

A WHITE PAPER

LIABILITY OF STATE AGENCIES AND LOCAL GOVERNMENTS UNDER
THE ENDANGERED SPECIES ACT

PERKINS COIE LLP

THE ENVIRONMENT GROUP
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FOREWORD

This white paper was originally prepared by the Perkins Coie Environment Group under the sponsorship of the Tri-County Forum Business Coalition, an informal group of businesses and business trade associations actively involved in salmon recovery and the Endangered Species Act (ESA) as implemented in the Puget Sound area. This 2002 update to the original white paper is sponsored by the Washington Association of REALTORS®, a statewide trade association representing over 15,000 members involved in the buying and selling of commercial and residential real estate. REALTORS® and their clients are routinely involved with permitting decisions of local governments that are based in part on efforts to comply with the ESA. Given the concern that state agencies and local governments would be subject to an onslaught of litigation for authorizing various land use activities in the face of the ESA, the purpose of this updated version of the original white paper is to examine the extent to which local governments have, or have not, been subjected to ESA liability since this paper was originally published.

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A WHITE PAPER:

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Numerous listings of species for protection under the federal Endangered Species Act (the "ESA") have prompted a broad public debate concerning compliance with the ESA. Although the ESA is a federal law, much of the debate has focused on the appropriate role of regulatory actions by state and local government in response to the ESA. Perkins Coie LLP represents businesses, property owners, trade associations, and local governments that are affected by the ESA. They frequently request a fair assessment of the duties and liabilities that the federal ESA imposes on state agencies and local governments in the exercise of their regulatory authority.¹

State and local agencies wield great authority under state law to regulate land use and business activities to protect the environment, including the habitat of ESA-protected species. Many in the regulated community support the ESA's objective of conserving listed species, and, under appropriate circumstances, the use of state and local

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regulatory programs to promote that objective. Regulated property owners recognize that state and local agencies are subject to the ESA's "take" prohibitions with respect to those agencies' proprietary activities and that agency regulatory programs may significantly reduce the risk of lawsuits to enforce the ESA. However, regulated interests are also concerned that the appropriate roles of federal, state, and local governments in ESA compliance and species conservation are often misunderstood.

In the 1990s, the National Marine Fisheries Service ("NMFS") listed several species of Pacific salmon and steelhead for protection under the ESA. In response, some state agencies and local governments concluded that they would face staggering ESA liability for performance of their regulatory duties under state and local law. **After several years of ESA listings, state and local governments have learned that the sky has not fallen. Far from it, we are aware of no state agencies, counties, or cities that have been found liable for "take" of ESA-listed salmon or steelhead because of their regulatory and permitting decisions. This paper describes why that is likely to remain the case.**

¹ This paper is not intended as legal advice for any particular client or any particular circumstance. Anyone seeking advice on compliance with the Endangered Species Act should contact a qualified attorney.

I. ISSUE

Are state and local governments liable for "take" under the Endangered Species Act when they authorize, or fail to prohibit, activities on private property that harms a species protected by the Endangered Species Act?²

Probably not. "Take" liability for state and local regulatory actions or inactions is highly unlikely, but some state and local governments have—out of fear of being found liable under the ESA for not "doing enough"—been tempted to pass very stringent regulations. However, in the collective zeal to respond to ESA listings, the legal requirements of the ESA are often misstated and confused with the broader policy goals of species recovery.

Business and property owners are especially concerned that state and local regulatory responses to ESA listings will impose added costs without achieving ESA compliance certainty or species recovery. While no ESA response is likely to be without its critics, the quality of response will be improved when businesses and property owners are afforded the maximum flexibility to assess their own ESA risks and respond accordingly. State and local governments can promote this quality of ESA response by establishing voluntary, incentive-based compliance programs for groups of property owners and classes of activities.

Businesses and property owners also recognize that, in some instances, it will be more effective for state and local governments to serve ESA compliance and species recovery objectives through regulatory programs that are officially sanctioned under the ESA. In those instances, it is essential that integration of ESA compliance be authorized under state law and that stakeholders have a say in how the ESA compliance strategy is developed and implemented. For example, the Washington State forest products industry has supported integration of ESA compliance with state forest practices regulations and the Washington legislature adopted the Forest and Fish Act, which authorizes the combination of state regulatory and ESA compliance standards. This proactive public-private response to ESA listings is clearly preferable to a rash of ESA litigation and enforcement actions against private parties. It is also preferable, however, to ensure that proactive public responses to ESA listings are based on a correct

² This paper addresses potential liability of state agencies and local governments arising out of their exercise of regulatory "police powers"; it does not address potential liability for proprietary actions of government such as management of public property, provision of public services, or construction of public works. See, e.g., *United States v Town of Plymouth*, 6 F. Supp. 2d 81 (D. Mass. 1998) (municipal government held liable for "take" under the ESA because management of publicly owned beach failed to adequately protect breeding grounds of the piping plover); *Northwest Ecosystem Alliance v. Belcher*, No. CS-97-323-FVS (E.D. Wash. 1997) (rejecting citizen plaintiffs' motion for preliminary injunction based on allegation that State of Washington's plan for management of the Loomis State Forest would "take" grizzly bears through road construction in violation of the ESA; case later dismissed with prejudice).

understanding of relationships between federal, state and local governments rather than the incorrect premise that state and local officials must enforce the ESA "take" prohibition through their regulatory authority over land and water use.

Two federal court cases, referred to here as *Strahan* and *Loggerhead I*, have fueled much of the misunderstanding concerning the legal duties of state agencies and local governments when species are listed for protection under the ESA.³ In these respective cases, a state agency and a local government have been held liable or potentially liable under the ESA for their regulatory regimes that authorize (*Strahan*), or fail to prohibit (*Loggerhead I*), private actions that cause the illegal take of protected species (although after remand to the trial court, *Loggerhead II* ruled for the local government and did not impose ESA liability).

This paper takes a closer look at the *Strahan* and *Loggerhead I* cases in light of statutory interpretations and constitutional limitations that should be used to temper the fears of state agencies and local governments that they might be penalized for authorizing or failing to prevent "take" in their regulatory decisions. The paper then concludes by outlining practical measures that state agencies and local governments may consider in responding to the intersection of the ESA and the exercise of state and local authority to protect public health, safety, and welfare.

II. BACKGROUND

ESA listings occur throughout the United States, and the analysis in this paper may be applied throughout the United States. However, the issues addressed in the scope of this paper are illustrated by focusing on ESA listings for Pacific salmon and steelhead.

In 1994, NMFS began a status review of West Coast salmonid species (i.e., salmon-like species such as bulltrout) to determine whether chinook, chum, coho, sockeye, and pink salmon and anadromous steelhead trout were threatened or endangered. At about the same time, the U.S. Fish and Wildlife Service ("USFWS") responded to a petition to list the bull trout for protection under the ESA. NMFS's status review led to an avalanche of listings in 1997, 1998, and 1999 for "evolutionarily significant units" of salmonids along the West Coast.⁴ Court action against the USFWS led to bull trout listings in

³ *Strahan v. Cox*, 127 F.3d 155 (1st Cir. 1997), *cert. denied*, 119 S. Ct. 81, and *cert. denied*, 119 S. Ct. 437 (1998); *Loggerhead Turtle v. Volusia County*, 148 F.3d 1231 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1488 (1999) *on remand*, 92 F. Supp.2d 1296 (M.D. Fla.), *related proceeding*, 120 F. Supp.2d 1005 (M.D. Fla. 2000).

⁴ Chinook (64 *Fed. Reg.* 14308 (Mar. 24, 1999)); Churn (64 *Fed. Reg.* 14508 (Mar. 25, 1999)); Coho (61 *Fed. Reg.* 56138 (Oct. 31, 1996), 62 *Fed. Reg.* 24588 (May 6, 1997), 63 *Fed. Reg.* 42587 (Aug. 10, 1998)); Sockeye (64 *Fed. Reg.* (Mar. 25, 1999)); Steelhead (62 *Fed. Reg.* 43937 (Aug. 18, 1997), 63 *Fed. Reg.* 13347 (Mar. 19, 1998), 64 *Fed. Reg.* 14517 (Mar. 25, 1999)). Evolutionarily significant units, or "ESUs," are a

1998 and 1999.⁵ Still more listings of fish species have been proposed or are under consideration.⁶

ESA listings have culminated in a geographic pattern of protected fish species and aquatic habitat that encompasses major metropolitan areas of the West Coast, and over 150 watersheds in Idaho, California, Oregon and Washington. Throughout the Pacific Northwest and California, any action or project that impacts riparian land use, water quantity, or water quality may have consequences under the ESA. State agencies and local governments may exercise some control over those consequences when they regulate and authorize projects or actions by third parties that significantly modify the habitat of listed fish species. When habitat modifications interfere with essential behavior of a listed species and cause actual death or injury to a listed species, the actions causing this result are called "take" and generally are prohibited under the ESA.⁷

Recent case law has expanded the scope of potential liability under the take prohibition in Section 9(g) of the ESA. In 1997, the United States Court of Appeals for the First Circuit decided *Strahan*.⁸ The court held that the ESA "not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking." *Strahan*, 127 F.3d at 163. Specifically, the court held that the Massachusetts Division of Marine Fisheries *caused* the taking of endangered whales when it licensed commercial fishing operations to use gillnets and lobster pots in a way likely to harm the whales. *Id.* In so holding, the court rejected the state's argument that the ESA was not intended to prohibit state licensure activity because such activity could not be a proximate cause of the taking by third parties. The

subset of "distinct population segments" that are included within the ESA's definition of "species." *See* 16 U.S.C. § 1532(16); 56 *Fed. Reg.* 58612 (Nov. 20, 1991); 61 *Fed. Reg.* 4722 (Feb. 7, 1996).

⁵ 63 *Fed. Reg.* 31647 (June 10, 1998); 63 *Fed. Reg.* 31693 (June 10, 1998).

⁶ *See, e.g.*, 64 *Fed. Reg.* 16397 (Apr. 5, 1999) (proposed rule to list sea-run cutthroat trout as threatened species).

⁷ By statute, the take prohibition applies to all animal species listed as "endangered," but for animal species listed as "threatened," the take prohibition only applies when USFWS or NMFS extends it by rule. USFWS has extended the take prohibition to all threatened species (e.g., bull trout) by a general rule, but NMFS continues to use individually promulgated rules for this purpose. NMFS has promulgated 4(d) conservation rules extending the take prohibition to most threatened species of salmon and steelhead. 67 *Fed. Reg.* 1116 (Jan. 9, 2002) (amending 50 CFR Part 223); 65 *Fed. Reg.* 42481 (July 10, 2000) (same); 65 *Fed. Reg.* 42422 (July 10, 2000) (same).

⁸ *Strahan v. Cox*, 127 F.3d 155 (1st Cir. 1997), *cert. denied*, 119 S. Ct. 81, and *cert. denied*, 119 S. Ct. 437 (1998)

court ordered the state to consider methods of modifying the offending fishing gear. *Strahan* initially caused a great deal of concern among state and local governments.⁹

In 1998, the Eleventh Circuit decided *Loggerhead I*.¹⁰ This case held that plaintiffs had *standing* to challenge a sea turtle protection ordinance enacted by Volusia County, Florida, based on allegations that unlawful take by third-party owners of artificial beach lights could be fairly traceable to "harmfully" inadequate regulation of artificial beachfront lighting." *Loggerhead I*, 148 F.3d at 1249. For purposes of *standing*, the court assumed that plaintiffs' allegations were true; namely, that artificial beachfront lighting harmed threatened loggerhead sea turtles by interfering with crucial stages in their reproduction and that Volusia County could be liable for take because its beach lighting ordinance, although beneficial to turtles, was not protective enough to prevent take by third parties. The questions of whether the county was actually in violation of the ESA, and if so what remedy might be appropriate, were left to be resolved on remand to the district court, which had never addressed the merits because it dismissed the suit for lack of standing.

On remand, the district court ruled that the county was not liable under the ESA. *Loggerhead Turtle v. Volusia County*, 92 F. Supp. 2d 1296 (M.D. Fla. 2000) ("*Loggerhead II*"). The court found that while beachfront lighting by county residents "harms" the endangered turtles (thereby violating the ESA), the county's regulatory measures¹¹ to protect turtles did not cause take by failing to prevent take. The plaintiffs specifically argued that the County's regulatory measures were not adequately preventing the harm. The court refused to hold the county liable merely because the regulatory measures were not ending all harm. The court denied the plaintiffs' request that the court order the county to impose a stricter ordinance; a federal court ordering a local government to write a particular ordinance would "raise a separation of powers conundrum," the court ruled. *Id.* at 1307. The court summed up the limits of local governments' ESA liability:

The [ESA] neither compels nor precludes local regulation[.] [The]
County cannot be made to assume liability for the act of its private

⁹ *Strahan* has spawned at least two citizen lawsuits against state agencies and officials claiming unlawful take based on allegations of harmfully inadequate environmental regulation of land use by third parties. *See EPIC v. Tuttle*, 2001 U.S. Dist. LEXIS 1154(N.D. Cal. 2001) (dismissed on ripeness grounds); *Pacific Rivers Council v. Brown*, No. CV 02-243-BR (D. Ore. filed Feb. 28, 2002) (pending).

¹⁰ *Loggerhead Turtle v. Volusia County*, 148 F.3d 1231 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1488 (1999) *on remand*, 92 F. Supp.2d 1296 (M.D. Fla.), *related proceeding*, 120 F. Supp.2d 1005 (M.D. Fla. 2000)

¹¹ While the case was pending, Volusia County enacted an ordinance to further restrict beachfront lighting harmful to sea turtles. *Loggerhead II*, 92 F. Supp. 2d at 1300-01.

citizens merely because it has chosen to adopt regulations to ameliorate sea turtle takings.

Id. at 1308.

While *Strahan* and *Loggerhead I* warrant prudence on the part of state agencies and local governments, they do not support sweeping claims that state and local authorities must regulate land and water use to prevent "take" or to achieve recovery of ESA-listed species as essential steps to avoid potential liability under the ESA.

The ESA requires nonfederal entities to refrain from taking animals listed for protection but, absent their prior agreement, does not require them to restore or protect habitat or take other steps to help recover the species beyond avoiding take. Further, the punitive potential of the take prohibition requires that it be strictly construed as prohibiting only actions that are the proximate cause of actual death or injury to members of species listed for protection. Finally, when considering whether public regulatory actions might be the proximate cause of takes, state and local governments should weigh their duties in light of statutory limitations on what the ESA actually does require, constitutional limitations on what Congress can require of states, and the alternative of assigning the responsibility for ESA compliance to permittees who can more appropriately and efficiently bear the burden of ESA compliance for their own actions.

When *Strahan* and *Loggerhead II* are read in the context of other ESA cases narrowly interpreting the take prohibition, and of non-ESA cases restricting federal control over state and local regulatory actions, it is fair to conclude that state and local agencies and officials have very little potential liability for take committed by parties they regulate. State agencies and local governments have considerable sovereign autonomy under state law to make their own judgments as to how their regulatory authorities can best be used to conserve ESA-listed species.

III. DISCUSSION

A. Can State and local government regulation—or the lack of regulation—*cause* the take of protected species?

Section 9 of the ESA makes it unlawful for any "person" to "take" any endangered species of fish or wildlife. 16 U.S.C. § 1538(a)(1)(B). The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). By this language, Section 9 prohibits actions that directly kill or injure protected species. Section 9 does not

Section 9 does not expressly prohibit state and local regulatory actions that permit, or fail to halt, private actions that cause the take of protected species.

expressly prohibit state and local regulatory actions that permit, or fail to halt, private actions that cause the take of protected species.

The Section 9 take prohibition has been extended indirectly to regulatory actions by state and local governments in only one reported court case (*Strahan*) (in another case, *Loggerhead II*, it was not).

Strahan resulted in an actual finding of take caused by a regulatory action, but the court only granted very limited relief because of constitutional limits on the ability of the federal government to impinge on state sovereignty. *Strahan* turned on an expansive interpretation of Section 9(g) of the ESA, which merely provides:

It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.

16 U.S.C. § 1538(g). *Strahan* held that a regulatory action or inaction by a state agency or local government could "cause to be committed" a take, but the risk stemming from these cases and their interpretation of Section 9(g) is often overstated. The *Strahan* interpretation of ESA Section 9(g) is by no means a settled legal question and it does not reflect the law of any circuit other than the First Circuit or the Supreme Court, where the issue has not yet been addressed. The implications of the *Strahan* decision is far more attenuated when one considers the limited facts of that case, the overall structure and intent of the ESA, the actual burden of proof for a take under the Supreme Court's interpretation of the ESA, and the potential circumstances and consequences where liability under Section 9(g) is alleged.

1. The facts and holdings in Strahan should not be overstated.

Strahan suggests that there are ESA litigation and liability risks for regulatory actions by state agencies and local governments, but those risks should be understood in the context of the specific factual circumstances of that case. *Strahan* was a citizen suit brought under the ESA to enjoin the licensing of certain fishing gear that was proven through uncontroverted evidence to have actually injured and killed protected whales. *Strahan* did not allege take liability merely on the basis that state permits had authorized adverse modification of whale habitat. *Strahan* does not stand for the proposition that a state agency or local government could be liable for take due to general licensing and

permitting activities that may modify habitat without evidence of specific causation of death or injury to protected animals.

The same court that decided *Strahan* has also held that a state regulatory action that authorizes a private activity posing even a "significant risk of harm" to a protected species will not be enjoined as take. *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 n.5 (1st Cir. 1993). The authorized action must be shown to cause actual death or injury to a listed species before the action will be enjoined. *Id.* at 165-66. Accord *Strahan v. Linnon*, 1998 U.S. App. LEXIS 16314 n.6 (1st Cir. 1998) (the mere possibility that a regulated activity might cause a take is no basis for enjoining the regulating authority to take some action or refrain from action). Finally, *Strahan* did not involve regulation of the use of private lands; the subject resources (fish and shellfish) were public resources and the private activity (fishing with gillnets and lobster pots) occurred in public waters and publicly owned sub-merged lands—a situation somewhat analogous to granting leases or franchises to use publicly owned property.

The remedy in *Strahan* is also instructive. The First Circuit Court of Appeals did not enjoin further fishing under the offending regulations, nor did it invalidate the licenses or the regulations. The court only ordered the defendants to "convene an Endangered Whale Working Group and to engage in substantive discussions with the Plaintiff [Strahan], or his representative, as well as with other interested parties, regarding modification of fixed-fishing gear and other measures to minimize harm to the Northern Right whales" and to apply for an incidental take permit and to prepare a proposal to restrict, modify, or eliminate the offending fishing gear. 127 F.3d at 158. *Strahan* clearly acknowledged that the Tenth Amendment did not allow the court to order the state to undertake a specific regulatory action. *See also Loggerhead II*, 92 F. Supp.2d at 1307 (a federal court ordering a local government to adopt ESA-friendly regulations would "raise a separation of powers conundrum"). At its core, *Strahan* simply teaches that a state agency or local government should not issue a permit for a project or action that is regulated and certain to cause death or injury to an ESA-listed animal—hardly a shocking result¹² *Strahan* does not interpret the ESA to block permits that authorize

¹² This conclusion may be further qualified to limit this duty to instances where regulations address the use of publicly owned resources such as fish and wildlife, and not private property. In *Strahan*, the regulatory scheme found to cause take was designed to manage and protect fisheries and other marine resources that are the property of the state and federal governments. In this manner, the *Strahan* case may be comparable to *Town of Plymouth*, where city management of a city-owned beach caused take of piping plovers. There are no reported cases where a state agency or local government's regulation of private property was found to cause take through the actions of the owner or user of the private property. Compare *Greater Ecosystem Alliance v. Lydig*, Order on Cross Motions for Summary Judgment (W.D. Wash. No. C94-1536C, Mar. 5, 1996) (holding Washington's hound and bait hunting regulations for black bears were likely to cause take of protected grizzly bears in the North Cascade grizzly bear recovery zone—black bears and grizzly bears are the property of the state and not private property).

habitat modification, nor does it require new regulatory action to prevent take or promote recovery.

2. *The structure and intent of the ESA are inconsistent with take liability based on state and local government regulatory actions or inactions.*

The structure and intent of the ESA do not support the notion that the regulatory actions or inactions of state and local governments can be considered the proximate cause of take of listed species. Under the ESA, only federal agencies have an affirmative duty to use regulatory and other programs of government to promote conservation and recovery of protected species. That duty exists under ESA Section 7(a)(1). Even this exceptional duty of federal agencies does not rise to the level of preventing take. Under ESA Section 7(a)(2), all federal agencies are required to consult with NMFS or USFWS to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). When the procedures and standards for consultation are satisfied, however, federal agencies are allowed to authorize activities that may result in take and, if NMFS or USFWS believes that incidental take is likely to result, the wildlife agencies can specifically authorize that take through an "incidental take statement" in their biological opinion. The purpose of the incidental take statement is to authorize a permit holder to proceed notwithstanding the expectation that take will likely occur.

The ESA imposes no obligation on state or local governments that it does not impose on private citizens. An uncritical interpretation of *Loggerhead I* suggests that to avoid the risk of take, Volusia County should have regulated to further limit beachfront lighting

The ESA imposes no obligation on state or local governments that it does not impose on private citizens.

and decrease the likelihood of harm to hatchling turtles. In other words, if it was within the power and authority of the county to prevent take, it should have done so at risk of liability for failing to do so. Under this reasoning, General Electric could be liable for introducing light bulbs and fixtures into commerce where they are purchased and used by

beachfront property owners or the local power company could be liable for supplying electricity to beachfront property owners during critical hatching times and seasons. The plain language of the ESA simply does not support this extension of take liability and the court in *Loggerhead II* agreed.

Congress never intended Section 9 to extend to state and local regulatory regimes. When it passed the ESA in 1973, Congress expected Section 9 to prohibit people from

directly injuring or killing listed species. By such a prohibition, Congress primarily expected to halt the sport hunting of listed species and the trade in endangered species products. Congress never anticipated that Section 9 would be construed to extend beyond a straightforward prohibition of a direct take. For these reasons, Congress debated little over the scope and meaning of Section 9. See Shannon Petersen, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 *Envtl. L.* 463 (Summer 1999).

Instead, Congressional debates centered on issues of federalism. Congress was most concerned about avoiding infringement on state and local authority. Indeed, many in Congress believed Section 6—"Cooperation with the States"—was the most important section in the Act. *Id.* The legislative history of ESA Sections 9 and 6 suggests that Congress did not intend for state and local governments to be subject to injunctions or civil and criminal penalties based on implementation of non-federal regulatory regimes designed to control land use and protect the environment. Federal environmental laws should not be construed to interfere with traditional state and local powers over land and water use unless expressly intended by Congress. See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) ("*SWANCC*") (acknowledging "States' traditional and primary power over land and water use.") The ESA contains no express language or intent to make state and local governments actionable for "take" based on allegations of harmfully inadequate regulation of third parties.

3. The Supreme Court requires a high burden of proof for take under the ESA, and it is more than mere habitat modification.

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995), the U.S. Supreme Court affirmed regulations defining the "harm" component of unlawful take to include significant habitat modification and other acts that actually kill or injure wildlife. See 50 C.F.R. § 17.3 (1994). *Sweet Home* concluded that a person may be liable for actions that indirectly take listed species through habitat modification, but the Court stressed that liability for take is contingent on evidence that such habitat modification is the proximate cause of *actual* death or injury to a listed species of animal.

Liability for take is contingent on evidence that such habitat modification is the proximate cause of actual death or injury of a listed species of animal.

A Ninth Circuit case illustrates the *Sweet Home* "actual" death or injury standard. In *Defenders of Wildlife v. Bernal* ("*Bernal*"), 204 F.2d 920 (9th Cir. 1999), a school district sought to build a school in the

designated critical habitat of the endangered pygmy owl. Because the plaintiff environmental groups could not show that building the school would cause actual death or injury to a pygmy owl, the court held that the proprietary action of the school district did not violate the ESA and would not be enjoined. That is, even though the school district's action might adversely affect the habitat of an endangered species, it was not a "take" or a likely "take."

Strahan goes beyond *Sweet Home* and *Bernal* and is cited for the proposition that a regulatory authorization or failure to regulate by a state agency or local government may "cause to be committed" an action by a third party that is, in turn, the proximate cause of actual death or injury to a protected species through habitat modification or interference with essential behavior. This two-step chain of causation is highly questionable when a state agency or local government merely determines that an action proposed by a third party is consistent with state and local regulations or simply is unregulated by state or local government.

When issuing permits for private activities, state and local agencies do not claim to be assuring the permittee that the proposed actions comply with federal law; on the contrary, it is well understood that federal rules may also apply and that it is the private party's responsibility to obtain any federal permits needed and take any other steps needed to comply with federal law. The holding in *Strahan* is truly exceptional, and there is good reason for state and local governments to be skeptical about such an expansive interpretation of take liability under ESA Section 9(g). Instead, state and local governments should look to *Loggerhead II*, a decision that properly interprets and applies the ESA in the context of local land use regulation.

Proximate cause is strained beyond the breaking point when state and local regulatory actions are alleged to cause take because of impacts incidental to the otherwise lawful actions of a third party. *See, e.g., Bhatti*, 9 F.3d at 166 (rejecting allegation that state regulation authorizing deer hunt would take protected eagles because eagles will ingest lead slugs in dead deer); *Loggerhead II*, 92 F. Supp.2d at 1307 (county's turtle protection ordinance does not "cause" harm to turtles by permitting third parties to build structures with lights that cause take).

When a private party or a public agency desires to construct a project, it will apply for permits from state and local regulatory agencies in order to comply with state laws and regulations or local ordinances administered by that agency. The state or local agency then determines whether the proposed project is consistent with those state and local requirements, and if so, issues appropriate permits. Those permits do not purport to

determine whether the project complies with federal law—that is between the project sponsor and the applicable federal agencies.¹³

For example, when a Washington city or county issues a substantial development permit for a shoreline use, it does so based solely on a finding that the proposed project is consistent with applicable requirements under the Shoreline Management Act; the project sponsor still must obtain any federal permits that may be needed under the Clean Water Act, the Rivers and Harbors Act, and any other applicable federal laws. If the project is built without those federal permits, or in violation of the terms of those federal permits, the project sponsor is liable under federal law—not the city or county that issued the shoreline permit. State and local permits do not require that the project be implemented; they merely confirm that the project, as proposed by its sponsor, is consistent with and not prohibited by a specific state or local law or ordinance. In this sense, state and local regulatory actions or inactions do not even cause an authorized private action, much less any impacts incidental to that action.¹⁴

The U.S. Supreme Court has never interpreted ESA Section 9 to extend to actions that permit or authorize other actions which result in illegal takings, or to actions that fail to prohibit other actions which result in take. Indeed, to so hold would be contrary to the Court's holding in *Sweet Home* that Section 9 liability is still subject to the "ordinary requirements of proximate cause and foreseeability." *Sweet Home*, 515 U.S. at 700. Under the holding in *Sweet Home*, state or local regulations, or the absence of such regulations, should not be considered the proximate cause of a Section 9 take. *Loggerhead II* confirms this to be true. *Id.* at 1307.

4. *The risk of state or local liability for take is diminished when one considers the actual circumstances and consequences where allegations of take would likely arise.*

In assessing the risk of take liability for state and local regulatory actions, it is important to note that *Strahan* was a citizen-initiated lawsuit where the ultimate remedy available to the court was an injunction. In such cases, the worst case outcome for a state agency

¹³ To concede or imply that state agencies and local governments should guarantee compliance with federal law through the permits they issue is a dangerous precedent that creates legal risks and imposes untold burdens on state and local governments. State agencies and local governments lack the authority, resources, and expertise to make such a determination.

¹⁴ See *Linnon*, 1998 U.S. App. LEXIS 16314, *13-*14 (when Coast Guard issues operating license to vessel, "[t]he vessel owner or operator is an independent actor who is, himself, responsible for complying with environmental and other laws. Accordingly, by issuing the necessary permits to operate, the Coast Guard does not subject itself to liability for crimes, including takings, that actor may commit."). *Linnon* distinguishes *Strahan* as an instance where the state licenses "in a specific manner."

The U.S. Supreme Court has never interpreted ESA Section 9 to extend take liability to state and local regulatory inaction or to state and local regulatory actions that allow the use of land or water by third-parties who cause take.

or local government is an injunction suspending a specific project or permit, or, at most, a class of permits.

As acknowledged by *Strahan*, federal courts are powerless to order specific state or local regulatory actions or enforcement.¹⁵ It is unlikely that a court would enjoin authorizations under an entire state or local regulatory program, especially where an existing program is protective of the environment and largely beneficial to listed species. Such an injunction would be improper unless the court found that an entire regulation or regulatory scheme causes take, on its face, and in every instance of authorization without exception. The burden of proof for such a conclusion is very high, and the likelihood of a court making such a finding is very low. This is especially true when the disputed regulations are protective of listed species and are likely to provide benefits that defeat a facial finding of take.

Faced with these burdens, citizens are more likely to use the ESA in challenges to individual permits or projects where there is specific evidence to make a colorable claim of habitat modification leading to take. This prospect is no different from the status quo where opponents already challenge projects and permits on environmental grounds. Potential ESA take allegations are merely an added ground for routine project challenges, and the burden of defense should fall on the project proponent.

The other risk for state and local governments is a take enforcement action by the United States on the basis of regulatory action or inaction. Under the ESA, any "person" responsible for a Section 9 take is also subject to civil and criminal sanctions through enforcement actions by the United States. Any person who knowingly takes a protected species may be assessed a civil penalty of up to \$25,000 per violation. 16 U.S.C. § 1540(a)(1). In addition, such a person faces criminal penalties of up to \$50,000 per violation and imprisonment for up to one year. 16 U.S.C. § 1540(b)(1).

We are unaware of any enforcement action brought by the United States alleging that state or local regulatory actions or inactions caused unlawful take, even though there are more than 1,000 listed species. In *United States v. Town of New Plymouth*, 6 F. Supp. 2d 81 (D. Mass. 1998), the United States brought an enforcement action against a

¹⁵ In a similar unreported ESA citizen suit, the United States District Court for the Western District of Washington also recognized this limitation on its powers and denied citizen plaintiffs' motion for injunction despite finding that state bear hunting regulations were likely to cause take of protected grizzly bears. *Greater Ecosystem Alliance v. Lydig*, Order on Cross Motions for Summary Judgment (W.D. Wash. No. C94-1536C, Mar. 5, 1996).

municipality because its **proprietary management of public property was alleged to cause take**; the case was based on the town's actions as property owner, not as a regulatory body, and could have been brought against a private owner who had done the same things. *New Plymouth* is instructive because it was founded on evidence of actual death or injury to protected birds after repeated warnings from USFWS and a factual pattern of extreme disregard for protection of breeding birds on the part of city officials.

Short of malicious and intentional actions resulting in actual death or injury to a species, it is unlikely that the United States, or a private party, would allege—much less be able to prove—that state and local regulatory actions cause take warranting civil or criminal punishment. Any punitive enforcement of the ESA against a state or local government for regulatory action would likely be subject to a legal standard that strictly construes Section 9(g) against the United States. As such, enforcement actions by the United States would probably be similar to a citizen suit and would result, in the worst case, in an injunction against a project or class of projects. The U.S. Constitution simply does not allow a federal court to use the ESA to order regulatory actions by state or local governments.

The U.S. Constitution simply does not allow a federal court to use the ESA to order regulatory actions by state or local governments.

B. The Tenth Amendment Prohibits Congress From Requiring State and Local Governments to Utilize Their Regulatory Authority to Implement the ESA.

The Tenth Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

U.S. Const. amend. X.

In *New York v. United States*, 505 U.S. 144, 156-57 (1992), the Supreme Court explained that while the Tenth Amendment is "essentially a tautology," it "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." (The federal government is similarly limited where local governments exercise regulatory functions under the police powers reserved to States.)¹⁶ The Court then held that: "**The Federal Government may not compel the States to enact or administer a federal regulatory program.**" *Id.* at 188 (emphasis added).

¹⁶ *Printz v. United States*, 521 U.S. 893, 933 (1997).

The *New York v. United States* petitioners challenged three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985. Petitioners did not contend that Congress lacked the power to regulate such waste, nor did they dispute that, under the Supremacy Clause, Congress could preempt state radioactive waste regulation. Instead, petitioners argued that the Tenth Amendment limited the power of Congress to regulate in the way it had chosen. "Rather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, petitioners argue, Congress has impermissibly directed the States to regulate in this field." *Id.* at 160. The Supreme Court agreed, holding that while Congress may directly regulate individuals, it *cannot* compel the states to implement federal laws. *Id.* at 165, 188.

While Congress may directly regulate individuals, it cannot compel the States to implement federal laws.

No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.

Id. at 178. (emphasis added). For an excellent description of why the Tenth Amendment protects state and local governments from draconian ESA liability, see Salvatore M. Giolandino, *Whales, Turtles, and the Tenth Amendment*, Nat'l Ass'n of Attorneys General Nat'l Environmental Enforcement J. (Oct. 1999).

There are good legal and political reasons for elected state and local officials to embrace the protection afforded by *New York v. United States* to ensure that accountability for implementation of the ESA rests with federal officials rather than state and local officials.

[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

Id. at 168-69 (emphasis added).

A recent legal dispute in Washington State provides a perfect example of the principles of federalism that must guide and limit implementation of the ESA. During an effort to update regulations implementing Washington's Shoreline Management Act, the Washington Department of Ecology engaged in negotiations with NMFS to develop rules that would ensure ESA compliance for all permittees. The Department of Ecology was motivated by a perceived risk of take liability for state and local governments implementing the state's shoreline regulatory scheme. However, in *Ass'n of Washington Business v. Dep't of Ecology*, SHB No. 00-037, (Aug. 27, 2001), the new shoreline regulations were overturned by the Washington Shoreline Hearings Board because they required local governments to enforce ESA standards, which exceeded the authority of the state agency and local governments under the state Shoreline Management Act.¹⁷ In that instance, NMFS' threats of ESA take liability were misused to commandeer the regulatory functions of local governments leading to conflict with state law and the sovereign will of the State of Washington.

The Tenth Amendment's prohibition against federal commandeering extends to local governments as well as states. In *Printz v. United States*, 521 U.S. 898, 933 (1997), the Supreme Court overturned the portion of the Brady Act requiring Chief Legal Enforcement Officers in every county to perform background checks on prospective handgun purchasers. In doing so, it relied in part on the holding of *New York v. United States* that Congress cannot compel the states to enact or enforce a federal regulatory program. It also extended *New York v. United States* by holding that the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or their political subdivisions, to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 933. In so holding, the Court reasoned that "such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Id.* This is especially true of land and water use regulations, an area in which the Supreme Court has repeatedly held that states and local governments have the primary regulatory power. See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (acknowledging "States' traditional and primary power over land and water use."); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("Regulation of land use [is] a function traditionally performed by local governments").

The constitutional bases for the ESA are the Commerce Clause and the federal power over foreign affairs. See ESA Sec. 2, 16 U.S.C. § 1531. Congress has the authority to

¹⁷ The Washington Association of REALTORS® was a petitioner in this successful challenge to uphold state law and principles of federalism.

regulate and protect endangered species to the extent needed to implement international agreements and regulate interstate and foreign commerce. Congress may address the problem of species extinction by directly regulating those persons who take listed species. It is impermissible under *New York v. United States*, however, for Congress to direct or coerce a local government to regulate this private behavior. Under *Printz*, it is impermissible for Congress to direct state or local government officials to administer or enforce the ESA.

The ESA does not create an affirmative duty for state and local governments to implement the ESA through regulatory actions, and any attempt to enforce the ESA based on the premise of such a duty is unconstitutional.

Unlike the Low-Level Radiation Waste Policy Amendments Act or the Brady Act, no provision of the ESA directly commands state or local governments to legislate to protect endangered species or to implement the ESA. However, holding state and local governments liable under ESA Section 9 for failing to prevent third party take of ESA-listed species has the same effect. Section 9 liability in these circumstances would improperly coerce state and local governments to promulgate regulations protecting listed species or to implement the ESA as directed by NMFS or

USFWS. Under *New York v. United States* and *Printz*, however, any injunction commanding a local government to adopt regulations to protect a listed species must violate the Tenth Amendment. Further, any potential take liability arising from regulatory inadequacies would subject a local government and its officials to the risk of civil and criminal penalties through enforcement by the United States and to the burden of having to defend themselves in citizen suits. A local government cannot be compelled to adopt regulations that effectively implement the ESA, either by an act of Congress or by the federal courts.

Notwithstanding their somewhat inconsistent results, *Strahan*, *Loggerhead*, and *Loggerhead II* clearly acknowledge that the Tenth Amendment limits the reach of the ESA and the power of federal courts to compel regulatory action by state and local government. The ESA does not create an affirmative duty for state and local governments to implement the ESA through regulatory actions, and any attempt to enforce the ESA based on the premise of such a duty is unconstitutional.

IV. SOVEREIGN IMMUNITY

There is also a constitutional argument that sovereign immunity will protect state and local governments from ESA citizen suits. It is a highly technical and evolving jurisdictional argument, however, and prior cases under the ESA suggest that it may not always provide an effective defense. On the other hand, more recent Supreme Court

decisions suggest that courts may not have jurisdiction over ESA suits against states, state officials and local governments with respect to their administration of state and local regulatory programs.

The defense of sovereign immunity in ESA citizen suits should be viewed along a continuum where the defense is most effective when the defendant is a state or state agency. The defense becomes more attenuated when state officials are named as defendants, and is weaker when local governments and officials are named as defendants. The defense of sovereign immunity is not presented as an excuse to ignore the duties and liabilities of state and local government under the ESA. Rather, it is outlined here to further elaborate on the sovereign status of the state and its political subdivisions, which should not be abdicated under threats that discretionary exercise of sovereign regulatory powers might be punished under federal law.

A. The State as State

The Eleventh Amendment provides:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Const. amend. XI.

The Eleventh Amendment stands for the proposition that private citizens of one state cannot sue another state in federal court. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997) (sovereign immunity prohibits citizens from suing their own states); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (Congress does not have the power to provide citizens statutory causes of action against states in state courts).

The defense of sovereign immunity should be confidently asserted in any ESA citizen suit against the state or a state agency as defendant. The U.S. District Court for the Western District of Washington has held that the Eleventh Amendment and sovereign immunity barred an ESA citizen suit against the Washington Fish and Wildlife Commission. *Greater Ecosystem Alliance v. Lydig*, Order on Cross Motions for Summary Judgment (W.D. Wash. No. C94-1536C, Mar. 5, 1996).¹⁸

¹⁸ In that case the plaintiffs succeeded in amending their complaint to take advantage of the *Ex parte Young* exception (discussed hereafter) to sovereign immunity, which sometimes allows federal courts to hear federal actions for prospective declaratory or injunctive

B. State Officials

Since *Greater Ecosystem Alliance* was decided, the Supreme Court has narrowed considerably the exception from the Eleventh Amendment in *Ex parte Young*, 209 U.S. 123 (1908) and expanded the shield of sovereign immunity for state officials. In 1996, the Court reaffirmed that Congress does not have the power to abrogate the states' sovereign immunity by allowing citizens to sue states that have not consented to jurisdiction in federal courts. *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996). In that case, the Seminole Tribe attempted to sue Florida under the Indian Gaming Regulatory Act, which authorized tribes to bring suits against states that failed to negotiate gaming regulations with tribes in good faith. *Seminole* held that the doctrine of *Ex parte Young* could not be used to enforce the Indian Gaming Regulatory Act against a state official. *Seminole Tribe*, 517 U.S. at 47.

In 1997, the Court further limited *Ex parte Young* by refusing to find the exception applied in every case where a suit was brought against an officer of the state, rather than the state itself. The Court found that to hold otherwise "would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 269. In *Coeur d'Alene Tribe*, the Court reasoned that a reflexive response that applies *Ex parte Young* in all cases where state officials are named as defendants would allow citizen plaintiffs to seek injunctive relief that invades the sovereign interests of the states. The Court noted that infringement on those sovereign powers requires a case-specific analysis, but also suggested that, under the Equal Footing Doctrine for admission of states to the Union, state authority over submerged land and water resources is an instance where states' sovereign interests should be guarded regardless of pleading formalities. *Coeur d'Alene Tribe*, 521 U.S. at 282-87. This holding has particular significance for protection of salmon and steelhead under the ESA, where the state's water resources are an important component of fish habitat and are clearly implicated by the implementation of the ESA and the state's regulatory functions are at the heart of state sovereignty.

C. Local Officials

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), plaintiffs attempted to sue a state agency for false and misleading

relief against state officials as defendants. However, more recent Supreme Court decisions suggest that the *Ex parte Young* doctrine may be limited in ways that will make it inapplicable to similar ESA cases in the future.

advertising in violation of the Trademark Remedy Clarification Act. *See* 15 U.S.C. § 1125(a). In a decision important to local governments, the Court extended *Seminole Tribe* by holding sovereign immunity applies not only to states, but also to any "arm" of state government. *College Savings Bank*, 527 U.S. at 691. *But see Alden v. Maine*, 527 U.S. at 756 (immunity does not extend to suits prosecuted against municipal corporations or other governmental entities when they are not acting as arms of the state).

Although the Supreme Court in *College Savings Bank* declined to further define "arm" of state government, other courts have held that local governments and agencies can act as arms of the state for purposes of sovereign immunity. In 1990, the Fifth Circuit held that, for the purposes of sovereign immunity,

a county official pursues his duties as a state agent when he is enforcing state law or policy. He acts as a county agent when he is enforcing county law or policy. It may be possible for the officer to wear both state and county hats at the same time, . . . but when a state statute directs the actions of an official, as here, the officer, be he state or local, is acting as a state official.

Echols v. Parker, 909 F.2d 795, 801 (5th Cir. 1990) (holding that county officers were acting as state agents when enforcing a Mississippi antiboycott statute). The Ninth Circuit has held that school districts are arms of the state because "their establishment, regulation and operation are covered by the [state] Constitution and the state Legislature is given comprehensive powers in relation thereto," and thus, the fact that "the state itself has decided to give its local agents more autonomy does not change the fact that the school districts remain state agents under state control." *Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 253 (9th Cir. 1992) (citation omitted).

The potential sovereign immunity of local officials from citizen actions under the ESA should receive special consideration when the exercise of local regulatory powers, delegated by the state, are alleged to be the cause of take. When one pairs the Supreme Court's holdings in *Printz* (federal law invades the reserved sovereign powers of the state when it commands regulatory action by county officials) and *Coeur d'Alene Tribe* (sovereign immunity may not be evaded by naming state officials as defendants when the requested injunctive relief would invade the state's sovereign authority), there is a strong argument that ESA citizen suits to enjoin local regulatory actions are barred by sovereign immunity and the Eleventh Amendment.

For example, to use the sovereign immunity defense in Washington State, local governments may argue that they are acting as arms of the state when implementing state regulatory programs such as the Growth Management Act and the Shoreline Management Act. Local governments are required to administer those laws, but state agencies and appeals boards oversee local implementation. Depending on the facts of particular cases, local governments may legitimately argue that they are immune from citizen suits for alleged ESA violations arising from state mandated and directed implementation of state law.

D. The Practical Implications of Sovereign Immunity

Despite the expansion of the doctrine in recent years, sovereign immunity may not always shield state and local governments from ESA liability. First, sovereign immunity does not bar suits brought against states by the federal government. The United States may bring an ESA enforcement action against a state agency or local government without limitation under the Eleventh Amendment. Second, the courts may be reluctant to recognize state sovereign immunity claims against citizen suits for alleged violations of the ESA or other federal environmental laws. The gloss of the law on sovereign immunity before recent Supreme Court rulings suggests that both state agencies and local governments may be brought before the jurisdiction of a federal court through an ESA citizen suit. For the courts to hold otherwise would significantly reduce the power of the citizen suit provisions found in the ESA and in many federal environmental statutes. Third, the most recent Supreme Court cases extending the doctrine of sovereign immunity, *Alden v. Maine*, *College Savings Bank*, *Coeur d'Alene Tribe*, and *Seminole Tribe*, were all decided by narrow five-to-four majorities. For this reason, until the Supreme Court squarely addresses the issue, federal courts may agree with the First Circuit's holding in *Strahan* that states cannot claim sovereign immunity from citizen suits arising from the ESA: "The very fact that Congress has limited its authorization to suits allowed by the Eleventh Amendment reinforces the conclusion that Congress clearly envisioned that a citizen could seek an injunction against a state's violation of the ESA." *Strahan*, 127 F.3d at 166.

Regardless of the merits of a sovereign immunity defense, however, state agencies and local governments should respond to ESA listings with the understanding that the ESA does not compel regulatory action by state and local government, and by recognizing that the risk of liability for take based on regulatory actions or inactions and the remedies available if liability does exist are highly limited and further diminished by sovereign immunity.

V. RECOMMENDATIONS

A. State agencies and local governments ought to make responsible use of their authority and resources to promote conservation of endangered species.

In light of the broad reach of ESA listings and their regulatory impact on property owners, state agencies and local governments should use their regulatory authority and resources to promote conservation of ESA-listed species and reduce the risk of takes from private activities that are appropriately regulated under state law. In so doing, however, state agencies and local governments should clearly distinguish between the limited legal requirements that are imposed on state and local regulatory actions through the ESA, and the broader discretion of state and local governments to implement species and habitat conservation measures regardless of the minimum legal requirements of the ESA. By making this important distinction, state agencies and local governments can maintain fidelity to the requirements of state law and accountability to the constituents of state and local government.

B. State agencies and local governments should not overstate their own potential for liability under the Endangered Species Act.

State and local officials should take care to acknowledge and protect the sovereignty of the state, a cornerstone of federalism. The benefits of federalism and dual sovereignty are more than theoretical because they ensure that the ESA is not implemented in a vacuum without regard for constitutional limitations, legal obligations under other statutes, state and local fiscal conditions, and competing interests that tend to ensure that the ESA is implemented in a more effective and efficient way.¹⁹ This is especially true in the case of ESA listings for anadromous fish, where the animals' life cycle and habitat transcend the jurisdiction of nations, states, local governments, and private ownership. In these circumstances, state and local governments have a unique responsibility to be effective and knowledgeable advocates for their constituents who otherwise may not have an effective voice in the policy and practice of salmon recovery and ESA compliance.

Because management of water quality, water resources, and riparian land is already controlled by an existing state and local regulatory framework, state and local agencies will necessarily play a prominent role in determining what ESA compliance will mean for a large and diverse set of interests. State agencies and local governments must

¹⁹ See generally Presidential Executive Order 13132 ("Federalism"), 64 Fed. Reg. 43255 (Aug. 4, 1999) (Federalism encourages enlightened public policy through greater flexibility for state and local governments to find effective solutions that may be inhibited by one-size-fits-all solutions. The national government should be deferential toward states and act with caution where state and local governments identify uncertainties with respect to the constitutional propriety of federal action).

recognize that they may be negotiating and determining ESA compliance on behalf of those interests in a way that may be truly inefficient, ineffective, or unduly burdensome from the perspective of separate private interests.

At a minimum, state agencies and local governments should listen to those interests and attempt to avoid or minimize inefficient and ineffective ESA responses. By asserting and preserving the sovereignty of the state and its constituent subdivisions, state and local officials preserve the flexibility to listen to constituent concerns and adjust ESA responses accordingly. In so doing, state and local entities also preserve a position that they may need to assert in the event of an ESA enforcement suit seeking to force changes in state and local regulatory programs and policies. When the state's sovereignty is ignored, state and local regulations are promulgated with the excuse that the ESA affords no other choice—an unnecessary concession that is difficult to remedy after-the-fact.²⁰

To protect the state's sovereignty, it is essential that state and local officials avoid rushing to the conclusion that every change, addition, or improvement to a regulatory program affecting use of land or water is required by the ESA and that there is no choice but to use regulatory authority to prevent take and recover salmon. Such an abdication of state and local responsibility is not required by the ESA, nor is it good policy or a valid interpretation of law.

At most, the ESA requires state agencies and local governments to refrain from committing take through their own actions and projects and possibly through the authorization of specific regulated actions that are known to cause actual death or injury to a listed species. Regulatory initiatives that go beyond compliance with the ESA's take prohibition clearly are not required by the ESA, but are policy choices that are within the discretion of state and local officials and should be honestly labeled as such. In Washington, for example, salmon recovery initiatives advocated by state and local officials are not required by the ESA, but are policy initiatives that must be authorized by and consistent with state law rather than justified by reference to the convenient (but incorrect) palliative that the ESA compels state and local agencies to adopt particular recovery strategies or actions.

²⁰ For example, both the attorneys general of Oregon and Washington have, at times, tended to overstate the duties and potential liabilities of state and local governments under the ESA. See Christine O. Gregoire & Robert K. Costello, *The Take and Give of ESA Administration: The Need for Creative Solutions in the Face of Expanding Regulatory Proscriptions*, 74 Wash. L. Rev. 697 (1999); Op. Ore. Atty. Gen. (June 22, 1990); 1990 Ore. AG LEXIS 13.

C. When implementing or adjusting regulatory programs to protect ESA-listed species, state agencies and local governments should not assume they have an obligation to prevent "take" by regulated persons.

In the debate over the legal duties of state and local governments under the ESA, state

"[S]tate and local governments may confidently assert that the ESA does not compel them to use their regulatory authority to regulate in a particular fashion."

and local governments may confidently assert that the ESA does not compel them to use their regulatory authority to regulate in a particular fashion to prevent take by any person subject to the police powers of the state or to promote recovery of a listed species. Because the take prohibition of ESA Section 9 applies to the persons whose actions are the proximate cause of take, the ESA contemplates direct enforcement against the party who directly causes a take.

By adopting the position that state agencies and local governments do not have an obligation to use all of their authority to prevent potential third-party take, state and local governments preserve their discretion and freedom to regulate in a way that is beneficial to ESA-listed species without fearing that beneficial regulations are invalid because they are imperfect and do not prevent take in all instances. If state agencies and local governments are not willing to disclaim the burden of regulating to prevent take, they may be better advised not to take regulatory actions beneficial to listed species for fear of doing so imperfectly or incompletely. This sort of counterintuitive result is contrary to the public interest and the objectives of the ESA.

D. State agencies and local governments should exercise great care when they authorize activities by their constituents that are certain to cause actual death or injury to a member of a listed species.

When a state agency or local government regulates and authorizes an activity that is known or likely to cause take, more care is warranted. This is especially true where the state or local government is regulating or managing resources that are publicly owned rather than private property. Ideally, the state or local government could adjust the regulatory standards at the margin to ensure that actions leading to take are not authorized. Preferably, these adjustments should be made through project-specific reviews rather than through generally applicable regulatory standards that are, in many instances, more protective (and costly) than necessary. Where take caused by authorized actions remains in doubt or is difficult to control, it is more appropriate for the state agency or local government to simply assign the risk and responsibility for ESA compliance to the permittee through a notice and disclaimer.

E. State agencies and local governments can warn permittees that it is their obligation to comply with the ESA, regardless of any authorization received from the state or local government.

Where a state agency or local government is issuing a permit or license for use of land or water with potential adverse effects on listed species or their habitat, they may wish to include in the permit or license an express warning that the holder is responsible for compliance with the ESA and that the permit or license includes no representation or warranty of ESA compliance.²¹ The Washington Department of Natural Resources has used this principle for years when it approves forest practices applications.

F. State agencies and local governments should incorporate equivalent compliance "off ramps" in their regulatory programs to allow for more innovative, effective, and efficient ESA compliance by regulated interests.

When state agencies and local governments promulgate regulatory programs designed to ensure ESA compliance by constituents or to promote species recovery, they should ensure that their programmatic compliance schemes are authorized under state law, and then use ESA compliance-equivalent "off ramps." Compliance-equivalent off ramps are based on the recognition that individual owners and users of land and water are sometimes capable of developing more innovative, effective, or efficient means to comply with the ESA. In those instances, relief from the state or local regulatory standards should be granted when the individual land or water user is able to provide evidence of alternative ESA compliance through an incidental take statement or incidental take permit. This principle is already reflected in Washington's forest practices regulations²² and the state process for water resource planning.²³

VI. CONCLUSION

State agencies and local governments have much at stake in responding to ESA listings, and therefore must engage in a careful and thoughtful analysis of the legal obligations imposed - and not imposed - by the ESA. Cities, counties and state agencies have an obligation to their constituents to function as sovereign entities, and not as agents of the

²¹ Of course, there would be an exception to this rule when the permit or license clearly is evidence of ESA compliance pursuant to a programmatic habitat conservation plan and incidental take permit covering the regulatory program, an incidental take statement that includes the state regulatory program within its scope, or a special 4(d) conservation rule for a threatened species that officially accepts a state or local permit as the equivalent of compliance with the ESA.

²² WAC 222-16-080(6)(a).

²³ RCW 90.82.120(1)(g).

federal government. Despite dire warnings to the contrary, ESA listings have not resulted in cases where the issuance of development permits led to sanctions, monetary or otherwise, against state agencies or local governments by either the federal government or private parties. Because of statutory and Constitutional constraints, we expect this will remain the case.

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