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Flaws in habitat conservation plans threaten scores of species

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The federal government is handing out licenses to kill endangered species.

Hundreds of exemptions to the Endangered Species Act have been issued nationwide since the mid-1990s, covering some of America's most sensitive lands.

The deals being cut are perfectly legal. Many last for decades. And they are helping push creatures to the brink of extinction, conservation biologists and other critics say.

Agencies entrusted to protect animals have allowed driving on Florida beaches where threatened sea turtles nest, the electrocution of rare birds on security fences at California prisons and the killing of protected salmon in one of southwest Washington's last undammed rivers.

These "habitat conservation plans" authorize developers, miners, loggers and others to "take" -- that is, harm, injure or kill -- creatures on the brink of extinction. Theoretically, the permit holder must do something good for the species to compensate for the bad.

Washington state is about to become the epicenter of this little-noticed trend. By the end of the year, about 11 million acres -- about one-quarter of the state -- are expected to be covered

by habitat plans that focus largely on logging of private forests. Other deals in the works could expand the total to more than 15 million acres -- tops in the country.

"Washington will be setting a huge precedent not only for how things happen in Washington, but also what will happen everywhere," said Daniel Hall of the American Lands Alliance, one of the few environmental groups tracking the plans.

It's a huge investment in a flawed program.

Many of the nation's habitat plans have serious shortcomings that tip the scales in favor of development over endangered species, a Seattle Post-Intelligencer investigation has found.

Although the conservation strategy was conceived by a developer's lawyer and launched to help the private sector, state, county and city governments are increasingly signing on -- primarily to shield major public-works projects from costly lawsuits. Coming up are plans covering state-owned Puget Sound waterfront and the King County sewage-treatment system.

It's a delicate balancing act: protecting endangered species, often by setting up preserves, while allowing private landowners to make a living.

The strategy is sweeping the country,

embraced by prominent Democrats and Republicans, big-scale developers and leading conservation groups. All say the program keeps the economy running smoothly while preventing further declines in the populations of some of the planet's rarest creatures.

There is no evidence of any species going extinct under the program, but there are signs that some are in decline. The P-I's nine-month examination of major habitat plans nationwide revealed systemic breakdowns that undermine the national strategy:

* The agency charged with protecting most threatened species, the U.S. Fish and Wildlife Service, doesn't know whether these plans are shielding creatures from further decline or speeding them toward extinction.

* Many plans open the door to permanent damage of wild places before scientists know how to best protect vulnerable animals. Most fail to predict how many creatures will be killed or harmed. Few spell out an exit strategy if things go wrong.

* Local governments eager to help developers are cutting them deals -- allowing existing parkland to count as "preserves" or defraying their costs by securing millions from federal coffers.

* The public, including independent scientists, often has little voice in the

* plans -- even some covering vast acreages -- until they are virtually a done deal.

* While habitat conservation plans focus on setting aside land to spare it from the bulldozer or chain saw, money is sometimes lacking to maintain the preserves.

The P-I investigation reviewed 98 habitat conservation plans of 100 acres or more, including all of those approved from 1999 to 2004. Of those, half failed to say how the development, timber cutting or other activity would affect the overall health of a species.

Each plan came with a promise to help the animal in question, but only 27 percent in the P-I study included benchmarks to ensure that, in fact, the "mitigation" would help the threatened animals.

Over the past decade, the Fish and Wildlife Service and the National Marine Fisheries Service have approved plans for petitioners as diverse as Enron and the Boy Scouts. The scores of creatures affected range from bald eagles swooping over Pacific Northwest forests to Nashville crayfish scooting through muddy Tennessee creeks.

The nation's nearly 400 habitat conservation plans now cover more than 37 million acres, and federal officials have said applications in the works could swell that to 100 million acres -- a swath of America larger than California.

Among the projects in the pipeline is a mega-plan that would cover 9.1 million acres in Washington -- most of the state's private forestland.

Gov. Christine Gregoire and other politicians have hailed the so-called Forests and Fish Plan, which sets tougher environmental standards for logging, as a boon to salmon.

It could be an economic boon, too, because it effectively would give the timber industry a half-century of immunity from prosecution under the Endangered Species Act. As long as timber companies followed the new rules, the government wouldn't charge them with violating the act and would defend them against conservationists' lawsuits, even if the companies ended up killing protected salmon.

A major goal is to keep Washington's timber industry alive. From a salmon's point of view, even clearcuts beat concrete, advocates of the plan say.

The plan, which is now under review, has been assailed by federal fish biologists and independent experts, who concluded that the science underlying the conservation strategy is inadequate. The public has until May 12 to comment on the plan to Fish and Wildlife and the Fisheries Services.

Nationally, conservationists are divided over the idea of habitat conservation plans, with some convinced that the deals offer a public benefit by converting some private land into preserves. Others have a bleaker assessment: They believe that trade-offs under the program are hastening the demise of some creatures.

"The whole process has been designed to maximize protection of and extend assurances to developers and timber companies and mining companies," said Eric Glitzenstein, a Washington, D.C., lawyer and environmentalist who is a leading critic of the plans. "What they have not done is maximize protection of endangered species."

Proponents point out that something has to be done to allow some use of private property -- unless the government wants to pay a staggering sum to landowners due just compensation under the Fifth Amendment to the

U.S. Constitution. Plus, backers say, choking off all economic activity on lands inhabited by endangered species would cost too many jobs.

"The landowner who's the last guy in line and needs to get a building permit -- he's the one who's expected to cure all the ills that have gone on for years and years?" asked Robert Thornton, the lawyer and former congressional aide who helped launch the program.

"The reason there is an endangered species problem is that society, at all levels, has made decisions about how to use natural resources."

Butterflies vs. bulldozers

The whole idea of a habitat conservation plan started on the outskirts of that paragon of eco-consciousness, San Francisco.

By Northwest standards, San Bruno Mountain is more hill than forbidding peak, cresting at 1,314 feet.

When developers moved in during the 1970s, "Save San Bruno" became a rallying cry around the Bay Area. By agreeing to keep San Bruno's heights free of concrete, the developers won their building permits for work at lower levels of the mountain. But before construction could begin, someone pointed out that two butterflies protected by the Endangered Species Act lived there: the mission blue and the San Bruno elfin.

For probably the first time in history, butterflies stopped bulldozers.

The developers, government officials and others came up with a plan that preserved 90 percent of the butterflies' habitat, while still allowing some construction.

Declaring the deal a "model," Congress in 1982 awarded Fish and Wildlife "broad discretion" in putting together similar plans. It is discretion the agency has used freely. Congress told the agency to always consider the "extent to which the conservation plan is likely to enhance the habitat of the species or increase the long-term survivability of the species."

The newly created exception went largely unexploited until Bill Clinton became president. Only 14 habitat conservation plans were in existence by the end of 1992. Developers shied away, not trusting the idea.

When Republicans swept to power in both houses of Congress in 1994, talk of gutting endangered species protections heated up on Capitol Hill. And landowners eyed lawsuits that could eviscerate the law.

But Clinton's Interior secretary, Bruce Babbitt, had already gone into protection mode.

Not long before, he had started to promote habitat conservation plans. He pointed out several aspects that pleased those leading Congress: Landowners entered into the plans voluntarily, and they often wound up buying property to shelter threatened species -- at no cost to the taxpayer.

After the contentious battle over spotted owls in national forests in the Pacific Northwest, the government had to find a better way to enforce the law on private land, Babbitt said. The issue quickly came to a head in Southern California, where some of the nation's most biologically rich acreage stood in the bulldozer's path.

"Politically, a problem obviously was simmering," Babbitt said in a recent interview. "In Southern California, we really had to get that one under control because this wasn't Oregon or

Washington, it was California -- 50-some seats in the House of Representatives. And it wasn't just a national forest thing -- it was every private landowner in Southern California on the warpath."

A call from the Irvine Co. -- the largest landowner in Southern California and a big supporter of California's conservative Republican governor, Pete Wilson -- led to a meeting with Babbitt at a downtown Phoenix restaurant. Either we make a deal, the company's representatives said, or we sue.

What emerged was Babbitt's decree that once habitat plans were issued, a developer would never again be asked by the government for more land or money to offset the harm done by that development.

"No surprises," as the policy was called, boosted the number of plans nearly sixfold in the five years after its creation. Although the blanket assurance was later rejected in court because it was adopted without public comment, the government re-adopted it -- twice -- and the policy remains in effect today.

By 1998, with Clinton halfway through his second term, Babbitt had become a big believer in the habitat plans.

Since the mid-'90s, these plans have been used to sanction myriad ways to kill or harm endangered animals, such as developing shopping centers and housing subdivisions, cutting down forests or mining gravel beside streams. Most were approved in the West and South.

Acting to blunt criticisms by environmentalists and scientists, the Clinton administration in 2000 adopted a five-point policy that calls for more public participation in the plans, biology-based goals, monitoring of habitat and other improvements. But it was never made a rule.

By the time the Bush administration came to power in 2001, habitat conservation plans were an ingrained, if little-noticed, feature of the government. They remain, in fact, the government's chief strategy for managing vulnerable species on private land.

Assistant Interior Secretary Craig Manson, the Bush administration's highest-ranking spokesman for the program, said it is impossible to say for now whether the plans are helping or hurting the animals in need of protection. He said they are "so new on the landscape that in natural history, they don't even register yet."

Some habitat plans have provided important benefits to imperiled species.

Before its spectacular bankruptcy, the telecommunications company WorldCom Inc. agreed through a subsidiary to pay \$938,000 to protect 3.7 acres of habitat for a snail -- the Morro Bay shoulderband -- in exchange for developing less than half an acre in tony Los Osos, Calif.

In Wisconsin, farmers, utility companies and others have enthusiastically responded to a state-sponsored habitat plan to create grasslands to help preserve the Karner blue butterfly.

In theory, the plans have advantages over the status quo by minimizing the harm done to threatened creatures on private lands.

For landowners and developers, "that's what the fight is about -- have you done enough?" said former Seattle lawyer Jeff Van Duzen, who represented Green Diamond Resource Co. -- then, in 2000, Simpson Timber Co. -- in getting such a plan in Washington.

But it is worth it, Van Duzen told a legal conference in Bellevue several years ago. Obtaining the government license is "the bucket at the end of the rainbow," he said.

"You may snicker when you hear this," Van Duzen told the assembled lawyers, "but there was in the company a desire to do good, to do something good for the environment."

Balancing 'inconsistent needs'

Across the country, there is evidence of rare creatures drawing closer to extinction under habitat plans.

In the hill country of central Texas, suburban sprawl chokes underground caves that are the last refuges of an Addams Family collection of mysterious, blind insects.

On the south side of San Diego, seasonal ponds that are among the last known havens for a prehistoric fairy shrimp are littered with household trash and rutted by dirt bikers, even though they were to have been protected by a habitat plan. As housing tracts and strip malls sprout, San Diego officials are so short of money that they are having city planners double as biologists to monitor whether the fairy shrimp and 84 other species are still in decline.

Officials hail it as a model plan anyway.

In Alabama, the Fish and Wildlife Service has been slapped down twice by a federal judge for proposing to allow a beachfront condominium project that, in its second incarnation, would have occupied 20 percent of the remaining prime habitat for an endangered beach mouse.

This on a stretch of beach where half of the creature's habitat has

been obliterated, and the agency approved five other condo projects.

Under a sweeping Pacific Lumber Co. plan that covers a swath of Northern California almost as big as four Seattles, officials estimated the number of endangered marbled murrelets that would be killed at as many as 340 -- nearly a quarter of the region's population of the small seabirds.

Top federal officials acknowledge that they have no system to track how habitat conservation plans are affecting threatened species, saying they monitor the overall health of the animals and so far none seem to be going extinct.

Environmentalists who support the concept say the government isn't equipped to enforce the Endangered Species Act on private land -- a charge government officials acknowledge -- and so at worst little is lost under the plans.

While it is illegal to harm or kill an endangered animal, it is too expensive and difficult to go after people or companies that do so in all but the most flagrant of cases.

More is gained by persuading landowners to sign up to protect species than by going after violators, said Craig Hansen, who oversees Fish and Wildlife's conservation plan program in Western Washington.

"We will never get the funding to have enough enforcement people out there to make the cases to prosecute all those who are knowingly or unknowingly taking species," he said.

"It balances two sometimes apparently inconsistent needs," said Manson, the Bush administration spokesman.

"It's brought peace between those who want to conserve endangered species and those who want to engage in economic activity."

But, critics ask, peace at what price?