislature set 2014 as the deadline for local governments to update their SMPs.<sup>81</sup> This rule making coincided with NMFS's listing of Puget Sound chinook salmon as a threatened species.<sup>82</sup>

The prevalence of listed salmon throughout the state of Washington led to a unique effort to incorporate salmon protections into the Shoreline Guidelines (Guidelines).<sup>83</sup> Ecology intended the Guidelines to

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74. 16 U.S.C. §§ 1451-1464 (1972). The CZMA's purpose is to balance continuing economic development with the conservation of the environment in coastal regions.

75. *Congressional Action to Help Manage Our Nation's Coasts*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, [http://coastalmanagement.noaa.gov/czm/czm\\_act.html](http://coastalmanagement.noaa.gov/czm/czm_act.html) (last updated March 22, 2011).

76. *Shoreline Master Program Guidelines (Chapter 173-26 WAC, Part III) Background and History*, STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, <http://www.ecy.wa.gov/programs/sea/sma/guidelines/index.html> (last viewed March 23, 2011).

77. Wash. Rev. Code § 90.58.020 (2010). The Shoreline Management Act requires that local governments in Washington State create Shoreline Master Programs with policies and regulations that prevent the general loss of ecological functions along the shoreline.

78. See *Shoreline Master Program*, supra note 76.

79. *Id.*

80. *Shoreline Master Programs (SMPs) Frequently Asked Questions*, STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, <http://www.ecy.wa.gov/programs/sea/shorelines/smp/faqs.html> (last viewed March 23, 2011).

81. *Status of Local Shoreline Master Programs (SMPs): Comprehensive Updates*, STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, <http://www.ecy.wa.gov/programs/sea/shorelines/smp/status.html> (last viewed March 23, 2011).

82. The Puget Sound chinook species was first listed as a threatened species on March 4, 1999; this status was reaffirmed on June 28, 2005. See *Puget Sound Chinook ESU: Threatened*, NMFS NORTHWEST REGIONAL OFFICE, <http://www.nwr.noaa.gov/ESA-Salmon-Listings/Salmon-Populations/Chinook/CKPUG.cfm>, (last updated August 15, 2011).

83. See WASH. ADMIN. CODE § 173-26 (2011).

further the ESA's protection of listed salmonids while including liability protection for state and local government actions implementing the SMA and permitted activities under the SMA.<sup>84</sup>

Initially, Ecology intended to develop a regulation that would be an exception to the ESA take prohibitions under a Section 4(d) rule, which was being developed by the Services. Ecology then started conversations in 2000 with the Services and Northwest Indian Fisheries Commission, with the goal of developing a two-track procedure for master program approval. Part of this procedure was designed to implement requirements sufficient to gain an exception from the definition of 'take' in the 4(d) rule promulgated by the Services.<sup>85</sup>

Later in 2000, Ecology published draft Guidelines aimed at providing protections for salmonids, while simultaneously opening the door for certain activities to be exempted from the ESA's take prohibition. The draft Guidelines included provisions requiring adaptive management programs to achieve "properly functioning conditions" or "PFC" for listed and threatened species, more detailed inventory requirements, expanded consideration of cumulative impacts, restrictions on developments within the "Channel Migration Zone," and vegetation management requirements.

NMFS published its 4(d) rule for the Northwest in July 2000.<sup>86</sup> Despite the earlier discussions between Ecology and the Services, the rule did not exempt permits under Ecology's Guidelines from the take prohibition. The NMFS rule also contained no option for the state to seek amendment of the rule to obtain such coverage.

However, Ecology continued ESA compliance discussions with NMFS, and it finally agreed to engage in formal consultation with the Services under Section 7 of the ESA.<sup>87</sup> The agreement was announced soon after Ecology adopted its final Guidelines. The agreement indicated that SMPs developed under the Ecology Guidelines would undergo formal consultation under Section 7. When the formal adoption of the Ecology Guideline rule was filed on November 29, 2000, the Implementation Plan filed with the Guidelines stated that SMPs affected by the ESA "will receive Incidental Take Statements."<sup>88</sup>

An appeal to the Washington State Shoreline Hearings Board (SHB), the administrative body charged with hearing appeals from agen-

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84. See Ass'n of Wash. Bus. v. Ecology, SHB No. 00-037 (Aug. 27, 2001) (Order Granting and Denying Appeal), available at <http://www.eho.wa.gov/searchdocuments/2001%20archive/shb%2000-037%20final.htm>.

85. *Id.*

86. 65 Fed. Reg. 42,422, 42,422 (July 10, 2000).

87. Ass'n of Wash. Bus., SHB No. 00-037 at 5.

88. *Id.* at 6.

cy action under the SMA, quickly followed.<sup>89</sup> Over forty parties, including several statewide business organizations and environmental groups, were involved by the time the case was heard.<sup>90</sup> In the Petition to the SHB, the development community argued that Ecology had no authority to apply the ESA through the Guidelines.<sup>91</sup> The parties agreed that the SMA did not expressly authorize the Guidelines to implement the ESA and that an agency regulation not authorized by statute would be invalid.<sup>92</sup>

The SHB analyzed whether the SMA implicitly authorized Ecology to implement ESA compliance.<sup>93</sup> The SHB reviewed federal statutes that allowed the delegation of authority to the state and the State Salmon Recovery Act.<sup>94</sup> The Recovery Act explicitly authorized the Governor to negotiate and obtain assurances from the Services that certain forest practices would not run afoul of an ESA 4(d) rule.<sup>95</sup> The SHB concluded that the Legislature did not provide such authority to Ecology to negotiate assurances with regard to 4(d) rules, or to agree to formal consultations under Section 7 of the ESA for SMPs. The SHB also concluded that without a legislative enactment, Ecology could not apply the ESA through the Guidelines, and that the Guidelines “constitute an improper amendment of the SMA to require master programs to implement the ESA” and are thus invalid under RCW 90.58.180(5).<sup>96</sup>

In reaching its conclusion, the SHB considered and rejected Ecology’s argument that Section 7 already required formal consultation. The SHB specifically noted that although the Guidelines were federally approved as part of the Washington Coastal Management Program, formal consultation was not required.<sup>97</sup> In so finding, the SHB reasoned that the level of consultation required does not necessarily involve the formal consultation and development of an incidental take statement contemplated by the agreement of Ecology and NMFS regarding consultation. Under ESA regulations, initial consultations under Section 7 do not always result in a determination that formal consultation is required.<sup>98</sup> Since 1991, numerous salmon runs in Washington have been listed as endangered or threatened species under the ESA.<sup>99</sup> Notwithstanding

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89. *Id.*

90. *Id.* at 1.

91. *Id.* at 6.

92. *Id.*

93. *Id.*

94. Wash. Rev. Code § 77.85 (2010).

95. Wash. Rev. Code § 77.85.190(3) (2010).

96. Ass’n of Wash. Bus. v. Ecology, SHB No. 00-037 (Aug. 27, 2001) at 6–7.

97. *Id.* at 8.

98. 50 C.F.R. § 402.14(a) (2010).

99. 56 Fed. Reg. 58519 (Nov. 20, 1991); 65 Fed. Reg. 7764 (Feb. 16, 2000).

these listings, the SHB noted, the federal government has approved components of the state coastal zone management plan without requiring the formal consultation contemplated by the state and federal agencies. This was the case in federal approval of the state coastal nonpoint pollution control program,<sup>100</sup> as well as a review of the state coastal zone management plan in 1999 and funding under the CZMA in 2000 by NOAA's Office of Ocean and Coastal Resources Management.<sup>101</sup>

The SHB appeared to be particularly troubled that agreeing to formal consultation would actually create additional liability, rather than reduce it:

The incidental take statement then functions much like a federal permit and establishes enforcement liability under 16 U.S.C. §1540. That liability includes a cause of action for citizen suits to enforce the conditions imposed under the take statement with respect to development activities under the SMA. The agreement to engage in formal consultations is devoid of an explanation of how the consultation will be conducted, what assurances the state will require and to what extent liability will be imposed or exempted for shoreline permit decisions and developments. The imposition of potential ESA liability on the state and local governments as well as shoreline permit applicants through shoreline master program promulgation, however meritorious, is properly a matter for express legislative authority.<sup>102</sup>

The SHB reviewed the holdings in the *Strahan* and *Loggerhead Turtle* cases, and concluded that while activities subject to local regulations could cause a take of listed species, this fact alone did not provide "binding authority for the proposition that Ecology must obtain incidental take statements for master programs."<sup>103</sup> The SHB further concluded that "the federal resource agencies are not authorized under the ESA to force Ecology or local governments, outside the context of a federal action, to adopt regulations in conformance with the ESA."<sup>104</sup>

Although the effort to formally link the ESA to shoreline permitting did not succeed, Ecology ultimately issued updated Shoreline Guidelines that significantly increased the number of measures intended to maintain and restore salmon and other aquatic habitat.<sup>105</sup>

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100. 65 Fed. Reg. 37094 (July 9, 1998).

101. Ass'n of Wash. Bus., SHB No. 00-037 at 8.

102. *Id.* at 7.

103. *Id.* at 8-9.

104. *Id.*

105. WASH. ADMIN. CODE § 173-26 (2011).

*D. Citizens' Alliance for Property Rights v. Sims*

The discussion to this point has focused on some of the complexities in combining local regulations with ESA tools, such as ESA 4(d) exemptions or HCPs. However, *Citizens' Alliance* illustrates that state land use and constitutional laws may also limit the use of local regulations to protect listed species even when the regulations are adopted entirely under state law.<sup>106</sup>

At issue in *Citizens' Alliance* was King County Ordinance 15053 §14<sup>107</sup> which limits clearing on property zoned "rural area residential" to a maximum of fifty percent, depending on the size of the parcel.<sup>108</sup> The clearing limit was identified as early in the Tri-County Model 4(d) proposal as a land use measure that would protect salmonids.<sup>109</sup>

The plaintiffs in *Citizens' Alliance* challenged the land use restriction in Wash. Rev. Code § 82.02.020, arguing that the statute violated their substantive due process rights.<sup>110</sup> This statute generally prohibits counties from imposing "any tax, fee, or charge" on the development of land and requires that, where such devices are used, the local government must demonstrate that the condition is reasonably necessary as a direct result of the proposed development.<sup>111</sup>

The appellate court concluded that the land clearing limitations constituted an in-kind indirect "tax, fee, or charge" on development and did not fall within any of the statutory exceptions.<sup>112</sup> The court, therefore, found the clearing limits to be illegal.<sup>113</sup>

Additionally, other Washington courts had concluded that a variety of land set asides to be an "in-kind" tax.<sup>114</sup> Based on this precedent,

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106. *Citizens' Alliance for Property Rights v. Sims*, 187 P.3d 786 (Wash. Ct. App. 2008)

107. King County Ordinance 15053 (2004).

108. King County Code 16.82.

109. PARAMETRIX, BIOLOGICAL REVIEW TRI-COUNTY MODEL 4(d) RULE RESPONSE PROPOSAL (2002), *available at* <http://your.kingcounty.gov/dnrp/library/2006/kcr1936/BioReview.pdf>.

110. *Citizens' Alliance*, 187 P.3d at 788.

111. Wash. Rev. Code § 82.02.020 (2010).

112. *Citizens' Alliance*, 187 P.3d at 788.

113. *Id.*

114. See *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wash. 2d 740, 759 (2002) (the open space set-aside condition to plat approval was "in kind indirect 'tax, fee, or charge' on new development"); See also *Vintage Constr. Co. v. City of Bothell*, 135 Wash. 2d 833, 959 (1998) (Wash. Rev. Code § 82.02.020 applicable where the ordinance required dedication of five percent of land for parks or payment of \$400 per lot in lieu of land); *Trimen Dev. Co. v. King County*, 124 Wash. 2d 261 (1994) (Wash. Rev. Code § 82.02.020 applicable to the ordinance requiring a developer to dedicate land for open space or recreation, or to pay a fee in lieu of land); *Henderson Homes, Inc. v. City of Bothell*, 124 Wash. 2d 240, 247-48 (1994) (Wash. Rev. Code § 82.02.020 applicable to the ordinance requiring a developer to pay a preset, per-lot fee as a condition of plat approval).

the *Citizens' Alliance* court concluded the land clearing limitation to be subject to the limits of Wash. Rev. Code § 82.02.020.<sup>115</sup>

The court next turned to the question of whether the ordinance met the requirement to address project specific impacts.<sup>116</sup> The court's statutory analysis is noteworthy for its application of the federal constitutional principles of nexus and rough proportionality.<sup>117</sup> The court also concluded that the county met its burden of establishing a nexus between the regulation and the development impacts.<sup>118</sup> However, the court concluded that the ordinance imposed a uniform requirement for cleared area on each lot without any evaluation of the demonstrated impact of proposed development.<sup>119</sup> Ultimately, the court concluded that "the necessary proportionality that is required to fulfill the statutory exception is not satisfied."<sup>120</sup>

#### V. LESSONS LEARNED

The integration of local land use planning and ESA tools to protect Northwest salmon species provide a number of lessons as communities consider using local planning and permitting provisions in conjunction with the ESA.

First, a strong consensus for action must exist. The efforts described above required significant commitments of money, time, and other resources. This commitment took place because of the historical and continued importance of salmon to the people of the Northwest. Significantly, even with that commitment, many of the efforts, including the shoreline permitting and Tri-County 4(d) process, were not successfully concluded.

Second, developing a strong scientific base is important. The science may be necessary to defend resulting regulations in states where local governments must establish a nexus between protective regulations and impacts to listed species. More importantly, the scientific platform is needed to support the wide range of available tools. As discussed above, science developed for the Shoreline Guidelines was carried forward to the final shoreline rules after the SHB invalidated the initial guidelines. Similarly, the science developed to support the unsuccessful Tri-County 4(d) rule helped form the basis for the ultimately successful Shared Salmon Strategy Recovery Plan.

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115. *Citizens' Alliance*, 187 P.3d at 789.

116. *Id.* at 794.

117. *Id.*

118. *Id.* at 796.

119. *Id.*

120. *Id.*

Third, the ESA 4(d) exemption process proved challenging to implement for land use planning and permitting. Efforts to use 4(d) rules for both the shoreline processes and local comprehensive planning have not been successful. While there may be numerous explanations for the lack of success, one prominent factor is the difficulty in developing rules of general applicability that are both politically acceptable to local governments and deemed sufficiently protective by the Services.

Fourth, the potential for municipal take liability for regulatory actions was insufficient motivation to produce final rules. This result may be appropriate given the high burden of proof to establish take, the ability of local governments to adopt protective regulations using their police powers and the mixed rulings of the courts on this question.

Finally, parties pursuing these strategies should be prepared for litigation. The Shoreline Guidelines litigation and the King County land clearing litigation illustrate that the stakes are high when government applies local tools to protect listed species.