

HABITAT CONSERVATION PLANS:
RESTORING THE PROMISE OF CONSERVATION

BY
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I. INTRODUCTION

In 1982, Congress amended the Endangered Species Act (ESA) to allow limited take of endangered species. This amendment requires the issuance of an Incidental Take Permit (ITP) by either the Secretary of Interior or the Secretary of Commerce, and creation of a Habitat Conservation Plan (HCP). The United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (collectively, "Services") oversee the HCP program. Since its creation, the HCP program has been one of the most controversial programs in environmental law. This Article will trace the history of the HCP program and suggest two inherent flaws: a lack of uniform standards and ineffective opportunity for public review and enforcement. Unless remedied, the HCP program will be unable to provide the conservation benefits promised by Congress.

II. RECENT CASE STUDY: THE ALABAMA BEACH MOUSE — AN HCP GONE BAD

The Alabama beach mouse was listed as an endangered species in 1985, due to the drastic destruction of the species' habitat by residential and commercial development, recreational activity and tropical storms.¹ At the time of listing, the USFWS determined there was a total baseline habitat on the Fort Morgan Peninsula of approximately 671 acres. Between 1985 and 1996, another 8.5% of beach mouse habitat was lost to development and destruction from Hurricane Opal.² During this time, the USFWS issued four Incidental Take Permits, allowing further habitat loss.³ In January of 1996, after more beach mouse habitat was destroyed by a series of hurricanes, the USFWS concluded that the designated critical habitat might be inadequate for beach mouse recovery and delisting.⁴ Despite this finding, the USFWS then issued ITPs for the Aronov project and the Fort Morgan project.⁵ The net effect of these two projects was the permanent destruction of 44.5 acres of beach mouse habitat and an undetermined amount of species take.⁶

¹ See *Sierra Club v. Babbitt*, 15 F. Supp.2d 1274, 1280 (S.D. Alabama 1998). Permitted projects included single-family residences, multi-family developments, and a golf course.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Private citizens and several environmental organizations brought an action to prevent the construction of the Aronov and Fort Morgan projects based on violations of the Endangered Species Act and the National Environmental Protection Act.⁷ The plaintiffs brought three claims: 1) the level of off-site mitigation funding was inadequate and lacked any rational basis; 2) the USFWS's off-site mitigation policy was inconsistent; and 3) the USFWS's reliance on unnamed sources to pay the additional costs for providing adequate off-site mitigation was arbitrary and capricious.⁸

As to the plaintiff's first contention, the court held that the required mitigation lacked any rational basis. The court based its decision on concerns raised by the USFWS's own field offices. The regional office stated that the effects of the Fort Morgan project were the largest of any beach mouse HCP to date, but provide the least mitigation.⁹ The court found the Administrative Record replete of any discussion regarding the level of mitigation required for the two projects.¹⁰ Instead, the USFWS claimed that mitigation concerns were addressed before the final Biological Opinion.¹¹ The solution reached by the USFWS and the developers, before the public had an opportunity to review and comment on the proposal, was to require additional funds for off-site mitigation. However, the source and amount of additional funds, or the location of the off-site mitigation were never mentioned in the record.¹² In response to the USFWS's actions, the court stated, "remarkably the USFWS simply ignored the clearly expressed concerns of the experts Congress intended the agency to rely upon in making such [a] discretionary decision."¹³ The court thus held that the level of mitigation prescribed by the USFWS was arbitrary and capricious.

The plaintiff's second claim addressed the USFWS's inconsistency in determining the level of mitigation required for incidental take. The court referred to the USFWS's Habitat Conservation Planning Handbook ("Handbook"), to evaluate the USFWS's decision. According to the Handbook, mitigation measures should be as consistent as possible for all HCPs with similarly situated species. The court examined the levels of mitigation required for other projects

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

within beach mouse habitat and found no consistency. For example, the Laguna Key project destroyed 19 acres of beach mouse habitat and was not required to fund any off-site mitigation, while the Phoenix project destroyed only 1.4 acres and was required to provide \$80,000 for off-site mitigation.¹⁴ The court minced no words when it stated that it “could find no evidence that the USFWS paid any attention to its own guidelines,” and that the record was “devoid of any biological or other good reasons to justify such finding” by the USFWS.¹⁵

In response to the plaintiffs third claim, the court held that the USFWS's reliance on unnamed sources for offsite mitigation was “contrary to the law and unsupported by any factually reliable basis in the Administrative Record.”¹⁶ The court found that the Biological Opinion required additional funds from non-profit organizations in order to fully mitigate the projects, but never stated how much, from whom, or the likelihood the funds would ever be acquired.¹⁷ As a result, the court held that the Administrative Record was devoid of any rational basis upon which the USFWS could have reasonably relied in deciding to issue the ITPs and, therefore, remanded the permits to the agency for review.

The Alabama beach mouse example illustrates two common criticisms of the HCP program: the failure to establish uniform and bright-line standards; and the lack of venue provided for citizen participation and oversight in the HCP process. To evaluate the validity of these criticisms, one must review the evolution of the HCP program. By tracing the history of the HCP, from its inception in 1982 through its most recent amendments, it becomes clear how the Aronov and Fort Morgan permits, like so many other HCPs, almost slipped through the cracks of the approval process.

III. EVOLUTION OF THE HCP PROGRAM

A. Overview of the ESA

Since its enactment in 1973, the Endangered Species Act has been our most protective and controversial environmental law. Congress enacted the ESA in response to findings that numerous species were becoming extinct due to

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

untempered economic growth and development.¹⁸ Congress' solution was "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved [and] to provide a program for the conservation . . . of such species."¹⁹ To this end, the ESA prohibits, with limited exception, public and private persons from "taking" a threatened or endangered species.²⁰ The ESA sets out detailed provisions for listing species; requirements for federal consultation; the designation of critical habitat; and the creation of recovery plans.²¹

B. Section 9 Prohibition on "Take"

Section 9 of the ESA sets out the general prohibition on taking listed species.²² Congress defined "take" as actions that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered species.²³ The legislative history suggests that Congress intended the definition of take "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."²⁴ The term "harm," which is included in Congress' definition of take, is defined by administrative regulation to include

¹⁸ 16 U.S.C. § 1531(a)(1) (1988).

¹⁹ 16 U.S.C. § 1531(b) (1988).

²⁰ 16 U.S.C. § 1531(a)(2) (1988).

²¹ "Listing" is the process whereby the Secretary of Interior or Commerce can add a species that is either endangered or likely to become endangered in the foreseeable future. S. REP. NO. 93-307 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989. Unfortunately, due to the large number of species that are under consideration for listing, there is a backlog of species. Critical habitat is defined as the areas containing physical or biological factors "essential to the conservation of the species" and which may require special management considerations or protection. 16 U.S.C. § 1532(5)(A) (1988). Federal agencies are required to 1) conserve listed species, 2) consult with Interior and to avoid actions that would "jeopardize" them or destroy or adversely modify their critical habitat, and 3) avoid "taking" them except where the harm is minimal and unavoidable. 16 U.S.C. § 1536(a)(4). For an in-depth analysis of these provisions, see Oliver Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993).

²² Section 9(a)(1) states that "with respect to any endangered species of fish or wildlife listed pursuant to Section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to . . . (B) take any such species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(b). Section 9 expanded the protection of listed species beyond that given under the Endangered Species Protection Act of 1966 to include protection of endangered and threatened species on private land. Endangered Species Protection Act, Pub. L. No. 89-669, 80 Stat. 926 (repealed 1973).

²³ 16 U.S.C. § 1532(19) (1988).

²⁴ S. REP. NO. 93-307 (1973), *reprinted in* SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980 (1982).

“significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”²⁵ With this broad definition of take, the ESA grew to include actions on private land. In addition, section 9 added teeth to species protection by including both civil and criminal penalties for the taking of endangered species.²⁶

The true power of section 9’s take prohibition, with the agency’s definition of harm, was not known until 1981, when the Ninth Circuit decided *Palila v. Hawaii Department of Land & Natural Resources*.²⁷ In *Palila*, the Ninth Circuit held that section 9 not only prohibits actions that directly kill an individual of the endangered species, but under certain circumstances prohibits habitat modification that may injure individual members of the species.²⁸ Several Circuit Courts, and most recently the United States Supreme Court, have followed the holding of *Palila*, giving section 9 and the corresponding definition of harm an expansive reading.²⁹ *Palila* and the line of cases that follow *Palila* can be interpreted to extend the reach of the ESA to a variety of common activities on private land.³⁰

C. Shift in Focus: San Bruno Mountain and the Creation of HCPs

Following *Palila*, confusion surrounded the relationship of the ESA to private development activity. Stories are told of USFWS offices threatening local government officials with criminal prosecution or fines if they approved certain

²⁵ 50 C.F.R. § 17.3 (1991).

²⁶ See U.S.C. § 1540 (1994).

²⁷ See *Palila v. Hawaii Dep’t of Land & Nat. Res.*, 639 F.2d 495 (9th Cir. 1981).

²⁸ See *id.* at 495. Fish and Wildlife proposed an amended definition of the term “harm” during the *Palila* litigation. 46 Fed. Reg. 29,490 (1981). Although the intention of the proposed change was to require actual death of an individual of the species, the revision merely made a few grammatical changes to the definition and the *Palila* court’s definition prevailed. See Robert Thorton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act*, 21 ENVTL. L. 603, 611 (1991).

²⁹ See *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995). It is important to note that in this plurality opinion, Justice O’Connor indicated that not all of the *Palila* decision was good law; *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (holding that harvesting timber in red-cockaded woodpecker habitat was modification that constituted taking); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1295 (8th Cir. 1989) (holding that registration of strychnine by EPA constituted taking because of consumption by endangered species).

³⁰ See Thorton, *supra* note 28, at 614 (describing reauthorization process by Congress and opposition by developers and local governments to section 9 following *Palila*).

developments within their jurisdiction.³¹ In response, developers and state and local governments called upon Congress to clarify the requirements of section 9.³²

While Congress considered the reauthorization of the ESA, a developer in California embarked on an innovative approach to allow development, while protecting endangered species. San Bruno Mountain, near San Francisco, was the site of a ten-year battle over development and the protection of endangered butterflies.³³ In late 1976, the local board of supervisors agreed to allow development if the developer dedicated two thirds of the property as a park for protection of the mission blue butterfly — an endangered species.³⁴ Two weeks after the developer's final conveyance for the required conservation, the USFWS proposed listing the Callippe silverspot butterfly, another species found on the property.³⁵ Instead of scratching the entire project, the developer entered into a three-year planning process that included landowners, developers, state, local and federal agencies, and members of the environmental community.³⁶ The ultimate goal of these negotiations was to allow development while providing long

³¹ See *id.* at 613-14 (describing incidents in California after *Palila*). It is important to note that some commentators believe that the furor after *Palila* was unfounded since the USFWS rarely took notice of activities on private land. This may explain the small number of HCPs created in the first 10 years of section 10. See Houck, *supra* note 21.

³² There seems to be some division as to the true concerns of Congress when the 1982 Amendments to the ESA were discussed in the congressional hearings. Karin Sheldon states that very few witnesses at the congressional hearings addressed the potential impacts of section 9 on private landowners. See Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 279, 294-95 (1998). Robert Thorton, who was Majority Counsel to the U.S. House of Representatives Subcommittee on Fisheries and Wildlife Conservation and the Environment at the time of the hearings, states that Congress realized the potential ramifications of a broad definition of take on private landowners and created the Amendments in order to relieve private landowners of the apparent burden. See Thorton, *supra* note 28, at 610.

³³ See Thorton, *supra* note 28, at 621; Sheldon, *supra* note 32, at 297.

³⁴ See Thorton, *supra* note 28, at 621-22.

³⁵ See *id.* 43 Fed. Reg. 28,938-45 (1978) (proposing to list Callippe silverspot butterfly as endangered species). According to one commentator, a listing of the silverspot after *Palila* would have left the developer with very little chance of receiving approval for development from the County. See Thorton, *supra* note 28, at 621-22.

³⁶ See *id.* It is important to note at this point that not everyone from the environmental community felt that they had the ability to participate in the San Bruno HCP. See DEFENDERS OF WILDLIFE, FRAYED NETS – CONSERVATION PLANNING UNDER THE ENDANGERED SPECIES ACT 43 (1998) [hereinafter FRAYED NETS]. In fact, the environmental group (Save San Bruno Mountain) that was part of the steering committee for the HCP disbanded as a result of internal conflicts over the negotiated deal. *Id.* One of the founding members of Save San Bruno Mountain claims that the two representatives from their organization “quietly hammered out a compromise” that was unsatisfactory to other members of the group. *Id.* (quoting David Schooley, founding member of Save San Bruno Mountain).

term protection for the endangered species.³⁷ Thus began the first Habitat Conservation Plan.

As the San Bruno negotiations continued, Congress debated bills to amend and reauthorize the ESA. Congress decided that private landowners needed a means to carry out otherwise lawful activities without being subject to the prohibitions of section 9.³⁸ The dilemma came in combining the protection of endangered species with a limited exception for private landowners.³⁹

During these debates, proponents of the San Bruno HCP approached Congress with their project. Although the members of the San Bruno HCP had reached a final agreement, it could not be implemented without an amendment to section 9.⁴⁰ Congress approved of the San Bruno plan, particularly its long-term commitment to preservation of habitat; consensus among diverse parties; and assurances to landowners that no further mitigation would be required.⁴¹ Based on the San Bruno proposal, Congress amended the ESA with the passage of section 10(a).⁴²

D. Section 10(a): The Incidental Take Permit

Section 10(a) grants the Secretaries of Interior and Commerce the authority to permit anyone to engage in activities that may result in the taking of an endangered or threatened species, so long as the taking is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."⁴³ An applicant for a section 10(a) incidental take permit must submit a conservation plan specifying the impacts of the take; steps by the applicant to minimize and mitigate the impacts of the project; alternatives considered by the applicant which would avoid the take; why these alternatives were not utilized; and any other measures that the Secretary feels are necessary for the particular project.⁴⁴ To issue an ITP,

³⁷ See *id.*

³⁸ See H.R. CONF. REP. NO. 97-835, at 29 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2808.

³⁹ See *id.* at 30. The House report notes that the Endangered Species Act intended species not to be viewed in isolation but rather in terms of their relationship to the ecosystem. With this goal in mind, Congress believed the section 10(a) amendment would allow for protection of the ecosystem, even though it may mean the loss of individuals of the species. *Id.*

⁴⁰ See 16 U.S.C. § 1538 (prohibiting take of endangered species).

⁴¹ H.R. REP. NO. 97-835, at 30-31 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2830-31.

⁴² See 16 U.S.C. § 1539(a) (1994).

⁴³ See *id.*

⁴⁴ See 16 U.S.C. § 1539(a)(2)(A); see also Thorton, *supra* note 28, at 621.

the Secretary of Interior or Commerce must find that the taking will be incidental; the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the take; the applicant will ensure adequate funding; the take will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and any additional measures required by the Secretary.⁴⁵

The legislative history of section 10(a) reflects Congress' vision for HCPs. The House Report for section 10(a) notes that Congress believed HCPs would further the ultimate goals of the ESA, which go beyond the protection of individual species. The Report states: "Although the regulatory mechanism of the Act focuses 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."⁴⁶ To this end, section 10(a) provides that the "Secretary may . . . approve conservation plans which provide long term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan."⁴⁷

The House Report states that the section 10(a) permit process is modeled after the San Bruno HCP and therefore the elements of that plan must be clearly understood.⁴⁸ The Report then proceeds to highlight important factors in the San Bruno plan that should be included in all future section 10(a) permits.

With respect to the scientific research involved in the San Bruno plan, Congress noted that "independent and exhaustive" biological studies were used

⁴⁵ See 16 U.S.C. § 1539(a)(2)(B); see also Thorton, *supra* note 28, at 621. In addition, since the issuance of an ITP is a federal action, the government must satisfy section 7 consultation before a permit is issued. See 50 Fed. Reg. 39,683 (1985) (determining that consultation is required before ITP is issued). See H.R. REP. No. 97-835, at 29 reprinted in 1982, U.S.C.C.A.N. 2807, 2829. The House Report states "The secretary would base his determination on whether or not to grant the permit, in part, by using the same standard as found in section (7)(a)(2) of the Act, as defined by the Interior Department regulations." *Id.* at 29. Similarities between section 10(a) requirements and section 7 include: specification of the takings impact, alternative actions considered, the nature of the taking will be incidental, no jeopardy will occur and steps will be taken to minimize the impact of the take. See Richard E. Webster, *Habitat Conservation Plans Under the Endangered Species Act*, 24 SAN DIEGO L. REV. 243 (1987). Generally, this is not a difficult procedure since most of the requirements of section 7 are mirrored in section 10(a). See Houck, *supra* note 21, at 353.

⁴⁶ See H.R. REP. No. 97-835, at 30, reprinted in 1982 U.S.C.C.A.N. 2807, 2830 [hereinafter House Report].

⁴⁷ See *id.*

⁴⁸ See *id.* at 2830-31 (stating that section 10 is modeled after plan developed in San Bruno area of San Mateo County).

to determine the location of species and their habitat.⁴⁹ Furthermore, "the biologic study developed substantial information regarding the habit and life cycles of the butterfly and other species of concern."⁵⁰ In order to collect this data, the field research portion of the San Bruno plan took over two years to complete.⁵¹

The House Report also notes that the San Bruno plan allowed for "the enhancement of the survival of the species," by preserving eighty-seven percent of the listed species' habitat.⁵² The plan also established a sufficient program to provide permanent on-going funding for important habitat management and enhancement activities.⁵³ Furthermore, the plan created a permanent structure to insure uniform protection and conservation of habitat throughout the area.⁵⁴ Finally, the plan required a formal agreement between the parties to insure implementation of all elements.⁵⁵

IV. THE CLINTON ADMINISTRATION: A NEW ERA FOR SECTION 10(A)

Despite the passage of section 10(a), very few HCPs were proposed during the 1980s.⁵⁶ In an effort to increase the use of HCPs by private landowners, the Clinton Administration created the "No Surprises" policy and an expedited permitting procedure for "low effect" HCPs. These two policies dramatically increased the number of HCP proposals and approvals in the last five years. However, based on recent reports, these additions may be doing more harm than good.

⁴⁹ See *id.* at 2832.

⁵⁰ See *id.*

⁵¹ See *id.* Experts were consulted not only for the endangered butterflies, but also for other unlisted species to be included in the HCP. See FRAYED NETS, *supra* note 36, at 22. For example, a research herpetologist for UC Berkeley was contracted to study and map the potential habitat of the San Francisco garter snake. *Id.*

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See Albert C. Lin, *Participant's Experiences With Habitat Conservation Plans and Suggestions For Streamlining the Process*, 23 *ECOLOGY L.Q.* 369 (1996). Mr. Lin provides an extensive review of ITP holders and their experiences with the process as a whole. See also Donald C. Baur and Karen L. Donovan, *The No Surprises Policy: Contracts 101 Meets the Endangered Species Act*, 27 *ENVTL. L.* 767 (1997) (stating that many early HCPs failed before negotiations were complete). Only 12 HCPs were approved in between 1982 and 1992. See FRAYED NETS, *supra* note 36, at 4.

⁵⁶ See *id.*

A. "No Surprises"

In August of 1994, the Clinton Administration introduced the No Surprises policy.⁵⁷ No Surprises states that the Services will not require additional land or financial compensation beyond that provided for in an approved HCP. The long-term assurances provided by No Surprises are intended to encourage use of the HCP process by taking the uncertainty out of the ESA.⁵⁸ To its supporters, No Surprises shows that the ESA can work to protect species without stifling resource utilization and economic development.⁵⁹ To its critics, No Surprises represents a one-way street — providing rock-solid assurances to landowners but leaving the public with virtually no safe guard to ensure that the HCP will in fact provide long term conservation benefits.⁶⁰ Consequently, the No Surprises policy continues to be one of the most debated provisions in the HCP regulations.

B. *The HCP Handbook and "Low Effect" HCPs*

In November 1996, the Department of the Interior and the National Oceanic and Atmospheric Administration published the Habitat Conservation Planning Handbook.⁶¹ The purpose of the Handbook is to provide the Services with a guide to processing incidental take applications and participating in the associated conservation efforts.⁶² The Handbook is the first standardized guide to the HCP process.

⁵⁷ See Administration's New Assurance Policy Tells Landowners: "No Surprises" in Endangered Species Planning, Office of the Secretary, U.S. Dep't of the Interior, News Release, Aug. 11, 1994, available in 1994 WL 440313 at *1.

⁵⁸ See Bauer and Donovan, *supra* note 55, at 777.

⁵⁹ See *id.* (stating that No Surprises essentially saved ESA from complete revision by making Act workable and less stringent).

⁶⁰ See John Kostyack, *Reshaping Habitat Conservation Plans for Species Recovery: An Introduction to a Series of Articles on Habitat Conservation Plans*, 27 ENVTL. L. 755, 761 (1997).

⁶¹ See U.S. Fish and Wildlife Service & National Marine Fisheries Service, *Endangered Species Habitat Conservation Planning Handbook*, Foreword (1996) available in 61 Fed. Reg. 63,854-57 (1996) [hereinafter Handbook].

⁶² See *id.* at 1-1. More specifically, the Handbook is intended to: 1) ensure that the goals and intent of the conservation planning process under the Endangered Species Act are realized; 2) to establish clear standards that ensure consistent implementation of the section 10 program nationwide; and 3) to ensure that USFWS and NMFS offices retain the flexibility needed to respond to specific local and regional conditions and a wide array of circumstances. See *id.*

In order to understand the HCP process set out in the Handbook, it is important to recognize several recent trends in HCPs. The Preface to the Handbook details two important trends — the enormous in-

A new addition to the HCP program found in the Handbook is the "low effect" HCP.⁶³ Generally, low-effect HCPs are created by single landowners with relatively few acres of habitat.⁶⁴ The effects of these projects on listed species are frequently "minor or negligible" and the applicants generally do not have the resources to withstand the long HCP application and approval process.⁶⁵ To accommodate such applicants, the Handbook mandates that the low-effect application process be "substantially simplified and permit issuance . . . be expedited to the maximum extent possible."⁶⁶ The Services intend to expedite this process by establishing clear processing standards for all HCP permit applicants; eliminating or standardizing section 10(a) documents whenever possible; eliminating unnecessary review procedures; and categorically excluding low-effect HCPs from NEPA.⁶⁷ Although the Handbook creates this new category, it fails to specifically define low-effect projects.⁶⁸ Therefore, the Services have substantial discretion with respect to allowing a project to fall into this category.

V. THE HCP PROGRAM TODAY: FILLING THE GAPS

Since the San Bruno HCP, over 200 HCPs have been approved, with just as many in development.⁶⁹ As the popularity of HCPs grows, so has the research addressing their effectiveness. In the past two years, several extensive reports have been released on the adequacy of HCPs.⁷⁰ These reports have been far from

crease in incidental take permits issued and the size of the HCPs being proposed. *See id.* at i-ii. In the first 10 years of the HCP program, FWS issued only 14 ITPs. *See id.* By the end of 1996 FWS issued 179 ITPs and another 200 were being developed. *See id.* Not only was there increase in number, there was a corresponding increase in size. Before 1995, most HCPs were less than 1,000 acres in size. *See id.* By 1996, approximately 25 exceeded 10,000 acres, 25 exceeded 100,000 acres, and 18 exceeded 500,000 acres in size. *See id.*

⁶³ *See id.* at 1-8, 1-9. Although the Handbook creates the category of low-effect HCPs, it does not give any specific criterion as to what projects could qualify as low-effect. *See id.* at 1-8. The Handbook states that the Services prefer to leave these decisions to the discretion of the Regional offices. *See id.* at 1-8, 1-9.

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See id.* It is not clear from the Handbook which procedures the services feel are "unnecessary," or if this is a decision that will be made on a national level or a case-by-case basis.

⁶⁹ *See id.*; NATIONAL CENTER FOR ECOLOGICAL ANALYSIS AND SYNTHESIS, USING SCIENCE IN HABITAT CONSERVATION PLANS (1997) [hereinafter NCEAS Report]; Daniel Hall, *Using Habitat Conservation Plans to Implement the Endangered Species Act in Pacific Coast Forests: Common Problems and Promising Precedents*, 27 ENVTL. L. 803; Lin, *supra* note 55.

⁷⁰ *See id.*; NATIONAL CENTER FOR ECOLOGICAL ANALYSIS AND SYNTHESIS, USING SCIENCE IN HABITAT CONSERVATION PLANS (1997) [hereinafter NCEAS Report]; Daniel Hall, *Using Habitat Conservation Plans to Implement the Endangered Species Act in Pacific Coast Forests: Common Problems and Promising Precedents*, 27 ENVTL. L. 803; Lin, *supra* note 55.

approving, concluding that HCPs generally lack scientific foundation and public input.⁷¹ As a result, many HCPs fail to provide the level of species protection envisioned by Congress in its creation of section 10(a).

A recent report by the National Center for Ecological Analysis and Synthesis (NCEAS) reveals several serious inadequacies in the quality of protection provided to species by most HCPs.⁷² The NCEAS report reviewed 208 approved HCPs to evaluate the scientific data and methods used to develop and justify the plans.⁷³ The report focused on the use of scientific data to determine the status of the species; the quantity of the proposed take; the impact this has on the species as a whole; and the mitigation measures implemented to compensate for the take.⁷⁴

To determine the status of species included in HCPs, the NCEAS report evaluated threats to viability and the estimated abundance of the species within the HCP and globally.⁷⁵ The report found that the greatest threat to species is habitat availability.⁷⁶ In sixty-three percent of the HCPs, the amount of habitat available to the species was declining.⁷⁷ In addition, only fifty-one percent of the habitat included in HCPs was of the quality required to support a self-sustaining population.⁷⁸ Even more disturbing was the report's finding that forty percent of the habitat provided by HCPs was of a quality that could not support an isolated population through time.⁷⁹ The report also found that for most species population sizes were declining in the HCP areas, while only two percent of the species in HCPs were increasing in number.⁸⁰

With respect to the quantity of the proposed take, the NCEAS report found that a high percentage of HCPs fail to even estimate the number of individuals to be taken.⁸¹ HCPs do not fare much better in their mitigation requirements, with

⁷¹ See FRAYED NETS, *supra* note 36, at vi-vii (concluding that HCPs lack scientific rationale and provide few opportunities for effective public participation); NCEAS REPORT, *supra* note 70, at 4-5 (concluding that HCPs lack adequate scientific data and analysis); Hall, *supra* note 70, at 833-39 (concluding that HCPs for Pacific coast forests fail to implement sufficient mitigation based on scientific research).

⁷² See NCEAS REPORT, *supra* note 70.

⁷³ See *id.* at 2.

⁷⁴ See *id.*

⁷⁵ See *id.* at 19.

⁷⁶ See *id.* at 22.

⁷⁷ See *id.*

⁷⁸ See *id.* This habitat was found unsuitable for an increase in the population of the species.

⁷⁹ See *id.*

⁸⁰ See *id.* at 19.

⁸¹ See *id.* at 22.

only fifty-seven percent addressing the primary threat to the species to a degree that is considered at least sufficient by the NCEAS.⁸² The report concludes that the HCP program fails to require adequate scientific foundation and generally lacks necessary data before allowing take to occur.⁸³

How did the HCP process degenerate from the congressionally mandated San Bruno model to a program that offers little, if any, conservation benefit? If the HCP program is to become an effective conservation tool, its implementation must recognize the needs of the species and not simply the desires of the applicant. Two ways the Services can improve the HCP program are to provide clearly defined requirements for all HCPs and allow public participation throughout the entire HCP process. Uniformity and public participation can turn the HCP program into a regulatory policy that not only encourages landowner participation but also provides the conservation benefits required by the ESA.

*A. Flexibly Creative Partnerships?
Unraveling the Rhetoric in a Search for Standards*

The Preface to the HCP Handbook states that two of the greatest strengths of the HCP process are flexibility and creativity.⁸⁴ The HCP Handbook encourages Regional Offices to adjust the HCP process to suit the needs of each applicant.⁸⁵ The Handbook states that although the ESA establishes basic biological standards, the HCP process should otherwise allow the creative potential of the HCP participants to flourish.⁸⁶ As a product of this flexibility and creativity, the HCP process envisions "creative partnerships."⁸⁷ These partnerships should join the public and private sectors in an effort to protect and conserve species and their habitat.⁸⁸ While flexibility and creativity can benefit a regulatory process, they can also hinder its ultimate goals. The sacrifice of bright-line rules for flexibility and creativity in the HCP process has led to an internally inconsistent

⁸² See *id.* at 26. "Sufficient," as used in the Report, refers to whether scientific evidence was presented in the HCP to substantiate the claim that the best possible mitigation was being used.

⁸³ See *id.* at 4.

⁸⁴ See Handbook, *supra* note 61, at i-ii.

⁸⁵ See *id.*

⁸⁶ See *id.* at i-ii.

⁸⁷ See *id.* at Foreword.

⁸⁸ See *id.*

program. Two examples of this inconsistency are the low-effect HCP and the protection of unlisted species.

B. The Low Effect HCP

It is generally accepted that habitat destruction is the greatest threat to biodiversity.⁸⁹ It is also believed that large, uninterrupted tracts of habitat are more beneficial to species preservation than smaller, fragmented areas.⁹⁰ The Services acknowledged this hierarchy of conservation preference when it added the "habitat-based HCP" as a new category of HCP in the Handbook.⁹¹ The goal of a habitat-based HCP is to preserve biodiversity by focusing on the needs of the ecosystem as a whole, rather than the needs of an individual species.⁹² This is a significant shift in focus from the traditional application of the ESA, which concentrates exclusively on the well being of individual species.⁹³

An example of a habitat-based HCP is the Southern California HCP, developed in conjunction with the Natural Communities Conservation Program (NCCP).⁹⁴ The Southern California NCCP extends from Orange County to San Diego County, with plans to expand into Mexico.⁹⁵ The NCCP began as a conservation program based on the coastal sage ecosystem, with the California gnat-catcher as its indicator species.⁹⁶ As the number of participants in the project grew, so did the scope of the plan. As proposed, the final NCCP would encompass over 6000 miles, stretching over five of the most populated counties in California.⁹⁷

⁸⁹ See EUGENE P. ODUM, *FUNDAMENTALS OF ECOLOGY* 8 (1971); see also Houck, *supra* note 21, at 295.

⁹⁰ See *id.*

⁹¹ See Handbook, *supra* note 61, at 3-37. Under the habitat-based approach, a specific type of habitat is selected for preservation, along with a few indicator species. See *id.*

⁹² See Marc J. Ebbin, *Is the Southern California Approach to Conservation Succeeding?* 24 *ECOLOGY* L.Q. 695, 695-96 (1997) (comparing NCCP approach to conservation with that of ESA).

⁹³ See *id.* Benefits to the environment of a habitat-based approach include the ability to protect a vast array of species, as well as the maintenance of large, intact portions of habitat. The benefits to a developer and the local government are that it creates certainty in future land use planning decisions throughout a vast area. With areas set aside early in the planning process, development and zoning decisions can be made with the assurance that further preservation restrictions will not be required in the future.

⁹⁴ See *id.* at 696-98.

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *id.*

Such a large-scale project requires the participation of numerous parties. These parties must endure the extensive negotiation and application process for successful completion of the project. If a party believes there is an easier, less expensive solution, at some point in the heat of a difficult negotiation, the party will likely opt for the path of least resistance.

The expedited permit process for low-effect HCPs allowed in the Handbook may create benefits for applicants, but it severely undermines two stated goals of the HCP process: large scale, habitat-based HCPs and creative partnerships. The low-effect exclusion may be the demise of many large scale HCPs because of the incentive it creates to apply for an individual section 10(a) permit rather than negotiate a multi-party plan. An example of such a breakdown is the Balcones Canyonlands regional-HCP (RHCP) near Austin, Texas. In the late 1980s, developers and landowners in the Austin area found themselves with an unusually high concentration of protected species.⁹⁸ Pending developments coupled with a slowing economy created heightened confrontation between developers, conservationists, and local governments. In 1988, the USFWS added to the tension by threatening action against any habitat destruction that could possibly harm a listed species.⁹⁹ As an alternative to this strict enforcement, the USFWS proposed an RHCP.¹⁰⁰

The Austin RHCP process began in 1988, with a fifteen-member Executive Committee, including various local government agencies, developers and environmental organizations.¹⁰¹ The Austin RHCP soon emerged as one of the most comprehensive conservation endeavors to date.¹⁰² As with any project of such proportion, difficulties quickly ensued. Adding to the complications, the USFWS announced the emergency listing of the golden-cheeked warbler, a species found in the proposed RHCP area.¹⁰³ As negotiations intensified after the USFWS announcement, the 3M company, one of the parties to the negotiations, made an unexpected move. The company announced that it would seek an individual section 10(a) permit.¹⁰⁴ Since 3M owned a relatively small portion of habitat

⁹⁸ See J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 SW L.J. 1393, 1414 (1991).

⁹⁹ See *id.* citing Austin RHCP Executive Committee Minutes of the meetings of Feb. 10, 1989, at 6.

¹⁰⁰ See *id.* citing Newsletter of the Regional Habitat Conservation Plan, Vol. I. No. 1, at 1.

¹⁰¹ See Ruhl, *supra* note 98, at 1415-16.

¹⁰² The Austin RHCP planning process included a biological assessment team, a steering committee, regularly scheduled public meetings, and a monthly newsletter.

¹⁰³ See Ruhl, *supra* note 98, citing 55 Fed. Reg. 18,844 (1990) (listing golden-checkered warbler).

¹⁰⁴ See *id.* citing Austin American-Statesman, May 17, 1990, at A1, col. 4.

occupied by a listed species, the permit process was relatively quick. Shortly after 3M left the bargaining table, the State of Texas followed, seeking individual permits for several road improvement projects.¹⁰⁵ After the State, another private developer sought an individual section 10(a) permit.¹⁰⁶ Although the Balcones Canyonlands RHCP was eventually approved, the absence of several parties weakened the effectiveness of the plan and could have destroyed the RHCP.

It is important to note that the Balcones Canyonlands negotiations took place before the Services created the low-effect HCP provision. Although the Services witnessed the near collapse of one of the largest HCPs to date, they still created a permit process that encourages people to seek individual permits, rather than join large-scale conservation projects. Given the benefits of large-scale HCPs and the specific mandates of Congress, expedited permits for low-effect HCPs create the wrong incentive. The Services should eliminate the low-effect HCP provision and create benefits for joining a large-scale plans, rather than barriers to successful habitat based and regional HCPs.

C. Protecting Unlisted Species From Extinction: Who Are We Really Protecting?

Including unlisted species in an HCP can be beneficial to the applicant, the Services and the species. The applicant receives regulatory certainty regardless of future listings. The Services do not have to reopen the permit if the unlisted species become threatened or endangered. The species and its habitat receive more protection than is legally required. In addition, inclusion of unlisted species fulfills Congress' desire to broaden the goals of the ESA by protecting more than listed species.

Despite the apparent benefits, treatment of unlisted species in HCPs has proved far from successful.¹⁰⁷ One problem lies in the lack of biological data on unlisted species and the failure of the Services to require more extensive research before granting a section 10(a) permit.¹⁰⁸ The Services admit that biological information on unlisted species can be limited, making it difficult to

¹⁰⁵ See *id.* citing Austin American-Statesman, July 12, 1990, at 1.

¹⁰⁶ See *id.* citing Austin American-Statesman, July 31, 1990, at A1, col. 1.

¹⁰⁷ See Hall, *supra* note 70, at 818-20 (finding that Services' current policy does not provide any significant protection for unlisted species included in HCPs).

¹⁰⁸ See *id.*; NCEAS Report, *supra* note 70, at 19-22 (discussing lack of scientific knowledge when species are included in HCP).

meet the section 10(a) issuance criteria without further research.¹⁰⁹ However, the Services continue to grant section 10(a) permits without requiring any research into the status of unlisted species.

Several recent HCPs demonstrate the cursory attention unlisted species receive before inclusion in an HCP.¹¹⁰ For example, two Pacific coast HCPs included unlisted species in their conservation plans, yet both simply identified the species and outlined basic habitat needs.¹¹¹ Despite this cursory information, both permittees received long-term assurances from the Services that no future mitigation with respect to the unlisted species would be required from them. Other HCPs merely consult the natural heritage database to determine whether unlisted species are likely to be found on the property.¹¹² In many cases, neither the Services nor the landowners actually survey for the unlisted species covered by the HCP.¹¹³ Despite these feeble attempts to assess the needs of unlisted species, the Services routinely allow HCPs to include unlisted species and therefore protect the landowners from any future obligations. This practice is clearly contrary to Congress' intent for section 10(a), as evidenced by the extensive research of unlisted species in the San Bruno Plan. As envisioned by Congress, unlisted species are to receive the same level of research and consideration as listed species before any assurances are given under the HCP.

D. Public Participation in the HCP Process: Power to the People

Historically, citizens have played a pivotal role in the creation and enforcement of environmental laws.¹¹⁴ Citizen involvement has always been encouraged, and indeed generally required by law. However, the Services' current application of section 10(a) denigrates citizen participation. In order to restore public participation and enforcement, the Services must require public notice at the development stage of the HCP application process and allow citizen enforcement of HCP mitigation requirements.

¹⁰⁹ See *id.* at 4-1-4-4.

¹¹⁰ See Hall, *supra* note 70, at 818-20.

¹¹¹ See *id.* at 818 (describing Regli Estate and Coast Range Conifers HCPs).

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See FRAYED NETS, *supra* note 36, at 41; Kostyack, *supra* note 60.

To date, citizens and environmental organizations have not been involved in the shaping of HCP policy or implementation.¹¹⁵ This is surprising since citizens regularly propose species' listings and enforce section 9 violations through the ESA's citizen suit provision. Since section 10(a) is intended to be an alternative to full section 9 compliance, it would seem the perfect forum for public participation. However, under current Services procedure, citizens are effectively cut out of HCP planning and enforcement.

Early access to the HCP process provides higher quality conservation and truly "creative partnerships." If the public is allowed access to HCPs at the development stage many of the scientific shortcomings of current HCPs could be solved. Independent peer review is one of the hallmarks of science. Under current HCP guidelines, scientific development of HCPs is limited to scientists hired by the applicant and reviewing Services biologists. It is not until HCP development is complete that the public is allowed access to the plan. At this point the crucial decisions on conservation strategy have already been made, and approved by the Services. The NCEAS report is a clear example of how independent peer review could drastically improve the HCP process.

Citizen participation at the development stage would provide an alternative perspective on the HCP, creating a truly "creative partnership." When a developer explores the possibility of an HCP, there are generally three objectives: certainty, efficiency, and cost effectiveness.¹¹⁶ Many developers feel unfairly burdened at the outset, believing they are sacrificing for the benefit of the general public.¹¹⁷ As Tobie Murray, the owner and manager of a major lumber company stated when she discovered three northern spotted owls on her property, "these three owls essentially placed forty percent of our merchantable timber off limits for the foreseeable future."¹¹⁸ Clearly, there is no delight at the discovery of an endangered species for a developer.

Traditionally, citizens have represented the voice of conservation and protection. Unlike most HCP applicants, citizens are not focused on the "liabilities" of endangered species, but are concerned with the preservation of the species.

¹¹⁵ See *FRAYED NETS*, *supra* note 36, at 41.

¹¹⁶ See Tobie Murray, *An Endangered Habitat Act to Help Landowners Protect Wildlife*, 24 *ECOLOGY* L.Q. 689, 691 (1997).

¹¹⁷ See Lin, *supra* note 55, at 404-05 (stating that major complaint of applicants was inadequate guidance by FWS throughout process). See also Murray, *supra* note 116 (describing frustration of being singled out to bear cost of endangered species).

¹¹⁸ See Murray, *supra* note 116.

While applicants emphasize the economic costs of HCP implementation, citizens focus on the conservation benefits. This interaction of point and counterpoint creates a development process that involves a truly creative partnership. The idea of citizen participation is not new; in fact, it was one of the cornerstones of the San Bruno model. Congress was sure to point out the fact that local citizens and environmental organizations supported the San Bruno plan. The return of citizen participation will balance the HCP process, including both economic development and habitat conservation.

Citizens are also precluded from enforcing the implementation HCPs. At the discretion of the Services, an HCP can include an Implementation Agreement (IA).¹¹⁹ Elements of the IA include: a definition of the obligations and benefits of all signatories and other parties to the HCP; assignment of responsibilities for implementing HCP measures; and specific monitoring requirements for USFWS.¹²⁰ The Handbook specifically precludes citizens from being beneficiaries of any IA entered into by the Services and the permittee. Not only are citizens excluded from enforcement, often times the Services fail to reserve the power to seek damages from a permittee if a violation occurs. A recent article analyzed several IAs in Pacific coast forests and found little, if any power reserved by the Services to seek remedies from permittees. One HCP stated that, "no party shall be liable in damages to another party . . . for any breach [of the HCP or IA] . . . or failure to perform."¹²¹ Another IA simply failed to implement any enforcement language.¹²² Without the ability to seek damages from a permittee, the Services' only remedy is revocation of the ITP. However, this is often a hollow threat. Generally, all of the potential taking of a listed species occurs at the front end of an HCP, since the development activity occurs at the start of a project. Often times, the mitigation requirements will run long after the threat of taking a listed species has passed.

To ensure that HCPs are fully implemented as written, citizens must be allowed to enforce IAs. It is clear that the Services have failed to adequately monitor many HCPs and often fail to reserve requisite enforcement power. A citizen suit provision for section 10(a) permits and IAs, similar to that found in the ESA and NEPA, could alleviate many of the implementation problems found

¹¹⁹ See Handbook, *supra* note 61, at 8-3.

¹²⁰ See *id.*

¹²¹ See Hall, *supra* note 70.

¹²² See *id.*

in HCPs. This would be consistent with Congress' intent to allow citizen enforcement of ESA violations.

E. Draft Addendum to the HCP Handbook: A Solution or More Confusion?

In March of this year, the Departments of the Interior and Commerce issued a notice in the Federal Registrar proposing an addendum to the HCP Handbook.¹²³ The addendum addresses five areas: 1) biological goals and objectives, 2) adaptive management, 3) monitoring, 4) permit duration, and 5) public participation.¹²⁴ To their credit, the Services address both the problem of uniformity and public participation. Unfortunately, the Services fail to get to the heart of these problems.

If approved, the addendum would require every HCP to include specific biological goals and objectives.¹²⁵ The addendum defines "biological goals" as the broad guiding principles for the conservation program — the rationale behind the mitigation and minimization strategies.¹²⁶ "Biological objectives" are the measurable targets for achieving the goals of the conservation program.¹²⁷ The goals and objectives are to be commensurate with the specific impacts and duration of the proposed action.¹²⁸ The addendum goes on to give generic examples of different goals and objectives of an HCP.¹²⁹ For example, the Addendum gives the example that a biological goal could be to ensure population viability by maintaining habitat contiguity. The specific objective for this goal could be to conserve an adequate number of acres in a certain configuration, so that a viable corridor is maintained. However, as in the HCP Handbook, the Services fail to take the next step and create an enforceable, bright-line standard.

The addendum suggests that "available literature, State conservation strategies, candidate conservation plans, draft or final recovery plans or outlines, and other sources of relevant scientific and commercial information can serve as guides in setting biological goals and objectives."¹³⁰ The Services appear to be

¹²³ Notice of Availability of a Draft Addendum to the Final Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 64 Fed. Reg. 45, 11485 (1999) (proposed Mar. 9, 1999).

¹²⁴ *See id.*

¹²⁵ *See id.* at 11485-86.

¹²⁶ *See id.* at 11486.

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *Id.*

more concerned with procedure than substance. The Services want guidelines, but are not concerned with what those guidelines actually entail. By providing a litany of possible guides, the Services have once again avoided defining the level of protection required under an HCP. Although recovery plans are mentioned as a possible source for guidelines, so is the amorphous "available literature." Without a hard and fast rule for all HCPs, the Services will continue to approve HCPs that simply fail to provide adequate mitigation, even though they are consistent with the stated biological goals and objectives.

Similar to the biological goals and objectives, the proposed Addendum fails to address the real problem underlying current public participation procedures. The Services state in the Addendum that they intend to expand public participation in the HCP process to provide greater opportunity for public access, review and analysis of the HCP and related documents.¹³¹ However, instead of requiring access to HCP documents earlier in the development process, the Addendum simply expands the current public comment period for most HCPs by thirty days.¹³² This is another example of the Services' favor of form over substance. While the Addendum expands the length of time the for public comment, it does nothing to substantively change the power citizens have in the development of HCPs.¹³³ Citizens are still precluded from participation in the early planning stages of HCPs and therefore their comments are not considered until after the baseline decisions are made. Once again, the Services aptly identify the problem, but fail to provide a satisfactory solution.

¹³¹ See *id.* at 11490.

¹³² See *id.* The Addendum expands the current 30-day comment period for most HCPs to 60 days. The comment period for low-effect HCPs would remain at 30 days and the comment period for "complex" or regional HCPs would be expanded to ninety days. The increased comment period for regional HCPs, coupled with the 30-day period for low-effect HCPs, creates further incentive for applicants to seek their own permits rather than endure an even longer permitting process as part of a regional HCP. Once again, the Services are creating mixed signals for applicants. On the one hand the Services "encourage" regional, multi-party plans. On the other hand, the Services continue to create disincentives for joining multi-party HCPs, while making it easier to pursue a low-effect HCP.

¹³³ See *id.* The Addendum "encourages" applicants for regional HCPs to provide extensive opportunities for public involvement during the planning and implementation process. This is another example of the Services increasing the demands on regional HCP applicants, while making the low-effect escape hatch even more tempting. If the Services are going to require more from regional HCPs, they should consider heightening the requirements for applicants seeking low-effect HCPs that could in fact be participants in a regional HCP. In this way, potential participants in a regional HCP would not be as inclined to seek an individual permit. Another possibility, one that the author believes would be more appropriate, would be to get rid of the low-effect HCP all together.

VI. CONCLUSION

The HCP program provides many potential conservation benefits. However, before these benefits can be realized, the Services must reevaluate their current implementation procedures. While it is important to create a regulatory policy that encourages participation of landowners, the overriding goal that all affected parties participate must not be lost. The HCP program, as currently applied, has lost sight of Congress' original goals. Instead of broadening the goals of the ESA, HCPs allow unmitigated take of endangered species and permanent conversion of essential habitat. Instead of a planning process consisting of diverse interests, HCPs are simply two-party agreements between the applicant and the Services. Returning to the principals on which Congress built the HCP program will allow creativity and flexibility for applicants, while protecting species and their habitat.

