31 ELR 10712 6-2001

ELR
NEWS & ANALYSIS

NWF v. Babbitt: Victory for Smart Growth and Imperiled Wildlife

by John Kostyack

On August 15, 2000, the U.S. District Court for the Eastern District of California issued a landmark ruling, in the case *National Wildlife Federation v. Babbitt (NWF v. Babbitt)*,[1] interpreting key provisions of the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA). This ruling provides important new direction to local governments, developers, federal wildlife agencies, and others seeking to design habitat conservation plans (HCPs). In striking down the Natomas Basin HCP and incidental take permit (ITP), the court signaled that HCPs purporting to conserve imperiled species that cross jurisdictional boundaries must confront the challenges of planning at the regional scale honestly and must provide guaranteed funding to achieve conservation objectives. This far-sighted ruling may stimulate the regional planning that is so desperately needed to achieve the interrelated goals of countering sprawl, promoting smart growth, and conserving imperiled wildlife.

Background: Species and Ecosystems at Risk Due to Sprawl

Roughly one-third of animal and plant species in the United States are declining toward extinction. This decline is a strong indication that the natural systems on which we rely for essential services, such as filtration of drinking water and flood control and the green spaces we enjoy for our quality of life, are in jeopardy.

Recent studies indicate that sprawl is a leading cause of this rapid loss of the nation's biological resources.[2] A classic example of sprawl is the current development activity in the Natomas Basin in and near Sacramento, California, where wildlife-rich agricultural lands in this deep floodplain are rapidly being replaced by poorly planned, automobile-dependent suburbs.

Responding to this loss of our natural treasures and to the numerous other problems that accompany sprawl, citizens, officials, and developers across the country have begun promoting the smart growth alternative to sprawl. Put simply, smart growth means planning for and investing in affordable, compact, transit-oriented, bicycle- and pedestrian-friendly communities and protecting open space for wildlife conservation and other public needs.

The Role of Local Governments in Conserving Wildlife Threatened by Sprawl

One of the great challenges facing smart growth proponents in the United States is to get local jurisdictions to factor wildlife conservation into their land use planning decisions. Historically, responsibility for wildlife conservation has rested with state and federal agencies, not local governments. Perhaps this approach once made sense because many species cross local jurisdictional lines and must be conserved using broad, landscape-level strategies. However, since World War II, the trend in the United States has been for local governments to approve sprawling residential, office, and retail facilities outside the jurisdictional boundaries of existing cities and towns. Although federal and state governments have played a significant role in subsidizing and otherwise stimulating this new development pattern, the ultimate decision on building location and designs has always rested with local governments. Thus, local governments have been in the position to undermine, or support, landscape-level conservation goals or strategies developed by state or federal wildlife agencies.

In recent years, numerous local governments, particularly in the West, have been obliged to address wildlife conservation issues for the first time due to restrictions on the destruction of endangered species and their habitat resulting from ESA listings in their regions. Facing the possibility of significant development restrictions due to the ESA's prohibition against taking of listed species and the possibility of liability for issuing permits in violation of this prohibition, local governments in California, Florida, Texas, and elsewhere have negotiated with federal agencies to ensure that their development plans are consistent with ESA standards. To achieve ESA compliance, many have prepared HCPs and secured ITPs under ESA §10 that allow development in

John Kostyack is Senior Counsel for the National Wildlife Federation (NWF) in its Office of Federal and International Affairs in Washington, D.C. In addition to serving as lead counsel for the plaintiffs in *NWF v. Babbitt* and other complex Endangered Species Act litigation, he manages the NWF's Smart Growth and Wildlife campaign, a nationwide effort to educate people about the harmful impacts of sprawl on wildlife and to promote smart growth solutions at the federal, state, and local levels. His e-mail address is kostyack@nwf.org.

1. 128 F. Supp. 2d 1274 (E.D. Cal. 2000). The court subsequently issued final judgment in favor of the plaintiffs. *See* National Wildlife Fed'n v. Babbitt, No. S-99-274 DFL JFM, 2001 WL 128425 (E.D. Cal. Jan. 26, 2001). The Endangered Species Act (ESA) is codified at 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18. The National Environmental Policy Act (NEPA) is codified at 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209.

2. *See, e.g.*, Brian Czech et al., *Economic Associations Among Causes of Species Endangerment in the United States*, 50 BIOSCIENCE 593 (2000). This Dialogue identifies urbanization as the primary cause of species endangerment on the mainland United States. Because sprawl—construction of low-density, automobile-dependent residences, offices, and stores in the natural areas outside of cities and towns—is the predominant urbanization pattern of the past 50 years in the United States, one can infer that the species decline found by Czech et al. is attributable to sprawl-type development. The National Wildlife Federation has begun issuing a series of white papers on this topic. *See* National Wildlife Fed'n, *Smart Growth and Wildlife*, *at* http://www.nwf.org/smartgrowth (last visited Mar. 1, 2001).

and around the habitats of imperiled species.[3] This was the approach taken by the city of Sacramento, which in December 1997, secured an ITP from both the U.S. Fish and Wildlife Service (FWS) and the California Department of Fish and Game to allow development in the habitats of a host of listed species, including the federally listed giant garter snake and the state-listed Swainson's hawk.

A Brief History of HCPs

Congress added the HCP tool to the ESA in 1982, in an effort to conserve imperiled species facing the risk of habitat destruction due to nonfederal economic activities. It viewed HCPs as a win-win situation for imperiled species and development interests: in return for securing ITPs allowing development interests to take a limited amount of habitat, they would commit in an HCP to protect and manage other habitat areas, thus enhancing the species' overall recovery chances.

Upon assuming office in 1993, the Clinton Administration made HCPs one of its top ESA priorities, pushing federal wildlife agencies to get deals done as a strategy for countering criticism of the law as insufficiently user-friendly. Prior to 1993, the FWS had issued a mere 14 ITPs in connection with HCPs. Today, approximately 290 ITPs governing the management of over 20 million acres of land have been issued, and many more are under development.[4] Many of the largest HCPs, in terms of acreage, are those that have been prepared by local governments to address proposed development in and around the habitats of listed species.

The Clinton-era expansion of HCPs has been controversial among environmentalists and independent scientists who have shown how the plans allow substantial amounts of habitat destruction while providing few reliable mitigation measures in exchange.[5] In response to these criticisms, the FWS and the National Marine Fisheries Service (NMFS)—the two agencies responsible for the administration of the ESA—recently amended their HCP handbook to include new guidelines on five key features of conservation planning: biological goals, monitoring, adaptive management, limits on permit duration, and citizen participation.[6]

These suggestions from the federal wildlife agencies on how local governments, developers, and others can effectively incorporate wildlife considerations into their land use planning were a positive step forward. However, the guidelines did not fully address the concerns of environmental groups and other critics of the HCP program. The new guidelines are completely voluntary and, thus, leave open the possibility that the glaring gaps in species protection found in past plans will be built into future plans and continue to place imperiled species at risk. Rejecting the advice of conservationists, the FWS and the NMFS refused to issue any "bottom line" regulatory standards to help ensure that harmful HCPs are no longer approved.

Thus, to date, the only enforceable obligations placed on ITP applicants are the statutory standards themselves, of which there are six.[7] Under ESA §10(a)(2)(B), before issuing an ITP, the FWS or the NMFS must find that:

> (1) the taking will be incidental;
> (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking (the "(B)(ii) finding");
> (3) the applicant will ensure that adequate funding for the plan and procedures to deal with unforeseen circumstances will be provided (the "(B)(iii) finding"); and
> (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild (the "(B)(iv) finding").[8]

In addition, under ESA §7(a)(2), the FWS or the NMFS must find that:

> (5) the ITP will not jeopardize the existence of the species covered by the plan; and
> (6) the ITP will not destroy or adversely modify the critical habitat of such species, if any critical habitat has been designated.[9]

Although these standards may appear rigorous to some, they have not (as discussed above) generally produced scientifically rigorous HCPs. The FWS' spotty implementation of these standards, and the reluctance of either the FWS or the NMFS to take regulatory steps to prevent such poor implementation in the future, continues to put imperiled species at unnecessary risk.

Citizen Enforcement of HCP Approval Standards Prior to *NWF v. Babbitt*

Over the past 27 years since the enactment of the ESA, when the FWS had failed repeatedly to meet one of its other ESA mandates, conservationists succeeded in forcing compliance through court action. However, citizen enforcement to ensure FWS compliance with HCP approval standards is a different story.

Prior to the arrival of the Clinton Administration, the courts had issued only one ruling concerning HCP approval standards.[10] In *Friends of Endangered Species v. Jantzen*,[11] the U.S. Court of Appeals for the Ninth Circuit rejected a challenge to the first HCP ever approved, a plan that ad-

3. Prominent examples include HCPs for the metropolitan areas of Austin, Texas; Las Vegas, Nevada; and San Diego, California.

4. *See* Marj Nelson, U.S. FWS, *Habitat Conservation Planning*, 24 Endangered Species Bull. 12 (Nov./Dec. 1999), *available at* http://endangered.fws.gov/esb/99/11-12/12-13.pdf (last visited Feb. 21, 2001).

5. *See, e.g.*, Peter Kareiva et al., Using Science in Habitat Conservation Plans (American Institute of Biological Sciences and National Center for Ecological Analysis and Synthesis 1999); Laura Hood et al., Frayed Safety Nets: Conservation Planning Under the Endangered Species Act (Defenders of Wildlife 1998).

6. *See* Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35241 (June 1, 2000). The NMFS has only recently begun to play a prominent role in reviewing and approving HCPs and in setting HCP policy. Prior to the recent listings of various Pacific salmon species, it had little involvement with the issue.

7. This Dialogue discusses only the specific substantive obligations of ITP applicants. ESA §10 and its accompanying regulations also create a number of procedural obligations and give the FWS and the NMFS the authority to add terms and conditions to the ITP that the agency deems necessary or appropriate to carry out the purposes of §10. *See* 16 U.S.C. §1539(a), (c), ELR Stat. ESA §10(a), (c). *See also* 50 C.F.R. §§17.22 and 17.32.

8. 16 U.S.C. §1539(a)(2)(B), ELR Stat. ESA §10(a)(2)(B).

9. *Id*. §1536(a)(2), ELR Stat. ESA §7(a)(2).

10. This is not surprising, considering that only 14 HCPs had been approved.

11. 760 F.2d 976, 15 ELR 20455 (9th Cir. 1985).

dressed real estate development in and around the habitats of two listed butterflies on San Bruno Mountain in northern California. Because this HCP protected a substantial percentage of the remaining habitats of the two species (87% and 92%, respectively), provided for restoration of degraded habitats, and had earlier been deemed by Congress to be a "model" of endangered species conservation, this ruling does not provide much of a road map for evaluating the more controversial HCPs of the 1990s.

From 1985 to August 2000, only two additional rulings on HCP approval standards were issued. In *Sierra Club v. Babbitt*,[12] a federal court struck down two HCPs allowing development in the habitat of the endangered Alabama beach mouse. The court focused solely on the FWS' ESA §10(a)(2)(B)(ii) finding, i.e., that the applicants would minimize and mitigate takings of the species to the maximum extent practicable. According to the court, this finding was arbitrary because the promised mitigation measures were to be funded in part by voluntary contributions from unidentified third parties.[13] This holding went to the heart of the conservation community's concerns with Clinton-era HCPs. The ruling highlighted how the FWS was allowing HCPs to go forward despite a high degree of uncertainty about whether developers would succeed in mitigating the harm to be caused by their proposed activity, and despite the developers' failure to take financial responsibility for addressing the inevitable challenges of achieving the mitigation goal.

In *Loggerhead Turtle v. County Council of Volusia County, Florida*,[14] a federal district court upheld an HCP allowing motor vehicles to be driven in and around the nesting areas of endangered sea turtles. Refusing "to become bogged down in the minutiae of each of the permit's measures," the court addressed only a handful of plaintiffs' concerns about the HCP.[15] However, one of the court's findings was noteworthy, considering the recurring questions about the reliability of HCP conservation measures. The court upheld the FWS' ESA §10(a)(2)(B)(iii) finding, i.e., that the county would ensure adequate funding, because the FWS had an opportunity prior to the HCP to observe the county's commitment to funding the HCP's contemplated programs, and because the ITP was made conditional upon the FWS' approval of the county's future budget allocations. This language raises important questions, addressed again in *NWF v. Babbitt*, about whether permit revocation authority provides a sufficient safeguard for species to justify allowing an HCP with highly uncertain conservation measures to go forward.

On August 15, 2000, U.S. District Judge David Levi of the Eastern District of California issued his ruling in *NWF v. Babbitt*. Because this was just the fourth ruling on HCP approval standards since the HCP provisions were added to the ESA in 1982 and the first in the West since the HCP boom began there in the early 1990s, Judge Levi's detailed opinion provides important guidance to anyone seeking to design and influence HCPs and similar negotiated arrangements under the ESA. To understand this ruling, it is necessary first to understand the basic features of the HCP at issue.

Key Facts About the Natomas Basin HCP

In its earliest phase of development in the early 1990s, the Natomas HCP was conceived as a regional plan, involving five jurisdictions, to address the threats posed by development to the federally listed giant garter snake and the state-listed Swainson's hawk, both of which were declining due to urbanization and both of which rely heavily on the Natomas Basin for their survival. The discussion among five Natomas Basin jurisdictions was prompted by the FWS, which in 1994 issued a biological opinion concerning the impact of proposed Natomas Basin flood control improvements on the giant garter snake. According to the FWS, development facilitated by those improvements would potentially jeopardize the snake, but such jeopardy could be avoided if Natomas Basin jurisdictions jointly prepared an HCP.

Ultimately, the FWS reversed course and allowed flood control improvements despite the absence of an HCP. As a result, four of the five Natomas Basin jurisdictions lost interest in planning, and the HCP process was taken over by a "Working Group" of developers with major land holdings in the city of Sacramento, working in tandem with the city government. Unlike in the other jurisdictions, development in the city was imminent and an immediate resolution of federal and state endangered species issues was needed.

Rather than targeting lands within the city for mitigation, the HCP devised by the Working Group indicated that all of the city's undeveloped lands in the Natomas Basin (roughly 7,500 of the 46,000 undeveloped acres in the basin) would be developed. The HCP estimated that roughly 10,000 acres outside the city would also be developed, although it placed no cap on total development. Under the HCP's funding assumptions, this 17,500 acres of development would generate mitigation fees from developers sufficient to achieve the plan's objective of acquiring and managing a connected series of wildlife reserves on 8,750 acres. Finally, the HCP assumed that the remainder of the Natomas Basin (approximately 20,000 acres) would be kept in agricultural uses during the entire 50-year life of the plan and complement the reserve network's role in conserving wildlife.[16]

A huge array of uncertainties, all of which posed substantial threats to the imperiled species of the Natomas Basin, were left unresolved in the HCP. For example, as the HCP acknowledged, the plan left unresolved the extent, location, and effectiveness of the proposed habitat reserve system. With one minor exception, the HCP did not target any particular areas for reserve acquisition, and the HCP contained no scientific estimate of the amount of habitat that the covered species needed in order to survive. As the HCP also admitted, the actual level of development was unknown, since the plan contained no limits on total development in the ba-

12. 15 F. Supp. 2d 1274 (S.D. Ala. 1998).

13. Another basis for the holding was the FWS' failure to explain why it allowed the permittees to provide less mitigation than had been required in other HCPs involving the beach mouse.

14. 120 F. Supp. 2d 1005 (M.D. Fla. 2000).

15. The court perhaps was reacting to the fact that the HCP challenge was only one of several legal challenges that plaintiffs had brought before it. The primary focus of plaintiffs' case was a challenge to Volusia County's beach lighting measures. *See* Loggerhead Turtle v. County Council of Volusia County, Fla., 148 F.3d 1231, 28 ELR 21546 (11th Cir. 1998), *cert. denied*, 526 U.S. 1081 (1999). (The author represented plaintiffs in the U.S. Supreme Court phase of this case.)

16. Unlike earlier drafts of the plan, which covered only the giant garter snake and the Swainson's hawk, the final HCP purported to conserve 26 imperiled species, including 11 that were federally listed at the time the HCP was approved in December 1997.

sin. Finally, although the HCP contemplated that all five jurisdictions of the Natomas Basin would ultimately participate, the plan left unresolved what conservation strategy would be followed in the event that the city remained the only participant. At the same time, the HCP's goal of large connected blocks of habitat reserves could not be achieved without financial contributions from jurisdictions outside the city.

In reviewing the HCP, the FWS dismissed the risks to species posed by these uncertainties. Instead, the FWS emphasized the "corrective" features of the HCP, such as the plan's provisions for monitoring biological conditions on the reserves, its adaptive management program, and its planned "comprehensive program review" that would occur when urban development in the basin reached 9,000 acres. However, as the court in *NWF v. Babbitt* noted, the HCP's "corrective" features would be too little, too late if problems with the HCP were identified after developers in the city had paid their fees and completed their development.[17] Under the implementing agreement incorporated into the city's ITP, both the city and city developers were insulated from any financial responsibility for correcting these problems.

NWF v. Babbitt: A Summary of the Holdings

Plaintiffs, a coalition of six local, statewide, and national conservation groups, challenged the issuance of the Natomas Basin ITP and approval of the HCP on six grounds, and the court ruled for plaintiffs on five of them. The court held that the FWS arbitrarily found that:

> the city would "minimize and mitigate . . . to the maximum extent practicable" as required by ESA §10(a)(2)(B)(ii)[18];
>
> the city had "ensured adequate funding" to carry out the HCP as required by ESA §10(a)(2)(B)(iii)[19];
>
> the city's permit would "not appreciably reduce the likelihood of survival and recovery" of the covered species as required by ESA §10(a)(2)(B)(iv)[20];
>
> the city's permit would not jeopardize the existence of the covered species as required by ESA §7(a)(2)[21]; and
>
> the city's permit would have no significant environmental impact and, therefore, NEPA did not require preparation of an environmental impact statement (EIS).[22]

The court rejected plaintiffs' claim that the FWS had improperly failed to ensure that the HCP disclosed its impacts on covered species as required by ESA §10(a)(2)(A)(i).[23]

Lessons Learned

Several important principles about conservation planning emerge from the court's extensive analysis of the facts and law. As discussed below, as a result of the court's ruling, in reviewing HCPs in the future, the FWS will need to take greater care to ensure that someone is legally and financially accountable for the success of the HCP's mitigation program, and it will need to do a more comprehensive analysis of the adequacy of the HCP's conservation measures. At a minimum, the following steps will need to be taken.

Ensure Success of Off-Site Mitigation Through Regional Planning

From the perspective of a smart growth advocate, one of the most important principles that emerges from *NWF v. Babbitt* is the notion that an HCP proposing to conserve habitats away from the site of the habitat destruction, i.e., to implement off-site mitigation, would more likely satisfy ESA standards if it were to reflect planning at the regional scale. Throughout its opinion, the court strongly criticized the FWS for failing to address the nonparticipation of Natomas Basin jurisdictions outside the city, especially considering the fact that the HCP relied upon those jurisdictions both for conservation lands and for developable lands to generate mitigation fees.[24]

The court also went to great lengths to encourage multi-jurisdictional regional planning. After noting the FWS' failure to analyze the problems created by the nonparticipation of other Natomas Basin jurisdictions, the court offered dicta concerning how well the Natomas Basin HCP would fare if such participation had been achieved. According to the court, the FWS' findings approving the Natomas Basin HCP would "largely pass muster" if all Natomas Basin jurisdictions had participated in the plan as the FWS had originally intended.[25]

The FWS' decisionmaking suffered from at least two legal defects that would not have been avoided had key Natomas Basin jurisdictions participated in the HCP. First, with respect to the HCP, the FWS arbitrarily found under ESA §10(a)(2)(B)(ii) that the harmful impacts of the plan were minimized and mitigated "to the maximum extent practicable."[26] Second, with respect to the city's ITP, the FWS arbitrarily found under ESA §10(a)(2)(B)(iii) that the city had "ensured" adequate funding for the plan despite the city's failure to provide a funding guarantee.[27] As discussed below, these two defects in the HCP would not have been cured simply by bringing additional Natomis Basin jurisdiction into the planning process.

17. *See* National Wildlife Fed'n v. Babbitt, 128 F. Supp. 2d 1274, 1292-93, 1299-1300 (E.D. Cal. 2000).
18. *Id*. at 1291-93.
19. *Id.* at 1293-95.
20. *Id.* at 1295-1300.
21. *Id.*
22. *Id.* at 1301-02.
23. *Id.* at 1291.
24. *See id.* at 1291 (criticizing the FWS' failure to "reckon with the local nature of the Permit or analyze what would happen if the City's lands were developed under the HCP, while the lands outside the City limits were developed piecemeal, by individual landowners, outside the HCP and the protections provided by the HCP").
25. *Id.*
26. *Id.* at 1291 n.15. See discussion of the need for an analysis of stronger mitigation alternatives, *infra*.
27. See discussion of the need for guaranteed funding, *infra*.

Analyze the Relative Importance of Habitats to Be Destroyed and Conserved

NWF v. Babbitt makes clear that the FWS is obligated under ESA §§10(a)(2)(B)(iv) and 7(a)(2) to analyze the quality of the habitats to be sacrificed to development in the city and to weigh this carefully against the quality of the habitats that would be conserved outside the city. According to the court, "it cannot be assumed that if valuable habitat lands in the City are developed, equally valuable habitat lands may be protected elsewhere."[28]

The court criticized the FWS because the record had "no particularized analysis of the City's lands as habitat" and "no consideration of how species will fare if the City's lands are developed and some or all of the remainder of the Basin is developed."[29] It also criticized the FWS for failing to address the impact on covered species if the HCP's goal of large, connected reserves cannot be achieved due to nonparticipation in the HCP by Natomas Basin jurisdictions outside the city.[30] In essence, the ruling provides the FWS with a road map for a regional cumulative effects analysis, one that measures the habitat-altering impacts of both permitted development and anticipated future development in the region against the conservation value of offsetting mitigation measures.

Analyze the Economic Practicalities of Securing Greater Mitigation

The court held that the FWS' ESA §10(a)(2)(B)(ii) finding was arbitrary because the record failed to show how the harmful impacts of the amount of take contemplated in the plan would be minimized and mitigated "to the maximum extent practicable."[31] According to the court, when examining alternatives to a proposed HCP, the FWS must "consider an alternative involving greater mitigation."[32] The FWS wrongly accepted without analysis the developer-led Working Group's assertion that the proposed mitigation fee was "practicable," without even inquiring into what fee would be the "*maximum extent* practicable."[33]

In the future, the FWS will need to analyze the economic practicality of securing greater mitigation than that proposed by the permit applicant. According to the court, it is not enough for the FWS to say that the proposed amount would meet "the minimum biological necessities of the species."[34] Moreover, ESA §10(a)(2)(B)(ii) is not satisfied simply because the HCP's adaptive management provisions will ultimately give rise to a higher fee. In fact, the court questioned how the initial fee to be borne by city developers could be deemed the maximum extent practicable if (as the HCP presumes) subsequent developers can afford to pay fee increases.[35]

Ensure a Reliable Funding Source

NWF v. Babbitt makes clear that the primary funding source for an HCP needs to be carefully spelled out. The court strongly criticized the HCP's reliance on future mitigation fee increases to pay for present-day increases in land acquisition costs, noting that such fee increases could not be covered without a "ready supply of land to be developed under the HCP."[36] Because the land in the city was expected to be developed in a short time frame, the developers that would be needed to pay an increased fee would be those with lands outside the city—lands that were not covered by the HCP. FWS' failure to address this funding gap was cited by the court in connection with all four of its holdings that FWS made arbitrary findings under ESA §§10(a)(2)(B)(ii), (B)(iii), (B)(iv), and 7(a)(2).[37]

Provide a Guaranteed Backup Funding Mechanism

In this author's view, the court's concern about the absence of a "ready supply of land to be developed under the HCP" does not necessarily point to a solution to the problem of the funding gap. That is, the funding gap identified by the court will not always be solved simply by identifying a larger "ready supply" of developable lands for inclusion in the HCP so that greater amounts of mitigation fees will be available. If the owners of the lands due to be developed in the later portion of the HCP's 50-year time frame are forced to pay substantially higher mitigation fees than previous developers, and if the reason for this higher fee is to remedy massive problems caused by the previous developers, the HCP might rightfully be rejected as an inequitable "Ponzi scheme."[38] To avoid this scenario, planners crafting HCPs need a more reliable backup funding mechanism.

Fortunately, the court in *NWF v. Babbitt* anticipated this problem by requiring a financial guarantee of the HCP's performance. According to the court:

> It is not clear that a funding mechanism that is not backed by the applicant's guarantee could ever satisfy the requirement of [ESA §10(a)(2)(B)(iii)] that the applicant "ensure" funding for the Plan. Assuming, however, that a cost shifting mechanism "ensures" funding within the meaning of [§10(a)(2)(B)(iii)], in these circumstances, where the adequacy of funding depends on whether third parties decide to participate in the Plan, the statute requires the applicant's guarantee.[39]

This language suggests that it *might* be possible for an ITP applicant to avoid providing a financial guarantee that the

28. 128 F. Supp. 2d at 1299. *See also id.* at 1291. The court did not address plaintiffs' contentions that the substantial net loss of habitats allowed by the HCP, and the HCP's failure to identify the location of the future reserves, violated the ESA's requirement that HCPs not "appreciably reduce the likelihood of survival and recovery" of a covered species. Instead, it accepted without analysis the FWS' contention in its biological opinion that "habitat enhancements [will] increase the amount and quality of [the covered species'] habitat." *Id.* at 1283.

29. *Id.* at 1291. *See also id.* at 1299.

30. *Id.* at 1299.

31. *Id.* at 1292-93.

32. *Id.* at 1292.

33. *Id*. (emphasis added).

34. *Id.* at 1293.

35. *Id.*

36. *Id.* at 1291.

37. *Id.* at 1293-95, 1299-1300.

38. The FWS' failure to address this disparity in the Natomas Basin HCP was part of the reason why the court struck down its ESA §10(a)(2)(B)(ii) finding. *See id.* at 1293 ("it is not obvious how the Secretary concluded that City developers would pay a fee that is the maximum practicable, particularly when later developers are expected to pay a much larger fee").

39. *Id.* at 1295 (citations omitted).

HCP will achieve its objectives, by "cost-shifting" to plan participants other than the ITP applicant. The court was unsure about whether even this hypothetical tactic would satisfy ESA §10(a)(2)(B)(iii). However, in either case—whether the ITP applicant is required to provide the backup funding or whether the backup funding could be provided by some other plan signatory—it is clear from *NWF v. Babbitt* that §10(a)(2)(B)(iii) can only be satisfied if a financial guarantee of the HCP's performance is provided. Because the permittee for the Natomas Basin HCP (the city) refused to make up any funding shortfall if the primary funding sources provided under the HCP proved inadequate, and because no one else had committed to make up a funding shortfall, the court struck down the FWS' §10(a)(2)(B)(iii) finding as arbitrary.

This holding, which upholds the plain meaning of ESA §10(a)(2)(B)(iii), does not necessarily place any new onerous burdens on local jurisdictions or other HCP permittees. As the court suggests, it may simply mean that the city or other permittee must begin securing private insurance (or, perhaps more appropriately, a performance bond) to cover the costs of achieving the plan's conservation goals in the event that the mitigation fee proves inadequate. The cost of the performance bond presumably could be covered by a higher mitigation fee.[40]

More importantly, this holding greatly improves the chances that habitat conservation planning will provide meaningful protections for imperiled species. Once permittees decide either to acquire a performance bond or to provide their own backup funding to ensure the success of the plan, the dynamics of HCP development will change substantially. Although permittees will likely continue to push the FWS to allow modest conservation objectives, they will no longer have the incentive to take cost-saving scientific shortcuts in designing strategies to achieve those objectives. Because the permittees or their surety companies will be obligated financially to achieve the objectives, they will be more likely to confront honestly the challenges of conserving imperiled species at the regional scale and will be more likely to take upfront measures to improve the chances of success.

Avoid Severe Limits on Adaptive Management

NWF v. Babbitt raises serious questions about the legality of placing severe limits on adaptive management. In its analyses of each of the four ESA violations, the court questioned the logic of the HCP's adaptive management scheme, which placed a cap on fee increases for many types of expenditures, prohibited retroactive application of fee increases, called for a "mid-course review" that was too late to accomplish anything, and insulated the city from the cost of any funding shortfalls.[41] The court suggested that this scheme could conceivably be valid if the HCP were to contain a mechanism to identify problems with HCP performance and to pay for necessary measures to correct these problems over the course of the plan.[42] However, the restrictive adaptive management scheme in the Natomas Basin HCP did not pass muster because the review of the plan's performance would be too late to accomplish anything, and because no one had committed to remedy any problems with plan performance that might be identified.

The court's analysis of the Natomas Basin HCP's adaptive management strategy places into question many of the "no surprises" HCPs that have been negotiated in recent years. "No surprises" HCPs are HCPs in which the permittee takes advantage of the limits on responsibility set forth in the 1998 "no surprises" rule[43] or the nearly identical policy issued in 1994.[44] The rule states that once an ITP is issued, the FWS "will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan *without the consent of the permittee*."[45] Permittees who avail themselves of this regulatory shield and refuse to consent to adaptive management in their HCPs effectively shift the risk of poor HCP performance to imperiled species.[46] *NWF v. Babbitt* suggests that, to satisfy the ESA, permittees must agree to broad adaptive management provisions in which the permittee (or some other entity) takes financial responsibility for ensuring that the HCP achieves its stated objectives.

Do Not Rely on the FWS' Oversight and Permit Revocation Authority to Provide Accountability

As noted earlier, the court in *Loggerhead Turtle* held that an HCP requiring a permittee county to submit its annual appropriation to the FWS for review and providing the FWS with permit revocation authority to address any funding inadequacies satisfies ESA §10(a)(2)(B)(iii)'s requirement that the permittee "ensure" adequate funding. The court in *NWF v. Babbitt* likewise considered an HCP with extensive FWS oversight and permit revocation authority. However, the court held that similar provisions did not satisfy §10(a)(2)(B)(iii)'s requirement that the permittee "ensure" adequate funding because they did nothing more than give the FWS the discretion to address permit violations.[47]

NWF v. Babbitt is the better reasoned of the two opinions. The mere fact that the FWS has discretion to revoke the permit does not mean that such discretion will in fact be exercised. In cases where the political ramifications of revoking

40. *See id.* at 1294 n.20.

41. *Id.* at 1293-94, 1299. *See also id.* at 1299-1300 (criticizing the FWS for failing to analyze how the HCP's monitoring and adaptive management provisions could be effective in light of evidence that the city's lands would be developed quickly).

42. *See id.* at 1291, 1294, 1299.

43. *See* Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. 8859 (Feb. 23, 1998).

44. NMFS, U.S. FWS, No Surprises: Assuring Certainty for Private Landowners in Endangered Species Act Habitat Conservation Planning (1994) (available from the ELR Document Service, ELR Order No. AD-319).

45. 50 C.F.R. §§17.22(a)(5), 17.32(a)(5) (2000) (emphasis added).

46. Although the Natomas Basin HCP and implementing agreement contained "no surprises" assurances, the city's permit stated that these assurances were of "no effect." The FWS had insisted upon this permit condition because it had promised in a 1997 interim settlement of unrelated litigation (Spirit of the Sage Council v. Babbitt, No. 1:98CV01873 (EGS) (D.D.C. 1997)) not to approve "no surprises" HCPs prior to issuance of the formal "no surprises" rule. After the "no surprises" rule was published in early 1998, the FWS proposed to amend the permit to reinstate the "no surprises" provisions of the Natomas Basin HCP. 63 Fed. Reg. 29020 (May 27, 1998). However, apparently in recognition of the fact that "no surprises" would increase the legal vulnerability of the HCP, the FWS ultimately decided not to follow through with this proposal.

47. 128 F. Supp. 2d at 1295.

a permit are severe, the FWS would likely avoid resorting to this tool at all costs. Moreover, even if the threat of permit revocation were credible, it is difficult to see how this threat would ensure adequate funding of an HCP's conservation program. After the bulk of the development activity under an HCP has been completed, a take has occurred, and problems with mitigation have begun to arise, the permittee would very likely prefer permit revocation over the alternative of having to address funding gaps. Because any protected habitats on the property would be destroyed and the take prohibition would no longer apply, permit revocation would not result in any restrictions on economic activity. Permit revocation authority is simply not a sufficient safeguard for species to justify allowing an HCP with uncertain funding (or other highly uncertain conservation measures) to go forward.[48]

Prepare an EIS

Under NEPA, an EIS must be prepared in connection with a federal permit unless the permitting agency finds that the permit will have no significant impact on the environment.[49] Despite the fact that the Natomas Basin HCP purported to allow up to two acres of endangered species habitat to be destroyed for every single acre to be acquired for reserves, the FWS found that no EIS was needed prior to issuing the ITP.

In concluding that the FWS' refusal to prepare an EIS was arbitrary, the court in *NWF v. Babbitt* focused on the list of factors, set forth in NEPA regulations, that the FWS was required to consider in determining whether the ITP and HCP would have a significant environmental impact.[50] According to the court, "[m]any of the factors identified by the regulations point toward preparation of an EIS," including the "unique geographic characteristics" of the basin, "the controversy concerning the likely effects of the Permit," "the degree to which the possible effects are uncertain," "substantial controversy" over the science, a "substantial dispute" over the effect of the action, the "precedential value of the Permit," and the "degree to which the [HCP] may affect an endangered or threatened species."[51]

Many of these "significance" factors are ones that arise repeatedly when HCPs are developed. By reaffirming the importance of these factors, *NWF v. Babbitt* gives the FWS and permit applicants a stern reminder of their duty to prepare an EIS in connection with most HCPs. By preparing EISs and carrying out scoping workshops and other public hearings in connection with them, the FWS and permit applicants will provide an important avenue for citizens to share important information and insights about how to reconcile development with wildlife conservation.

Conclusion

NWF v. Babbitt gives life to some important wildlife safeguards inherent in the ESA and NEPA that the FWS has neglected in its rush to build an HCP program. The effect of the ruling will likely be to produce more rigorous HCPs that honestly confront the challenges of conserving wildlife species that cross jurisdictional boundaries. This may lead to more and better regional planning, which is good news for anyone trying to conserve imperiled species and ecosystems in the face of rapid sprawl.

48. The holding in *NWF v. Babbitt* regarding permit revocation authority is especially significant in light of the FWS' recent regulation clarifying that it has the authority to revoke ITPs in the event that they are jeopardizing the existence of species. *See* Safe Harbor Agreements and Candidate Conservation Agreements With Assurances, 64 Fed. Reg. 32705 (June 17, 1999). The FWS enacted this regulation in response to the *Spirit of the Sage Council* litigation, *see supra* note 46, in which environmentalists are arguing that the "no surprises" rule's restrictions on adaptive management pose unacceptable risks to imperiled species. *NWF v. Babbitt* suggests that the FWS' assertion of permit revocation authority would not cure the "no surprises" rule's legal defects.

49. 42 U.S.C. §4332(2)(C), ELR STAT. NEPA §102(2)(C).

50. 128 F. Supp. 2d at 1301-02.

51. *Id.*

Addendum:

On May 15, 2001, U.S. District Judge Levi approved an interim settlement agreement between the plaintiffs, the City of Sacramento and developers, allowing a limited amount of development to go forward in specified areas of the City during the one- to two-year period in which a new regional HCP and EIS is prepared. The agreement provides for acquisition of some of the best quality habitats in the basin, calls for substantial increases in mitigation fees to pay for them, and provides a guarantee from the City to cover any funding shortfalls. Although the federal government was not a party to the settlement, it supported the agreement and, like the City and developers, dismissed its appeal of Judge Levi's rulings.