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Habitat Federalism

Robert L. Fischman*

I. Introduction

The common image of cooperative federalism involves the Environmental Protection Agency (EPA) inducing states to adopt permit and other pollution abatement programs. States can tailor some standards, but public health benchmarks and end-of-the-pipe technologies are uniform across the nation. Inducements include both carrots, mostly in the form of federal funds and flexibility, and sticks, mostly in the form of penalties and loss of control.

This essay discusses cooperative federalism for habitat conservation. Habitat federalism focuses more on ecology than chemistry, more on cities and counties than states, and more on place-based variation than on uniform standards. It is about how land use control relates to federal natural resources law, especially the Endangered Species Act (ESA).

The ESA in particular, and natural resources law in general, present special challenges for intergovernmental coordination that the pollution control side of environmental law has neglected. The most important of these challenges is addressing the ways in which land use, a function dominated by local government, affects national goals. The ESA presents this challenge starkly because habitat loss and degradation is far and away the most important cause of species extinction. But many other federal priorities, including the conservation missions of the public lands, require some coordination with local resource managers.

Natural resources law interacts with state and private land use control in a variety of ways that substantially diversify the portfolio of federalism frameworks beyond the common institutional arrangements of pollution control law. Part II of this essay reviews the narrow model of pollution control law and then describes some alternative schemes. The alternative, a broader conception of cooperative federalism is, in many ways, better suited to the problems of coordinating habitat management between local regulators and national policymakers.

*Professor, Indiana University School of Law–Bloomington. I am grateful to Rob Verchick both for organizing the AALS panel on cooperative federalism and for inviting me to participate. This essay borrows freely and substantially from Robert L. Fischman, Cooperative Federalism and Natural Resources Law, 14 N.Y.U. ENVTL. L.J. 179 (2005). I thank Mark Rohr for research assistance.
Nonetheless, the pollution control model of enlisting state institutions to implement permit and planning programs that meet federal standards offers important advantages for advancing habitat protection. Part III describes an ESA experiment adapting the pollution control model to salmon habitat protection and enhancement in the Puget Sound region. The ESA example illustrates a kind of Gresham's Law of regulatory choice: lax standards drive stringent standards out of circulation. The availability of alternative avenues of compliance undermines more rigorous experimentation with the narrow pollution control model of cooperative federalism.

The recent emergence of place-based collaboration to tailor habitat conservation to the circumstances of interested parties illustrates the attraction of this tool of natural resources law. In whatever form it manifests, habitat federalism will play an increasingly important role in environmental law. Urban lawyers will contribute their planning and land use control expertise to the design and implementation of habitat federalism. And, as the southeast portion of the Puget Sound region illustrates, conflicts over habitat conservation are important urban and regional growth issues.

II. Cooperative Federalism in Environmental Law

The field of environmental law has proven the most fertile ground for creating variations on the theme of cooperative federalism. However, the scholarship is dominated by discussion of pollution control laws. Broadening the scope of examination of cooperative federalism to include natural resources law serves to expand what is understood as the tools and techniques of cooperative federalism.

Commentary about cooperative federalism centers around EPA-administered pollution control laws where states participate in the implementation of federal standards. What I term the "narrow conception"

1. Most of the important and widely cited literature on cooperative federalism focuses on pollution control and either discusses constitutional issues or proposes normative theories of the proper roles of the various levels of government in environmental regulation. See, e.g., Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 YALE L.J. 1196 (1977) (hereinafter Stewart, Pyramids of Sacrifice?); Richard B. Stewart, The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act, 62 IOWA L. REV. 713 (1977); Daniel C. Esty, Revitalizing Environmental Federalism, 95 MICH. L. REV. 570 (1996). But see Philip J. Weiser, Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C.L. REV. 663, 664–67 (2001) (drawing from a broader pool of topics to illustrate modes of cooperative federalism). In contrast, the focus of this article is the scope and taxonomy of cooperative federalism, as actually practiced in the United States.
of cooperative federalism is based on this common, constricted view of environmental law. For example, under the foundational pollution laws, the Clean Air Act (CAA)\(^2\) and the Clean Water Act (CWA),\(^3\) cooperative federalism involves programs where federal monies available to each state are contingent on its creation of a regulatory scheme that is at least as stringent as the federal floor. States may tailor federal standards (water quality criteria under the CWA), establish compliance strategies (state implementation plans under the CAA), implement permit programs (state pollutant discharge elimination systems under the CWA), and enforce rules (state administrative and judicial procedures).

Broader definitions of cooperative federalism are scarce in environmental law scholarship. When they do appear, it is almost exclusively in articles that consider natural resources law. The "broad conception" of cooperative federalism provides a more fundamental understanding of the power dynamics of modern environmental implementation. It also encompasses a wider spectrum of tools from which to choose in the service of law reform than the architecture of pollution control might suggest.

A carrot-and-stick approach to inducements is fundamental to cooperative federalism under any conception.\(^4\) The federal government may offer significant incentives for implementation, such as funding for state environmental agencies or opportunities for local officials to tailor requirements. Alternatively, Congress may "require federal agencies to impose the 'stick' of preemptive federal requirements if states do not regulate as desired..."\(^5\) Also, the financial consequences of a state's failure to enforce standards, such as loss of highway funds for noncompliance with the CAA,\(^6\) may spur cooperation with the federal program.\(^7\)

Though the approaches to cooperative federalism may emphasize such administrative practices as standard-setting, planning, certifying, and permitting, there is a monetary incentive lurking in the background.

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5. Id. at 206.
Money, especially federal grants, almost always sweetens a cooperative deal. The sad truth about implementation of environmental law is that it is largely limited by what agencies (and sometimes third parties, such as private attorneys general) can afford to do. While the legal structure of cooperative federalism is very important, it is the funding for it that most controls the extent of state participation. The strength of the inducement in cooperative federal relationships will depend on the significance of the funds at stake. Some programs, such as CWA non-point source planning, are notoriously weak due to paltry funding. In contrast, the highway funds at stake in the CAA do induce states to participate in comprehensive planning and regional cooperation.

Other inducements to cooperative federalism similarly vary in strength. Participation in cooperative federalism is most attractive when the federal government is largely bound by the state determination, as in Coastal Zone Management Act consistency. A less powerful, but still attractive, lure for state participation in federal procedure is the relatively formal consideration given to state and local resource plans found in the Bureau of Land Management (BLM) general management planning. On the weak end of the spectrum, the Forest Service roadless rule's invitation for states to submit proposals comes with little in the way of procedural or substantive assurance that state efforts will yield significant influence on the federal decision makers. This spectrum of federal deference to state preference through procedure mirrors the tailoring component of the standard pollution control model, where states are more likely to participate where the EPA has relatively weak abilities to override their choices.

A. The Narrow Conception of Cooperative Federalism

The narrow conception focuses on programs in which the federal government establishes minimum standards that states may opt to implement through programs that are no less stringent. There are two key elements to the traditional, narrow definition of cooperative federalism: (1) fostering state administrative programs and (2) delegating

10. See infra Part II.B.3.
11. Id.
12. Id.
tailored standard-setting. Both of these elements operate under oversight by the federal government. In practice, this oversight is generally less strict than legislation suggests because of political considerations and fiscal limitations. These elements constitute a deeply rooted program resulting from years of administrative experience and fine-tuning through litigation and legislation. Perhaps most important, they are the interface between the national pollution control regime and the hundreds of thousands of people and businesses subject to regulatory restrictions.

1. STATE PROGRAMS
Fostering state programs, the first element of the narrow conception of cooperative federalism, has three components. The first is an offer of federal “carrots.” The federal government underwrites a good portion of the state programs it wishes to promote, and funding is the chief incentive for states to participate in cooperative federalism. The “partnership” rhetoric that is now prevalent in environmental law builds on a foundation of cost-sharing for state administration. Though many federally funded programs, such as the nonpoint source control incentives,\(^{13}\) are loosely organized, the flagship pollution control programs allow states to implement their own permit schemes in place of a federal permit requirement.\(^{14}\) State permit programs offer local polluters the convenience of working solely with the state agency for authorizations, without having to pursue either dual state/federal permits or sole federal permits issued at a more distant, less responsive office.

The second component is the federal stringency floor by which states\(^{15}\) may tailor pollution control programs to be stricter, but not more lax, than the federal standards.\(^{16}\) The floor may concern both substantive standards for environmental performance, such as the application of a best available technology, and administrative standards, such as public participation provisions in permit issuance. Although states are generally free to enact environmental regulation that is more stringent than the federal standard, most states deviate little from the federal floor.

\(^{14}\) See, e.g., 33 U.S.C. § 1342 (2000) (describing the national pollutant discharge elimination system [NPDES] permitting scheme that allows states to create their own permit programs in lieu of the federal program).
\(^{15}\) Local jurisdictions, such as storm water treatment districts, may also be cooperative partners with the federal government in some of the pollution control programs. See, e.g., Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999).
The third component of fostering state programs is federal enforcement, or oversight and penalties: sticking to the funding carrot. The federal government requires cooperating states to submit to continual oversight. States face federal scrutiny of programmatic matters, such as enforcement records and administrative procedures, as well as individual decisions, such as particular permits or administrative orders. Failure to meet even procedural requirements, such as refusing to allow citizens to challenge permit applications, may result in revocation of a state's authorization to substitute its program for the EPA's. Moreover, states are subject to penalties for failure to fulfill agreements with the federal government or to meet statutory requirements. Ordinarily the penalty is disqualification for federal funding of state environmental programs or revocation of authorization to operate permit programs. However, some legislation, such as the CAA's link to federal highway funding, provides dramatically greater fiscal penalties for state noncompliance.

2. STATE SUBSTANTIVE STANDARDS

State standard-setting is the second element of the narrow conception of cooperative federalism. Notwithstanding the stringency floor for state programs, cooperative federalism programs typically allow for significant customization of standards. For instance, under the CWA, states have a great deal of discretion in determining water quality standards by defining designated uses and their applications to particular bodies of water. Moreover, when allocating pollution loads for waters that cannot attain their designated uses, states are largely free to pursue their


18. See, e.g., 33 U.S.C. § 1342(c)(3) (providing for withdrawal of federal approval of a state program when the state is not administering the program in accordance with federal requirements). Threat of revocation, however, may be weakened by the EPA's lack of capacity to actually run permit programs in the states. See Kenneth M. Murchison, Learning from More Than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future, 32 B.C. ENVTL. AFF. L. REV. 527, 594-95 (2005) (“EPA can revoke a state’s delegating authority to administer the [NPDES permit program] but Congress has not funded or staffed the federal agency to administer [the programs when states fail.] As a result, EPA never has revoked a state’s authority to administer the [NPDES] program when a state has failed to perform its obligations.”); John Pendergrass, Md. Air Program Takeback Sad for All, ENVTL. F., Jan./Feb. 2002, at 6 (“On the practical side, EPA does not have the staff to administer a complete air permitting program in [a state found to fail to meet minimum requirements of federal law].”)


own priorities. Similarly, in writing state implementation plans (SIPs) under the CAA to achieve attainment of the federally determined national ambient air quality standards, states have wide latitude to choose among air pollution abatement and reduction strategies.

States may tailor their standards to regional economic and social priorities, but there are aspects of the process that must be justified by science, which is almost exclusively funded and supplied by the federal government. For example, water quality standards are measured against criteria that the EPA establishes through its labs and funded experiments. Similarly, in their SIPs, states must justify deviations from the elaborate federal models that combine sources of pollution into a prediction of ambient air quality for a region. While the federal science is a form of national subsidy for states that are unlikely to be able to afford to conduct comparable studies, it is also a significant restriction on state tailoring.

B. The Broad Conception of Cooperative Federalism

The broad conception of cooperative federalism includes all programs with incentives for state, tribal, and local jurisdictions to help advance federal law. Natural resources law provides important additional tools to extend cooperative federalism beyond the narrow conception. These tools are particularly well suited for site-specific habitat federalism because of the strong tradition of decentralized management in resource management law. This section describes important models of intergovernmental coordination in natural resources law and distills principles that are particularly helpful in habitat management.

21. See id. § 1313(d).
25. See, e.g., Weiser, supra note 1, at 668-69.
Cooperative federalism generally involves the national government, through legislation and oversight by federal agencies, working with and inducing state (or tribal) legislatures and agencies to take certain actions. Local jurisdictions that have delegated state powers under enabling legislation may stand in for the state actor in cooperative federalism. Habitat federalism is more likely to reach down to induce cooperation directly from local land use control jurisdictions. But an irreducible aspect of even the broad conception of cooperative federalism is that it involves coordination between some entity of the federal government and a counterpart from a state government.28

Thus, many of the recent initiatives designed to increase public participation in land management decisions pursuant to the George W. Bush Administration's "cooperative conservation" initiative are not part of cooperative federalism.29 Cooperative conservation has been a consistent theme of the Norton Interior Department and adopted by the White House in an executive order to all agencies.30 Including corporations, nongovernmental organizations, and individuals as the collaborating partners in "cooperative conservation" is consistent with President Bush's 2004 executive order.31 But many of these cooperative conservation efforts may more properly be considered a form of private-public partnership, or even corporatization.32 For instance, ESA habitat conservation plans (HCPs), though they may include state or local land use planning jurisdictions, are agreements typically negotiated between the U.S. Fish and Wildlife Service and private landowners, such as timber companies or developers. For this cooperative arrangement, there may be no state partner at all to anchor this arrangement in the rubric of cooperative federalism.

28. I disagree with the overly broad definition of cooperative federalism used by Robert Comer in categorizing federal-private partnerships. Robert D. Comer, Cooperative Conservation: The Federalism Underpinnings to Public Involvement in the Management of Public Lands, 75 U. Colo. L. Rev. 1133, 1135 (2004) (using "the term 'cooperative federalism' to identify the constitutional authority for cooperative conservation, or the sharing of federal authority with nonfederal entities in the management of public lands").
30. Id.
31. Id. § 2.
HABITAT FEDERALISM

The disparate forms of habitat federalism arrangements revealed by natural resources law can be organized into three categorical approaches: place-based collaboration, state favoritism in federal process, and federal deference to state process.

1. PLACE-BASED COLLABORATION

One tool that has emerged under the broad conception of cooperative federalism is place-based collaboration. A place-based collaboration is a system of decision making about the environment that is unique to a particular site or region. Rather than impose a uniform model for interaction, place-based collaborations grow from the particular circumstances of the locus and nature of a dispute. The chief strength of this approach is that it brings a wide range of stakeholders and regulatory jurisdictions, state and federal, together to engage in holistic management. Place-based collaborations are one of the most popular current approaches to cooperative federalism in natural resources law.\(^3\) They soften the command-and-control requirements that typically bind parties in environmental law; instead, they employ more flexibility to create a region-specific approach. Place-based collaboration also helps satisfy many of the criteria for ecosystem management.

One example of a place-based collaboration is the CalFed Bay-Delta project ("CalFed"), which sought to manage the Sacramento River Delta.\(^4\) In this region, both the federal government and the state make decisions that relate to water quality and habitat necessary to support imperiled fish.\(^5\) Conservation of water and fish in the delta requires some coordinated control over upstream users. CalFed was an example of an administrative collaboration\(^6\) and consisted of a sprawling cooperative agreement among eighteen state and federal agencies to use their authorities in concert.\(^7\) As with many place-based collaborative bodies, the federal government created incentives for the parties to come together.

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36. Administrative collaboration is initiated principally by agencies and is not centrally controlled by place-specific legislation.

together. The carrot for CalFed was federal funding. When the money dried up, so did the cooperative effort. Lurking behind the carrot was the stick of severe restrictions on water use if the delta’s imperiled species are unable to reverse their population declines, as mandated by the ESA or permitted under federal water projects. But the federal government can forestall draconian consequences of the ESA and many other laws through waivers and less formal implementation decisions.

The ESA explicitly authorizes another tool of place-based collaboration, the incidental take permit. This permit waives the otherwise strict prohibition on harm to listed species’ habitat. In order to secure such a permit, a party must complete a habitat conservation plan (HCP). Many place-based collaborations originate with the need to combine enough mitigation habitat to qualify for an incidental take permit. Examples include the land use plans for San Diego and the lower Colorado River. In those cases, the federal government participates in negotiations with landowners, state agencies, and land use regulators in order to tailor a plan that both meets the needs of the permitees and ensures protection of the imperiled species.

2. STATE FAVORITISM IN FEDERAL PROCESS

Another approach found in a broad conception of cooperative federalism is state favoritism in the federal process (“procedural favoritism”), which is well entrenched in natural resources law. This coordinating tool reserves a special role for states in the process by which the federal government makes environmental decisions. Though it does not guarantee that the state view will prevail, federal agency decision

38. Id. at 4 (“California taxpayers, stakeholders and the Federal government will be called upon to invest billions of dollars over the next decade in CalFed programs. Expenditure of those funds must be based upon accountability and measurable progress being made on all elements of the Program.”).

39. Tarlock, supra note 26, at 1352.


43. Recent examples of states’ failure to persuade federal resource managers, despite the states’ heightened role, include the Forest Service management plan for the Sierra Nevada forests and the BLM oil and gas leasing decision for the Otero Mesa. J.M. McCord, State Sues over Sierra Forest Plan, HIGH COUNTRY NEWS, Feb. 21, 2005, at 1; Laura Paskus, Whose Rules Rule on Otero Mesa?, HIGH COUNTRY NEWS, Mar. 7, 2005.
makers have a responsibility at least to document their consideration of the state’s view and to explain why it did not prevail. The state’s direct avenue to assert its interests often is not open to other stakeholders in the federal decision.

The federal land planning provisions are excellent examples of procedural favoritism. States and counties may engage in their own planning exercises in order to receive the special consideration afforded by the foundational laws governing federal multiple use land management. For instance, the legislation guiding management of BLM lands, the Federal Land Policy Management Act (FLPMA), requires the BLM to coordinate with state and local governments in the development of land use plans “to the extent consistent with the laws governing the administration of the public lands,” and to consider input concerning land use decisions from states (and other nonfederal entities). Likewise, the National Forest Management Act (NFMA) requires the Secretary of Agriculture to coordinate with the natural resource “planning processes of State and local governments . . . .” Also, the National Wildlife Refuge System Improvement Act requires federal long-range plans for national wildlife refuges to be consistent with state wildlife conservation plans, “to the extent practicable.” Federal statutory preference for consistency with a state or local plan is an incentive for states to be more organized than they otherwise might be in developing their own objectives.

The George W. Bush Administration has used procedural favoritism to give special voice to elected state, local, and tribal officials in federal resource management. Though this may be a way to avoid listening

44. See, e.g., Cowart & Fairfax, supra note 26, at 418–20 (detailing the planning process under the FLPMA).
47. 16 U.S.C. § 668dd(e)(1)(A)(iii) (1998); see also Wyoming v. United States, 279 F.3d 1214, 1231 (10th Cir. 2002) (stating that the statute “inspirits a ‘cooperative federalism,’ calling for, at a minimum, state involvement and participation in the management of the” refuges).
48. This policy, cooperative conservation, was formalized as a national approach in a 2004 executive order. See Exec. Order No. 13,352, 69 Fed. Reg. 52,989 (Aug. 26, 2004); see also supra notes 27–32 and accompanying text; Rebecca W. Watson, Letter to Editor, HCN Has It Wrong on Bush, High COUNTRY NEWS, Feb. 21, 2005. (Watson, the Assistant Secretary of the Interior for Lands and Minerals, states that “[a] new Bush administration policy specifically engages local governments and state agencies to be full cooperators in our planning efforts.”). The Interior Department has implemented this executive order via a number of initiatives. See, e.g., 70 Fed. Reg. 32,840 (June 6, 2005) (to be codified at 40 C.F.R. pt. 1501.6) (clarifying the cooperating agency status of state and tribal agencies in the preparation of environmental impact analyses).
to national environmental groups without forsaking public participation entirely, it certainly has given procedural favoritism a shot in the arm. An example of the Bush Administration's use of procedural favoritism is the 2005 National Forest Roadless Rule.\footnote{70 Fed. Reg. 25,654 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294).} This rule reversed a 2001 regulation\footnote{Roadless Area Conservation Rule, 66 Fed. Reg. 3,244, 3,244–45 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294, to be replaced with National Forest Roadless Rule, 70 Fed. Reg. at 25,661).} that prohibited logging and other development activities in nearly 60 million acres of roadless areas in the national forests.\footnote{Roadless Area Conservation Homepage, http://roadless.fs.fed.us (last visited Sept. 20, 2006).} In place of the national prohibition, the new rule invites state governors to petition the Forest Service to promulgate special rules establishing management requirements for roadless areas within the state.\footnote{National Forest Roadless Rule, 70 Fed. Reg. at 25,661.} The rule binds the Forest Service to act on the state petition within a definite time frame\footnote{Id. at 25,662.} but reserves federal national forest management authority.\footnote{16 U.S.C. §§ 1271–87 (2000).} The roadless rule's version of procedural favoritism is similar to the Wild and Scenic Rivers Act,\footnote{Id. § 1273(a)(ii). The Interior Secretary must find that the state-nominated river meets federal criteria established by law and regulation. Id. For a case study of this avenue for state favoritism, see Sally K. Fairfax et al., Federalism and the Wild and Scenic Rivers Act: Now You See It, Now You Don't, 59 WASH. L. REV. 417 (1984).} which provides an alternative to congressional river designation where a governor applies to the Secretary of the Interior for administrative designation of rivers protected under state law.\footnote{See, e.g., Dan Berman, Western Govs Question Roadless Rule's Petition Process, GREENWIRE, June 15, 2005, available at http://www.eenews.net/Greenwire/Backissues/061505/061505gw.html#. Several eastern states have also applied for special roadless rules, and are the first to receive approval from the Department of Agriculture. See U.S. Dep't of Agriculture, USDA Accepts First Three State Petitions For Conserving Roadless Areas in National Forests (Press Release No. 0212.06), June 21, 2006, available at http://www.usda.gov/wps/portal/utp/s.7_0_A/7_0_1OB?contentidonly=true&contentid=2006/06/0212.xml (last visited Sept. 19, 2006) (accepting the rulemaking petitions for North Carolina, South Carolina, and Virginia). Rey Says Many States Interested in FS Roadless Area Rule, PUBLIC LAND NEWS, Sept. 16, 2005, at 7 [hereinafter "Rey Says"].

The state petition provision of the roadless rule has received a great deal of attention from governors of western states, where most of the national forest roadless areas occur.\footnote{Id. at 25,662.} It offers an additional avenue for state influence over national forest management that goes beyond participation in individual forest plans. The petition must contain seven categories of information, including how recommended management actions
would affect animals and how the petitioned actions compare to existing state policies, which makes the petition an arduous requirement for the states. Though the federal government is offering modest grants to states to develop the information, the burden of completing the petition process may dissuade states from participating, especially because there is no guarantee that the Forest Service will adopt state proposals.

3. FEDERAL DEFERENCE TO STATE PROCESS

Federal deference to state process is created when legislation specifies that a state policy, standard, or plan, if adopted in accordance with certain procedures, will be employed by the federal government in its own national decisions. While procedural favoritism gives states an advantage over other stakeholders in asserting their interests in federal decision making, the third category, federal deference, provides greater assurance that the federal government will actually comply with the state position.

The best example of this approach to cooperative federalism is the Coastal Zone Management Act’s (CZMA) consistency criterion. The CZMA provides funding and guidelines for states to use in developing coastal zone management plans. Once the National Oceanic and Atmospheric Administration approves a state’s plan, all activities authorized or carried out by federal agencies that affect the coastal zone must be consistent (to the maximum extent practicable) with the state’s...
Federal licenses, leases, and permits are covered by the consistency criterion, which gives the state a great deal of leverage to condition proposed projects by insisting on modifications necessary to achieve consistency with state specifications. The same kind of state power to condition or seek denial of federal permits exists under section 401 of the CWA. Though it is administered by the U.S. EPA, the CWA contains many “natural resources” provisions seeking to protect ecological resources. Under section 401, applicants for federal discharge permits must receive certification from the state that the proposed project would not result in a violation of state water quality standards. States may condition their certifications on requirements to assure compliance with fish conservation concerns in water quality standards. In 1994, the Supreme Court upheld the statutory right of Washington State to condition the issuance of a federal hydroelectric permit on bypass flows, in order to ensure that salmon runs on the Dosewallips River would not be adversely affected by the construction of a dam.

Compared to the consistency provision of the CZMA, the CWA 401 certification is more deferential to states because it is not conditioned on practicability. But both represent significant influence that states can and do assert upon national resource management programs. They are models of cooperative federalism that assure states a major role in federal permits and projects.

III. The ESA Experiment with Habitat Federalism

Though the narrow pollution control model of cooperative federalism exists in at least one Interior Department program, the regulation of surface mining, it is largely absent from resource management. This lacuna in resource management hampers the federal government, 63. Id. § 1456(c)(2).
64. Id. § 1456(c)(3).
69. Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1328 (2000). This Act uses the narrow, pollution control model of cooperative federalism, where states implement federally set standards. See id. § 1202 (stating that the Act’s purpose is to “assist the States in developing and implementing a program to achieve [the establishment of a nationwide program]”).
already stretched thin from fiscal austerity, from achieving many con-
servation goals, but particularly those requiring land use control to
protect habitat. Habitat federalism, generally associated with the broad
model, can benefit from all the approaches of coordinating and inducing
conservation.

The ESA is a particularly good candidate for adapting the narrow
model because its strong regulatory component provides a close anal-
ogy to many of the EPA-administered pollution control programs.\textsuperscript{70} The
relative difficulty that even the ESA has experienced in enhancing its
effectiveness through cooperative federalism illustrates the limitations
of importing the pollution control approach across the environmental
law divide. Specifically, recent developments in the Puget Sound re-
gion amplify the importance of having in place the proper elements
of inducement to cooperative federalism. Insufficient carrots and weak
sticks ultimately undermined the important cooperative federalism ex-
periment in the Puget Sound salmon 4(d) rule.\textsuperscript{71} However, the place-
based collaboration that has emerged illustrates an important trend in
habitat federalism.

The ESA protects only those species that are explicitly “listed” under
a federal administrative process that evaluates their risk of extinction.\textsuperscript{72}
The ESA is best known for its interagency consultation that requires
actions authorized, funded or carried out by federal agencies to avoid
jeopardizing the continued existence or adversely modifying the critical
habitat of listed species.\textsuperscript{73}

But, the ESA also contains a more broadly applicable prohibition for
any person, including individuals, states, municipalities, and corpora-
tions: section 9 makes it illegal to “take” an endangered species.\textsuperscript{74} The
ESA definition of take includes “harm.”\textsuperscript{75} Harm to an imperiled animal
can occur from incidental habitat modification where it causes actual
injury as a result of significant disruption of essential behaviors, such as

\textsuperscript{70} I have previously described the ESA as a hybrid statute because it contains
characteristic elements of both pollution control and natural resources law. Robert L.
Fischman, \textit{Predictions and Prescriptions for the Endangered Species Act}, 34 ENVTL.

\textsuperscript{71} Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolu-
pt. 223).


\textsuperscript{73} 16 U.S.C. § 1536(a) (1988).


nesting, feeding, and breeding. As a strict prohibition, the proscription on take does not require much administrative effort, other than direct enforcement, which is exceedingly difficult in the case of detecting injury from habitat modification caused by land development or logging. Consequently, the federal government does very little direct enforcement of the habitat harm component of take.

In 1982, in response to the unforgiving character of the prohibition against take of listed animals, Congress amended the ESA to establish a permit program for incidental takes. Incidental takes are generally indirect, unintended harms to habitat that result from otherwise lawful activities. The permit allows incidental takes where a permittee develops an HCP, makes commitments to fund the plan, and mitigates the effects of the permitted action.

In contrast to the pollution control laws, the ESA amendment did not explicitly provide for delegating permitting to states. However, it marked a significant change for wildlife law in particular, and natural resources law in general. After 1982, the strict take prohibition could be read in the same manner as the CWA § 301 prohibition on discharge—not as a real proscription in practice, but as a trigger requiring certain actions to be subject to the close scrutiny of a permit-issuing agency. Rather than prohibiting incidental takes, the ESA now has an administrative program that focuses on controlling the impacts of those takes. Though the ESA incidental take permit program was slow to gain momentum, it now has been an active area of implementation for over a decade.

76. 50 C.F.R. § 17.3 (2006) ("Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."). The Supreme Court upheld this regulation against a facial challenge in Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687 (1995).
79. 50 C.F.R. § 17.22 (2004).
A. The Endangered Species Act's Versions of Habitat Federalism

The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and to recover listed species. The most glaring obstacle to accomplishing the national objectives of the ESA is that the greatest cause of species endangerment is habitat modification and destruction. The activities causing habitat degradation typically result from private land uses, such as forestry and residential/commercial development, which are principally under the control of state or local authorities. Therefore, the federal government absolutely needs the help of states to accomplish the goal of species recovery.

Section 6 of the Act, which authorizes funding for state programs, is the centerpiece of the ESA's long-standing but minor program of cooperative federalism. This section promotes federal-state cooperation: it allows states to share in species management and federal monies if they adopt programs that are at least as stringent as the federal one. When Congress enacted the modern ESA in 1973, it envisioned that state programs would play a key role in the Act's recovery program. Instead, section 6 has languished at the periphery of ESA implementation. Few states have comprehensive state endangered species programs that match the stringency of the ESA, although some do sign cooperative agreements and become eligible to receive federal funding for more limited projects.

Nonetheless, section 6 is an important foundation upon which to build more cooperative federalism. In an era of ever-shrinking state and federal conservation budgets, section 6 grants are one of the very

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86. Id.; see also Fischman, supra note 66, at 462.
87. See id. at 463; see also Holly Doremus, Delisting Endangered Species: An Aspirational Goal, Not a Realistic Expectation, 30 ENVTL. L. REP. 10,434, 10,441 (2000).
few natural resources funds that have grown in the past fifteen years. From no funding in fiscal year 1990,\textsuperscript{89} the section 6 budget line has increased in fits and starts\textsuperscript{90} to $82 million for the fiscal year 2006.\textsuperscript{91} These budget numbers for cooperative grants offer a somewhat deceptive comparison to the pollution control area because most of the money goes to habitat acquisition, not state administrative program support.\textsuperscript{92}

But grants alone, especially at current funding levels, will not address the vexing challenge of controlling land-disturbing activities to improve prospects for imperiled species recovery. Answering that challenge will require the development of state permit programs. Incidental take permits, though federal, do incorporate site-specific tailoring.\textsuperscript{93} However, they lack an adequate stringency floor. Though the goal of the ESA is to recover imperiled species so that they no longer need the protection of federal law to survive over the long term, the standard for issuance of an incidental take permit is that the action not be likely to appreciably reduce the survival of the species.\textsuperscript{94} This standard fails to ensure progress toward recovery

\begin{footnotesize}
\begin{enumerate}
\item See 50 C.F.R. § 17.22(b)(2)(ii) (2004) (When deciding whether to grant an incidental take permit, “the Director shall . . . consider the anticipated duration and geographic scope of the applicant’s planned activities, including the amount of listed species habitat that is involved and the degree to which listed species and their habitats are affected.”).
\end{enumerate}
\end{footnotesize}
and often allows for further declines in the viability of the listed species.\textsuperscript{95}

There is another option for permitting that could delegate operational responsibilities to state and local jurisdictions.\textsuperscript{96} ESA section 4(d) offers an outstanding opportunity to advance the goal of species recovery through habitat federalism. Section 4(d) allows the federal government to promulgate special rules that “provide for the conservation” of species listed as threatened.\textsuperscript{97} For threatened species, the general prohibition against take need not apply with full force. Rather, the federal government can specifically define which activities are proscribed and which are permissible. It may even define permissible activities in terms of which comply with state conservation programs. The 4(d) approach presents an opportunity to capture the inducements of cooperative federalism: (1) eligibility for federal grants and relief from potential penalties for violating the statute; (2) convenience and protection of permitees, who need neither apply for federal permits nor worry about take liability for permitted activities; and (3) comprehensive, area-wide conservation that promotes flexibility within the jurisdiction to choose which lands are disturbed.

There are several respects in which section 4(d) could advance habitat federalism through the incorporation of elements from the pollution control model. First, though most 4(d) rules either adopt the section 9


\textsuperscript{96} Another option for delegating ESA tasks is a statewide safe harbor agreement. Under the safe harbor program, a landowner who enhances habitat for an imperiled species may receive an assurance from the federal government that the species attracted to the enhancement will not cause greater restrictions on land use. U.S. FISH & WILDLIFE SERV., SAFE HARBOR AGREEMENTS FOR PRIVATE LANDOWNERS 1 (2004), available at http://www.fws.gov/endangered/recovery/harborqa.pdf. In the past few years, the Interior Department has injected cooperative federalism into the safe harbor program by authorizing individual states to implement the program. Authorized states can offer individual landowners “certificate[s] of inclusion.” Id. at 2. This has been a popular approach for managing forests to provide habitat for the red-cockaded woodpecker (RCW). Currently, Louisiana, Georgia, North Carolina, South Carolina, Texas, and Virginia have state authorization for RCW certificates of inclusion, and Alabama and Florida are close to finalizing their agreements. Daniel Cusick, HCPs, Safe Harbor Reap Benefits for Red-Cockaded Woodpecker, LAND LETTER, Mar. 31, 2005.

\textsuperscript{97} 16 U.S.C. § 1533(d) (2000). Of the two categories of species listed for protection under the ESA, threatened species are not quite as close to the brink of extinction as endangered species, though even threatened species occupy tenuous toeholds on continued existence. The ESA defines “threatened species” as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion range.” Id. § 1523(20). Of all the species in the United States protected by the ESA, some 29 percent are listed as threatened. See U.S. Fish & Wildlife Service, Summary of Listed Species, http://ecos.fws.gov/tess_public/TESSBoxscore (last visited Sept. 19, 2006). This percentage is substantially higher for fishes (45 percent) and reptiles (62 percent). Id.
take prohibition without modification or grant blanket immunity to certain classes of activities, a new generation of 4(d) rules is carving some exceptions from take liability for certain activities covered by approved local/state municipal, residential, commercial, or industrial development permit programs. This kind of 4(d) rule is the most promising vehicle for importing cooperative federalism to address habitat disturbance. Unlike HCPs, the permit programs approved for the exception to the general take definition must be part of a cumulative strategy in the 4(d) rule to meet the higher standard (the federal floor) of species conservation, not merely a means of avoiding an appreciable reduction in species survival.

Moreover, permit programs authorized under the criteria of a 4(d) rule would cover a larger area than most incidental take permits. This is important because large-scale planning for biological diversity is essential for long-term success in recovery. The federal government is mostly reactive in habitat conservation planning: it responds to specific applications. Though the federal government's policy is to encourage multi-party, area-wide plans, it still receives mostly single landowner plans. In fact, 82 percent of incidental take permits are issued to single landowners. In contrast, the 4(d) rule permit programs are based on an entire jurisdiction's plan, which leaves much more

100. See 16 U.S.C. § 1533(d) (2000). The conservation, or recovery, standard applies to the 4(d) rule, as a whole. Though each individual program approved under a 4(d) rule need not independently meet the conservation standard, the rule must show how its program approvals will add up to recovery.
101. Id.
room for legitimate trade-offs, mitigation, and restoration, even if the jurisdiction does not encompass the entire habitat for a threatened species.104

Finally, indirect liability for proximately caused (foreseeable) harms, a controversial new application of section 9 of the ESA, may raise a significant threat of penalty to local governments not participating in a 4(d) arrangement.105 Notwithstanding potential Eleventh Amendment constitutional problems,106 federal courts have found state and local governments liable under the take prohibition for inaction, where it causes a take "to be committed."107 A jurisdiction administering land use programs, therefore, may be liable for takes resulting from habitat modification that it allows through permits.108 For instance, the First Circuit has granted injunctive relief against Massachusetts for takes of whales that become entangled in fishing and lobster gear authorized for use under state licenses.109 Thus, the incentive for a state or locality that permits land-disturbing activities, such as residential development, to cooperate with the federal government in attaining certification under a 4(d) rule for its permit program would be based, in part, on eliminating the risk of indirect liability. Combined with the interest of developers to avoid incidental take liability, section 9 provides the sticks to support a cooperative federalism approach.


B. Habitat for Salmon in the Puget Sound Region

The most important experiment using a 4(d) rule to promote cooperative federalism is the regulation governing Puget Sound Chinook salmon.\(^\text{110}\) The Fisheries Service issued a 4(d) rule for fourteen threatened fish “evolutionarily significant units” (ESUs) in 2000.\(^\text{111}\) An ESU is the Fisheries Service’s application of the “distinct population segment[s]” qualifying for protection under the ESA’s definition of species.\(^\text{112}\) Several of the ESUs occur in the Puget Sound, where habitat degradation through urban and suburban development creates special recovery challenges.

The magnitude of the challenges is daunting. Many salmon runs, which roughly correspond to ESUs, have already disappeared completely from the region.\(^\text{113}\) Of the remaining runs, the fish populations have diminished to less than ten percent of their historic numbers.\(^\text{114}\) Moreover, the salmon crisis indicates a larger problem within the regional ecosystem. More than 137 species of animals depend on salmon for at least one stage of their life, and countless more depend on the same disappearing habitats that support salmon runs.\(^\text{115}\) Compounding existing problems is the likelihood that the Puget Sound region will grow by more than a million people during the next fifteen years.\(^\text{116}\)

In an attempt to address these challenges, which involve many development activities already regulated by cities and counties in the region, the 4(d) rule establishes a framework for federal approval of state programs that will conserve habitat and avoid take liability.\(^\text{117}\) The final 4(d) rule generally extends the same prohibitions on take and harm that apply to endangered species. However, the Fisheries Service identified thirteen “programs and criteria for future programs” for which there would be no section 9 liability.\(^\text{118}\) These categorical exceptions are programs that the Service certifies as contributing to recovery; and are called “limits on the take prohibitions.”\(^\text{119}\)

\(^{111}\) Id.
\(^{114}\) Id.
\(^{115}\) Id. at 5.
\(^{116}\) Id. at 6.
\(^{117}\) For a more detailed analysis of the 4(d) rule, see Fischman & Hall-Rivera, supra note 104, at 109–19.
\(^{119}\) Id.
limitations are narrowly drawn to cover activities complying with particular programs the Fisheries Service had already approved, such as Oregon's road maintenance plan or Portland's park pest management plan; others cover activities already carefully monitored, such as scientific research and fisheries management. But, for habitat federalism, the most important category is the limit on take for municipal, residential, commercial, and industrial (MRCI) development activities.

The MRCI category focuses on addressing habitat modification caused by activities regulated by local planning jurisdictions. In order for MRCI development activities to avoid liability for takes, they must occur pursuant to an ordinance or governmental plan that the Fisheries Service predetermines to be adequate in order to meet the standard of the 4(d) rule. This determination requires the evaluation of the local program against twelve substantive considerations that address the recovery needs of the salmon, most notably the protection and restoration of riparian areas to attain properly functioning conditions (PFC). The PFC are "the sustained presence of a watershed's habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation." Other considerations include avoidance of unstable slopes, wetlands, and other areas of high habitat value; prevention of adverse stormwater impacts; preservation of historic physical characteristics of streams; and provisions for monitoring, enforcement, funding, reporting, implementation, and periodic evaluation.

The procedures for approving and reviewing an MRCI development program for the 4(d) rule take limitation are similar to those employed by the federal pollution control programs in the certification of state permit programs (and SIPs under the CAA). For instance, the Fisheries Service must publish notice in the *Federal Register* of consideration of a MRCI development program and open a public comment period. Also, the local governments operating approved programs must report periodically on their implementation and effectiveness to the Fisheries Service, and the Fisheries Service reserves the power to request modifications as a result. Local programs that fail to implement modifications face revocation of their limits on the take prohibition.

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120. 50 C.F.R. § 223.203(b) (2006).
121. See id. § 223.203(b)(12).
122. Id.
123. Id. § 223.203(b)(12)(iii).
124. Id. § 223.203(b)(12)(i).
126. Id. § 223.203(b)(12)(ii).
127. Id. § 223.203(b)(12)(iii).
The MRCI development limit on take initially seemed poised to remake habitat federalism in the image of pollution control law. Indeed, one regional association of local governments in Puget Sound had already engaged in substantial work to craft an MRCI development program that would meet the rule's standards even before the Fisheries Service announced its final rule in June 2000. Unlike Richard Stewart's "pyramids of sacrifice," where uniform federal standards override local environmental preferences, salmon recovery is a popular goal in the Puget Sound region, especially around the urban Seattle area. Also, given the already extensive land use regulation in some areas, such as Seattle and King County, the marginal burden to local governments of qualifying for an MRCI development limitation seemed small compared to the advantages of funding, tailoring, and gaining a liability shield. Seattle, for instance, already regulated most of the activities that harm salmon habitat.

In addition to harnessing the pollution control cooperative federalism approach, the 4(d) rule addressed many of the ESA's widely criticized shortcomings. The 4(d) rule advanced species recovery better than the existing federal incidental take permit program; promoted a comprehensive, area-wide plan for conservation; responded adaptively to uncertainty; assured open public participation; and clarified what activities the ESA prohibits. Combined with an incoming administration that was committed to sharing federal power with localities, the salmon 4(d) rule seemed, at the time, to represent the next chapter in ESA implementation.

But that is not how things turned out in the succeeding five years. At first, optimism about the effectiveness of the narrow version of habitat federalism seemed justified when, in early 2002, the Bush Administration extended the 4(d) MRCI development limitation approach to three

128. Fischman & Hall-Rivera, supra note 104, at 89, 133-41.
130. Stewart, supra note 1, at 1221–22.
132. See CITY OF SEATTLE, CITY OF SEATTLE'S LAND USE REGULATORY AND STORMWATER PROGRAMS: AN ENDANGERED SPECIES CONTEXT 4, 5, 15, 17–18 (1999). Activities regulated by the city include use of property; location siting, sizing, and construction of new structures; alterations of existing structures; demolition; vegetation removal; grading, drainage, excavation, and placement of fill; road, parking lot and driveway construction; and utility installation. Id. at 4.
133. See Fischman & Hall-Rivera, supra note 104, at 132–60.
California salmon ESUs. Despite this additional invitation for state and local governments to cooperate, the Fisheries Service has yet to receive a formal application for the MRCI development limitation on take. Questions about how stringently the Fisheries Service will apply the considerations for approval of an MRCI development limitation, therefore, remain unanswered. Why haven’t the existing 4(d) rules spurred cooperative federalism for land use controls under the ESA?

1. THE OBSTACLES TO MRCI DEVELOPMENTS LIMIT IMPLEMENTATION

The reasons for the stall in implementing the 4(d) rule MRCI development limitation are complex, but three developments following the Puget Sound 4(d) rule help explain it: the Alsea Valley Alliance decision, the Washington Environmental Council lawsuit, and the difficulty of attaining the PFC standard. I will address each in increasing order of importance.

First, the 2001 Alsea Valley Alliance decision undermined the 4(d) rule by calling into question whether salmon ESUs were properly listed under the ESA. The Fisheries Service’s listing practice had been to distinguish “naturally spawned” from “hatchery spawned” fish populations in determining whether a particular ESU teetered on the verge of extinction. This distinction is important because when hatchery spawned fish are added to the population counts of many salmon runs, the numbers may exceed the listing threshold. However, the district court found that distinction to be arbitrary and capricious because it relied on factors Congress did not intend the agency to consider. Rather than appeal this decision, the federal government announced that it would conduct

137. Alsea Valley Alliance, 161 F. Supp. 2d at 1161.
140. Alsea Valley Alliance, 161 F. Supp. 2d at 1161-62 (“The central problem with the NMFS listing decision of August 10, 1998, is that it makes improper distinctions, below that of a DPS, by excluding hatchery coho populations from listing protection even though they are determined to be part of the same DPS as natural coho populations.”).
biological status reviews of all west coast salmon listings, including the Puget Sound ESUs, and rewrite its hatchery policy.\textsuperscript{141}

For four years, the foundation for the 4(d) program remained uncertain while local governments and developers lost much of their initial enthusiasm for participating in the MRCI program. During that time, political and scientific debates raged about the role of hatchery fish in ESUs.\textsuperscript{142} Finally, in June 2005, the Fisheries Service announced its decision to maintain the listing of almost all salmon ESUs, including the Puget Sound fishes subject to the 4(d) rule.\textsuperscript{143} The new hatchery policy, announced the same day, now includes hatchery stocks as part of ESUs but distinguishes them from naturally spawning populations, which have special importance in maintaining the productivity, genetic diversity, and geographic distribution of salmon runs.\textsuperscript{144}

The second reason the 4(d) rule has not been implemented is that in 2000, the Washington Environmental Council challenged the 4(d) rule directly, contributing to the uncertainty surrounding the cooperative federal framework for the Puget Sound salmon.\textsuperscript{145} The suit alleged both that the 4(d) limits on take, generally, were an impermissible interpretation of the ESA and that the MRCI development limitation, specifically, failed to meet the recovery criterion. In 2002, the district court upheld the 4(d) rule against the facial challenge in all respects, but left opened the possibility that the MRCI development provision, as applied by the Fisheries Service in a particular program approval, might run afoul of the ESA.\textsuperscript{146}

There is good news from this case for the narrow cooperative federalism approach: the court upheld the authority of the Fisheries


\textsuperscript{143} Endangered and Threatened Species; Final Listing Determinations for 16 ESUs of West Coast Salmon, and Final 4(d) Protective Regulations for Threatened Salmonid ESUs, 70 Fed. Reg. 37,160, 37,170 (June 28, 2005).

\textsuperscript{144} Policy on the Consideration of Hatchery-Origin Fish in Endangered Species Act Listing Determinations for Pacific Salmon and Steelhead, 70 Fed. Reg. 37,204, 37,206 (June 28, 2005).


\textsuperscript{146} Id. at *9.
Service, pursuant to the ESA, to create a take limitation under section 4(d). However, in dismissing the environmental group's more specific challenge to the implementation of the MRCI development limitation as unripe, the court deferred a more detailed review of the considerations for a qualifying MRCI program until the Fisheries Service actually approves a program. Though the court was legally correct to postpone evaluation until it can assess how the Service actually evaluated a program and applied the twelve substantive criteria, the ruling creates unfortunate deterrence. No land use jurisdiction now desires to be the first applicant for an MRCI development limitation because it would establish the first administrative record for an as-applied challenge to the MRCI development limitation approval criteria. It is not clear, for instance, whether an MRCI development plan failing to meet some of the key considerations could be approved under the ESA. A better 4(d) rule would have clarified this ambiguity up front by establishing the twelve substantive considerations as binding criteria that must be met before the Fisheries Service would approve a program.

In addition, Washington Environmental Council may have created another deterrent for a jurisdiction considering the first MRCI development limitation by confirming that the Fisheries Service would have to apply the National Environmental Policy Act (NEPA) when it evaluates an application for a limit on take. NEPA places the legal responsibility for conducting an environmental impact analysis on federal agencies. But standard practice and budgetary necessity demand that applicants pay for the effort, which is typically conducted by private consultants. This raises the real cost for a land use jurisdiction seeking the take limitation, particularly because the first analysis will have no clear template to copy.

Third, the PFC standard, one of the twelve considerations for approval of an MRCI development program for the take limitation, proved to be more difficult to satisfy than the regional land use

147. Id. at *7-*8.
148. Id. at *9.
149. For a more detailed critique of the 4(d) rule, see Fischman & Hall-Rivera, supra note 104, at 116--19.
150. 2002 WL 511479.
151. Id.
152. Id. at *9; Telephone Interview with John Lombard, Senior Policy Analyst, Steward & Associates, in Snohomish, Wash. (Mar. 21, 2005).
jurisdictions initially thought. Among its considerations for approval of an MRCI development program, the 4(d) rule included "riparian area management requirements to attain or maintain" PFC around all bodies of water and "compensatory mitigation . . . where necessary, to offset unavoidable damage to PFC due to MRCI development impacts to riparian management areas."\textsuperscript{154} The PFC are "the sustained presence of [a watershed's] natural habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation."\textsuperscript{155} The PFC concept is central to the scientific basis for evaluating the relationship between land use and salmon conservation. The biological processes of spawning, breeding, rearing, feeding, migrating, and sheltering are among the essential functions habitat supports.\textsuperscript{156} Though the Fisheries Service retained discretion to approve plans that fail to meet one or more of the twelve considerations,\textsuperscript{157} failure to meet as important a standard as PFC might be fatal to a program application.\textsuperscript{158} Alternatively, even if Fisheries Service approved the application, the limit on take might be vulnerable to a citizen suit challenging the validity of the approval.

While PFC is difficult to restore and maintain in rural regions, it is almost impossible in developed areas. A 2002 biological review of the Tri-County Model, which was developed by three Puget Sound counties in anticipation of the 4(d) rule to secure an MRCI development limitation,\textsuperscript{159} indicated that the habitat restrictions and restoration programs of the counties would not meet the PFC standard.\textsuperscript{160} For instance, limitations on tree clearing would not do enough to restore previously cleared riparian forest cover. The federal government has indicated its

\textsuperscript{155} \textit{Id.} § 223.203(b)(12)(iii). Even though the 4(d) rule did not bind the Fisheries Service to require that all programs meet each of the twelve “considerations,” an evaluation of each program application against the considerations would have to be part of the administrative record of decision. \textit{Id.} § 223.203(b)(12)(i).
\textsuperscript{157} \textit{Id.} § 223.203(b)(12)(i).
\textsuperscript{158} See Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units, 65 Fed. Reg. at 42,431–32 (discussing the PFC as a basis for evaluating habitat).
\textsuperscript{160} Parametrix, Biological Review: Tri-County Model 4(d) Rule Response Proposal 8–1 to 8–13 (2002); Interview with John Lombard, \textit{supra} note 152.
\end{footnotesize}
agreement with the unfavorable assessment. Failure to meet PFC in the most environmentally progressive jurisdictions in the region deflated most hopes that the 4(d) rule would spur a cooperative federalism era in the ESA. Though the tri-county model probably represents the best effort anyone has made to keep salmon habitat from degrading further, it is insufficient to restore the necessary ecological functions in the face of population growth. Without a major restoration program to mitigate new development and compensate for past harms, the best that developed areas around Seattle can hope for is improvement from a status of “not properly functioning” to “at risk,” which falls short of attaining PFC.

2. THE SHARED STRATEGY RECOVERY COLLABORATION EMERGES

Nonetheless, a snapshot of salmon habitat protection in the Puget Sound area is not entirely bleak. The desire of local governments to recover harvestable salmon runs, to comply with stringent state laws governing growth management and watershed conservation, and to improve local parks, roads, and storm/waste water systems have led to better plans and ordinances that are environmentally protective by any national measure. Moreover, regional cooperation with the federal government has resumed under a new place-based collaboration called the “Shared Strategy.” Though the Shared Strategy represents a path-breaking collaborative approach to


162. Interview with John Lombard, supra note 152.


recovery under the ESA, it abandons the 4(d) model imported from pollution control. Instead, the Shared Strategy employs one of the broader natural resources approaches by bringing together a diverse group of governmental officials, business sector leaders, and other stakeholders to draft a recovery plan for the Puget Sound Chinook salmon. The Shared Strategy submitted its draft plan to the federal government in June 2005.\(^{167}\) Six months later, notwithstanding shortcomings noted by a review panel of scientists, the Fisheries Service announced its proposal to use the Shared Strategy to fulfill its ESA § 4(f) requirement to prepare a recovery plan.\(^{168}\) Unlike MRCI development limitation programs, however, section 4(f) recovery plans are nonbinding. Moreover, the draft plan is not site specific enough at this time to identify whether it will succeed in maintaining PFC.\(^{169}\)

The Shared Strategy marks a movement away from the pollution control model, and toward the use of place-based collaborations as a cooperative federalism tool in ESA § 4(f) recovery planning, a program that has been a notorious underachiever.\(^{170}\) Though all recovery plans share the inducement of tailoring, the Shared Strategy illustrates how regional collaborative planning deploys the other inducements of cooperative federalism. First, and most obviously, local governments and their constituents get to play a more active role in the tailoring. The collaborative process of the Shared Strategy offers stakeholders far greater access to the decision-making and standard-applying process than does the ordinary, closed-door drafting of recovery plans. Moreover, the Shared

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Strategy participants have the same access to nationally sponsored science as most conventional recovery planning teams.

Second, Shared Strategy offers financial incentives. A great deal of money is at stake in salmon recovery. Puget Sound is openly competing for a share of $100 million from the federal Pacific Salmon Recovery Fund and making the case for greater national and state contributions to the regional effort. On the other hand, salmon will likely decline further if the region does not push recovery, which is expected to cost $120 million per year. Adverse economic consequences of that scenario may include incidental take liability, as well as foregone profits from ever more stringent restrictions on development.

Third, the Shared Strategy secured the inducement of procedural favoritism. This is because the collaboration enjoys direct agency participation and advances the theme of the Administration’s cooperative conservation. As a result, the federal government plans to promulgate the Shared Strategy’s draft plan as its own in fulfillment of the ESA § 4(f) requirement.

The Shared Strategy, therefore, is a significant improvement over the traditional recovery planning process. It incorporates a more robust set of habitat federalism elements from the broad conception. However, it is also a significant retreat from the binding constraints of the narrow cooperative federalism model of the 4(d) rule. It is unlikely that the stakeholders who found their planning efforts blocked by the PFC standard in the 4(d) effort will agree to as stringent a goal in the Shared Strategy. Without the PFC, though, the Shared Strategy may succeed in attaining federal approvals and local participation while failing in the long run to recover salmon.


172. Les Blumenthal, supra note 169 (also noting that Congress recently cut funding for salmon recovery and that the State of Washington would need to contribute more for recovery).

173. A different, less successful cooperative venture, the Quincy Library Group lacked this direct agency participation. The Quincy Library Group collaborative process for managing a region covering a handful of national forests in northern California failed to garner strong Forest Service support, in part, because national forest officials did not participate. See Timothy Duane, Community Participation in Ecosystem Management, 24 Ecology L.Q. 771, 789 (1997).

174. The George W. Bush Administration’s cooperative conservation initiative is discussed in supra notes 27–32 and accompanying text.
IV. Conclusion: Whither Habitat Federalism?

The stalled effort to import the narrow cooperative federalism model into the ESA through 4(d) rules presents a paradox: the 4(d) rules are at once both too loose and too tight. The 4(d) rules are too loose because they fail to be explicit in requiring compliance with each consideration.\textsuperscript{175} But the 4(d) rules are also too tight because they establish some stringent conditions that have ultimately deterred local governments from applying for the MRCI development limitation. The strictest criterion is the PFC standard, which would require extending existing regulatory restrictions so widely that even the jurisdictions with the greatest inclinations to participate, such as King County, decided to forego MRCI development limitation applications.\textsuperscript{176}

Even though the Fisheries Service has recently reaffirmed the status of salmon as a threatened species, the threat of indirect liability for harm resulting from failure to adopt a salmon-friendly planning and zoning program is exceedingly slight. The Service has few enforcement resources and is part of an administration that is generally less supportive of adversarial approaches. In addition, it would be difficult for an environmental group acting under the ESA citizen suit provision to satisfy the burden of proof necessary to connect land use controls to actual injury, or significant impairment of essential behavioral patterns, of salmon.\textsuperscript{177} So the liability risk to a local government is infinitesimal, even less than the risk of a challenge to an MRCI development limitation approval. The low risk of section 9 liability from continuing business as usual is the single most important factor explaining the lack of interest in gaining federal approval for land use programs under the narrow model of cooperative federalism in the ESA; if such liability were imminent, there would be more of an incentive to explore alternate regulatory tools.

Another extremely important factor dampening interest in MRCI development limitation applications is the continued availability of incidental take permits. The 4(d) rule must provide for recovery\textsuperscript{178}

\textsuperscript{176} Press Release, Ron Sims, \textit{supra} note 164.
\textsuperscript{177} See, e.g., Pac. Rivers Council v. Brown, No. CV 02-243-BR, 2003 U.S. Dist. LEXIS 8139 (D. Or. Apr. 21, 2003) (denying a preliminary injunction blocking a state rule allowing the state forester to approve logging on steep slopes because of its alleged harm to threatened coho salmon habitat).
\textsuperscript{178} 16 U.S.C. § 1533(d) (2000); see also Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 442 n.48 (5th Cir. 2001).
and, therefore, demands stringent constraints on approval of land use controls. In contrast, the federal government interprets the incidental take permit provision, which requires that any harm "will not appreciably reduce the likelihood of the survival and recovery" as authorizing a more relaxed standard for approval. Despite legislative history and good policy arguments to the contrary, the federal government has interpreted this standard to require no contribution to recovery, or increase in population rates, necessary for incidental take permits and their associated HCPs. Though this interpretation has been questioned in the context of interagency consultations under similar language in another provision of the ESA, the federal government continues to demand no contribution to recovery and to approve permits as long as they provide for retention of sufficient habitat for bare survival. Another key advantage of the incidental take permit for potentially liable parties is that it offers a "no surprises guarantee" that makes reopening the conditions imposed by the permit more difficult than revising the standards for MRCI development program approval.

The availability of the two choices (incidental take permit or a 4(d) MRCI limitation) for relieving section 9 take liability leads to a kind of Gresham's Law of regulatory choice: lax standards drive stringent standards out of circulation. In this case, the lower standard for securing an incidental take permit pulls land use jurisdictions away from a

180. See Fischman & Hall-Rivera, supra note 104, at 144–45.
182. See Sierra Club, 245 F.3d at 441–43 (holding that the goal of conservation in the critical habitat designation requires not mere survival but also recovery of a listed species).
While the Shared Strategy is a retreat from the stringency of the 4(d) rule, it will likely produce better recovery actions than the conventional, federally dominated recovery plan would. Nonetheless, the Shared Strategy is unlikely to spur the sacrifices required by the PFC standard to safeguard the future of salmon in the Puget Sound.

Where resource development is bound to a single federal program, with no alternatives, it will be easier to incorporate narrow cooperative federalism principles to encourage and strengthen state programs. For instance, the BLM could bind oil and gas lessees to state standards on access, compensation to surface estate owners for disturbance, and waste-water discharge. Federal incorporation of state forest practices laws, in addition to state water quality standards, would provide more consistent resource management across watersheds with fragmented ownership patterns and an incentive for states to improve their programs. Outside of these situations, habitat federalism will likely grow from the existing natural resources tools of place-based coordination and procedural federalism.


186. Currently, the BLM and the State of Wyoming are at loggerheads over the validity of a state law, which would require federal oil and gas lessees to compensate others for “loss of land value” in a larger number of instances than the BLM’s more lenient compensation requirements. Jean Feriancek, Surface Damage Acts, Nat. Resources & Env’t, Winter 2006, at 58; Kerry Brophy, Feds Oppose State’s Effort to Empower Landowners, High Country News, Aug. 22, 2005, at 6.