CONSERVATION PLANNING UNDER THE ENDANGERED SPECIES ACT: A NEW PARADIGM FOR CONSERVING BIOLOGICAL DIVERSITY

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> *[The wholesale loss of global natural diversity] "is the folly our descendants are least likely to forgive us."*
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> —E.O. Wilson[1]

In March 1983, now over a decade ago, the federal Fish and Wildlife Service (Service) approved my client's request for the first habitat conservation plan (HCP), covering San Bruno Mountain, a 3400-

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1. *Critical Issues—80's: Species Loss*, 2 FOCUS (Mar./Apr. 1980).

acre, open-space island immediately south of San Francisco.[2] Based on that HCP, the Service issued the first permit for the take of several species listed as endangered under the then recently enacted Section 10(a) of the federal Endangered Species Act (ESA or Act).[3] The take, as required by ESA, was to be incidental to otherwise lawful activities and would not "appreciably reduce the likelihood of the continued existence and recovery of the species in the wild."[4] In retrospect, this take was the beginning of a major paradigm shift in national policy for conserving the Nation's biological diversity and, potentially, for addressing other complex issues facing our society. This article discusses the history of conservation planning, critical elements that are necessary to achieve its promise and opportunities for the application of this paradigm beyond the conservation of biodiversity.

I. THE SAN BRUNO MOUNTAIN HABITAT CONSERVATION PLAN: A MAJOR PARADIGM SHIFT

The ESA originally envisioned protection for individual species—the grizzly bear, gray wolf, sea otter, snail-darter, desert pup fish, etc.[5] In stark contrast, the San Bruno Mountain HCP was a multiple species plan, addressing the conservation of fifty-one species, both listed and unlisted, as a biological community. Specifically the San Bruno Mountain planning process and Section 10(a) contemplated:

> 1. A focus on the biological community, including both listed and unlisted species;[6]

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2. Friends of Endangered Species v. Jantzen, 760 F.2d 976, 979 (9th Cir. 1985).

3. 16 U.S.C. § 1539 (1988 & Supp. V 1993). Congress cited the San Bruno Mountain HCP as the "model" for the amendment. H.R. REP. NO. 835, 97th Cong., 2d Sess. 31 (1982).

4. 16 U.S.C. § 1539 (a)(2)(B)(i), (iv) (1988 & Supp. V 1993).

5. 119 CONG. REC. 25,674 (1973).

6. The Conference Report regarding the 1982 amendments to the Act provided:

> In enacting the Endangered Species Act, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem. . . . Although the regulatory mechanisms of the Act focus on species that are formally listed . . . the purposes and policies of the Act are far broader . . . and allow unlisted species to be addressed in the plan . . . . To the maximum extent possible, the Secretary should utilize this authority . . . to encourage creative partnerships between the public and private sectors and among governmental agencies in the interest of species and habitat conservation.

Noting that the provision was "modeled after a habitat conservation plan that ha[d] been developed by three Northern California cities, the County of San Mateo, and private landowners and

> 2. Pro-active, collaborative, planning focused on the reconciliation of economic development and wildlife concerns, while first addressing the negative space, to determine the outlines of the positive space (the space for urban development); and[7]
> 3. Assurances, primarily in the form of an implementing agreement, that the plan would be honored.[8]

II. DEEPER CHANGES IN THE GOVERNANCE STRUCTURE

However, the Section 10(a) HCP process reflected deeper changes in our governance structure. Preceding the San Bruno Mountain process were four key historical concepts.

First, from Genesis flowed the prevailing anthropocentric view of the world: that humankind is apart from and should dominate and control the animal community for its own benefit (as contrasted to the Native American view that the community of which man was a part included wildlife).[9]

Second, "fragmentation" or Cartesian logic, was a Western way to think about things and to plan for and control the environment. Examples of fragmentation are found in systems of taxonomy, physics, medicine, business, and industry (such as the organization of assembly-lines where each person has his or her own job and sphere of authority). I am reminded of the conceptual thinking of President Jefferson, reflected in his garden, which was framed in small square plots with a separate species in each, the decimal monetary system, and the township system of mapping employed by the National Survey, which divided the landscape into a grid of sections for easier use and exploitation.[10] The

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developers [the San Bruno Mountain HCP] . . . ." H.R. REP. NO. 835, 97th Cong., 2d Sess. 30-31 (1982).

7. *Id.*

8. *Id.* at 30.

9. "And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth." THE BIBLE, *Genesis* 1:26 (King James).

10. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 61 (1968).

result, of course, is the geometric pattern of uses exemplified by the towns and fields that we observe as we drive or fly across the country.

Third, representative democracy[11] operates on the principle that the individual is the font of authority. This authority is then delegated by the people through state and federal constitutions and laws to specific administrative agencies such as the Service. While very effective overall, this institutional structure necessarily contributes to the difficulty of addressing issues of the commons. It results in a tension between the reserved authority of the people and the regulations promulgated. In addition this institutional structure increases the fragmentation within the system. The people are individuals, each of whose rights and interests are separately protected, a far different problem than the barons faced with King John, the sovereign, at Runneymede.[12] In turn, Congress must base its regulations on the certain enumerated powers, which tends to promote a finer and more fragmented articulation of authority. The resultant institutional scheme is in stark contrast to a sovereign who rules by divine right and can act and delegate more broadly and with less resulting fragmentation of authority and legal conflict. Representative democracy is equally in contrast to schemes that contemplate common action by consensus, such as the process used by the Quakers, or the lack of corporate authority among Native Americans, such as the California Yurok Indians.[13] In many cases within the Native American culture, there is no corporate "tribe" that can speak for and bind the individual member.[14]

Fourth, the judicial model of conflict resolution, inherited from England, resulted in adversarial, quasi-judicial decision-making processes. These are effective in determining the facts in retrospect and assigning guilt, but very ineffective in providing a framework for prospective group planning.[15]

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11. *See* GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1991).

12. *See generally* DORIA M. STANTON, AFTER RUNNYMEDE: MAGNA CARTA IN THE MIDDLE AGES (1965).

13. A.L. KROEBER, HANDBOOK OF THE INDIANS OF CALIFORNIA 20 (Dover Publications 1976) (1925).

14. *Id.*

15. An example of the traditional process is the use of a local lay Planning Commission or City Council, as a quasi-judicial body and using a quasi-judicial process, to hear and decide upon a landowner's proposal to develop his or her land. In contrast, it is possible to conceive of a collaborative group planning process, as discussed later in this article, which would be much different and would not rely upon the judicial process model.

The governance system that embodied these concepts was very effective in providing for the economic development of this Nation. The strength of the system was individual freedom, including the many points of action-initiation, which originated from the general premise that an individual is free to follow his or her own lights, subject only to proscriptions promulgated pursuant to limited grants of authority. Its weakness was its difficulty in addressing the complex issues that transcended the many resulting fragments making up the system. Throughout the system, authority was delegated and then exercised utilizing "command and control" directives, often controlling vast systems of subordinate components. The picture that comes to mind is of Harold Geneen, past President of ITT, surrounded by filing trunks, each containing the vital planning records of a separate ITT subsidiary under his personal control.[16] The strength of that system was the single, creative vision that controlled the entire system. The weakness was the rigidity of Geneen's system and its inability to readily incorporate the creative ideas and initiative of others.

Particular agencies, such as the Service, were given the authority to protect endangered species utilizing such command and control mechanisms. However, these fragmented centers of authority only addressed immediate concerns, tending to treat others as "externalities," factors not considered. Developers were accused of not considering the "environment" and conservation agencies, such as the Service, were accused of not considering economic factors. Both groups were accused of not addressing concerns such as inter-generational equity. This narrow perspective can be observed in the "language" of our governance structure. For example, "goals" have been used as a way to express policy, rather than "concerns." Goals normally express the objective of the agency to be obtained as narrowly and specifically as possible. On the other hand, concerns tend to provide greater flexibility (particularly over time) in the method of addressing the objective, allowing greater consideration of the concerns of others.[17]

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16. *See* Elizabeth Lesly, *While It Lumbers, ITT Stock Has Legs*, BUS. WK., May 30, 1994, at 94.

17. *See generally* MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES (1973) (discussing the importance and role of words and language in the establishment and operation of power structures).

Following the Depression and the enormous successes of World War II (i.e., winning the war and creating the most devastating weapon in history) and the economic growth period that ensued (including international efforts such as the Berlin airlift and the Marshall Plan), some have suggested that we viewed ourselves as superhuman and that simply our command would provide the gratification we desired. Only slowly have we begun to rethink our own limitations (as a result of Three Mile Island, Vietnam, etc.).[18] However, with the 1960s, we began to be concerned that our institutions were not meeting the demands of change and the problems that transcended our fragmented governance structure. This concern took a number of different forms and became the subject of broad exploration and discussion in the following years.[19]

First were the number of authors whose writings concerned the environment such as Rachel Carson,[20] Marjory Stoneman Douglas,[21] Aldo Leopold,[22] Garrett Hardin,[23] and Paul and Ann Ehrlich.[24] Additionally, convocations such as Earth Day expressed environmental concerns. Second were the many attempts to utilize the command and control mechanisms to address specific problems: air and water quality; flood plains; historic and cultural resources; open space; scenic rivers; endangered species; and the need for environmental studies and reports. Some of these mechanisms began to address the issue of fragmentation. For example, the National Environmental Policy Act (NEPA)[25] required the consideration of alternatives that transcended the authority of the lead agency. We began to explore the innovative use of plans that transcended jurisdictional boundaries[26] and other innovative approaches were suggested to refocus the legal system on underlying concerns rather

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18. *See* DANIEL YANKELOVICH, NEW RULES: SEARCHING FOR SELF-FULFILLMENT IN A WORLD TURNED UPSIDE DOWN 21-22 (1981).

19. *See* LINDELL MARSH & PETER LALLAS, *Wildlife and Habitat Protection*, 24 ENVTL. LAW PRAC. GUIDE 5-7 (1993).

20. *See* RACHEL CARSON, SILENT SPRING (1962).

21. *See* MARJORY STONEMAN DOUGLAS, THE EVERGLADES: RIVER OF GRASS (1947).

22. *See* ALDO LEOPOLD, SAND COUNTY ALMANAC (1949).

23. *See* GARRETT J. HARDIN, MANAGING THE COMMONS (1977).

24. *See* PAUL EHRLICH, THE POPULATION BOMB 102-26 (1968); PAUL EHRLICH & ANN EHRLICH, EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES (1981).

25. 42 U.S.C. § 4321, §§ 4331-4335, §§ 4341-4347, §§ 4361-4370 (1988 & Supp. V 1993).

26. *See* Ira M. Heyman, *Innovative Land Regulation and Comprehensive Planning*, 13 SANTA CLARA LAW REV. 183, 225-35 (1972); Jerome Muys, *Interstate Compacts and Regional Water Resources Planning and Management*, 6 NAT. RESOURCES LAW. 153 168-72 (1973); Comment, *Regional Government for Lake Tahoe*, 22 HASTINGS L.J. 705, 717-21 (1971).

than the rights and interests of people.[27] Further, "scoping" under NEPA was instituted to provide for greater collaboration.[28]

More subtly, spiritual/psychological ideas and concepts were evidenced in Martin Buber's *I/Thou*,[29] communes, psycho-therapy, group therapy, "T" groups, the concept of "dialogue," etc.[30] Other cultures expanded our ideas and concepts.[31] Some thinkers focused on how change itself is addressed. For example, in 1960, Thomas Kuhn, presented the idea of paradigm shifts.[32]

Drawbacks of fragmentation were explored by writers focusing on developments in physics stressing connectedness and chaos. The idea that the movement of butterfly wings over China affects weather in the United States is an example of connectedness and chaos. This concept underscores our limits of control and argues for humility regarding our ability to comprehend and control our environment (a major theme of the recent film, *Jurassic Park*).[33] The gurus of business culture started exploring concepts such as "team building," "management by values," "virtual organization" and "partnering." These concepts move away from the authoritarian command and control management pyramid toward a flatter "horizontal" management structure that transcends the legalistic boundaries of our fragmented public and private sector

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27. *See* CHRISTOPHER STONE, SHOULD TREES HAVE STANDING? (1974); Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

28. NICHOLAS YOST, THE GOVERNANCE OF THE ENVIRONMENTAL AFFAIRS—TOWARDS CONSENSUS 13 (1982).

29. *See* MARTIN BUBER, I AND THOU (1958).

30. *See* LAWRENCE HALPRIN, THE RSVP CYCLES: CREATIVE PROCESSES IN THE HUMAN ENVIRONMENT (1969).

31. A very powerful exhibit of Japanese "culture" was held in Los Angeles in the mid-1980s. (TOKYO: FORM AND SPIRIT, Exhibit Catalogue and Guide, (1986). The catalogue from the Exhibit notes: "worker participation . . . decisions not made by one man at the top, but as a result of long consultations in which everybody's voice is heard . . . [t]hat magic word consensus—all these qualities have been fostered in Japan for centuries . . . the necessity for consultation and consensus . . . ." (p. 139). In addition, a plethora of books have been published on the Japanese management systems and processes such as the Japanese tea ceremony. SOSHITSU SEN XV, TEA LIFE, TEA MIND (1979).

32. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970). *See also* M. MITCHELL WALDROP, COMPLEXITY (1992) (describing the recent exploration of approaches for comprehending and addressing "complexity"); MURRAY GELL-MANN, THE QUARK AND THE JAGUAR (1994).

33. *E.g.,* FRITJOV CAPRA, TAO OF PHYSICS (3rd ed. 1991); JAMES GLEICK, CHAOS (1987); FRITJOV CAPRA, THE TURNING POINT (1982).

organizations.[34] Ethical issues were raised regarding intergenerational equity,[35] sustainable development,[36] and the allocation of the resources of the world.[37]

A. San Bruno Mountain HCP: A Product of its Time

The San Bruno Mountain planning process was a product of its time and reflected, albeit more specifically, these broader explorations, as have the conservation planning processes that followed. These processes reflect a critical and profound transformation that has been occurring in the Nation's system of governance.

The San Bruno Mountain HCP provided the basis for the issuance of a thirty year permit by the Service under Section 10(a) of the ESA for the take of the several species occurring within the 3000 acre plan area that were then listed as endangered and otherwise protected by Section 9 of the Act. In addition, the HCP addressed the ecosystem and unlisted species as well.[38] Thus, while the species-oriented provisions of the Act provided a "bottom-line" for the protection required, the focus of the HCP was on the ecosystem.[39] From a conceptual perspective, the view was that once the underlying concerns were satisfied, specific issues, such as the adequacy of protection for the individual species or the very definition of specific terms such as "species," could be more easily addressed.

The HCP planning process was led by San Mateo County, not the landowner, with the participation of a working group informally comprised of the three affected cities, the landowners, the state and

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34. *E.g.*, John A. Byrne, *The Horizontal Corporation*, BUS. WEEK, Dec. 20, 1993, p. 76. This movement toward the horizontal management structure has also been facilitated by the increased ease of information management. The individual is less dependent on a vertical structure organization to obtain, store, manipulate and communicate information. The result is increased individual freedom and the possibility of more varied collaboration among individuals; however, such collaboration also requires better collaborative mechanisms and processes.

35. Edith Weiss, *In Fairness to Future Generations*, 32 ENV'T 7, 8-10 (1990).

36. *See* PAUL HAWKEN, THE ECOLOGY OF COMMERCE: A DECLARATION OF SUSTAINABILITY (1993); WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987).

37. *See Declaration of Principles Governing the Sea-Bed and Sea Floor, and Subsoil Thereof, Beyond the Limits of National Jurisdiction*, G.A. RES. 2749, U.N. GAOR, 25th Sess., Supp. No. 28, at 24 U.N. Doc. A/8028 (1971).

38. The Callippe Silverspot butterfly that precipitated the conflict was proposed for listed as "endangered" under the ESA. However, as a result of the HCP, it was never listed.

39. *Agreement with Respect to the San Bruno Mountain Area Habitat Conservation Plan*, Mar. 4, 1983, at 7 (on file with author).

federal wildlife agencies and the conservation organizations. The county supervisor for the area chaired the effort and a facilitating biological consultant was engaged. Studies of the various species' requirements were performed, including extensive "capture/recapture" field/computer studies of the affected butterflies. The objective was to determine the habitat required to assure that development would "not appreciably reduce the likelihood of the survival and recovery of the species."[40] A high percentage of the habitat was ultimately conveyed to the county, with conservation easements being conveyed as well to the state wildlife agency.[41] Ongoing maintenance funding was provided by a charge on adjacent development (in an amount not exceeding twenty dollars per year per residential unit, with provision for cost of living increases). Habitat restoration activities were also provided, including the removal of Gorse, an exotic plant species that was destroying the butterfly habitat, and the establishment of a native seed bank which provides seed stock in connection with the revegetation of areas after development. In general, decisions were made by informal consensus, with the unstated understanding that any outstanding issues would be resolved by the county, city and wildlife agency decision-makers. While wildlife conservation was the focus, the planning process necessarily was required to address housing, roads, potential mud slides, electric transmission facilities and other issues.[42]

Assurances that the HCP would be honored were provided by an implementing agreement entered into by the Service, the California Departments of Fish and Game and Parks and Recreation, the County, three cities, and a number of landowners. This was the first such agreement of which I am aware that bridged the federal, state, local

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40. 16 U.S.C. § 1539 (a)(2)(B)(iv) (1988).

41. While the San Bruno HCP studies and plan were commended by a peer group of experts, including Paul Ehrlich, subsequent conservation planning processes have become interestingly sophisticated. In several efforts, a time horizon of 200 years has been used as a standard for studies of population viability. In general, a computer simulation of the current population as affected by a number of hypothetical factors, including time, is conducted. The product is an indicator of viability, although, it is acknowledged that the indicator is only as accurate as the factors selected. Clearly, as we move away from project-by-project analysis toward ranges and eco-systems, the sophistication of our thinking regarding concepts of population viability and the complexity involved is becoming similarly advanced. *See* GELL-MANN, *supra* note 32.

42. *See* Lindell Marsh and Robert Thornton, *The San Bruno Mountain Habitat Conservation Plan*, *in* MANAGING LAND-USE CONFLICTS (David Browere ed., 1987).

public/private sector chasm and provided for assurances and limitations on further regulation.[43]

"Focused planning" became a helpful concept. Simply stated, it is the idea that the effort would focus on a specific species, issue or concern, but with the understanding that in order to address the focused-upon issue, a broader set of issues and concerns would also be considered.[44] Thus, the line between planning for a species, for wildlife, for other concerns, was transcended.[45] In a like manner, the plan transcended the many individual projects and ownerships comprising the San Bruno Mountain planning area, in contrast to the historic project-by-project approach.

Interestingly, the wildlife agencies are still unsure of their role in this process. While the wildlife agencies were clearly at the table in the San Bruno Mountain process, they have subsequently grappled with the characterization of their role. The question is whether the plan is theirs or whether they are merely observers and commentators, with the plan belonging to the landowner and perhaps the local agency, to be formally received and reviewed at the end of the process as if it were a giant permit application. The difference is significant. For example, as the elements of the plan are developed, what weight is to be given to the informal indications and assurances of the Service staff as to their preferences? Has the agency, or its staff, made a decision, or a series of decisions, prior to formal public review of a proposed permit? In the past, even where the Service staff has come to tentative agreement on an acceptable plan or permit, the custom has not been to reflect their informal approval at the public notice stage. In part, I suspect that this custom reflects the lack of an ongoing vertical management feedback system within the Service, depending instead on a single vertical management review at the time of the final permit decision. It is predictable that the role and approach of the Service will be clarified, with the Service's participation in the planning and its understanding that the resulting proposal represents the position of the staff, not the formal position of the Service. Further, it can be anticipated that scoping reports

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43. Although it should be noted that in 1979, California had authorized "development agreements" which bridged this chasm. CAL. GOV. CODE §§ 65864-65869.5 (1987)

44. LINDELL MARSH, *Focal Point Planning*, *in* 5 ZONING AND LAND USE CONTROLS 28A-1 (1987).

45. *Id.*

will become increasingly useful to provide for incremental plan development.

Another change of significant proportions involves the concept of "mitigation." Under the project-by-project paradigm, in the usual case, it is very difficult, if not impossible, for the Service staff to determine the project-specific conservation requirements of a species in a range-wide context. For example, except in very rare instances, the single project proponent cannot be expected to conduct range-wide studies. Accordingly, there is a tendency to adopt fairly arbitrary mitigation standards and to require "sequencing,"[46] that is, to require the applicant first to avoid impact to the species "on-site" before proposing "off-site" mitigation.[47]

In determining mitigation requirements under the conservation planning paradigm, the Service staff has tended to apply the same project-by-project requirements, suggesting that the same avoidance and ratio approach be applied. However, Section 10(a) provides that the standard should be whether the proposed take "appreciably reduces the likelihood of the survival and recovery of the species."[48] Rather than applying a fixed mitigation ratio, the effect of the proposed take on the existence of the species range-wide is required, allowing consideration of a number of factors (e.g., numbers and densities of populations, buffers, protectability, the so-called "gap" analysis, and connectivity). Further, from a planning context, other factors can be considered, such as the best populations of the species and habitat to be conserved (whether on-site or off-site of a particular project), as well as the economics and the impact on individual landowners. Accordingly, the relative cost of land and the investment backed expectations of the landowners can be taken into

46. *See generally* 40 C.F.R. § 230.10(a)(1) (1993) (providing for the sequencing of the consideration of various kinds of mitigation measures under the Clean Water Act).

47. In some cases, the Service staff has taken the position that after avoiding on-site impacts to the extent practicable, the remaining on-site impacts should be mitigated at a ratio of at least "one-to-one" off-site. It is relatively easy to see that a one-to-one ratio results in a 50% loss of the resource and that an on-site loss of 90% of the resource would result in an overall conservation ratio of slightly more than 50%, while a 10% on-site loss would result in a conservation ratio of approximately 80%. In short, the more the landowner conserves on-site, the more he or she is penalized and required to provide proportionately more land.

48. 16 U.S.C. § 1539(a)(2)(B)(iv) (1988).

consideration.[49] This is reflected in the finding required under Section 10(a) that "to the maximum extent practicable" the applicant has minimized and mitigated the impact of any taking of the species.[50]

Collaboration of the entire "constituency of interests" was critical to the consummation of the plan. The collaboration involved more than cooperation; it was more in keeping with the spirit of Buber's *I/Thou* relationships. That is, collaboration was respectful of the differences among the participants. The concerns of each were honored, even when the developers did not understand the reason for conservation and the conservationists did not understand the need for development. The intent was to come to a consensus among the affected agencies and interests. Collaboration did not dwell on whether certain standards had been satisfied, but whether the underlying concerns of the interests had been addressed; it built relationships of trust and consideration. At the outset of the planning process, the attorney for the local environmental group and I had agreed that we would attempt to reconcile our concerns, rather than compromise them.

We also developed a "tool kit" of more specific process elements that have been helpful in achieving success in these efforts. The elements include facilitation, common technical support, involvement of the constituency of interests, application of the underlying NEPA logic, the "box" and the "ratchet," and the command and control regulatory compliance.

FACILITATION: We further developed this element in a conservation planning process regarding North Key Largo, Florida,[51] employing a facilitator to assist the constituency in developing an acceptable plan. This approach has since been used in the various Southern California efforts.

COMMON TECHNICAL SUPPORT: We used a common team of experts and technicians working as a facilitation team with the facilitator

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49. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987); Dolan v. City of Tigard, ___ U.S. ___, 114 S. Ct. 2309, 2319 (1994). The plan offers the opportunity to address and articulate the "nexus" between anticipated development and mitigation required, as well as the "rough proportionality" of the allocation of the burden, as required by recent decisions. Further, such a plan can assist in avoiding unconstitutional takings by providing increased flexibility and can provide greater defense against takings claims by better articulating the relationship between the objective addressed and the conservation required. *See generally* HEYMAN, *supra* note 26.

50. 16 U.S.C. § 1539(2)(B)(ii) (1988 & Supp. V 1993).

51. *See generally* MARSH, *supra* note 44.

as orchestrator of the process. Application of the underlying NEPA logic, the box and the ratchet, and the command and control regulatory compliance.

INVOLVEMENT OF THE CONSTITUENCY OF INTERESTS: We gathered a constituency of interests under the guidance of a lead agency and a facilitation team.

APPLICATION OF THE UNDERLYING NEPA LOGIC: We followed a process involving the affected constituency, (1) focusing on the particular concern or action, (2) considering alternatives (process brainstorming), transcending artificial governance boundaries, (3) scoping the issues, (4) identifying relevant impacts, (5) narrowing the alternatives and (6) identifying a preferred set of actions.

THE BOX AND THE RATCHET: We used references that stressed the importance of keeping the constituency together to complete the plan and to keep the process moving rapidly to completion.

COMMAND AND CONTROL REGULATORY COMPLIANCE: We established the bottom-line, minimum requirements to be met by the plan. The benefits of this approach to planning are clear: greater opportunity for creativity; better documented decisions; comprehensive, farsighted decisions that have breadth and flexibility; and better relationships involving trust and cooperation. The vision of the paradigm shift was to add to the freedom of action underlying representative democracy, the ability to transcend the inherent fragmentation, and allow creative collaboration in a focused, respectful, and principled manner.

B. After San Bruno Mountain

At the time we completed the San Bruno Mountain HCP, our small group, representing developers, conservationists and the public sector, asked ourselves whether our collaboration was a fluke, a chance coming together of the right people and the right circumstances, or whether it could be replicated. Since 1983, less than thirty HCPs, a mere handful, have been approved.[52] They cover single species, multiple

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52. BEATLEY, HABITAT CONSERVATION PLANNING (1994); MICHAEL J. BEAN ET AL., RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT (1991); *see generally* MARSH, *supra* note 44; Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL L. 605, 607 (1991).

species, and areas ranging from several acres to tens of thousands of acres.[53]

The strength of the HCP approach, however, is based on its implicit acceptance of the two basic principles deeply held by this Nation: the policy objective underlying the ESA that the biodiversity of the Nation should be conserved and the right to own and use property as a component of individual freedom. Further, it was becoming increasingly apparent that the wildlife conservation objective would be difficult, if not impossible, to attain by utilizing our historic project-by-project, adversarial, quasi-judicial processes. These old processes were like trying to fight a forest fire sweeping across the landscape at the time when the flames of investment backed expectations were highest and our flexibility and options were at their lowest. The interest in the HCP approach reflects the conclusion that the result of this historic model has been fragmented and ineffective mitigation, very expensive and often unsuccessful attempts to save "endangered" species, an unacceptable level of frustration and conflict, and the belief that we must do better, without compromising the two principles of biodiversity conservation and freedom.

In keeping with Thomas Kuhn's observations on the nature of paradigm shifts, it is quite understandable that the HCP approach has taken time to be generally employed. With the increasing listings of endangered species that affect greater areas of land and economic development, the HCP approach has now caught. We, as a national community, have embraced the vision and are, in Kuhn's terms, in the phase of filling in the elements of the concept, with more than 130 HCPs in process addressing conflicts involving urbanization (the Balcones HCP in Austin, Texas, and the multi-million-acre NCCP program in Southern California), fisheries, water and timber. However, several critical elements are incomplete or missing.

III. CRITICAL MISSING ELEMENTS TO COMPLETE A NATIONAL CONSERVATION PLANNING PARADIGM

There are three critically needed elements of a successful national conservation planning program. First, the individual HCP processes must

53. Single species HCPs include Coachella Valley Fringed Toed Lizard HCP, the Desert Tortoise, the California Gnatcatcher and the Stephens' Kangaroo Rat (SKR). Multiple species HCPs include San Bruno Mountain HCP and North Key Largo HCP.

be more expeditious and less expensive. Second, the private sector (and other interests) must be provided with assurances. Third, a national "funding framework" must be invented.

A. The Need for an Expeditious and Less Expensive Collaborative Process

The San Bruno HCP addressed fifty-one species within 3000 acres of land and involved a handful of landowners and developers, four local agencies, two state agencies, and the Service. It required approximately $1.5 million, three years, and an amendment to ESA which added Section 10(a). Subsequent efforts have focused on one and, more recently, multiple species with respect to a single project (typically one to several thousand acres) or broad regions (such as the NCCP of Southern California) involving millions of acres[54] with public and private sector processing costs that range from $500,000 to more than $4 million for each of the major project HCPs and $20 to $50 million for a multi-million acre regional plan. While it appears that the regional NCCP type plans are more efficient than project level HCPs, they are now very

54. The Austin, Texas, (Balcones) multiple species HCP includes approximately 300,000 acres, while the Southern California NCCP planning areas include 3,840,000 acres. The cost of the Balcones HCP approached $1 million ($600,000 for biological studies, $100,000 for economic feasibility studies, and the remainder for public time and expense) and has taken in excess of five years to date with the ultimate success of the effort still in question. The Balcones HCP has left 12,000 acres short of the 60,000-acre objectives. In 1993, the voters rejected proposed bond funding of $48.9 million that was to be used to implement the plan. The public agencies in Southern California have spent approximately $10,000,000 over the past three years with respect to the various multiple species efforts. These expenditures include the Riverside Stephens' Kangaroo Rat HCP and multiple species planning, the two NCCP plans in Orange County and the riparian habitat plans by San Diego Association of Governments, four sub-regional plans, and one city-wide plan in Carlsbad, and in San Diego County the NCCP/multiple species plans. The public agencies anticipate spending a total of $15 million before completion of the planning efforts in approximately two years (including approximately $5 million from the state and other sources such as the National Fish and Wildlife Foundation). This does not include private sector costs which would probably add another $20 to $30 million, for a total expenditure in the range of $30 to $50,000 for multiple species planning in Southern California over a five to eight-year period.

Three recent private sector efforts, one focusing on only the California Gnatcatcher, a project area of 700 acres, with 125 acres of habitat, took four to five years to complete at a planning cost of roughly $463,000. Two others, the Rancho San Diego HCP and the Fieldstore/Carlsbad HCP, each addressing approximately sixty species within 2000 acres, will respectively require approximately $3 million to $3.5 million, and eight and five years, to complete.

complex and difficult to implement and complete.[55] Further, they may contemplate further project-level plans to fill in critical details. My guess is that if the process were properly organized, an HCP for urbanizing lands covering 2000 to 5000 acres should take two years and cost less than $1 million. A large sub-regional multiple species HCP should take three to four years and cost $5 to $7 million (aggregating up to $20 to $30 million for a multi-million acre region). These estimates are intended to provide orders of magnitude and can be expected to vary significantly in a particular case. For example, as the richness of the wildlife resource or the density of the urban development decreases, the cost of the plan should also decrease. Further, conservation plans addressing urbanization involving the partition of lands for development and those for wildlife vary significantly from those addressing processes involving greater co-management of lands for wildlife and other purposes, such as silva culture and fisheries.

The question is how can these plans be completed faster and less expensively? There are two key factors. First, we must overcome the institutional inertia to change and embrace the opportunity provided by the collaborative planning approach. Second, that change must be better managed.

B. Resistance to Change

The most difficult problem is overcoming the resistance to change within the existing institutions (both public and private). Until recently, the Service considered HCPs as "habitat development plans." In 1990, the prevailing view within the Service shifted to the belief that the project-by-project mitigation must give way to the HCP approach as the best hope for conserving the Nation's wildlife.[56] Within the

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55. The primary reason for the time delay is the lack of a "funding framework" as discussed below. The Stephens' Kangaroo Rat HCP, covering 40,000 acres in western Riverside County, has taken over six years with another year estimated for completion. Those working on the plan have estimated that the process could have been completed within three years had an adequate funding framework been available at the outset.

56. When we first proposed the HCP approach for San Bruno Mountain in 1980, every level of the Service resisted the idea on the basis that it was not contemplated by the Act. With the encouragement of Senator Breaux (then Congressman and Chairman of the House Merchant Marine and Fisheries Subcommittee on Fisheries and Wildlife), the Service agreed to explore the idea. Later, while celebrating the success of the San Bruno Mountain process, one of the high-level Service participants confided in me that when we first proposed the HCP process, they were convinced that it was with a view toward "rolling them." In 1990, it was with the leadership of then

conservative elements of the development community, HCPs were viewed as a compromise to preclude hoped-for wholesale changes in the ESA that might allow individual species to be compromised in deference to economic development.

As the result of the California NCCP initiative,[57] the conservation planning paradigm has become the primary focus for national wildlife conservation efforts. To be fully effective, however, the approach must be embraced all the way down to the staff at the field office level.[58]

C. Managing Change

Historically, within the Service, authority has been pushed down to the field office level, primarily staffed by biologists. Under the old system, the field office staff viewed their lot as one of constant loss, compromise and retreat. Each negotiation was giving up part of a habitat. With the exception of ESA, they had little power. Even where they had some leverage, they viewed their role as that of advocates and negotiators. They started high in their demands, compromised and always accepted less.[59] Understandably, they have applied this viewpoint to HCPs, seeing the HCP as a giant permit application with the

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Assistant Secretary Constance Harriman, Service Director John Turner, and others in the Portland Regional Office that the Service finally embraced the concept as national policy.

57. The leadership for this effort was provided by the California Resources Agency and Secretary Douglas Wheeler and his deputies, Michael Mantell, and Carol Whiteside, and Governor Wilson, together with support from elements of the conservation community, the more forward-looking elements of the development community, and Secretary of Interior Babbitt.

58. Recently, I asked general counsel of a richly wildlife endowed 20,000-acre coastal ranch in northern California why they did not take my suggestion and develop an HCP for the ranch. He said that they were discouraged by Service staff at the field office level who disfavored the approach and preferred to deal with the wildlife issues one-by-one (leaving the future of the wildlife resources of the ranch to future uncertainty).

In another instance, in discussing the delays in the processing of a plan with the regional office of Fish and Wildlife Service, the reviewing regional staffer (after the plan had been fully worked out at the field office level) indicated that a delay of four to five months to provide his comments was not unreasonable. Two to three months between review meetings regarding a drafted HCP are not unusual. When these factors are coupled with frequent personnel changes, the time delays that have been required to complete an HCP (three to six years) are easily understood.

59. I can recall when I first began to understand the attitude of the Service field office staff. I was flying back to California from the Portland District Office with the southern California Field Supervisor. We had been at odds over a project and after a long talk he said, "We are always losing. Maybe just half each time, but we never win." This was before San Bruno Mountain. It began to make me think that the process was wrong if it made the staff feel that they could only lose.

plan representing the applicant's proposal. Time and delay serve as negotiating tools (the regional office refused to consider a plan, or issues under a plan, until agreement was reached at the field office level) and the risks and burdens were to be placed on the developer. Any early approaches to the regional office were viewed as end runs.

The field office staffs could not see that the HCP paradigm shift required that both the development community and the wildlife agencies collaborate to work out extremely difficult issues, often of national importance, and make commitments early as the planning progressed and, in return, assume certain risks. In return for this early commitment of habitat, the development community asked for certainty, no more mitigation, and accepted a lesser amount of flexibility in developing their lands. The lower level service staff, with understandable reluctance and without sufficient encouragement, has been hesitant to move away from the side of the pool and swim in this deeper, seemingly riskier water.[60] What is required to overcome this reluctance is management innovation and leadership from the top of the Department of Interior.[61] The fact is, however, that with the resources at hand, Secretary Babbitt probably could not have done more. In twenty years of working with the Department, I have never seen it staffed with a brighter, more experienced or hardworking team stretching to address these concerns.

In managing change, the Department of Interior should address the following four concerns. First, the command and control attitude of the federal agencies should evolve toward an attitude that the conservation plans being developed are accomplished by the collaboration of the agency and the applicants. "Partnering" should be the rule.

Second, the management skills utilized by the Service should expand (internally or by partnering with others) to include land planners and economists. New management tools and concepts being explored in the private sector should be encouraged, such as "management by values," "virtual organization," and "facilitation."

Third, delay should be discouraged, while legitimate, vertical ongoing issue management should be encouraged.

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60. In fact, as compared with the record of ESA to date, the approach predictably will be more effective.

61. *See generally* BEAN et al., *supra* note 52 (describing specific suggestions regarding management approaches that should be explored).

Fourth, one technical point of the ESA should be confirmed by amendment of the Act if necessary. The current practice of the Service is that an HCP may cover a group of species, referred to in the HCP as "species of concern." In approving an HCP, the Service issues a Section 10(a) permit for the listed species and an agreement promising to issue a Section 10(a) permit for any "Species of Concern" that may be listed in the future.[62] This is because there are some that believe that a take permit for a species cannot be issued until after the species is listed. Others, including me, believe that as with the present conveyance of future interests in real property, the Service is authorized to issue a permit that will allow the take of a species in the event that it is listed (provided of course that it is addressed in the HCP as if it were listed). This would substantially simplify the administrative process involved without affecting the substance of the Act.[63]

While the foregoing focuses on the benefits of public sector collaboration in developing the conservation plan, we are only beginning to imagine the opportunity of public/private sector collaboration in the implementation of these plans. We can envision a public sector in which the policies of the federal and state communities are implemented pursuant to conservation plans at the local or regional level (probably through a joint powers arrangement). We are only beginning to imagine the ways in which the private sector can coordinate its activities with the public sector through these plans so as to engage the genius of entrepreneurial effort while complying with public sector policies.

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62. H.R. REP. NO. 835, 97th Cong. 2d Sess. 30 (1982).

63. The Conference Report regarding the 1982 amendment adding Section 10(a) provides as follows:

> In enacting the Endangered Species Act, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element. Although the regulatory mechanisms of the Act focus on species that are formally listed as endangered or threatened, the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species . . . . The conservation plan will implement the broader purposes of [the Act] and allow unlisted species to be addressed by the plan.

H.R. REP. NO. 835, 97th Cong., 2d Sess. 30 (1982).

D. The Need for Assurances

A critical component to the successful development of collaborative plans has been assurances. As described above, the implementation agreement entered into with respect to the San Bruno Mountain Plan was signed by four local agencies, two state agencies, the Service, and four major developers. It provided that each developer would be required to provide no further mitigation except with respect to the operation of the Conserved Habitat. This model has served us well. However, some within the Service argue that there should be a broad "out" for unforeseen circumstances. Thus, they would contend, while the Act requires a developer to minimize and mitigate the impacts on the species to the maximum extent practicable, he or she may be asked (in the event of unforeseen circumstances) to do even more.[64] Recently, Secretary Babbitt formally proposed that the policy reflected in the San Bruno Mountain HCP should become the general policy of the Service.[65] This will go a long way to provide the certainty required by the private sector. However, it is only one element of an adequate program. While it is important that the public sector (the local, state, and national communities) assume the risk to biological diversity of unforeseen circumstances, it must have the financial capacity to address this risk.

E. The Need for a Funding Framework

The most critical need is a funding framework. In Southern California, some of us have roughly estimated that the cost of conservation (exclusive of long-term management costs) is from $1.25 to $2 billion. This is a large number. It is also a small number. The amount required over a long period of time from California, the eleventh-ranked

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64. There are three additional points that should be considered. First, in many cases the landowner is asked to convey the conserved habitat up-front, limiting its development flexibility and its ability to provide further mitigation on-site. Second, the likelihood of the Service exercising this "out" is acknowledged to be slight (some estimate 1/2 to 2%). Accordingly, it is of small benefit to the Service, and yet to the developer it is very burdensome because bankers and investors have a difficult time evaluating the economic effect of the biological condition. Third, referring back to the concept of "partition" between the economic development and wildlife elements of the land, once the partition is effected, it can be argued that the public sector should accept the further risk. In some respects, this reflects the idea of a roughly proportional sharing of the conservation burden between the developer and the various communities (local, regional, state, and national) and a belief that we cannot continue to look to the developer to shoulder all of the burdens of the commons. *See* Dolan v. City of Tigard, ___ U.S. ___, 114 S. Ct. 2309 (1994).

65. Robert Reinhold, *California Environmentalists Cut a Deal, Hope for the Best*, N.Y. TIMES, Mar. 28, 1993, § 4 (The Nation), at 4.

economy in the world, is little more than the cost of three fully equipped B-1 Bombers.[66]

A significant portion of this amount must be available up front, to be drawn upon as needed. This initial funding is critical because we need to draw lines early, to clearly articulate the lands that must be acquired in order to fix expectations. It is legally difficult to do this without at the same time being prepared to purchase those lands.[67] While the entire funding requirement will not be required immediately, the most critical missing piece of the conservation planning paradigm is a funding framework that is agreed upon by the constituency of interests.[68]

In Southern California, exactions for single family homes commonly range between $20,000 and $30,000. Further exactions will be resisted and would have a significant inflationary effect. Local, state, and federal taxpayers are equally resistant to tax increases. To a large extent, this shortfall is an unpaid debt of prior development. Prior urban development has used up the resource cushion, and while the national settlement policy of the 1950s and 1960s funded roads, navigation and flood control channels, and sewer systems, it failed to fund conservation programs to offset the resource impacts of those systems. We can reasonably conclude that the shortfall is an unfunded collective burden.

Specifically, a funding framework must include the following four components. First, the federal share of the burden could be provided by revolving loans repayable from local revenues, similar to the current approach for waterways, flood control and sewer projects.

Second, another element of the need could be provided by a federal real estate transfer charge levied by local or state agencies upon the sale of lands within a HCP area. In California, this would overcome the restrictions of state enacted Proposition 13.

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66. Melaine Olen, *B-1 Fixes to Top $1 Billion, Panel is Told*, L.A. TIMES, Mar. 7, 1991, at A15.

67. With respect to the importance of up-front funding, see the discussion of the issue regarding the taking of private property in connection with local planning and regulation for the preservation of biodiversity. A. DAN TARLOCK, *Local Government Protection of Biodiversity: What is its Niche?*, 60 U. CHI. L. REV. 555, 586-98 (1993).

68. Much of this discussion is based on a draft paper discussing the funding issue co-authored by Douglas R. Porter, David Salvesen, and me entitled, *Wildlife Conservation in Southern California, How Should We Pay the Piper?*

Third, in connection with the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)[69] and other national settlement infrastructure programs, a portion could be designated for addressing the past impacts of such systems. This could be echoed at the state and local levels, including amounts required of new development.[70]

Fourth, with a funding framework in place, the HCP for an area could significantly simplify the conservation burden. With such a framework, a plan could include the following elements. First, the HCP could describe the lands (habitat, linkages, buffers, etc.) needed within the area for long-term conservation. Local regulation could prevent these lands from being developed.[71] The public sector would be prepared to acquire the lands so designated which are beyond the regulatory requirements for other purposes. Second, the funding framework would be provided, including up-front funds available from federal loans as needed, repayment from development impact fees as well as taxes and charges on regional services and supplies (e.g., roads, water, sewerage, utilities, etc.) or other sources. Third, a regional collaborative conservation effort under the leadership of local agencies (probably under a joint powers arrangement) could acquire the lands and interests necessary at fair market value without discount for wildlife considerations and thereafter manage the lands acquired as conserved

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69. Pub. L. No. 102-240, 105 Stat. 1914 (1991).

70. The need for contributions by economic development and the local, regional, state, and federal communities may vary depending upon the circumstances. For example, there may be little need for federal or state funding where landholdings are large, investment backed expectations small, sensitive resources widely spread and economic development pressure weak and in the distant future. On the other hand, there may be a greater need for state and federal funding where, as in Southern California, there are 378 sensitive species being considered for listing under the Act. Their habitat covers virtually all of the developable lands available. Historic development has taken up much of the resource cushion and land ownerships with high investment backed expectations for development have been fragmented. The internationally respected biologist, E.O. Wilson, has included the Southern California coastal plain in one of the 18 "biodiversity hotspots" in the world. EDWARD WILSON, THE DIVERSITY OF LIFE 261 (1992).

There are a number of ways to efficiently allocate the development community's burden among those affected, including, for example, the transfer of development rights and credits. Increasingly, we are finding that impact fees can be used in these circumstances with greater ease and effectiveness, utilizing money as the common medium of exchange. For example, in connection with the SKR HCP, in connection with a requirement of an acre of habitat for an acre of development, the developer was allowed to pay 150% of the anticipated average cost of an acre of habitat to the regional conservation agency, which in turn acquired the habitat. The approach was termed "pay and go."

71. The acquisition plan set forth in the conservation plan could be updated on an on-going basis based on changing circumstances, surveys and other information.

habitat. Fourth, development impact fees could provide the development community's share of the funding (ideally broadly allocated to maintain a "level playing field" within the development community). Finally, given the HCP planning and funding framework, in general, development would not be required to conduct further wildlife surveys or to address wildlife impacts under any environmental statements or reports, relying instead on the regional HCP/NCCP to provide for such impacts.

I strongly suspect that if the collaborative planning model is employed creatively, we will find that economic objectives can be advanced simultaneously, with the result that the cost of wildlife conservation will be more than offset.[72]

With a quick and efficient HCP process, providing assurances to the private sector, and a funding framework, the endangered species/urbanization conflicts under ESA would be significantly lessened. However, the promise of the collaborative planning paradigm does not end there. This is just one of the easier applications.

IV. A BROADER PERSPECTIVE

A. Collaborative Planning Models

The HCP is only one type of collaborative, focused, planning model. Others include: special area management plans (SAMPS);[73] resource management plans (Chapter 380 Plans in Florida);[74] watershed plans;[75] and, most recently, the California NCCP approach mentioned above. They share certain common elements. They all bring the constituency of interests (developers, local government, conservation interests, and state and federal wildlife agencies) to the table early, when our ability to cope with the conflict is greatest, with the objective of reconciling both wildlife and economic development concerns in the context of the plan. The resulting plan evidences the necessary

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72. In watching the Clinton Forest Summit in 1993, it was apparent that the primary long term issue in the Northwest was the economy, not the Spotted Owl. Analogously, I suspect that working collaboratively to win World War II, seemingly an economic drain, in fact strengthened us economically.

73. 16 U.S.C. §§ 1451-1464 (1988 & Supp. V 1993).

74. FLA. STAT. ANN. §§ 380.012-380.27 (West 1988).

75. 103d Cong., 2d Sess., S.2093, the proposed *Water Pollution Prevention and Control Act of 1994*, as passed by the Senate (1994).

reconciliation[76] and is the basis of a formal implementation agreement which provides the participants with predictability and certainty.

B. Urbanization HCPs Distinguished

As mentioned above, the HCP has initially been developed with respect to the conflict between urbanization and wildlife conservation. The resulting plan tends to be characterized by a partition of lands for development and those for wildlife conservation. In contrast, HCPs for silva culture, agriculture and water may provide for much more cooperative management of lands for the two different purposes.

C. Beyond Wildlife

A key aspect of the HCP process is the element of focus. I have characterized this process as "focal point planning." This characterization acknowledges that while the focus may be a limited concern such as wildlife, other concerns may have to be considered in order to address the focal concern. This is an extremely important point. For example, in addressing wildlife, we may find a way to benefit the economic efficiency of our cities and regions (for example, by encouraging development along transportation corridors or in a more compact pattern, thereby allowing us to compete more effectively in the international marketplace) and, in turn, to provide more resources to address wildlife concerns. This synergism is discouraged by our historic project-by-project approach[77] and, in contrast, is enhanced by collaborative planning.[78] An even broader point is that the collaborative

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76. These plans contemplate reconciliation, *not* compromise; they must comply with the standards of ESA.

77. Consider that NEPA requires that we examine anticipated impacts, but does not encourage the exploration of opportunities.

78. For example, I have been representing one of the finest furniture makers in the country, Sam Maloof, whose workshop and house are eligible for listing on the National Register of Historic Sites and are threatened by an impending freeway. Pursuant to a collaborative planning process, similar to the HCP process, Maloof and the freeway proponents have agreed upon a conservation plan, similar to an HCP, providing for the relocation of the workshop and house and the endowment of a museum and cultural center. We initially viewed the freeway project as a calamity and while it is true that Maloof and his wife would prefer that the project is abandoned, the planning focus has resulted in a conservation plan that will provide for the conservation and preservation of his work after his death (he is now almost 80). At a recent collaborative planning meeting, the Curator of Decorative Arts of the Boston Museum of Fine Arts asked what was to be done with this collection during the relocation period, noting that its storage would be very expensive. The freeway project planning director noted that there were funds for storage. "Better," suggested the Curator, "to assist

planning process could be developed to address other communal concerns ranging from the lagging economy of a region to urban ills. We have only begun to explore its usefulness and its forms.

V. IN SUMMARY

The HCP focused, collaborative planning process is a major paradigm shift in the way that we conserve the biodiversity of our nation. While promising and embraced by the national community, there are a number of critical elements that must be provided: a quicker less costly process, assurances, and a funding framework. The promise of this paradigm extends beyond the wildlife/economic development conflict to other complex issues that plague our nation. This HCP process offers collaboration and creativity as a way to supplement our concept of freedom, to address the complex, communal problems that face us, and to take advantage of the opportunities available.

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in partially funding a touring exhibit of this exceptional collection, which will also provide us with a catalogue and photographic documentation of the collection." We never looked at the freeway project as providing the opportunities that have blossomed. At the same time, the relocation solution developed was the least expensive alternative for the freeway project. A win/win/win for the project, Maloof and the public.