

# Habitat Conservation Plans: Protecting Species, Enhancing Democratic Legitimacy and Promoting Stewardship Are Not Mutually Exclusive Goals

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## I.

### INTRODUCTION

Habitat Conservation Plans (HCP's) have become more commonplace as vehicles that allow private landowners to conduct development projects on non-federal lands that otherwise would have been prohibited if the project was likely to cause the "taking" of endangered or threatened species. The Endangered Spe-

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cies Act (ESA) § 10 was amended in 1982 to allow for protection of endangered or threatened species on private lands that were increasingly targeted for development. The goal of habitat conservation plans is to provide collaborative partnerships between the public and private sectors in preserving species and their habitats.<sup>1</sup> The success of this model in balancing the preservation of species and development on non-federal land remains questionable. Several factors that hinder the success of HCP's have been identified, particularly in large multi-species conservation plans (MSCP).<sup>2</sup> These factors include the type of applicant, land ownership patterns, the extent to which HCP's affect the local economy, and public participation.<sup>3</sup>

Of these factors, a "well managed public participation process has the potential to provide significant benefits to HCP applicants, U.S. Fish and Wildlife Service (FWS) staff, outside stakeholders and affected species."<sup>4</sup> Effective public participation and deliberation is identified as one of the most important elements to a plan's ultimate success. The importance of public deliberation to the success of large MSCP's was recently underscored in *Southwest Center for Biological Diversity v. Bartel*, where a U.S. District Court enjoined the defendants from implementing an incidental take permit first granted in 1997.<sup>5</sup> The lack of public deliberation on appropriate mitigation measures and funding assurances was one of the principal reasons for the court's order.<sup>6</sup>

Public deliberation is defined as a "dynamic process in which the . . . [s]takeholders share information with each other about their interests, concerns and ideas."<sup>7</sup> The sharing of information

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1. H. R. REP. NO. 97-835, at 31 (1982) (Conf. Rep.).

2. Matthew E. Rahn et. al., *Species Coverage in Multispecies Habitat Conservation Plans: Where's the Science?*, 51 BIOSCIENCE 613 (July, 2006).

3. JEREMY ANDERSON & STEVEN L. YAFFEE, *BALANCING PUBLIC TRUST AND PRIVATE INTEREST: PUBLIC PARTICIPATION IN HABITAT CONSERVATION PLANNING* 11 (1998).

4. *Id.* at 4.

5. *Southwest Ctr. for Biological Diversity v. Bartel*, No. 98-CV-2234, 2006 U.S. Dist. WL 3914425, at \*1 (S.D. Cal. Dec. 15, 2006).

6. *Id.* at \*17-31. The FWS did not evaluate the design of the Preserve to determine if it would mitigate the expected harm to the vernal pool species outside the Preserve. The Court also concluded that FWS arbitrarily concluded that the City ensured adequate funding because only speculative and undependable sources of funding were cited. This reluctance to confirm a long-term funding plan raises a "red flag."

7. ANDERSON & YAFFEE, *supra* note 3, at 8; see also Craig W. Thomas, *Habitat Conservation Planning*, in *DEEPENING DEMOCRACY, INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE*, 151 (Archon Fung & Erik Olin

in a manner that achieves meaningful participation requires: 1) applicants to solicit and incorporate public participation during the planning process, 2) that all parties communicate expectations of how public input will be used in the planning process, and 3) creating an environment of trust in which the parties can work together to formulate creative, acceptable solutions to problems.<sup>8</sup> Public deliberation is beneficial because it improves the quality of an HCP, builds long-term public support for it, provides a measure of success during the planning process and supports the Congressional goal of creating partnerships between federal agencies and private landowners in facilitating mutually supported mechanisms for both development and species preservation.<sup>9</sup> Yet, the complexity of fostering public deliberation in large MSCP's is often viewed as an impossible, inefficient and even illegal process.<sup>10</sup>

The process of developing an HCP is governed by the Endangered Species Act § 10, a basic no frills regulation codified in 50 C.F.R. § 17.22(b) and the detailed guidelines set out in the "HCP Handbook," an internal guidance document. However, the regulatory framework created by these sources is too linear and reductionistic to meet the complex goal of balancing the preservation of species and economic development, much less than to meet the goal of facilitating public deliberation. There is no legal requirement, nor even a real incentive, for citizens from the variety of stakeholder groups to have a meaningful role in HCP development, other than in the sterile public comment periods required by ESA § 10(c).<sup>11</sup> These legally required public

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Wright eds., 2003) ("To be deliberative, participants must listen to and carefully consider each other's positions before making final decisions. Rather than simply voting or advocating preformed preferences, they must allow their preferred goals and strategies to evolve through collective deliberation.").

8. ANDERSON & YAFFEE, *supra* note 3, at 8.

9. *Id.* at 12.

10. George C. Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 *ECOL. L.Q.* 602, 604 (1999). Very few positive results from devolved collaboration/consensus can be identified. Much local decision-making has been narrow, greedy and shortsighted, resulting in price-fixing, collusion, corruption, and subsidization. Perhaps the worst aspect of devolution is the utter irresponsibility of all of the parties, notably the federal agencies who abdicate their legal functions. *Id.*

11. Laura C. Hood, *Frayed Safety Nets: Conservation Planning under the Endangered Species Act*, <http://www.defenders.org/pubs/hcp01.html> (last visited Mar. 14, 2006).

comment periods are inadequate both in terms of timeframe and process for facilitating true deliberation.<sup>12</sup>

The overall success of preserving species is further hindered by a society rooted in utilitarian rights to private land ownership. Constrained by the legal framework, utilitarian values of land ownership and the current industrial model paradigm, public participation in HCP's has resulted in changes in only fourteen percent of currently developed plans.<sup>13</sup>

The following case study involving the Balcones Canyonlands Conservation Plan (BCCP), is particularly illustrative. The BCCP, a regional MSCP, consists of a permit issued to both Travis County and the City of Austin, Texas on May 2, 1996 by the U.S. Fish and Wildlife Service (FWS), pursuant to § 10 of the ESA.<sup>14</sup> The BCCP highlights the complexity of promoting the goal of conserving endangered species in an area experiencing significant growth and serves as a useful case study in analyzing the success of large MSCP's. This paper will argue that in addition to the reconceiving of HCP's as experiments in which society has a real stake, we must confront the fact that *transformational leadership* is the missing catalyst for the kinds of public deliberation large MSCP's must sustain to succeed. The BCCP provides powerful anecdotal evidence for this claim.<sup>15</sup> The detrimental effects that resulted from inadequate public deliberation support the claim that not only are the ESA §10 and the HCP Handbook not prescriptive enough, but the lack of leadership plays a critical role in the outcomes of MSCP's. Fundamental changes are needed to the structure and processes that support the development of an HCP. This paper will suggest that the theoretical framework of Empowered Participatory Governance (EPG),<sup>16</sup>

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12. ANDERSON & YAFFEE, *supra* note 3, at 4; see Stephanie Tai, *Three Asymmetries of Informed Environmental Decisionmaking*, 78 TEMP. L. REV. 659, 681 (2005) (finding that current structures and processes for public participation may "actively damage civic virtues by reinforcing American tendencies towards adversarialness and confrontation" and "hinder agencies from making decisions at effective rates.").

13. ANDERSON & YAFFEE, *supra* note 3, at 17.

14. David Bidwell, *Balcones Canyonlands Conservation Plan*, in IMPROVING INTEGRATED NATURAL RESOURCE PLANNING: HABITAT CONSERVATION PLANS (Oct. 14, 1998), available at <http://www.ncedr.org/casestudies/hcp/balcones/htm>.

15. Melinda E. Taylor, *Promoting Recovery or Hedging a Bet Against Extinction: Austin, Texas's Risky Approach to Ensuring Endangered Species' Survival in the Texas Hill Country*, 24 ENVTL. L. 581, 585 (1994).

16. ARCHON FUNG & ERIK OLIN WRIGHT, *DEEPENING DEMOCRACY, INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE* (2003).

coupled with transformational leadership<sup>17</sup> would provide the means for enhancing public deliberation at the local level.

EPG aims to provide mechanisms for democratic institutions that are “at once more participatory and effective than the familiar configuration of political representation and bureaucratic administration.”<sup>18</sup> Three general principles, which are the foundation of the EPG model include: 1) a focus on specific, tangible problems, 2) involvement of ordinary people affected by and close to those problems, and 3) the deliberative development of solutions to these problems.<sup>19</sup> EPG requires a fundamental reconceptualization of the institutions that frame our notion of democracy. This democratic experimentalism envisions a deliberative polyarchy at the local level in which citizens participate directly, supported and encouraged by more efficient, transparent governmental structures.<sup>20</sup> True public deliberation, as articulated by Fung, Wright, and others, could contribute to protection of species while enhancing democratic legitimacy and promoting stewardship on a broader scale. While much has been written on the tangible elements of this reconceptualized model, a normative framework remains under-theorized.<sup>21</sup> The elements of this reconceptualized model include: 1) different structures which allow for collaborative problem solving,<sup>22</sup> 2) increased stakeholder participation and interagency coordination,<sup>23</sup> and 3) adaptive management.<sup>24</sup> However, successful implementation of this model will require true transformational

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17. Bernard M. Bass, *Does the Transactional-Transformational Leadership Paradigm Transcend Organizational and National Boundaries?*, 52 *Am. Psych.* 2, 130 (1997).

18. FUNG & WRIGHT, *supra* note 16, at 15.

19. *Id.*

20. Michael C. Dorf & Charles Sabel, *A Constitution Of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267, 288 (1998).

The aim [of democratic experimentalism] is to change the reasons and evidence produced in public debate, and with them the conditions for participation in civic life, so that our disputatious democracy is made both more effective and as an instrument of public problem solving and more faithful to its purpose of assuring the self-determination of free and equal citizens.

*Id.*

21. Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 *DUKE L. J.* 795, 802 (2005).

22. J.B. Ruhl, *Regulation By Adaptive Management—Is It Possible?*, 7 *MINN. J. L. SCI. & TECH.* 21, 56-57, (2005) (arguing that new institutional governance structures are necessary to achieve the back end requirements of adaptive management for success with the HCP program).

23. Freeman & Farber, *supra* note 21, at 801.

24. *Id.* at 801.

leadership.<sup>25</sup> This paper will build upon previous works that describe these elements in detail by focusing in particular on structures that enhance stakeholder participation and deliberation. This paper will demonstrate how transformational leadership can serve as the critical linchpin in facilitating success in large MSCP's. By focusing on the structures and elements necessary to enhance public participation and deliberation at the local level, this paper will add to a reconceptualized model for HCP's that simultaneously protects species, enhances democratic legitimacy, and promotes stewardship among stakeholders.<sup>26</sup>

## II.

### STATUTORY REQUIREMENTS FOR EFFECTIVE PUBLIC DELIBERATION ARE LACKING

In 1982 §10 of The Endangered Species Act (ESA) was revised to include exceptions formulated in response to complex tensions between development and preserving habitat for threatened and endangered species.<sup>27</sup> ESA § 10(a)(1)(B) provides that the FWS may issue a permit to an applicant that authorizes "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." In amending the ESA, Congress made it clear that individual species must be viewed in relation to their ecosystem and that conservation plans developed pursuant to ESA § 10 would be "creative partnerships" for the interest of species and habitat conservation.<sup>28</sup> Public comment requirements are governed by ESA § 10(c), which provides that the notice of permit application "shall invite the submission from interested parties, within thirty days *after* the date of the notice."<sup>29</sup> Public comment periods provide a forum in which the public can review a plan and submit comments or questions in writing. A public meeting is often held. The comment periods

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25. Bass, *supra* note 17, at 130-33.

26. Ruhl, *supra* note 22, at 34 ("Before we change anything about administrative law, we need first to define the problem, set objectives, assess the baseline and formulate models."). The fragmentation of environmental regulation between federal and state governments makes it manageable in some respects, however, the incompleteness of the federal statutes has led reformers to argue that a more holistic model for environmental regulation and resource management is needed. Freeman & Farber, *supra* note 21, at 810.

27. 16 U.S.C. § 1539 (1982).

28. H. R. REP. NO. 97-835, at 9 (1982) (Conf. Rep.).

29. 16 U.S.C. § 1539 (emphasis added).

alone do not provide a forum for dialogue, nor is there a legal requirement to address or incorporate these comments into the final plan. The legal requirements for public comment are inadequate to meet the HCP goal for creative partnerships for three reasons: 1) timing, 2) the emphasis on efficiency and satisfaction of the applicant, and 3) the forum for public comment actually hinders participation by being time-limited and geared towards obtaining reactions to an already-developed plan rather than engendering input and consensus.

First, the timing of public comments does not allow for meaningful participation. The HCP permit application process is considered a private action. Thus, public comments are not required by law until after the plan has been developed and submitted to the FWS. ESA § 10(a)(2)(A) provides that no permit may be issued unless the applicant also submits a conservation plan. Conservation plans do not require additional public participation despite Congress' intention that they reduce conflicts and assure the implementation of the broad mandate for all statutes enacted to conserve "all fish and wildlife resources of this nation."<sup>30</sup> The statutory text of ESA § 10(a)(2)(B) suggests that the FWS's role is solely to review and issue permits rather than to function as a stakeholder in the deliberation of the plan from its origin. The timing sequence for public comment and lack of statutory text prescribing a more deliberative process among all stakeholders is inadequate for a regional, complex HCP like BCCP.<sup>31</sup> Public participation is needed both in the development phase and on an on-going basis.<sup>32</sup> Rather than facilitating public deliberation, the legally imposed requirements that govern the timing of the public comment period after the plan is developed actually serves as a disincentive for the applicant to elicit additional stakeholder participation. The public comment periods only allow citizens to react to a fully developed plan. These forums do not provide opportunities for citizens' meaningful input while the plan is being developed.<sup>33</sup> Late public participation causes applicants to be less willing to take alternative views into consideration and

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30. H. R. REP. NO. 97-835, at 9 (1982) (Conf. Rep.).

31. 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, 7 (1991).

32. Hood, *supra* note 11, at 29.

33. See e.g., Holly Doremus, *Preserving Citizen Participation in the Era of Reinvention: The Endangered Species Act Example*, 25 *ECOL. L.Q.* 707-715 (1999) ("Public participation in and oversight of the decisionmaking process should be pro-

citizens to have less time to educate themselves about the scope and ramifications of the plan.<sup>34</sup> Citizens may have difficulty responding to a technically complex plan in this type forum at this late stage of the process. As a result, the legally imposed timing of public comment periods result in inadequate and ineffective public participation throughout both the planning and implementation processes in most HCPs.<sup>35</sup>

The timing of public comment may also be affected by the National Environmental Policy Act (NEPA). Public involvement, outlined in the NEPA Guidelines, requires that agencies "shall make diligent efforts to involve the public in preparing and implementing their NEPA procedures."<sup>36</sup> Since no legal mandate is required other than the post-plan public comment period under the ESA, nor is there a legal requirement under NEPA, public deliberation to the permit application becomes more of a burden than a vehicle to enhance the substantive outcome of the plan. In fact, the focus on developing plans that are litigation-proof hinders an agency's perspective regarding the value of early public deliberation. Rather than soliciting public involvement up front, the inclination is to use the public comment period as a forum for identifying and then warding off potential legal actions down the road.<sup>37</sup>

The second reason that the legal requirements are inadequate to promote public deliberation results from a focus on efficiency and expediency over stakeholder engagement.<sup>38</sup> The HCP Handbook, published by the U.S. Fish and Wildlife Service, pursuant to ESA § 10, provides guidelines for applicants submitting HCPs. The guidelines in the handbook are not binding because they were not subject to the rulemaking procedures of the Administrative Procedure Act (APA) § 553.<sup>39</sup> The guidelines are

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vided at the negotiation stage . . . All HCP negotiations should be conducted in public, under procedural rules like those of the FACA.").

34. Tai, *supra* note 12, at 693-95.

35. ANDERSON & YAFFEE, *supra* note 3, at 7.

36. 40 C.F.R. § 1506.6 (2006).

37. Tai, *supra* note 12, at 693.

38. U.S. FISH AND WILDLIFE SERVICE, HABITAT CONSERVATION PLANNING HANDBOOK, <http://www.fws.gov/endangered/hcp/hcbook.html> (last visited Mar. 10, 2006).

39. 5 U.S.C. § 553 (1946). There are several exceptions to when notice or a hearing are required by statute. These exceptions include interpretive rules, general statements of policy or rules of agency organization, procedure, or practice; or when the agency, for good cause, finds that notice and public comment are impracticable, unnecessary or contrary to public interest. *Id.* at § 553(b).

intended to make the ESA § 10(a) process more “efficient” and to promote customer satisfaction on the part of the applicant.<sup>40</sup> The guidelines do not “promulgate exhaustive cookbook regulations” but rather promote a policy of “flexibility and ingenuity.”<sup>41</sup> As a result, the text of the guidelines supports the statutory procedural requirements for public comment rather than promoting the goal of public deliberation.

The goals of efficiency and expediency are further supported by the sequencing of the public comment periods with the submission of the permit application. For example, the handbook guidelines provide that in order to promote efficiency and expediency, the biological opinion should be written as the application is being processed and after public comment.<sup>42</sup> This clearly limits the information that is shared with the public and actually assures that the public comments will be based solely on citizen’s own perspectives rather than providing a forum for information sharing, assimilation and true deliberation on the impact of the plan. The citizens who choose to comment (participate) do not have the benefit of integrating the biological report with their own private concerns—either to support or negate their personal issues.

Similar to the intent articulated by Congress, the FWS clearly recognizes the value of public participation to these plans.<sup>43</sup> However, the guidelines merely encourage, rather than require “consensus building and integration of numerous interests,” especially in large scale HCP’s.<sup>44</sup> For example, there is no statutory requirement under the ESA compelling the FWS to determine the best project location and land use solutions. Instead, the FWS *encourages* the applicant to consult with them regarding the choice of location and timeframe for development.<sup>45</sup> Although the issuance of the permit requires the taking to be incidental, engaging the FWS to determine site location or placement could serve to mitigate the current fragmented approach that results from a plan that is based on the applicant’s property line or municipal boundary rather than anticipating upfront the needs of

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40. U.S. FISH AND WILDLIFE SERVICE, *supra* note 38, ch.1, at 3.

41. *Id.*

42. *Id.* at ch.1, 5; *see also* ANDERSON & YAFFEE, *supra* note 3, at 24 (“[t]he timing of comment periods on NEPA documents is particularly mismatched with the dynamic decision-making that occurs in HCP negotiations.”).

43. U.S. FISH AND WILDLIFE SERVICE, *supra* note 38, ch. 1, at 15.

44. *Id.*

45. Ruhl, *supra* note 31, at 1403.

"endangered species population trends or ecological boundaries."<sup>46</sup> The HCP handbook does provide that the FWS should "encourage the applicant to involve all appropriate parties" in these decisions once the application is submitted.<sup>47</sup> Despite this encouragement, however, the mandate to the FWS is to promote efficiency and applicant satisfaction with the process, rather than requiring additional stakeholder involvement. This, in turn, leads to an environment in which concerned citizens have little recourse other than to influence the process by attempting to delay or obstruct decisions.<sup>48</sup>

The focus on efficiency and expediency also limits public participation to a one-time opportunity rather than fostering on-going dialogue. Although the intent of Congress was to "encourage creative partnerships between public and private sectors,"<sup>49</sup> this front-end approach to stakeholder involvement is devoid of any legal requirements or incentives to include the public as construction begins or species are impacted over time.<sup>50</sup> Providing for on-going public participation and adaptation of plans based on public input has been shown to add one hundred fifty days to a plan's decision timeframe, further denigrating the value of public deliberation for all stakeholders.<sup>51</sup>

The third reason that the legal requirements for public participation are inadequate is that the actual vehicle of public comment itself serves more as a façade for participation rather than a true forum to engage additional stakeholders by requesting their participation. Notice of public comment periods are printed in the Federal Register and, sometimes, in other local venues. The public is invited to either attend a public meeting or submit comments in writing. This requires that the public has reviewed the plan, which is often only available at certain locations, and to submit comments or questions related to the final plan. The

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46. *Id.* at 1403.

47. U.S. FISH AND WILDLIFE SERVICE, *supra* note 38, ch. 6, at 22 (emphasis added).

48. Tai, *supra* note 12, at 695-97 (finding that delaying decisions diminishes the ultimate aspirations of public participation given the adversarial nature of the forum, weakens the legitimacy of proposed agency actions and discourages agencies from making full use of public input).

49. H.R. REP. NO. 97-835, at 30 (1982) (Conf. Rep.).

50. Ruhl, *supra* note 22, at 41.

51. *Id.* at 36. ("It is little wonder that, having to operate in an atmosphere in which each decision involves so much front-end preparation designed largely in anticipation of the onslaught of the public's participation and judges' hard looks, many agencies display an aversion to adaptation.") (internal quotations removed).

often complex and technical nature of plans may discourage or intimidate citizens from participating.<sup>52</sup> Those citizens who do participate do not necessarily get answers to their questions, nor are they assured that their feedback will be incorporated into the plan.<sup>53</sup> It is by chance that the veracity or sheer volume of comments might serve to alter the plan that has been presented. Though this forum allows the public to provide comments, it offers no opportunity to engage in dialogue, enhance learning from others' perspectives or elicit a broader sense of ownership in the plan's success. This structure of one-time public participation actually undermines agency accountability and legitimacy<sup>54</sup> and can erode development of civic virtues by causing citizens to feel distanced or overpowered by more influential groups or those with specialized training.<sup>55</sup> For reasons beyond the scope of this paper, this is unlikely to occur barring significant transformative changes in statutory requirements for public deliberation.

### III.

#### THE CURRENT INSTITUTIONAL STRUCTURE IS INADEQUATE TO ACHIEVE TRUE PUBLIC DELIBERATION

True public participation and deliberation is further compromised by a bureaucratic administrative structure that is mired in an industrial age model that is ill suited to address the complex and horizontal processes required in large MSCPs.<sup>56</sup> Furthermore, our notions of what constitutes an effective democratic organization have led to administrative procedures that ensure a slow process encumbered by high frustration levels for landown-

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52. Tai, *supra* note 12, at 679.

53. *Id.*

54. *Id.* at 691; see Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science Mandate*, 34 ENVTL. L. 397, 441 (2004) ("The rationality of agencies' choices cannot be understood without an explanation of potentially confounding uncertainties, and the agency cannot be made politically responsible for the manner in which it deals with uncertainty unless those dealings are publicly revealed.").

55. Tai, *supra* note 12, at 692.

56. Jamison E. Colburn, *The Indignity of Federal Wildlife Habitat Law*, 57 ALA. L. REV. 417, 420 (2005); see also Ruhl, *supra* note 22, at 22-28 (explaining that the current issues that must be addressed by regulatory agencies are no longer unilateral, linear problems that can be addressed by prescriptive regulation). Current issues are complex, with unwieldy dimensions that can no longer be solved by typical target-response solutions. Instruments of regulation must be transformed and managed adaptively in order to achieve the incremental decision-making that is required for complex ecosystems.

ers and other stakeholders and no assurance that private or public goals will be attained.<sup>57</sup> The tension between private landowners' utilitarian rights of land ownership versus the public trust issues of preserving endangered species collides head-on in this win/lose forum. The irony is, rather than achieving the goals that were the hopes of ESA § 10, the escalated tension between stakeholders often vitiates the process and may cause extreme compromises in plans, ultimately limiting protection for species in the end.<sup>58</sup> It is this result that contravenes the Congressional mandate of the ESA and the intent of the 1982 amendments to encourage creative partnerships among stakeholders.<sup>59</sup> Further, the current framework of our centralized, bureaucratic administrative structure impedes interagency coordination and adaptation as new information evolves and undermines the essence of what the ESA was designed to achieve.<sup>60</sup> The current architecture cannot support the needs of a holistic, reflexive model that advances deliberative democracy, protects complex ecosystems, and assures public deliberation in the process.

Beyond improving the institutional forums to engage all stakeholders, we must determine what constitutes adequate public participation. The lack of legal or procedural mandates on substantive public participation in HCP's results in notice and comment periods that are nonetheless consistent with the forum requirements promulgated by the Administrative Procedure Act (APA). APA § 553 governs notice and comment requirements for agency rulemaking. APA § 553(b)(3) states that notice shall include the "terms or substance of the proposed rule or a

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57. Ruhl, *supra* note 31, at 1421; *see also* Freeman & Farber, *supra* note 21, at 815 ("Centralized top-down regulation is thought to inhibit the kind of policy and institutional innovations that come only from local knowledge and experience.").

58. Holly Doremus, *Adaptive Management, the Endangered Species Act and the Institutional Challenges of "New Age" Environmental Protection*, 41 WASHBURN L. J. 50, 54 (2001). Professor Doremus persuasively argues that current institutional structures and arrangements are key impediments to achieving on-going public participation and adaptive management. *Id.*

59. H.R. REP.NO. 97-835, at 31 (1982) (Conf. Rep.) ("To the maximum extent possible, the Secretary should utilize this authority under this provision to encourage creative partnerships between the public and private sectors and among governmental agencies *in the interests of species and habitat conservation.*") (emphasis added); *see* Taylor, *supra* note 15, at 591 ("In the legislative history, Congress emphasized that the San Bruno HCP enhanced the species' chances of survival. Congress noted that enhancement was the first of the "basic elements" of the San Bruno plan and stressed that the Secretary consider this factor in determining whether to issue a long-term permit.").

60. Colburn, *supra* note 56, at 497-98.

description of the subjects and issues involved.”<sup>61</sup> In determining if notice is adequate, a court must decide whether the agency has sufficiently integrated the policies underlying the notice requirements in its planning process.<sup>62</sup> The three purposes of notice requirements are: 1) to ensure that agency regulations are tested by a diverse public comment, 2) to ensure fairness and an opportunity to be heard, and 3) to enhance judicial review.<sup>63</sup> The test thus requires that these forums be consistent with the underlying statutory policy. The policy mandates of the ESA, made clear in its purpose statement<sup>64</sup> and in the hope that “creative partnerships” will produce viable HCPs, are consonant with the purposes behind NEPA. Pursuant to NEPA § 102, all agencies of the federal government are required to “utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences” in “planning and . . . decision making which may have an impact on man’s environment.”<sup>65</sup> Properly structuring notice and comment proceedings has been the grist for much of the much of the legal debate surrounding the implementation of these policies.<sup>66</sup> For the ESA, the strength and breadth of these policy mandates demand forums for public deliberation that are “properly accommodated.” The standard notice and comment periods are functionally insufficient for a complex HCP addressing incidental takings of endangered spe-

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61. 5 U.S.C. § 553 (1996).

62. *Bldg. Indus. Ass’n v. Babbitt*, 979 F. Supp. 893, 901 (D.D.C. 1997).

63. *Small Ref. Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

64. 16 U.S.C. § 1531(b) (1988) (The purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”).

65. 42 U.S.C. § 4332(2)(A); *see also* Exec. Order No. 13352, *Facilitation of Cooperative Conservation*, 69 Fed. Reg. 52989 (Aug. 26, 2004).

66. *See, e.g.,* *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115 (N.D. Cal. 2006) (rejecting challenge that citizens’ right to adequate participation was denied.); *see also* *Bldg. Indus. Ass’n*, 979 F. Supp. at 901 (challenging both that notice and comment period was insufficient due to lack of awareness of scientific study results on shrimp habitat and that conservation needs were rejected by the court); *see also* *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013 (3d Cir. 1972) (upholding challenge that notice was insufficient to allow for opportunity to comment because plaintiffs were not apprised of the scope of the changes being proposed); *cf. Gerber v. Norton*, 294 F.3d 173, 178 (D.C. Cir. 2002) (upholding challenge that opportunity for comment was insufficient because plaintiffs were not informed of mitigation site for fox squirrel habitat or shown map of proposed territory).

cies<sup>67</sup> and there is currently no institutional structure or social expectation demanding anything more robust.

The procedures required under APA § 553 for public participation reflect Congress's intent to give deference to the agency experts in making decisions. This makes sense given the complexity of government and the delegation of authority to agencies. However, the complex arena of large scale, multi-species HCP's with divergent and often conflicting legal interests between stakeholders are not completely analogous to the institutions of agencies with prescribed authority. Habitat conservation planning has been referred to as a "shared power world" wherein decision-makers are faced with the reality that decisions of this type can no longer be made unilaterally or solely within power bases embodied by certain institutional actors.<sup>68</sup> The explicit mandate of Congress in enacting the ESA makes this clear.

Properly accommodating broad public participation raises fundamental, operational challenges.<sup>69</sup> Studies suggest that even regional HCP's with more elaborate participatory measures would struggle with the competing goals of being responsive to multiple constituents and efficiency.<sup>70</sup> Generally, HCP's with a public entity as the permittee are regional in scope, tend to have representative participation and a desire to include multiple constituencies—whereas private permittees do not.<sup>71</sup> Despite the fact that regional plans tend to have broader participation, participants reported a struggle between being responsive to multiple constituencies and achieving desired outcomes in an ef-

67. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (citing S. REP. NO. 752, at 14-15).

Considerations of practicality, necessity and public interest . . . will naturally govern the agency's determination of the extent to which public proceedings should go. Matters of great import, or those where the submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures.

*Id.*

68. David Ostermeier et. al., *Habitat Conservation Planning: Current Processes and Tomorrow's Challenges*, in IMPROVING INTEGRATED NATURAL RESOURCE PLANNING: HABITAT CONSERVATION PLANS, available at [http://www.ncedr.org/case\\_studies/hcp.html](http://www.ncedr.org/case_studies/hcp.html) (last visited Mar. 12, 2006).

69. Colburn, *supra* note 56, at 452-53; see generally ARCHON FUNG & ERIK OLIN WRIGHT, *Thinking About Empowered Participatory Governance*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE, at 3 (2003).

70. Ostermeier et. al., *supra* note 68, at 170; see also ANDERSON & YAFFEE, *supra* note 3, at 27 ("Managing effective negotiations requires a different approach than the traditional public participation approach that most HCP's follow.").

71. *Id.* at 170.

ficient manner.<sup>72</sup> Four themes surfaced in plans that had broad representative participation, suggesting that despite attempts at including public participation, the processes for doing so are discretionary and the current models of democratic forums have not evolved to achieve truly effective deliberative outcomes. These themes are: 1) lack of process design and management, 2) variability of the FWS personnel involvement, 3) variability in the negotiations process, and 4) time constraints:

- Lack of process design and management has resulted in confusion over service personnel roles, goals and the process for decision-making. In only two regional HCP's, discussions clarifying these expectations occurred in the initial phase of the project and helped to facilitate an efficient, open and satisfying process.<sup>73</sup>
- Variability of the role of FWS is often ill-defined, resulting in eight out of twenty plans reporting that the lack of clarity of the FWS personnel's role and their "hands-off approach" contributed to participants' frustration, delays and a perceived lack of accountability for decisions.<sup>74</sup> Conversely, in the instances in which the FWS personnel fulfilled a leadership role, the outcomes were perceived as positive and critical to the success of the plan.<sup>75</sup>
- Variability in the process of negotiation resulted in significant differences in the regional plans that had representative participation. Decision-making and negotiation problems occurred in plans where authority was unclear. Lack of clarity as to authority and accountability of committees led to frustration, delays and the perception of disconnect between groups and FWS personnel.<sup>76</sup>

Time delays in large representative plans stemmed from excessive bureaucratic review and approval processes within the service.<sup>77</sup> As a result, the HCPs with broad participation remained mired in a structure that contributed significantly to the dissatis-

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72. *Id.*

73. *Id.* at 171.

74. *Id.*

75. *Id.* ("In other cases where role assumptions among participants, cases progressed more smoothly. Clark County [HCP] was unique in that an outside facilitator was hired near the outset and this fostered a relatively planned and open process.")

76. *Id.* at 172.

77. *Id.* at 173.

faction of participants.<sup>78</sup> Qualitative analysis of these studies indicate that the benefit of broad public deliberation cannot be achieved through traditional institutional models. Creating models of deliberative democracy that provide institutions of collaborative problem solving and environments in which multi-stakeholder deliberation is desired and encouraged are necessary to enhance the outcomes of HCPs.

#### IV.

##### PUBLIC PARTICIPATION IN THE BALCONES CANYONLANDS CONSERVATION PLAN: A CASE STUDY

The lack of public deliberation and the lack of a legal framework that Ruhl described have arguably contributed to the disappointing results both for wildlife preservation and for enhancing the democratic legitimacy of the Balcones Canyonlands Conservation Plan.<sup>79</sup> The public participation in the BCCP was legally insufficient for three critical reasons: 1) the clear mandates and legislative history of the ESA were not achieved by the process employed in this MSCP model, 2) the public had no opportunity to participate in the decision resulting in significant habitat degradation of both the golden-cheeked warbler and the black-capped vireo populations, and 3) the public had no opportunity to participate in funding decisions for land acquisition and mitigation efforts as funding was not assured up front. Each will be addressed separately.

First, the BCCP was not a "creative partnership" between all stakeholders in initiating an ESA § 10 permit. Though provisions were made to invite all stakeholders, private landowners not directly affected by the development plan were only able to participate in a limited fashion. This problem was further compounded by group structures that were not set up for true deliberative processes. The BCCP (formerly, the Austin Regional Habitat Conservation Plan) was initiated in 1988 as a means to address the impact of rapid development on two bird species, the golden cheeked warbler and the black-capped vireo, and six karst invertebrates located in Austin and Travis County, Texas.<sup>80</sup> The development in the area contributed to a loss of habitat and sub-

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78. *Id.*

79. Ruhl, *supra* note 31, at 1395.

80. *Id.* at 1415; *cf.* Bidwell, *supra* note 14.

sequent population declines in these species. The encroachment of the development also fragmented the species' habitat.

In response to the concern about species decline, a fifteen-member steering committee was formed to oversee the development of a regional habitat conservation plan and to serve as the decision-making body for the plan. The goal of the plan was to establish a habitat preserve which would sustain viable populations of the bird species and karst species while allowing for planned development. The steering committee consisted of members of the City and County government, the Nature Conservancy, the Lower Colorado River Authority, The Texas Parks and Wildlife Department, the Texas General Land Office, Texas Department of Transportation, development interests and environmental interests.<sup>81</sup> A member of the FWS participated as an ex officio member and did not have a major role in the planning process.<sup>82</sup> The group had equal representation from government, environmental and development interests.<sup>83</sup> Others were invited to join the group at initial meetings. As a result, early meetings had over one hundred participants.<sup>84</sup> Because of the misguided attempt to assure broad participation, the size of the group was unwieldy and ineffective. Furthermore, despite these attempts, private landowners without a direct stake in the process felt underrepresented even though they did make use of the public comment period.<sup>85</sup> The steering committee reconfigured the structure of the groups in order to address the complex needs of representation for such a large project. However, lack of clarity over authority, lack of transparency and uncoordinated decentralization resulted in a disjointed effort that impeded the effectiveness of public participation.<sup>86</sup> The lack of true deliberation

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81. Bidwell, *supra* note 14.

82. *Id.* at 1; *see also* Ruhl, *supra* note 31, at 1416 (1991) (“[i]t was apparent that the Service would act principally as the final arbiter and, unfortunately, not as a major planning force.”).

83. Bidwell, *supra* note 14, at 1.

84. *Id.* at 2.

85. *Id.*

86. *Id.* The original steering committee, seeking to keep the decision-making group from being too cumbersome, renamed itself the Executive Committee and was the primary decision-making body for the process. A steering committee was formed to address fund raising. A biological advisory team met in private. *Id.*; *see also* Hood, *supra* note 11, at 14 (“These recommendations [of the BAT] were deliberately developed with no reference to the political or economic contexts.”). In August 1989, the Executive Committee banned interim development pending the final HCP. Development projects already in the process of moving forward were halted. This decision resulted in some participants, including large corporations, to drop out

from all stakeholders, beyond those with a perceived direct role, resulted in a plan that arguably did not, to the "maximum extent practicable, minimize and mitigate the impacts of such takings. The process employed by the BCCP was thus a violation of ESA § 10(2)(B)(ii), an outcome which could have been avoided.

Second, lack of public participation in the Biological Advisory Team (BAT) study likely contributed to a plan which may in fact "appreciably reduce the likelihood of survival and recovery of endangered species in the wild." This would also constitute a violation of ESA § 10(2)(B)(iv). In April 1990, a Biological Advisory Team was formed to assess the acreage that would be required to sustain viable populations of the bird species. The Biological Advisory Team intentionally worked in private so that "politics and other interests would not influence their recommendations."<sup>87</sup> The BAT determined that in order to sustain viable populations of each species, there must be enough habitat to support 500-1000 breeding pairs of each. This would require 130,000 acres of preserved habitat out of the total 648,000 in Travis County.<sup>88</sup> Though, on its face, the closed door policy of the BAT might seem to make sense, the lack of transparency and deliberation resulted in recommendations to the Executive Committee that were completely out of sync with any realistic land acquisition plans or funding capabilities.

In essence, despite good will attempts at obtaining broad-based input for the plan, the structure and function of each group hindered the development of a cohesive, coordinated product that could be agreed upon up-front. Though members believed that their comments or biological research would have an impact on the final BCCP, the lack of clear role accountability, authority and hierarchical decision making resulted in a final BCCP that differed dramatically from BAT recommendations and the perceived goals from all other constituents.<sup>89</sup> The final draft BCCP,

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of the process, reasoning that it was more cost effective to pursue land clearing and risk enforcement while others submitted independent HCP's, assuming that the process would not be encumbered by so many constituent groups. At a poorly attended public meeting in Aug. 1990 the Executive Committee decided to discontinue the public newsletter even though there was no consensus on the HCP, the draft EIS, the Section 10 application or the habitat acquisition funding plan. Ruhl, *supra* note 31, at 1417-21.

87. Bidwell, *supra* note 14, at 2.

88. Hood, *supra* note 11, at 14; *see also* Taylor, *supra* note 15, at 598 ("[h]owever, the draft BCCP departed from a number of the BAT's most fundamental recommendations.").

89. Taylor, *supra* note 15, at 599.

approved in 1996—eight years after it was initiated—was an extreme compromise rather than a scientifically supported plan that would assure conservation goals.<sup>90</sup> The plan proposes the creation of a reserve of a minimum of 30,428 acres in seven preserve units.<sup>91</sup> The preserved area ignores the initial BAT recommendations for preventing fragmentation of habitat or providing adequate edges from development.<sup>92</sup> The plan also allows for the taking of 55% of the black-capped vireo and 71% of the golden cheeked warbler populations.<sup>93</sup> Rather than supporting the BAT's recommendations for land acreage requirements, the final plan relies on aggressive management techniques to conserve the bird species.<sup>94</sup> The impact of aggressive management of species in lieu of the severely compromised plan for land acquisition was not studied by the BAT and thus, the ultimate success of the plan in preserving the bird species is not guaranteed.<sup>95</sup>

The deliberative process that went into the BCCP contributed to results that may not achieve conservation goals and has led to a high level of frustration among stakeholders.<sup>96</sup> The lack of a deliberative process in the BCCP mirrors the flawed process in the recent San Diego MSCP, which resulted in an immediate en-

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90. Hood, *supra* note 11, at 14.

91. See 60 Fed. Reg. 54701 (Oct. 25, 1995) (The permit to allow incidental taking of Golden-Cheeked Warbler, Black-Capped Vireo, and Six Karst Invertebrates includes that the applicants will conserve a minimum of 30,428 acres, conduct biological management of the conserved habitat and provide funds to implement the habitat conservation plan.).

92. See U.S. FISH AND WILDLIFE SERVICE, HABITAT CONSERVATION PLAN AND FINAL ENVIRONMENTAL IMPACT STATEMENT: BALCONES CANYONLANDS CONSERVATION PLAN (March 1996) 512 (on file with the Western New England College School of Law). The edge effects of the plan are not as severe as those projected by the BAT. This was based on the fact that there is no reliable information on the edge effects on the warbler, so this calculation was not done. Since current information is based on assumptions, the edge effects are being used as a general planning tool rather than a specific design for the preserve. See also Hood, *supra* note 11, at 14.

93. *Id.* at 510. The plan does allow for fifty-five percent of the known black-capped vireo population to be taken. The plan was based on acreage surrounding known vireo sightings. These take areas contain one or two pairs existing in small habitat units and are not the clusters of vireos that are considered important by the plan. *Id.*

94. *Id.* at 20 (Table S-1: Summary of Impacts and Mitigation of Alternatives); see also Hood, *supra* note 11, at 14.

95. *Id.* at 215 (The current consensus of wildlife agencies is that “the [p]roposed action could threaten population viability of the golden-cheeked warbler.”).

96. See generally *supra* note 92, 510-32. Public comments relating to impacts on warblers, vireos and karst species showed frustration with the process and skepticism about the mitigation measures, the scope of the preserve and the lack of assurances on the impact to the species. *Id.*

joiment of the city's incidental take permit for all pending and future development projects that would result in the taking of any of seven vernal pool species including fairy tail shrimp and certain aquatic plants.<sup>97</sup> Specifically, the San Diego MSCP involves the creation of a 171,917 acre preserve as part of mitigation efforts for the destruction of sensitive species.<sup>98</sup> The preserve would not be established by the MSCP but would require the on-going dedication of acreage over fifty years. As a result, the FWS did not evaluate the impact of the conservation plan based on factors such as the size, design or mitigation measures to the species outside this area. Instead, much like the proposal in the BCCP, the San Diego MSCP proposes to evaluate the impact of development in the future while locking in the mitigation measures now.<sup>99</sup> This process conflicts with the creative partnership approach envisioned by Congress that was based on the San Bruno Mountain Mission Blue Butterfly Conservation Plan.<sup>100</sup> The San Bruno Mountain HCP had specific biological goals generated after two years of biological study of the proposed development's impact on the Blue Butterfly and required both on-going monitoring as well as requirements to change courses should the species suffer more losses than anticipated.<sup>101</sup> The flawed processes of both the BCCP and the San Diego MSCP support the assertion that the ESA, as currently structured, is not sufficiently prescriptive and suggests that achieving deliberation in these complex arenas requires a reconceptualization of the institutions of democracy.

Third, the lack of true public deliberation eroded trust in the BCCP process, fueled a breakdown of communication and collaboration among groups and ultimately led to major parties pulling out of the regional process in favor of pursuing single habitat conservation plans on their own.<sup>102</sup> Ongoing public discourse in 1993 led Travis County residents to reject a \$48 million dollar bond proposal which would have paid for land acquisition

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97. *Southwest Center for Biological Diversity v. Bartel*, No. 98-CV-2234-B(JMA), 2006 U.S. Dist. WL 3914425, at \*1, \*36 (S.D. Cal. Dec. 15, 2006).

98. *Id.* at \*6-7.

99. *Id.* at \*16-17, \*22 ("The Court finds that the Assurances violate the ESA because they lock in ineffective, unstudied and inadequate mitigation for the vernal pool species for fifty years."). Although the targeted boundaries of the Preserve have been determined, FWS has not evaluated how the extent of the taking permitted under the conservation plan will benefit the vernal pool species.

100. *Id.* at \* 20.

101. *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 983 (9th Cir. 1985).

102. Ruhl, *supra* note 31, at 1419.

for the preserve and represented the power and importance of public participation.<sup>103</sup> The final BCCP still does not have the requisite funding to reach the land acquisition goal of 30,428 acres.<sup>104</sup> To date, eighteen years after initiation and ten years after plan approval, ninety-one percent of the 30,428 acres have been preserved.<sup>105</sup> Inadequate funding also required that the monitoring program be scaled back. Biologists track where birds are located but do not track nesting success or adult and juvenile movement.<sup>106</sup> Despite hard work and notably good intentions, inadequate public participation contributed directly to funding inadequacies and thus, a violation of ESA § 10(2)(B)(iii) which requires that the applicant will “ensure that adequate funding for the plan will be provided.”<sup>107</sup> The importance of ensuring adequate funding was addressed recently in the San Diego MSCP. In San Diego, the Court concluded that the FWS’s issuance of the incidental take permit was arbitrary because the city did not identify dependable sources of funding but, rather, relied on future actions such as a regional plan, a possible bond issue requiring voter approval and raising the sales tax.<sup>108</sup> Inadequate funding in the BCCP and more recently in the San Diego MSCP stands in stark contrast with other MSCPs that outline detailed funding plans up front before the permit is issued, further suggesting the importance of public participation and deliberation in the plan’s development and on-going management.<sup>109</sup>

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103. Bidwell, *supra* note 14, at 3.

104. *Id.* at 7.

105. BALCONES CANYONLANDS CONSERVATION PLAN, <http://www.co.travis.tx.us/tnr/bccp/faqs.asp#1>.

106. Bidwell, *supra* note 14, at 25.

107. Southwest Ctr. for Biological Diversity v. Bartel, No. 98-CV-2234-B(JMA), 2006 U.S. Dist. WL 3914425, at \*1, \*30 (S.D. Cal. Dec. 15, 2006).

108. *Id.* at 31.

109. Nat’l Wildlife Fed’n v. Norton, 306 F. Supp. 2d 920, 921-23 (E.D. Cal. 2004). The Metro Air Park MSCP, in Sacramento California, covers fourteen species and requires the purchase and maintenance of 1208 acres of mitigation land. The mitigation measures are funded by fees paid by each developer at the price of \$10,027 per acre. Additionally, the plan allows for the raising of fees to adjust for any increased costs of achieving the required mitigation plan or maintaining habitat. Enforcement is covered by the right to place a lien on any parcel that refuses to pay and also allows for adjustments to the plan if there are changed conditions which require increased funding.

## V.

EMPOWERED PARTICIPATORY GOVERNANCE IN HCPS  
CAN RESULT IN GOAL ATTAINMENT,  
DEMOCRATIC LEGITIMACY AND  
PROMOTE STEWARDSHIP

There is strong evidence that the current approach to preserving species in a complex and dynamic environment is not working. Despite the legal teeth of the ESA, in the twenty-five years since it has been amended, the loss of habitat continues to occur and many species have declined in numbers or become extinct.<sup>110</sup> Perversely, the framework of the law has resulted in a myopic approach to species preservation that attempts to define, characterize and prescribe static rules for a science that is dynamic and not well understood. The science of ecosystem governance has only recently been understood to be based on complex interdependencies that cannot be understood in isolation but rather in context with all other factors which impact the system.<sup>111</sup> Furthermore, the structure and policies employed to conserve species are based on an industrial paradigm that roots conservation in a scientific model which is ill-suited to understand, much less address, the holistic interconnectedness of species and habitat. It is certain that the bounding of habitat in prescribed regions without concomitant understanding of viability requirements or lack of on-going adaptive management is no longer an adequate approach.<sup>112</sup> Given the recent proliferation of HCP applications,<sup>113</sup> it is imperative that formidable changes be made to the HCP process based on current quantitative and qualitative data.

The results in the BCCP lend empirical support to studies that show that public deliberation is crucial to the outcomes of HCPs. The Empowered Participatory Governance (EPG) model provides a framework for enabling deliberative decision-making at

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110. Hood, *supra* note 11, at 3.

111. Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity and Dynamism*, 21 VA. ENVTL. L. J. 189, 193 (2002).

112. *Id.* at 191; *see also* Ruhl, *supra* note 31, at 1404 (“Efforts to mitigate the adverse effects of each successive project can lead to a patchwork approach rather than the necessary comprehensive ecosystem management strategy, which is unsatisfactory to environment activists seeking a more holistic, biologically significant approach.”).

113. Rahn et al., *supra* note 2, at 613 (“By 2005, 450 HCPs covering 40 million acres had been approved.”); *see* Craig W. Thomas, *Habitat Conservation Planning*, in, DEEPENING DEMOCRACY, INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE, 144, 148 (Archon Fung & Erik Olin Wright eds., 2003) (stating that by April 2002, 379 HCPs had been approved).

the local level.<sup>114</sup> Empowered participatory governance and the constructs of democratic experimentalism can augment the lack of prescription in the statutory text by providing the architecture to frame and carry out the HCP process in a more deliberative and efficient manner.

Empowered Participatory Governance as described by Fung and Wright, requires three institutional design features: 1) the devolution of public decision *authority* to empowered local units, 2) creation of formal linkages of responsibility, resource distribution, and communication that connect these units to each other and to super-ordinate, centralized authorities, and 3) generation of new state institutions to support these decentralized problem-solving efforts.<sup>115</sup>

The first design feature, devolution to local units of power, is a radical shift from the current ideology of democratic government and goes far beyond seeking public comment from citizens. Rather, in the context of habitat conservation plans, local stakeholders would be convened and charged with producing a “highly tailored habitat management plan that advances both development and species protection.”<sup>116</sup> Applying this model, the BCCP might have developed decision-making groups consisting of a mixed set of stakeholders charged with certain goals such as species preservation or funding.<sup>117</sup> This would have contributed to all members sharing information, learning from others’ perspectives and working collaboratively to achieve goals rather than making compromises. Groups (councils) should be product-oriented rather than functionally grouped and include a diverse range of representative stakeholders accountable to each other and their stakeholders for certain defined portions of the plan.

Addressing the practical difficulties that have plagued a deliberative polyarchy model requires a restructuring of current insti-

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114. FUNG & WRIGHT, *supra* note 16.

115. *Id.* at 16 (emphasis added).

116. *Id.* at 21.

117. See Hood, *supra* note 11, at 54 (“Balance representation on steering committees. These groups should equitably represent conservationists and others interested in the affected public resources, and conservationists on those committees should represent views of the broader conservation community.”); see also Karkkainen, *supra* note 111, at 224 (arguing that mixed groups that are best poised to take full advantage of the informational benefits of collaboration and to avoid pitfalls of relying on an excessively narrow information base are ideal).

tutions.<sup>118</sup> Councils would require that membership is not voluntary but by appointment, that the role of each member is similar to that of a board member, that the council's work is ongoing and that the decision-making process will be more consensus based and adaptive rather than by simple majority vote.<sup>119</sup> These councils would not rely on merely "steering by higher levels of government,"<sup>120</sup> but should be chaired by a member of the action agency who is specially trained in concepts of transformational leadership,<sup>121</sup> facilitation, and consensus building.

The second design feature, centralized supervision and coordination, requires amending the top down hierarchical model of decision-making replete with veto power while maintaining an efficient system for coordination and flow of information across decision-making groups horizontally and vertically to the coordinating group or council. The goal of the supervisory group, or preferably the coordinating council, is not to review and approve or dismiss group decisions post-facto but rather to reinforce the quality of local decision-making by assuring and facilitating a more consensus based decision for the good of the whole. Rather than facilitating a win-lose proposition, the coordinating council will assure that information from groups gets shared horizontally, thus avoiding duplication and surprises.<sup>122</sup> Clearly, one of the major problems with the BCCP stemmed from a lack of this second design feature. Although groups were convened to address issues and afforded participation, their work was viewed as advisory in nature and subject to approval, veto or change by the Executive Committee. This process is so rooted in our understanding of democracy that it hindered participants from questioning its effectiveness. For example, the Biological Advisory Team consisted of a group of experts charged with formulating recommendations for the scope of habitat that would best meet the preservation goals for the golden-cheeked warbler and the black-capped vireo.

Despite lengthy research, the recommendations were not adopted. This was due to insufficient funding and the fact that the scope of habitat required was large and would cover land that

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118. Freeman & Farber, *supra* note 21, at 834.

119. Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459, 477-80 (2002).

120. Freeman & Farber, *supra* note 21, at 834.

121. Bass, *supra* note 17, at 130.

122. FUNG & WRIGHT, *supra* note 16, at 21.

was already in the queue for development. The end result was a serious impediment to the success of the BCCP and arguably, the preservation of the two endangered bird species. Instead, the process employed in the BCCP fueled frustration, wasted efforts and failed to foster a common sense of ownership for the plan's outcomes. Applying the second design feature of the EPG model, the BAT could have been set up as a decision-making group that included scientists and members of the community working collaboratively, rather than a group of scientists who served solely as an advisory group. By empowering this group up front and providing clear information as to what was possible, they could have discussed the habitat needs in context with funding and land constraints and likely developed a plan that protected species, assured a funding plan and garnered a broader base of support. The coordinating council in this reconceptualized model should consist of a chairperson and each chair from the other established decision-making councils. By having each trained chairperson of other councils also be members of the coordinating council, they would be required to represent their individual council's work, assure coordination of the plan across agencies, councils, and all stakeholders, while limiting redundancies and promoting transparency. The role of the coordinating council is to assure that the development, implementation, evaluation and adaptation of the plan are shared across constituent groups efficiently with open dialogue rather than serving in a supervisory or final decision-making capacity.

The third design feature, generation of new state institutions, seeks to transform "mechanisms of state power into permanently mobilized deliberative democratic grassroots forums."<sup>123</sup> This design feature goes beyond participation from interested parties and inviting volunteers to truly engaging citizens as "consumers of public goods, in the direct determination of what those goods are and how they should best be provided."<sup>124</sup> Clearly, this is a significant departure from our notion of attending a public meeting because the matter concerns or angers us. Rather, this design feature requires local actors to be engaged in a deliberative democratic process that affects citizens individually and as a community. The result is a process which is dependent upon the energy, varied expertise and commitment of local citizens to assure that common goals are achieved.

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123. *Id.* at 22.

124. *Id.*

This design feature will require fundamental changes in the role of individual actors and agencies to change the common group dynamic of politicking and negotiating a win-lose proposition to one of shared purpose and ownership.<sup>125</sup> The role of the councils will not be to usurp that of federal and state agencies but rather to work collaboratively and in tandem with them.<sup>126</sup> Applying this to the BCCP might have facilitated a structure where mixed groups would have had a sense of mission and purpose in achieving goals rather than simply having forums for voicing concerns. Engagement in this manner requires enabling conditions of leadership and facilitation that have not been typically employed in regional HCPs<sup>127</sup> or widely incorporated into a theory of deliberative democracy. Leadership in councils and among agencies will be required to depart from the top-down, command-control style and foster consensus and ownership without raising new disparities.<sup>128</sup> This level of deliberative decision-making more closely resembles the creative partnerships that were intended to be the hope of HCPs.

These three design features of Empowered Participatory Governance will not be successfully institutionalized without significant leadership. Specifically, transformational leadership is the critical link which heretofore, has not been incorporated into the reconceptualized model for HCPs, and is vitally important in regional multispecies HCPs (like BCCP). Transformational leadership,<sup>129</sup> as articulated by Bass, is defined as leadership which

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125. Karkkainen, *supra* note 111, at 225; *see also* FUNG & WRIGHT, *supra* note 16, at 22.

126. Freeman & Farber, *supra* note 21, at 835; *see* Foster, *supra* note 109, at 479; *see also* Dan Tarlock, *Slouching Toward Eden: The Eco-Pragmatic Challenges of Ecosystem Revival*, 87 MINN. L. REV. 1173, 1207 ("Because [ecosystem] revival will never be an exclusively federal or state responsibility, agency efforts must be better integrated with stakeholder participation.").

127. FUNG & WRIGHT, *supra* note 16, at 23; *see also* Karkkainen, *supra* note 111, at 242. This requires "aligning a set of diverse institutions and individuals with varied missions, interests, and operational constraints into a pattern of cooperative or collaborative behavior that allows them jointly to define and take steps to achieve a common objective that would be beyond the reach of any of them operating individually." *Id.*

128. Foster, *supra* note 119, at 495-96 ("Any decision-making process that hopes to improve participation must pay sufficient attention to the political economy and resulting social relations of constituencies in a participatory process.").

129. BERNARD M. BASS & RONALD E. RIGGIO, *TRANSFORMATIONAL LEADERSHIP* (2d ed. 2006). Transformational leaders do more with colleagues and followers than set up exchanges or agreements. They achieve superior results by employing one or more of the four core components of transformational leadership, which include charisma, idealized influence, inspirational motivation and individualized con-

stimulates and inspires followers to both achieve extraordinary outcomes, and, in the process, develop their own leadership capacity. Transformational leaders help to align the objectives and goals of the individual followers, the leader, the group and the larger organization.<sup>130</sup> The importance of transformational leadership cannot be understated in the context of large MSCPs. It is crucial to both a successful deliberative process and to actualizing the reconceptualized model for HCPs.<sup>131</sup> Transformational leaders, unlike transcendental leaders, “motivate followers to work for transcendental goals that go beyond immediate self interests.”<sup>132</sup> Followers and other constituencies are motivated to do more than originally expected as they strive together for higher order outcomes.<sup>133</sup>

The universality of transformational leadership is well documented across countries, organizations, and teams.<sup>134</sup> Most notably for HCPs, team members can learn how to make the team itself more transformational.<sup>135</sup> The significance of motivating cooperation among diverse constituents is particularly important in the context of HCPs where the utilitarian desire to develop privately owned land and the goal of protecting endangered species collide.<sup>136</sup> Despite the force of the “regulatory hammer of the ESA” and the advantages of working collaboratively with ecological experts in order to develop a habitat conservation plan, cooperation was most often achieved where leadership supported collaboration and consensus building, facilitated interpersonal trusting relationships, and eliminated hierarchical decisions by driving decision-making authority down to staff and line man-

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sideration. Each of these individual components, along with the full range of transformational leadership, have been extensively researched, utilizing the Multifactor Leadership Questionnaire (MLQ) across all types of organizations, the military, teams and in a variety of international settings over the past twenty-five years. *Id.*

130. *Id.* at 3.

131. See CRAIG W. THOMAS, BUREAUCRATIC LANDSCAPES, INTERAGENCY COOPERATION AND THE PRESERVATION OF BIODIVERSITY, 49-50 (2003). The case studies show that leadership was crucial for line managers to form position-based communities and facilitate interagency cooperation on the issue of biodiversity. *Id.*

132. Bass, *supra* note 17, at 133.

133. *Id.* at 133.

134. BASS & RIGGIO, *supra* note 129, at 16.

135. Bass, *supra* note 17, at 132; see also BASS & RIGGIO, *supra* note 129, at 218 (“Research on team leadership suggests that teams can be more effective if members have a shared mental model of the team’s appropriate processes, goals, and expectations.”).

136. THOMAS, *supra* note 131, at 199.

agers at the local level.<sup>137</sup> Unfortunately, the lack of transformational leadership as a critical element of the HCP process has resulted in haphazard approaches and inconsistent results.

The work required to accomplish this paradigm and structural shift is daunting and to some, undoubtedly impossible. This is not surprising given society's comfort with the nature and order of hierarchical, top-down institutions and decision-making. However, the legal mandates of Congress and the ESA show that Congress views the "value of endangered species as incalculable."<sup>138</sup> The legal mandate to transform the processes for true deliberative democracy at the local level as a means to achieve this mission requires a rethinking of the institutional structures and procedures required to enable a more deliberatively democratic and holistic process. The theoretical and empirical underpinnings of empowered participatory governance, coupled with transformational leadership suggest that this may be the means to protect endangered species, enhance democratic legitimacy, and promote stewardship as common rather than mutually exclusive goals.

The conceptual model described herein could serve effectively to balance the goals of private landowners and conservation in HCP's. Scholarly debate reveals opposing viewpoints on the need to amend the ESA in order to accomplish these changes.<sup>139</sup> Barring the very unlikely event of that happening with a Congress and President of different parties, revision of the HCP handbook is a valuable and imperative first step.

## VI.

### CONCLUSION: RECOMMENDATIONS FOR REVISING THE HCP HANDBOOK

Building upon the constructs of Empowered Participatory Governance and democratic experimentalism, the process for re-

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137. *Id.* at 270-76.

138. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 186 (1978).

139. Doremus, *supra* note 54, at 450 ([These] "steps could certainly be implemented under the current legislative scheme, and probably could be forced on the agencies by reviewing courts."); see also Ruhl, *supra* note 22, at 57 (2005) ("It will be essential, therefore, for advocates of adaptive management to move beyond defining the need for and basic approach of adaptive management and begin working directly and aggressively with the institutional design questions."). For a divergent perspective, see Tarlock, *supra* note 125, at 1207 ("Eventually the nation's environmental laws will have to be revised to reflect the experience of the last thirty years. We need new statutory foundations for ecosystem revival.").

vising the HCP Handbook should be deliberative, involving diverse stakeholders rather than the usual approach in which the FWS would be responsible for any revisions. A multidisciplinary group representing agencies (FWS and others), citizens, environmental groups, scholars, scientists and industry could be convened to accomplish this work. The revision team should be facilitated by a leader, trained in transformational leadership in order to promote consensus building and facilitate higher order goals. Revisions should include the elements of the empowered participatory governance and the reconceptualized model of HCP's which require: 1) structures that allow for collaborative problem solving, 2) increased stakeholder participation and interagency coordination, 3) adaptive management, and 4) transformational leadership; along with specific text that outlines the components of public deliberation, the schematic structure of the councils, the role of council members, the decision-making authority of the councils, process for appointment to the councils and the training that will be required for leaders of these groups. For example, Chapter 1 of the HCP Handbook, which provides the purpose of the HCP process and its goals, states that a goal of the HCP is to "establish clear standards that ensure consistent implementation of the section 10 program nationwide."<sup>140</sup> This goal could be supplemented by expanding on the importance of public deliberation as a means of facilitating the success of the HCP and include the elements of empowered participatory governance as the means to achieve public deliberation consistently.<sup>141</sup> Section 5 of Chapter 1 outlines the guiding principles of the HCP process, including the role of the FWS role in facilitating partnerships. This should be enhanced by describing in more detail the value and methodology for creating these long term partnerships and raising both awareness and expectations that the role of stakeholders will go beyond providing one-time commentary.

Chapter 2 of the HCP handbook provides an overview of the roles and responsibilities of FWS personnel in the HCP process. The focus of chapter 2 should expand beyond a checklist of steps

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140. U.S. FISH AND WILDLIFE SERVICE, *supra* note 38, ch. 1, at 1.

141. This rules out the kind of shallow improvements to the Handbook the Service appended in 2000 in its so called "Five Point Policy." See U.S. Fish and Wildlife Service, Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35242, 35256 (2000) (extending the minimum comment period to 60 days).

to successful submission of the permit application to a broader explanation of the leadership role that the FWS will play in assuring public deliberation throughout the process. By expanding and clarifying the role of FWS personnel, the frustration caused by FWS role variability and the lack of management could be alleviated.<sup>142</sup>

Chapter 3 outlines pre-application coordination and development. Chapter 3 currently includes, for the first time, the importance of leadership provided by the FWS personnel and the concept of steering committees. This chapter would be suitable for expanding on these concepts to include the structures of the councils (including the coordinating council), the importance of transformational leadership by all chairpersons of these councils, the decision-making authority of these groups and the benefits of true public deliberation in these forums. Establishing the expectation that the coordinating council will be truly cross-cutting in jurisdiction and capacity is fundamental. In doing so, this part of the Handbook could facilitate the implementation of empowered participatory governance by providing the guide for its achievement rather than merely ascribing to the importance of leadership.

The HCP handbook, though only a procedural guide for agency personnel as opposed to a statute, is an important part of the regulatory process with significant influence on the permitting process. It could be used to facilitate the changes needed to achieve true public deliberation in HCPs.<sup>143</sup> The revision process itself could facilitate a broader dialogue on the reconceptualized model of HCPs and begin to build national consensus on implementation of the HCP process going forward. Dissemination and training on the improved handbook to all HCP groups going forward could enable a more deliberative approach to plan implementation. Qualitative and quantitative monitoring of the roll-out of this model while utilizing the improved handbook could assist with addressing the fact that a normative framework for HCPs has been under-theorized.<sup>144</sup> The fundamental changes to institutional structures and processes required to enable public deliberation are daunting. However, the value of public partici-

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142. Ostermeier et al., *supra* note 68, at 171.

143. *Cf.* *GE v. EPA*, 290 F.3d 377, 380-82 (2002). The EPA's Guidance Document should have been subjected to rulemaking because it binds both applicants and the agency, and is treated by the agency as "controlling in the field." *Id.*

144. Freeman & Farber, *supra* note 21, at 802.

pation and true deliberation in HCPs has been widely acknowledged. The steps to accomplish this, described above, can begin to move closer to an HCP model which enhances democratic legitimacy, protects species and promotes stewardship among stakeholders.

