

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Biodiversity Protection: Implementation and Reform of the Endangered Species Act (Summer Conference, June 9-12)

1996

---

6-10-1996

### Waiting to Exhale Under the ESA: The Evolution of HCPs and Section 4(d) Rules

Donald J. Barry

Follow this and additional works at: <https://scholar.law.colorado.edu/biodiversity-protection-implementation-and-reform-endangered-species-act>



Part of the Biodiversity Commons, Environmental Law Commons, Environmental Policy Commons, Land Use Law Commons, Legislation Commons, Natural Resource Economics Commons, Natural Resources and Conservation Commons, Natural Resources Law Commons, Natural Resources Management and Policy Commons, Property Law and Real Estate Commons, Terrestrial and Aquatic Ecology Commons, and the Water Resource Management Commons

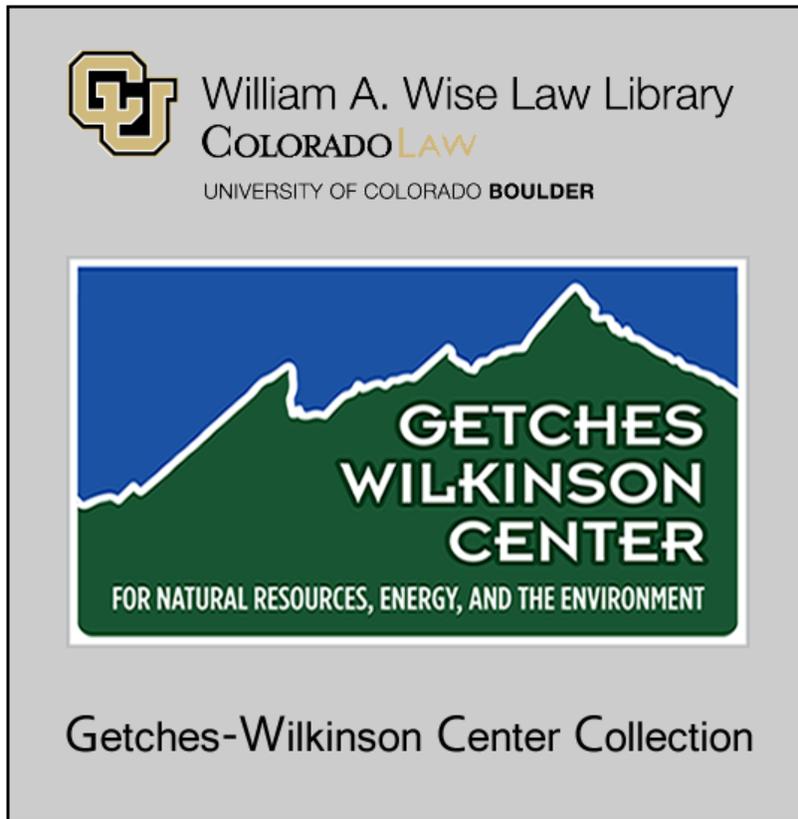
---

#### Citation Information

Barry, Donald J., "Waiting to Exhale Under the ESA: The Evolution of HCPs and Section 4(d) Rules" (1996). *Biodiversity Protection: Implementation and Reform of the Endangered Species Act (Summer Conference, June 9-12)*.

<https://scholar.law.colorado.edu/biodiversity-protection-implementation-and-reform-endangered-species-act/6>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



Donald J. Barry, *Waiting to Exhale Under the ESA: The Evolution of HCPs and Section 4(d) Rules*, in *BIODIVERSITY PROTECTION: IMPLEMENTATION AND REFORM OF THE ENDANGERED SPECIES ACT* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1996).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

WAITING TO EXHALE UNDER THE ESA:  
THE EVOLUTION OF HCPs AND SECTION 4(d) RULES

Donald J. Barry\*  
Counselor to the Assistant Secretary  
for Fish and Wildlife and Parks  
U.S. Department of the Interior  
Washington, D.C.

BIODIVERSITY PROTECTION:  
IMPLEMENTATION AND REFORM OF THE  
ENDANGERED SPECIES ACT

Natural Resources Law Center  
University of Colorado  
School of Law  
Boulder, Colorado

June 10-12, 1996

\*The views expressed in this paper are solely those of the author and do not purport to reflect the views of the Department of the Interior.

WAITING TO EXHALE UNDER THE ESA:  
THE EVOLUTION OF HCPs AND SECTION 4(d) RULES

I. INTRODUCTION: 1995 -- THE YEAR OF THE FAILED  
"QUICK FIX"

- \* Opponents of Section 9 definition of "harm" assumed 1995 would be a very good year: Congress or Supreme Court likely to ride to the rescue with quick and easy cure.
- \* Despite initial threat from Republican Revolution in Congress, no override of the ESA and Section 9 "take" took place.
- \* Long-standing legal debate over the take of endangered species through habitat modification finally resolved in favor of the "harm" definition in *Babbitt, et al. v. Sweet Home Chapter of Communities for a Greater Oregon et al.*, 115 S. Ct. 2407 (1995).
- \* Supreme Court has now shifted focus away from whether Section 9 take prohibitions apply to land use and development activities, to how those prohibitions and their related exemptions and exceptions apply.

## II. ADMINISTRATIVE REFORMS UNDER SECTIONS 9 AND 10

- \* Administration response to the ESA property rights challenge: Secretary Babbitt's push for ESA administrative reforms and his ESA ten-point reform plan of March 6, 1995.
  
- \* The emergence of new ESA policy initiatives to resolve conflicts with listed species on non-Federal lands: the "no surprises" policy for Habitat Conservation Planning (HCPs); "Safe Harbor" agreements; "no take" agreements; candidate conservation or pre-listing agreements; multiple species and habitat-based HCPs; Pacific Northwest Forest HCP initiative; process streamlining for low effect HCPs; and expanded use of Section 4(d) "special rules" for threatened species.
  
- \* Will provide special focus on two of the vehicles for relief to private landowners under the ESA: Habitat Conservation Planning (HCPs) under Section 10(a)(1)(B) of the ESA (16 U.S.C. 1539(a)(1)(B)) and threatened species "special rules" under Section 4(d) of the ESA (16 U.S.C. 1533(d)).

HCPs and Section 4(d) rules very different in their scope, their effect, and the mechanisms by which they are implemented:

- \* HCPs developed through one-on-one negotiations with private landowners or representatives of State and local governments and result in issuance of permits under Section 10(a)(1)(B) authorizing the "incidental take" of either endangered or threatened species in the course of otherwise lawful land use activities.
  
- \* Section 4(d) grants very broad regulatory authority to the Secretary over threatened species. A Section 4(d) "special rule" establishes specific prohibitions and exceptions for a given threatened species through informal rulemaking. Although limited to threatened species, Section 4(d) special rules are potentially more efficient than HCPs since exemptions or waivers implemented by across-the-board Federal regulations as opposed to individual ESA permits.

### III. THE EVOLUTION OF HABITAT CONSERVATION PLANNING

#### A. 1982 CONGRESSIONAL AUTHORIZATION -

- \* Section 10(a)(1) amended in 1982 to authorize

issuance of an "incidental take" permit to non-Federal landowners. In exchange for a long-term habitat conservation plan for a listed species, landowners allowed to incidentally take that species in course of an otherwise lawful activity.

\* Modeled after an HCP agreement negotiated in 1982 for development project involving San Bruno Mountain in San Francisco and an endangered butterfly.

\* Essential Elements for an HCP (16 U.S.C. Sec. 1539(a)(2)(A)) :

\* Plan must assess likely impact from incidental taking

\* Plan must detail proposed steps applicant will take to "minimize and mitigate" such impacts

\* Plan must detail long-term funding committed in support of the Plan

\* Plan must detail alternative actions considered and reasons such alternatives were not chosen

- \* Other measures deemed necessary or appropriate by the Secretary
  
- \* Secretary shall issue HCP permit if he finds, after opportunity for public comment, that:
  - \* Taking will be incidental
  - \* Impacts of such takings will be minimized and mitigated to maximum extent practicable
  - \* Adequate funding for Plan assured
  - \* Taking will not appreciably reduce likelihood of survival and recovery of the species in the wild
  - \* Any special measures required by the Secretary will be met
  
- \* Although not mentioned on face of statute, 1982 Conference Report noted need for long-term HCP permits and method for addressing "unforeseen circumstances" during term of permit that might jeopardize the affected listed species.

B. THE EARLY YEARS OF HCPs - LIFE IN THE SLOW LANE -

Variety of limitations curtailed early HCP program:

- \* Very few HCPs negotiated and authorized during first ten years of program: only 14 HCP permits between 1982-1992.
- \* General characteristics of early HCPs: limited in scope; addressed only one or two species at a time; involved land development versus land use activities; took years to negotiate.
- \* Inadequate long-term certainty provided HCP permittees (FWS reserved broad authority to revise and expand required mitigation).
- \* FWS historically reluctant to engage as an active participant in multi-party HCP negotiations (would hang back in advisory role rather than in role as active negotiator).
- \* Chronic difficulty to get closure on HCP negotiations: renegotiation of permit terms at each successive level of the FWS' bureaucracy (field office, state office, regional office, etc.).

- \* Variation in FWS HCP policies and negotiation expertise from FWS region to region (only real practical experience in early years in FWS Region 1 (California) -- little FWS familiarity with HCPs or consistency of approach in other regions).
- \* Lack of biological information and useful GIS data base upon which to frame negotiations: significant down-time spent by permit applicant collecting and assembling essential biological baseline data.
- \* Landowner unwillingness to accept validity of "harm" prohibition (if you don't accept the prohibition, you won't buy into an HCP exemption).
- \* Reluctance of local governments to commit to long-term funding mechanisms in support of broad-scale HCPs.
- \* Difficulty of translating agreed-upon mitigation package into binding legal commitments: Implementation Agreements accompanying HCPs frequently became bottomless heat-sinks for dueling attorneys.
- \* Little encouragement for HCP policy reform from past Administrations (desiring to get rid of the Act, not improve its implementation).

C. Babbitt's Blitzkrieg: HCP Policy Reforms

- \* ESA policy sea-change occurred with the arrival of Secretary Babbitt: a deep personal interest in, and knowledge of, the ESA in general and HCPs in particular.
- \* Babbitt's emphasis on streamlining HCP process and providing landowners with greater certainty and incentives to participate. Tremendous landowner response to reforms: compared to only 14 permits issued in first ten years of HCP program, over 130 permits have been issued in last three years under Secretary Babbitt, a huge increase. Moreover, FWS anticipates 300 HCPs under negotiation during FY '97 alone. Clearly something remarkable has changed.
- \* The "No Surprises" Policy (August 11, 1994) -  
The single most important policy reform under the Act and a major catalyst for renewed interest in HCPs. Babbitt's regulatory promise that "a deal is a deal" .... no second regulatory bite at the mitigation apple.
- \* No Surprises Policy: for species adequately covered by a properly functioning HCP, FWS will not

come back at some later date and ask for more land or for more mitigation funding -- even if the affected species continues to decline. Only in "extraordinary" or "unforeseen" circumstances would FWS come back to the HCP permit holder at all and then only to explore options to make previously agreed upon conservation program more effective without additional cost to the landowner.

- \* If permittee has abided by the terms of the HCP in good faith and the affected species continues to decline after the issuance of the permit, No Surprises means its not the problem of the permittee.
  
- \* Applies to all species adequately covered under the terms of the HCP, including unlisted and candidate species: if such species are listed later, they would be added to the HCP permit without additional mitigation requirements.
  
- \* IN SUMMARY, despite some rough edges that are still being smoothed out, net effect of "no surprises" policy has been to stimulate significant level of interest in the HCP process. Not a simple concept to implement but FWS committed to solving these tough issues to make it work.

## Other HCP Reforms and Variations:

- \* Multiple Species and Habitat-Based HCPs - To avoid inefficiency and short shelf-life of single species HCPs, Secretary Babbitt has strongly promoted large scale multi-species and habitat-based HCPs like the agreements being completed under the Natural Communities Conservation Planning Program (NCCP) in Southern California (covering hundreds of thousands of acres, multiple jurisdictions, hundreds of species and habitat-based).
  
- \* Classic "big tent" negotiation process authorized under California NCCP law soon to bear fruit: Using the NCCP process to develop habitat-based conservation proposals, Secretary Babbitt will issue this month a long-term HCP permit for central Orange County covering a 208,000-acre planning area. A second long-term NCCP/HCP permit expected this fall for 500 square mile area in San Diego County. These HCPs are unprecedented in scope, duration and size.

State Level Single Species HCPs - Arising out of red cockaded woodpecker battles in Southeastern States, these HCPs for the woodpecker provide

tremendous savings to private forestland owners by having State departments of Forestry and Fish and Game apply for and negotiate the terms of the HCP (absolving individual landowners from the cost of HCP development and negotiation). Terms of HCP would be incorporated into State forestry practices, eliminating need for separate HCP permits for each landowner. Approach first begun in Georgia and now pursued by five other southern States.

- \* Pacific Northwest HCP Forest Initiative - To encourage State and large industrial forestland owners in the Pacific Northwest to pursue HCPs, FWS established a special HCP office in Olympia, Washington, whose sole purpose is to streamline HCP process and negotiate forest HCPs. National Marine Fisheries Service (NMFS) has detailed staff to the Olympia HCP office to provide first ever "one stop shopping" for a combined FWS/NMFS HCP permits. Negotiation times have dropped significantly and landowner response has been tremendous: more than 33 major HCP negotiations completed or underway involving over 4.4 million acres of forestland. HCPs vary from single species approach to habitat-based/multiple species approaches like the very creative and comprehensive HCP prepared by Plum Creek Timber

Company.

- \* Short-Form and Low Effect HCPs - To lessen burden on small landowners and small-scale/low effect activities, FWS has developed in certain southeastern States "short-form" template HCPs with set mitigation schedules and/or two-three page fill-in-the-blank documentation requirements. FWS first focuses on needs of a particular listed species and develops a template mitigation package ranging from limited post-construction habitat restoration to habitat avoidance or acquisition. In even more radical break with tradition, FWS in southeastern region of country has dropped requirement of a separate Implementation Agreement altogether for low-effect HCPs.
  
- \* HCP Handbook - To ensure consistency in HCP policies across the Nation, FWS also finalizing a comprehensive handbook on HCPs which will significantly streamline documentation requirements for low effect HCPs and provide helpful "how to" guidance to assist private landowners in reducing costs for HCP development.
  
- \* IN SUMMARY, current explosion in HCP activity generating a wide and diverse array of HCP approaches and streamlining ideas. From single species fill-in-

the-blank forms for low effect activities to habitat-based plans covering hundreds of species over entire landscape and regional areas, the HCP program of today is dramatically different from the program of the past that enticed only 14 landowners over a ten-year period.

#### IV. FLEXIBILITY UNDER 4(D): TEACHING OLD REGULATORS

##### NEW TRICKS

Congress defined statutorily the prohibitions and exemptions for endangered species -- it punted, however, on threatened species and relied instead on broad grant of Secretarial regulatory discretion to decide the level of protection appropriate for each threatened species:

Sect. 4 (d) Protective Regulations. - Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish and wildlife, or section 9(a)(2), in the case of plants, with respect to endangered species;...

- \* 1975 FWS regulations for threatened species adopted general regulatory presumption such species would need same protection accorded endangered species -- where this was not the case for a particular threatened

species, FWS would issue a "special rule" containing customized prohibitions and exemptions for the species (*see 40 Fed. Reg. 44415 (1975); 50 C.F.R. 17.31 (1995)*).

- \* Courts have differed over scope and limitations of Section 4(d) regulatory authority (*see Sierra Club v. Clark, 577 F. Supp. 783 (D. Minn 1984), aff'd in part, rev'd in part 755 F. 2d 608 (8th Cir. 1985); Sweet Home Chapter of Communities for a Greater Oregon, et al. v. Lujan, et al. 806 F. Supp. 279 (D.D.C. 1993)*).
- \* Secretary Babbitt's goal to exercise under-utilized authority under ESA to provide conservation incentives: why not Section 4(d) "special rules" ?
- \* Early use of 4(d) "special rules" fairly limited -- first creative use as incentive for habitat conservation involved 1992 listing of the Louisiana black bear. (*57 Fed. Reg. 594 (1992)* (rule exempted agreed-upon timber harvest practices from incidental take prohibitions)).
- \* Next major use involved 1993 listing of California gnatcatcher. To encourage comprehensive State-based conservation planning for gnatcatcher under the

California Natural Community Conservation Planning (NCCP) Program, 4(d) special rule deferred to State planning effort and said that compliance with an adequate state plan constituted compliance with ESA (58 *Fed. Reg.* 16758 (1993)).

- \* Most recent and sweeping 4(d) special rule: February 17, 1995, proposed rule for northern spotted owl. Special rule would relax incidental take restrictions for spotted owl over millions of acres of private and State forest lands in California and Washington. (60 *Fed. Reg.* 9484 (1995)). FWS able to propose relaxation due to benefits to spotted owl on Federal lands under President Clinton's Northwest Forest Plan.

## V. CONCLUDING REMARKS