October 31, 2006
Endangered Species and Wetlands Report

San Diego MSCP does not comply with ESA, judge finds FWS, Corps told to reconsult on vernal pools

A federal judge in San Diego has prohibited further destruction of habitat for seven T&E vernal pool species in San Diego until the Fish and Wildlife Service and Army Corps of Engineers re-examine the impact of a nine-year-old habitat conservation plan (Center for Biological Diversity v. Bartel, 98-2234-B(JMA), S.D. Ca.)

Senior U.S. District Judge Rudi Brewster did not go so far as to revoke the Incidental Take Permit issued to the city, but he did enjoin construction in vernal pool habitat for San Diego fairy shrimp, Riverside fairy shrimp, and five plants — Otay mesa
mint, California Orcutt grass, San Diego button celery, San Diego mesa mint and spreading navarretia.

“Having considered the administrative record, the legal briefs, and the relevant case law, it appears to this court that the ITP would permit monumental destruction of the vernal pool species, which are extremely sensitive to their environment and were virtually extinct in 1995,” Brewster said.

The decision also contains important rulings on recovery plans (they must be implemented) and “No Surprises” assurances contained in the plan’s Implementing Agreement (they’re illegal). In an unusual move, the judge said he would not entertain
motions for a stay. He remanded the matter to FWS, which presumably will restart Section 7 consultation with the Corps. The government hasn’t decided whether to appeal.

When the San Diego County Board of Supervisors approved the Multiple Species Conservation Plan on Oct. 22, 1997, then-Interior Secretary Bruce Babbitt called it “a major milestone in America’s conservation history and a model plan for communities
nationwide.” The area-wide habitat conservation plan is intended to eventually cover 900 square miles of southwestern San Diego County. The lawsuit targeted development within the city of San Diego.

But Brewster did not offer even grudging praise. He said the MSCP does not comply with the Endangered Species Act’s purpose, which includes bringing species to the point where they no longer need formal protection.

The opinion has to be taken seriously by other courts challenging FWS’s implementation of HCPs, and the ESA in general. That’s partly because there isn’t much HCP case law, but also because Brewster is not the stereotypical tree-hugger. He’s a Reagan nominee who’s been serving on the bench since 1984. “The implications [of the decision] are huge for all the San Diego MSCP subarea plans and all other similar multispecies
HCPs,” said David Hogan, director of the urban wildlands program at the Center for Biological Diversity.

Hogan said he’s not sure how many projects will be held up by the decision. “A handful,” he speculated. “There are not that many vernal pools left.” Estimates from the late 1980s and early 1990s were that “at least 97 percent of all vernal pools have been lost,” Hogan said, but the number is likely higher now. Three subarea plans, which are prepared by localities within the MSCP planning area and are “tiered” to the MSCP, are currently under development, Hogan said. Two, the North County SAP (subarea plan) and the East County SAP — will cover “hundreds of thousands” of acres, Hogan said.

Farther afield, in Pima County, Arizona, the decision could have an impact on the long-in-development Pima County HCP (aka the Sonoran plan), because it “still doesn’t have an assured funding source,” Hogan said. Nor does it adequately address conservation for the rarest species, he said.

Recovery Plan’s must be implemented, judge concludes

In a holding that could be the most far-reaching in the opinion, Brewster said although the service has the discretion to determine recovery plans’ content, the ESA “clearly requires FWS to follow through with the measures identified in recovery plans.”
A decade ago, the 11th Circuit ruled that recovery plans are not binding on the agency (Fund for Animals v. Rice, 85 F.3d 535, 11th Cir. 1996).

But Brewster said he “respectfully disagrees with the cases minimizing the importance of recovery plans.”

Taking note of the requirement that FWS report to Congress every two years “on the status of efforts to develop and implement recovery plans” for listed species and “on the status of all species for which such plans have been developed,” Brewster said,
“There would be no need for such ongoing reports if FWS were not endeavoring to meet the goal of recovery.”

“Accordingly, during the re-initiation process ordered by this court in response to the SWANCC decision, FWS must consider the standards and other information in its Vernal Pool Recovery Plan to evaluate the effect of the city’s ITP on the vernal pool species and whether the mitigation is adequate.”

Brewster said the service must reconsult with the Corps because the Biological Opinion did not adequately consider the effects of the Supreme Court’s 2001 SWANCC decision, which he said removed the Corps’ authority to prohibit filling of isolated, intrastate waters such as vernal pools.

Building groups that intervened in the case sought to have the permit reissued to allow work on vernal pool parcels to proceed, but the judge was not prepared to declare open season on development in the areas where the pools appear. “The builder intervenors seek a windfall,” he said, denying their request. “The proper course is for the expert agency, in the first instance, to consider what protections are necessary when a specific development will affect the seven vulnerable vernal pool species.”

Mitigation not shown to mitigate, judge says

The plan’s “egregious flaw,” Brewster said, is the service’s decision to lock in the amount of mitigation without analyzing the ENDANGERED SPECIES & WETLANDS REPORT / Oct. 31, 2006 3 impact of development in San Diego on the vernal pool species. FWS, he said, did not present a reasoned explanation for how the mitigation required by the plan would make up for the loss of habitat allowed by it.

“FWS has not evaluated the design of the permanent [847-acre] preserve to determine if it would mitigate the expected harm to the vernal pool species outside the preserve. There is no indication that the acres selected for preservation are occupied by viable populations of fairy shrimp.”

“A close and careful examination of the record reveals that the plan is structured to permit unfettered take of vernal pool species and to destroy over 300 acres of its habitat, without any corresponding duty to ameliorate the damage if conditions change. The preserve has been designed to protect 847 acres of vernal pool habitat, but the slack standard to ‘ avoid’ vernal pools outside the planned preserve leaves unrestrained discretion to development to destroy completely the 336 acres” located outside it.

The city’s own Environmentally Sensitive Lands Ordinance (ESLO) “favors development,” Brewster said, and the city’s reliance in the plan on “avoidance” of vernal pools is “toothless.” “The ordinance states simply that ‘impacts to wetlands should be avoided.’ The term is not defined and merely offers a suggestion that development ‘should’ avoid the vernal pools. ‘Examples of unavoidable impacts include those necessary to allow reasonable use of a parcel entirely constrained by wetlands,’ ... thereby allowing development of a large complex of interrelated vernal pools when that provides the healthiest environment for these species.” Saying that construction should avoid the pools “when ‘practicable’ virtually guarantees development, and the ersatz mitigation measures run counter to the realistic needs of these dwindling vernal pool species and may hasten their extinction,” Brewster said.

“Both the city and developers have a strong financial interest in obtaining the highest financial return on expensive real estate, and neither has the expertise or incentive to contemplate the ESA protections: By simple ipse dixit, the city or developer can proclaim that avoidance of the vernal pools is not possible on the site, and thus shift their attention to providing the mitigation outlined in the MSCP.”

“The ‘no net loss’ standard illustrates the flaccidity of the avoidance standard in the HCP,” Brewster said. “Here, the ‘no net loss’ policy permits the substitution of off-site mitigation whenever on-site mitigation is ‘impracticable.’ Nothing suggests that merely drafting a development plan that envisions using the entire plot could render on-site mitigation ‘ impracticable.’ ”

Assurances make future conservation unlikely

Brewster found that the assurances provided to property owners in the Implementing Agreement are illegal under the ESA. “The [No Surprises] assurances prohibit FWS from imposing additional conservation measures beyond those measures contained in the city’s HCP during the fifty-year life of the ITP,” he said. The judge called “particularly troubling” FWS’s failure to “scrutinize the conservation plan for impacts to the vernal pool species.”

“The unforeseen circumstances provision has been stripped of its meaning,” he said. “[A]s development proceeds under the MSCP, the indirect harm to the vernal pools intensifies. Yet, FWS will not require the developers who obtain permission to take the species to repair that compounding damage to the listed species.” Brewster said that the scientific data in the record “show” that the vernal pool species will be damaged by the fragmentation and edge-effects of the continued, rapid development of the San Diego region.” Yet “if, during the next fifty years, biologists confirm that restoration attempts such as transplanting fairy shrimp cysts is unsuccessful, the assurances forbid the city or FWS from obtaining additional financial contributions, land restrictions, or other mitigation.”

The judge said there is no assurance that the proposed mitigation for the fairy shrimp will work.

“The city’s conservation plans concentrate on collecting species from the site of the development and transplanting them to a site within the preserve, but the record establishes that fairy shrimp cannot be successfully transplanted, and, even if successful, it risks hybridization with other species of fairy shrimp.”
“The court agrees with plaintiffs’ characterization of the structure of the assurances … as creating a ‘shell game’ in which FWS effectively eliminates the ESA protections for vernal pools by promising to protect them in the future at the same time it restricts its authority to those unevaluated measures set forth in the MSCP and Subarea Plan.”

“Unnatural” pools should be protected, as well Brewster saw no reason to deny protection to shrimp found in such unlikely habitat as “a rut left by a tire track, a roadside ditch, or a cattle stockpond.”

“Despite the prior harm, these vernal pools have regained their capacity to sustain life. Yet FWS gives these hearty, surviving species less protection than other vernal pools simply because those pools were considered to be within the jurisdiction of the CWA,” he said.

“It is arbitrary to assume that surviving vernal pools need less protection than those that exist in relatively pristine and less developed settings. FWS has the statutory duty to protect the threatened and endangered vernal pool species that now reside in those degraded habitat areas,” he said.