

# COOPERATIVE FEDERALISM AND NATURAL RESOURCES LAW

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## I. INTRODUCTION

The two sides of the environmental law field, pollution control and resource management, share a common focus on the natural materials and services that sustain healthy lives and productive livelihoods. However, they differ in their constitutional authority, conceptual frameworks, legislative tools, and administrative strategies.<sup>1</sup> Cooperative federalism, a term describing an arrangement under which a national government induces coordination from subordinate jurisdictions, highlights this divide in environmental law.

This Article confronts the puzzle of cooperative federalism from two asymmetric perspectives. It takes a broad, conceptual route to explore how natural resources law can contribute to pollution control. On the other hand, it employs a narrower, practical approach to discuss the lessons pollution control offers natural resources law. This analysis challenges commentators on both sides of the environmental law field to expand their horizons.

Section II begins by establishing a theoretical and historical framework to define the various meanings of cooperative federalism. It then mines natural resources law for lessons that deepen our understanding of cooperative federalism. Because most of the environmental law scholarship on cooperative federalism focuses only on the pollution control side, the discourse is skewed. The basic elements of cooperative federalism can be combined in a wider variety of forms than are recognized by most pollution control programs or scholarship. A review of the ways in

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<sup>1</sup> The characteristic differences between the resource management and pollution control strands of environmental law are explored in greater depth in Robert L. Fischman & Jaelith Hall Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 COLUM. J. ENVTL. L. 45 (2002); David J. Hayes, *Cross-Pollination*, ENVTL. F., July–Aug. 1998, at 28; and Robert L. Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and its Relationship to Pollution Control Law*, 74 DENV. U. L. REV. 779, 784–86 (1997).

which resource management law has brokered the state-federal relationship expands the otherwise cramped spectrum of arrangements that might fairly be called cooperative federalism. The narrow pollution control model entails the fostering of state administrative programs that can receive authorization to tailor and implement federal standards. Section II identifies three broader categories of cooperative federalism employed in resource management: place-based collaboration, state favoritism in federal process, and federal deference to state process.

Section III examines how the importation of the narrow pollution control model of the cooperative federalism concept can advance natural resources law. It is on this pragmatic level of incremental law reform where pollution control law can best contribute to existing debates in natural resources management. One reason for the cooperative federalism literature's preoccupation with pollution control is the depth of experience with the wealth of implementing tools employed by the Environmental Protection Agency ("EPA"). Section III applies some of those tools to the Endangered Species Act ("ESA") and discusses recent developments that modify my previous work in this area. The ESA creates a program rooted in natural resource management but infused with a regulatory sensibility. It is thus a perfect proving ground for cooperative federalism because it crosses many commonly recognized boundaries in environmental law. Because land use is such an important determinant of habitat quality for biodiversity, there is an acute need for federal coordination with state and local jurisdictions. The extent of the ESA's adaptability to the narrow pollution control model of cooperative federalism suggests opportunities for reshaping natural resources law generally. For example, federal certification of local programs for the purpose of meeting national standards can spur more effective grass roots conservation while eliminating awkward duplication.

However, the problem of inadequate inducements highlights important limitations to the effectiveness of direct borrowing from pollution control to resource management. In particular, 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 will undermine more rigorous experimentation with the narrow pollution control model of cooperative federalism.

Section III concludes with some observations about the role of cooperative federalism in environmental law. The environment itself is a seamless whole. But law is necessarily reductionist as it attends to particular disputes and issues that demand peaceful resolution. Law must designate particular winners in adjudications and establish clear expectations for behavior with regard to the natural world. This mismatch between the physical reality of the environment and the practical demands of law inevitably creates friction.<sup>2</sup> Cooperative federalism is a useful tool for smoothing out the corners of the square peg of law as we pound it into the round hole of the environment.

The popularity of the topic of cooperative federalism betrays its flexibility as a term that can be stretched and tailored to fit most problems in the administration of public law. But a concept that becomes something to everyone ultimately loses its meaning. In this Article, I hope to pin down the contours of the doctrine as it is applied in a wide range of contexts. In the end, the task of fitting the cooperative federalism mantle on aspects of environmental law tells us as much about the shape of environmental law as it does about relations between the federal government and the states.

## II. USING NATURAL RESOURCES LAW TO BROADEN COOPERATIVE FEDERALISM

In the realm of pollution control, cooperative federalism largely operates to facilitate the creation of state programs and state substantive standards. When applied to natural resource management, the use of cooperative federalism results in three additional approaches to cooperative federalism: place-based collaborations, state favoritism in federal process, and federal deference to state process. Irrespective of the subfield in which it appears, cooperative federalism entails a common vocabulary of inducements to spur action.

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<sup>2</sup> J.B. Ruhl attributes much of this friction to environmental law's ignorance of complex adaptive system dynamics. J.B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System: How to Clean Up the Environment by Making a Mess of Environmental Law*, 34 HOUS. L. REV. 933, 967-68 (1997).

### A. *What is Cooperative Federalism?*

Federalism denotes the distribution of power between the national government and the states (or Indian tribes). Though the word may be used normatively (and popularly) to refer to a theory of power allocation that favors states, I employ it positively to characterize the actual power structure.<sup>3</sup> The adjectival root, “federal,” aptly implies the strong national government created in the U.S. Constitution to repair the relatively weak central government created by the Articles of Confederation. Therefore, most scholarly approaches to federalism emphasize the national government as the dominant partner.

While the Constitution allocates enumerated powers to the national government, it does little to specify the relationship between those powers and the reserved powers of the states. States retain significant leverage because the federal government does not always have the wherewithal to accomplish its goals without some reliance on state implementers.<sup>4</sup> Cooperative federalism is fundamentally about the relationship between levels of government, which is worked out principally in statutes and through the actions of agencies.

Federalism can be mapped on a continuum defined by the poles of exclusive state power and exclusive national power, as displayed in Figure 1. Though federalism runs the gamut between these limits, actual state-federal relationships in environmental law seldom hit either extreme. Approaching one extreme at the exclusive national power pole are pesticide labeling and defense-generated nuclear waste. On the other side, states generally maintain near-exclusive control over land use regulation, substantive tort law, allocation of property (such as water rights) among private interests, and game hunting on private land.

Most environmental law falls somewhere in the middle of this spectrum, illustrated in Figure 1.<sup>5</sup> In this middle area, both levels of government play some role. This vast middle ground may be

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<sup>3</sup> This is what Douglas T. Kendall calls “federalism as a fact rather than federalism as an ideology.” Mark Agrast, et al., *How to Protect Environmental Protections?*, 35 ENVTL. L. REP. 10,413, 10,417 (2005).

<sup>4</sup> See Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 671 (2001).

<sup>5</sup> J.B. Ruhl offers a similar continuum describing the federal-state relationship in J.B. Ruhl, *Cooperative Federalism and the Endangered Species Act* (June 4, 2005) (unpublished manuscript, on file with author).

labeled either “dual” or “cooperative” federalism. Dual federalism is a term that should be reserved for situations where either the federal and state governments act independently, without attempting to align their efforts, or where the federal and state spheres of authority do not overlap.<sup>6</sup> Examples of dual federalism include noise control, electricity conservation, and aspects of automobile emissions in California. In contrast, cooperative federalism, the focus of this Article, requires a greater degree of coordination between the two levels of government. Since the New Deal, cooperative federalism typically appears as congressional or administrative efforts to induce (but not coerce or commandeer)<sup>7</sup> states to participate in a coordinated federal program.

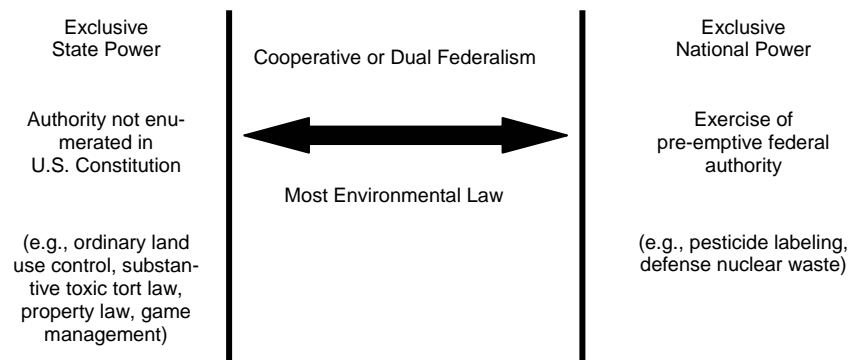


Figure 1: The Federalism Continuum

<sup>6</sup> See Weiser, *supra* note 4, at 665.

<sup>7</sup> Too much compulsion, amounting to federal commandeering of state lawmaking, violates the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 175 (1992) (finding that a federal law forcing states to take title to a type of radioactive waste if they failed to address disposal issues pursuant to a federal program “crossed the line distinguishing encouragement from coercion”).

A more sophisticated and revealing model of cooperative federalism unfolds the one-dimensional continuum to a Cartesian graph, as illustrated in Figure 2. Points and programs are defined by an axis indicating the extent of national power and another indicating the extent of state power. Unlike the one-dimensional model, in which increases in the power of one sovereign correspond with decreases in the power of another, the graphic model recognizes that there are many subjects for which both the state and federal governments may have extensive and increasing (or restricted and decreasing) authority. In the two-dimensional conceptualization, the most interesting cooperative federalism may be found where both the state and federal governments have exercised relatively great power over and interest in a subject. Examples of this domain include mining reclamation, pollution control, and imperiled species protection. This defines the zone in the upper-right quadrant of Figure 2. Other interesting challenges in coordinating authority can occur even when one partner employs relatively little authority compared to the other. For instance, non-game, non-endangered wildlife management is an area dominated by states but with some key federal cooperative programs. Similarly, the national government dominates proprietary management of the federal public lands; though, as Section II.B.2. discusses below, states may seek and obtain some influence over management decisions.

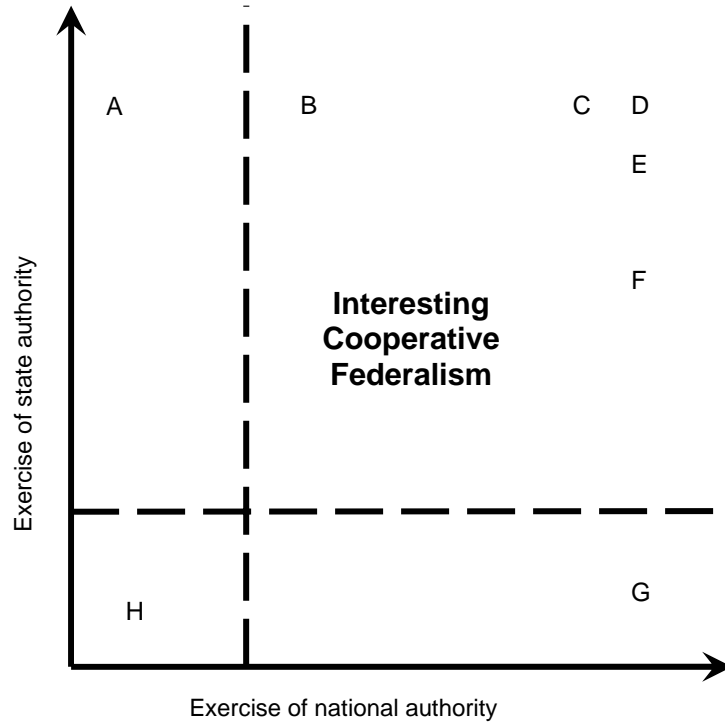
Cooperative federalism rose with the New Deal, when the national government significantly heightened its presence in the operation of state programs.<sup>8</sup> The increase in legislative and administrative law led states and the federal government to experiment with new forms of cooperation.<sup>9</sup> A 1938 Iowa Law Review “cooperative federalism” symposium collected early scholarship on the relationship between burgeoning federal and state programs<sup>10</sup> and is an excellent starting point for understanding the historical roots of our current arrangements.

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<sup>8</sup> See Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619, 644-48 (1978); Weiser, *supra* note 4, at 669.

<sup>9</sup> See *Foreword*, 23 IOWA L. REV. 455, 456 (1938).

<sup>10</sup> *Symposium on Cooperative Federalism*, 23 IOWA L. REV. 455 (1938).



- Key:**
- |   |                                  |
|---|----------------------------------|
| A—toxic tort procedure                          | E—imperiled species protection   |
| B—non-game, non-endangered, wildlife management | F—federal public land management |
| C—mining reclamation                            | G—mobile source air emissions    |
| D—pollution control                             | H—noise pollution                |

Figure 2: The Federalism Plane in Environmental Law



Most of the early commentary built on the work of eminent Princeton constitutional scholar and New Dealer, Edward Corwin.<sup>11</sup> The Iowa symposium considered cooperative federalism to be an “entirely new field of experiment characterized by the participation of several governments in cooperative legislative or administrative action.”<sup>12</sup> Then, as now, the Iowa editors could conclude that cooperative federalism, while significant, is “no unifying gospel.”<sup>13</sup>

Cooperative federalism in the New Deal largely concerned economic regulation, such as antitrust, securities, labor, and tax law. However, some public health laws, such as those dealing with food and drug safety, had already contributed somewhat to cooperative practices between the two levels of government.<sup>14</sup> The Iowa symposium even contains some discussion of natural resources law, most notably wildlife protection and drainage district management, which offered models of state-federal cooperation.<sup>15</sup> Nonetheless, it was not until the explosion of legislation in the 1970s that cooperative federalism emerged from its significant but transient status<sup>16</sup> to become an enduring, organizing concept in environmental law.<sup>17</sup>

Though cooperative federalism is a term that retains some currency outside of environmental law, it does not play as central a role in any other field. Only the literature on telecommunications regulation (especially on the 1996 Telecommunications Act) comes close to environmental law commentary in its interest in the

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<sup>11</sup> For an example of Corwin’s writings on cooperative federalism, see Edward S. Corwin, *National-State Cooperation—Its Present Possibilities*, 46 YALE L.J. 599 (1937).

<sup>12</sup> *Forward*, *supra* note 9, at 456. Of the articles in the 1938 symposium, Jane Perry Clark’s comes closest to the current interpretation of cooperative federalism in environmental law. Jane Perry Clark, *Interdependent Federal and State Law as a Form of Federal-State Cooperation*, 23 IOWA L. REV. 539 (1938).

<sup>13</sup> *Foreword*, *supra* note 9, at 458.

<sup>14</sup> See Clark, *supra* note 12, at 543–44; see also Frank R. Strong, *Cooperative Federalism*, 23 IOWA L. REV. 459, 479–82 (1938).

<sup>15</sup> See Clark, *supra* note 12, at 541–42 (discussing state and federal regulation concerning migratory birds), 559–61 (discussing the “close administrative interrelationships between federal and state officials” in enforcing and implementing game laws); see also William E. Warne, *The Drainage Basin Studies: Cooperative Federalism in Practice*, 23 IOWA L. REV. 565 (1938).

<sup>16</sup> *Forward*, *supra* note 9, at 458.

<sup>17</sup> See Weiser, *supra* note 4, at 669–70; see also Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1159–60 (1995).

cooperative federalism framework; the same issues debated in the environmental law scholarship play out in these articles.<sup>18</sup> Still, the term “cooperative federalism” has been loosely applied to such disparate programs as Medicaid, OSHA, public utilities regulation,<sup>19</sup> law enforcement licensure,<sup>20</sup> online pharmacy regulation,<sup>21</sup> and hate crime enforcement.<sup>22</sup>

### B. *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 the pollution control laws. Though these laws offer important lessons, discussed in Section III, this limited scholarship neglects the range of programs from the natural resources side of the divide. 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.

Scholarly commentary about cooperative federalism centers around EPA-administered pollution control laws where states

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<sup>18</sup> See, e.g., Jim Chen, *Subsidized Rural Telephony and the Public Interest: A Case Study in Cooperative Federalism and Its Pitfalls*, 2 J. TELECOMM. & HIGH TECH. L. 307, 309–11 (2003) (discussing the fragmentation of regulatory requirements that results from devolution of power to states in the telecommunications context); Roy E. Hoffinger, “Cooperative Federalism” *Gone Wrong: The Implementation of the Telecommunications Act of 1996*, 2 J. TELECOMM. & HIGH TECH. L. 375, 376–83 (2003) (discussing the extent to which states should set their own policies rather than just implement federal standards); Raymond W. Lawton & Bob Burns, *Models of Cooperative Federalism for Telecommunications*, 6 ALB. L.J. SCI. & TECH. 71 (1996) (appraising various models of cooperative federalism in the telecommunications context); Sarah C. Rispin, Comment, *Cooperative Federalism and Constructive Waiver of State Sovereign Immunity*, 70 U. CHI. L. REV. 1639 (2003) (discussing states’ constructive waivers of sovereign immunity via their participation in cooperative federalism regulatory schemes); Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1 (1999) (discussing the scope of judicial review of state decisions under a federal framework).

<sup>19</sup> Rispin, *supra* note 18, at 1642–43.

<sup>20</sup> Roger L. Goldman, *State Revocation of Law Enforcement Officers’ Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism*, 22 ST. LOUIS U. PUB. L. REV. 121, 123–26 (2003).

<sup>21</sup> Sara E. Zeman, *Regulation of Online Pharmacies: A Case for Cooperative Federalism*, 10 ANNALS HEALTH L. 105, 106–07, 122 (2001).

<sup>22</sup> Bernard P. Haggerty, *Hate Crimes: A View from Laramie, Wyoming’s First Bias Crime Law, the Fight Against Discriminatory Crime, and a New Cooperative Federalism*, 45 HOW. L.J. 1, 56–72 (2001).

participate in the implementation of federal standards.<sup>23</sup> What I term the “narrow conception” 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”)<sup>24</sup> and the Clean Water Act (“CWA”),<sup>25</sup> cooperative federalism involves programs where federal monies are made available to each state contingent on its creation of a regulatory scheme that is at least as stringent as the federal floor. States may tailor federal standards (e.g., water quality criteria under the CWA), establish compliance strategies (e.g., state implementation plans under the CAA), implement permit programs (e.g. state pollutant discharge elimination systems under the CWA), and enforce rules (e.g., 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.<sup>26</sup> 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

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<sup>23</sup> 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 Weiser, *supra* note 4, at 664–67 (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.

<sup>24</sup> 42 U.S.C. §§ 7401–7671q (2000).

<sup>25</sup> 33 U.S.C. §§ 1251–1387 (2000).

<sup>26</sup> See Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 205–06 (1997).

may “require federal agencies to impose the ‘stick’ of preemptive federal requirements if states do not regulate as desired . . . .”<sup>27</sup> For example, the financial consequences of a state’s failure to enforce standards, such as loss of highway funds for noncompliance with the CAA,<sup>28</sup> may spur cooperation with the federal program.<sup>29</sup>

### 1. *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) the fostering of state administrative programs, and (2) the delegation of 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. The vast majority of the literature employing the narrow conception of cooperative federalism remains within the confines of the two-element model, described in further detail below.

#### a. *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-

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<sup>27</sup> *Id.* at 206.

<sup>28</sup> 42 U.S.C. §§ 7410(m), 7509 (2000).

<sup>29</sup> *See, e.g., Missouri v. United States*, 918 F. Supp. 1320, 1331 (E.D. Mo. 1996) (noting the importance of coercive measures in states’ enforcement of federal regulation), *vacated on other grounds*, 109 F.3d 440 (8th Cir. 1997).

sharing for state administration. Though many federally funded programs, such as the nonpoint source control incentives,<sup>30</sup> are loosely organized, the flagship pollution control programs allow states to implement their own permit schemes in place of a federal permit requirement.<sup>31</sup> 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.<sup>32</sup>

The second component is the federal stringency floor by which states<sup>33</sup> may tailor pollution control programs to be stricter, but not more lax, than the federal standards.<sup>34</sup> 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, suggesting that fears of a “race to the bottom” in the absence of a strong federal presence are well founded.<sup>35</sup>

The third component of fostering state programs is federal enforcement, or oversight and penalties: the stick to the funding

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<sup>30</sup> 33 U.S.C. § 1329 (2000).

<sup>31</sup> See, e.g., 33 U.S.C. § 1342 (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).

<sup>32</sup> For a general discussion endorsing the presumption that local environmental concerns are best addressed at the state or local level, see Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 134–44 (2005). But see, William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 110 (faulting these arguments for “failing to consider several dimensions in which regulatory challenges and effective regulatory responses exist”).

<sup>33</sup> Local jurisdictions, such as storm water treatment districts, may also be the 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, 64,748 (Dec. 8, 1999).

<sup>34</sup> See, e.g., 33 U.S.C. § 1313(e)(3)(A).

<sup>35</sup> See Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?* 48 HASTINGS L.J. 271, 274–80 (1997). However, a recent “unexpected flurry of state-level engagement on climate policy,” may require a re-thinking of these assumptions. Barry G. Rabe et al., *State Competition as a Source Driving Climate Change Mitigation*, 14 N.Y.U. ENVTL. L.J. 1, 7 (2005). But see Buzbee, *supra* note 32, at 129.

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 of individual decisions, such as particular permits or administrative orders.<sup>36</sup> 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.<sup>37</sup> Moreover, states are subject to penalties for failure to fulfill agreements with the federal government or to meet statutory requirements.<sup>38</sup> 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.

b. *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.

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<sup>36</sup> See, e.g., 33 U.S.C. § 1342(b) (2000) (outlining federal oversight of state NPDES permit programs); see generally LAW OF ENVIRONMENTAL PROTECTION § 7.7 (Sheldon M. Novick ed., 2002) (discussing federal oversight of state programs in pollution law).

<sup>37</sup> See, e.g., 33 U.S.C. § 1342(c)(3) (2000) (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 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].").

<sup>38</sup> See, e.g., 33 U.S.C. § 1256(e) (conditioning federal grants on states' monitoring procedures and contingency planning).

Moreover, when allocating pollution loads for waters that cannot attain their designated uses, states are largely free to pursue their own priorities.<sup>39</sup> 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.<sup>40</sup>

While states may tailor their standards to regional economic and social priorities, there are aspects of the process that must be justified by science, which is almost exclusively funded and supplied by the federal government.<sup>41</sup> For example, water quality standards are measured against criteria that the EPA establishes through its labs and funded experiments.<sup>42</sup> 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.<sup>43</sup> 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.

## 2. *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.<sup>44</sup> Natural resources law provides important additional tools to extend cooperative federalism beyond pollution control. Compared to commerce clause regulation of pollution, the property clause of the constitution provides a stronger basis for exclusive federal control of federally owned natural resources.<sup>45</sup> Nonetheless, a strong tradition of decentralized management exists in domestic resource management law.<sup>46</sup>

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<sup>39</sup> See *id.* § 1313(d).

<sup>40</sup> See 42 U.S.C. § 7410(a) (2000).

<sup>41</sup> See Adler, *supra* note 32, at 145–48 (discussing the economies of scale involved in environmental research with nation-wide implications).

<sup>42</sup> See 33 U.S.C. § 1314(a) (2000).

<sup>43</sup> See 40 C.F.R. § 51.112 (2004).

<sup>44</sup> See, e.g., Weiser, *supra* note 4, at 668–69.

<sup>45</sup> The Supreme Court has upheld the broad reach of the Property Clause. See *United States v. Gratiot*, 39 U.S. 526, 537 (1840); *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

<sup>46</sup> Stewart, *Pyramids of Sacrifice?*, *supra* note 23, at 1210. *But see* Jason

Few scholars of cooperative federalism have considered the broad conception. The ones that do consider environmental programs outside of the aegis of the EPA.<sup>47</sup> This section describes important models of intergovernmental coordination in natural resources law and distills principles that deepen our understanding of cooperative federalism.

While pollution control law began employing cooperative federalism in the early 1970s, federal resource management remained largely independent of state implementation until the “Sagebrush Rebellion” of the late 1970s and early 1980s.<sup>48</sup> Though the Sagebrush Rebellion failed to transfer federal public land management authority to states or commodity users, it did prompt more state cooperative involvement in federal land administration.<sup>49</sup> A heightened willingness of the federal government to work with states as well as an increased capacity of the states to offer substantive expertise and clearly articulated policies supported the rise of this informal, administrative federalism.<sup>50</sup> The informal, ad-hoc, complex arrangements facilitating greater state leverage over federal lands decisions remain intact today.<sup>51</sup>

For instance, states often accept statutory invitations to participate in resource planning for federal multiple use lands. The planning process encourages federal agencies to manage consistently with state objectives and, in some cases, provides

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Scott Johnston, *The Tragedy of Centralization: The Political Economics of American Natural Resource Federalism*, 74 U. COLO. L. REV. 487, 531–83 (2003) (stressing the historic theme of central national control in U.S. resource management).

<sup>47</sup> For key scholarly works exploring the broad conception of cooperative federalism, see generally Hope M. Babcock, *Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models from Other Laws Save Our Public Lands?*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 193 (1996); Richard H. Cowart & Sally K. Fairfax, *Public Lands Federalism: Judicial Theory and Administrative Reality*, 15 ECOLOGY L.Q. 375 (1988); A. Dan Tarlock, *Biodiversity Federalism*, 54 MD. L. REV. 1315 (1995).

<sup>48</sup> The Sagebrush Rebellion was the effort to transfer 324 million acres of federal public land administered by the BLM to the states. See Johanna H. Wald & Elizabeth H. Temkin, *The Sagebrush Rebellion: The West Against Itself—Again*, 2 UCLA J. ENVTL. L. & POL’Y 187 (1982).

<sup>49</sup> See Cowart & Fairfax, *supra* note 47, at 380.

<sup>50</sup> See *id.* at 408–09, 414–38.

<sup>51</sup> *Id.* at 382. Some argue that administrative federalism obscures the source of decisionmaking and creates transparency problems for citizens seeking to participate effectively. See Sarnoff, *supra* note 26, at 210.



formal mechanisms for states to assert their interests.<sup>52</sup> In other situations, states may secure seats at the table to collaborate in reviewing proposed federal projects and seeking ways to mitigate the effects of federal decisions.<sup>53</sup> Finally, as the *Granite Rock* case illustrated,<sup>54</sup> states may assert police powers to regulate environmental impacts from federal resource management decisions, such as mining.<sup>55</sup>

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. 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.<sup>56</sup> For instance, ESA habitat conservation plans, though they may include state or local land use planning jurisdictions, are agreements typically negotiated between the U.S. Fish and Wildlife Service (“FWS”) 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.

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. 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.<sup>57</sup> Including corporations, nongovernmental

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<sup>52</sup> See, e.g., Cowart & Fairfax, *supra* note 47, at 416–20 (describing the planning process under FLPMA).

<sup>53</sup> See *id.* at 430–38.

<sup>54</sup> California Coastal Comm’n v. Granite Rock Co., 480 U.S. 572 (1987).

<sup>55</sup> See Cowart & Fairfax, *supra* note 47, at 458, 468–69.

<sup>56</sup> 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”).

<sup>57</sup> Exec. Order No. 13,352, 69 Fed. Reg. 52,989 (Aug. 30, 2004).

organizations, and individuals as the collaborating partners in “cooperative conservation” is consistent with President Bush’s 2004 Executive Order.<sup>58</sup> But many of these cooperative conservation efforts may more properly be considered a form of private-public partnership, or even corporatization.<sup>59</sup>

The disparate forms of cooperative 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.

a. *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.<sup>60</sup> 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 project, which seeks to manage the Sacramento River Delta. In this project, both the federal government and the state make

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<sup>58</sup> *Id.* § 2.

<sup>59</sup> For a definition of corporatization, see Robert L. Fischman & Richard L. Nagle, *Corporatisation: Implementing Forest Management Reform in New Zealand*, 16 *ECOLOGY L.Q.* 719, 720 (1989). See also TOMAS M. KOONTZ ET AL., *COLLABORATIVE ENVIRONMENTAL MANAGEMENT: WHAT ROLES FOR GOVERNMENT?* (Tomas M. Koontz et al. eds., 2004) (providing a recent catalog of different kinds of collaborations); Allyson Barker et al., *The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis*, 23 *J. LAND RESOURCES & ENVTL. L.* 67, 72–73 (2003) (providing further information about private-public partnerships in natural resource law).

<sup>60</sup> See ROBERT B. KEITER, *KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA’S PUBLIC LANDS* 244–46 (2003).

decisions that relate to water quality and habitat necessary to support imperiled fish.<sup>61</sup> Conservation of water and fish in the delta requires some coordinated control over upstream users. CALFED is an example of an administrative collaboration,<sup>62</sup> and consists of a sprawling cooperative agreement among eighteen state and federal agencies to use their authorities in concert.<sup>63</sup> As with many place-based collaborative bodies, the federal government creates incentives for the parties to come together. The carrot for CALFED is federal funding.<sup>64</sup> Lurking behind the carrot is 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. The federal government can forestall draconian consequences of the ESA and many other laws through waivers and less formal implementation decisions.<sup>65</sup>

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").<sup>66</sup> 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<sup>67</sup> and the lower Colorado River.<sup>68</sup> In those

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<sup>61</sup> See Joshua Harris, *A Lasting Proposal for Endangered Bay-Delta Fish Survival: The Environmental Water Account and the Accumulation of Water Contract Rights in the Central Valley Project and the State Water Project*, 26 ENVIRONS ENVTL. L. & POL'Y J. 121, 132-33 (2002).

<sup>62</sup> Administrative collaboration is initiated principally by agencies and is not centrally controlled by place-specific legislation.

<sup>63</sup> CALFED BAY-DELTA PROGRAM, PROGRAMMATIC RECORD OF DECISION 1 (2000), available at <http://calwater.ca.gov/Archives/GeneralArchive/rod/ROD8-28-00.pdf>.

<sup>64</sup> *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.").

<sup>65</sup> Tarlock, *supra* note 47, at 1352.

<sup>66</sup> 16 U.S.C. § 1539(a) (2000).

<sup>67</sup> See Natural Cmty. Conservation Planning, San Diego Multiple Species Conservation Program, [http://www.dfg.ca.gov/nccp/MSCP/mscp\\_home.htm](http://www.dfg.ca.gov/nccp/MSCP/mscp_home.htm) (last visited Nov. 11, 2005).

<sup>68</sup> LOWER COLO. RIVER MULTI-SPECIES CONSERVATION PROGRAM, IMPLEMENTING AGREEMENT 5-6 (2005), available at <http://www.usbr.gov/lc/rmscp/publications/FinalIA.pdf>.

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 permittees and ensures protection of the imperiled species.

Some collaborative bodies, such as the Valles Caldera Trust and the Columbia River Gorge Commission, have actual decision-making authority. The Valles Caldera board, composed of seven presidential appointees and two neighboring federal land managers, has proprietary control over a large parcel of land purchased by the federal government.<sup>69</sup> The cooperative aspect of the board is reflected in the legislative requirement that the presidential appointees represent particular governmental entities (or organizations) or possess specific expertise.<sup>70</sup> Similarly, the Columbia River Gorge Commission, composed of representatives appointed by affected counties and the Washington and Oregon governors,<sup>71</sup> has land use planning oversight authority over a zone on either side of the gorge.<sup>72</sup> The federal government has a non-voting chair on the Commission,<sup>73</sup> but influences behavior through legislation and grants.<sup>74</sup>

Sometimes place-based management results not from multi-party collaboration, but rather from bilateral negotiation between the federal government and a state or tribe. For instance, FWS recently signed an agreement ceding to the Confederated Salish and Kootenai Tribal Governments a wide range of management and maintenance programs on the National Bison Range.<sup>75</sup>

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<sup>69</sup> 16 U.S.C. § 698v-5(a). For further information regarding the Valles Caldera Trust and its progress, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-98, VALLES CALDERA: TRUST HAS MADE SOME PROGRESS, BUT NEEDS TO DO MORE TO MEET STATUTORY GOALS (2005), available at <http://www.gao.gov/new.items/d0698.pdf>.

<sup>70</sup> See 16 U.S.C. §§ 698v-4 to -10 (2000). For instance, seats on the Valles Caldera board are reserved for someone "active in a nonprofit conservation organization concerned with the activities of the Forest Service" and someone "active in State or local government . . ." *Id.* § 698v-5(a)(1)(C)(iv), (vii). Careful selection of appointees influences the direction that the collaboration takes. See Laura Paskus, *Trouble on the Valles Caldera*, HIGH COUNTRY NEWS, Nov. 28, 2005, at 12 (noting that Bush administration appointees to the board have tilted management toward ranch interests).

<sup>71</sup> *Id.* § 544c(a)(1)(C).

<sup>72</sup> *Id.* §§ 544a-b.

<sup>73</sup> *Id.* § 544c(a)(1)(C)(iv).

<sup>74</sup> *Id.* § 554l.

<sup>75</sup> FISCAL YEARS 2005-2006 ANNUAL FUNDING AGREEMENT BETWEEN THE UNITED STATES FISH AND WILDLIFE SERVICE AND THE CONFEDERATED SALISH

Spurred by legislation promoting delegation of some refuge administration activities to tribes,<sup>76</sup> the FWS specifically contracted with the tribes to conduct wildlife management, fire protection, visitor services, and maintenance in the Bison Range.<sup>77</sup> The tribes have special historic and cultural claims on the Bison Range resources. But broad delegations of management authority on refuge system lands to states have been common for some time as “coordination areas.”<sup>78</sup> While states and tribes generally gain power and funding through the place-based refuge management agreements, the federal government may also seek some control it might not otherwise have. For instance, the FWS recently entered into an agreement with the Nisqually Tribe to share tribal land within the boundaries of the Nisqually National Wildlife Refuge and work together on ecological restoration and recreation.<sup>79</sup>

These collaborative decision-making bodies are increasingly popular, but must be approved by statute. In 1999, a federal court found that the Park Service had illegally ceded control of Niobrara National Wild and Scenic River to an independent local council consisting mostly of local stakeholders.<sup>80</sup> The court held that while relevant statutes encouraged the Service to enter into cooperative agreements with local governments, those statutes did not give the Service the ability to delegate stewardship responsibilities.<sup>81</sup> The Service’s retention of the power to terminate its agreement with the council was not sufficient to ensure continuing federal control; place-based collaborations with true decision-making power must have direct congressional authorization.<sup>82</sup>

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AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION 7–9 (2004), *available at* [http://mountain-prairie.fws.gov/cskt-fws-negotiation/nbrc\\_afa\\_12104final.pdf](http://mountain-prairie.fws.gov/cskt-fws-negotiation/nbrc_afa_12104final.pdf).

The National Bison Range was designated as part of the National Wildlife Refuge System in 1908. *See* 16 U.S.C. § 671 (2000).

<sup>76</sup> *See id.* at 2. The agreement is authorized by Title IV of the Indian Self-Determination and Education Assistance Act. 25 U.S.C. § 458cc(c)(i)(1) (2000).

<sup>77</sup> *Id.* at 8.

<sup>78</sup> ROBERT L. FISCHMAN, *THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW* 24–26 (2003).

<sup>79</sup> Hilary Watts, *Indian Tribe to Share Refuge with Feds*, HIGH COUNTRY NEWS, Mar. 21, 2005, at 6.

<sup>80</sup> Nat’l Parks & Conservation Ass’n v. Stanton, 54 F. Supp. 2d 7, 18–19 (D.D.C. 1999).

<sup>81</sup> *Id.* at 20.

<sup>82</sup> *Id.* at 21.

b. *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,<sup>83</sup> federal agency decision-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.<sup>84</sup> 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 Bureau of Land Management (“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 non-federal entities).<sup>85</sup> 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.”<sup>86</sup> 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.”<sup>87</sup> Federal statutory preference

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<sup>83</sup> 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 6; Laura Paskus, *Whose Rules Rule on Otero Mesa?*, HIGH COUNTRY NEWS, Mar. 7, 2005, at 12.

<sup>84</sup> See, e.g., Cowart & Fairfax, *supra* note 47, at 418–20 (detailing the planning process under the FLPMA).

<sup>85</sup> 43 U.S.C. § 1712(c) (2000).

<sup>86</sup> 16 U.S.C. § 1604(a) (2000).

<sup>87</sup> 16 U.S.C. § 668dd(e)(1)(A)(iii). See also *Wyoming v. United States*, 279 F.3d 1214, 1231 (10th Cir. 2002) (stating that the statute “inspires a ‘cooperative

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.<sup>88</sup> Though this may be a way to avoid listening to national environmental groups without forsaking public participation entirely, it certainly has given procedural favoritism a shot in the arm. Two examples stand out. First, in 2003 the Interior Department amended its regulations governing recordable disclaimers of federal interests in certain lands.<sup>89</sup> The new rule allows states (and counties) to petition to secure title to rights-of-way previously claimed under a now-repealed 1866 statute<sup>90</sup> granting title to constructed highways.<sup>91</sup> This administrative shortcut relieves states from going to court to claim rights-of-way in what have proved to be protracted and uncertain judicial proceedings.<sup>92</sup>

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federalism,' calling for, at a minimum, state involvement and participation in the management of the" refuges).

<sup>88</sup> 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. 30, 2004); see also *supra* text accompanying notes 57–59; Rebecca W. Watson, Letter to Editor, *HCN Has It Wrong on Bush*, HIGH COUNTRY NEWS, Feb. 21, 2005, at 20 (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 CFR pt. 1501.6) (clarifying the cooperating agency status of state and tribal agencies in the preparation of environmental impact analyses).

<sup>89</sup> Conveyances, Disclaimers and Correction Documents, 68 Fed. Reg. 494 (Jan. 6, 2003) (codified at 43 C.F.R. pt. 1860).

Section 315 of [FLPMA] authorizes the Secretary of the Interior, through a delegation of authority to BLM, to issue a document of disclaimer of interest or interests in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where the Secretary determines a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.

*Id.* (citing 43 U.S.C. § 1745 (2000)).

<sup>90</sup> An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes, ch. 262, 14 Stat. 251, 253 (1866) (repealed 1976).

<sup>91</sup> Conveyances, Disclaimers and Correction Documents, 68 Fed. Reg. at 496.

<sup>92</sup> See Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56

A second example of the Bush administration's use of procedural favoritism is the 2005 National Forest Roadless Rule.<sup>93</sup> This rule reversed a 2001 regulation<sup>94</sup> that prohibited logging and other development activities in nearly 60 million acres of roadless areas in the national forests. 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.<sup>95</sup> The rule binds the Forest Service to act on the state petition within a definite time-frame<sup>96</sup> but reserves federal national forest management authority.<sup>97</sup> The roadless rule's version of procedural favoritism is similar to the Wild and Scenic Rivers Act,<sup>98</sup> 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.<sup>99</sup>

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.<sup>100</sup> 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

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HASTINGS L.J. 523, 543–54 (2005).

<sup>93</sup> 70 Fed. Reg. 25,654 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294).

<sup>94</sup> 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).

<sup>95</sup> National Forest Roadless Rule, 70 Fed. Reg. at 25,661.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 25,662.

<sup>98</sup> 16 U.S.C. §§ 1271–1287 (2000).

<sup>99</sup> *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).

<sup>100</sup> See, e.g., Dan Berman, *Western Govs Question Roadless Rule's Petition Process*, GREENWIRE, June 16, 2005, [http://www.eenews.net/Greenwire/searcharchive/test\\_search-display.cgi?q=western+govs&file=%2FGreenwire%2Fsearcharchive%2FNewsline%2F2005%2FJune15%2F06150501.htm](http://www.eenews.net/Greenwire/searcharchive/test_search-display.cgi?q=western+govs&file=%2FGreenwire%2Fsearcharchive%2FNewsline%2F2005%2FJune15%2F06150501.htm). The Department of Agriculture has indicated that at least two non-western states, Alabama and Wisconsin, might also submit petitions, and that more than fifteen states had had expressed interest. *Rey Says Many States Interested in FS Roadless Area Rule*, PUBLIC LAND NEWS, Sept. 16, 2005, at 7.



state policies,<sup>101</sup> 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.<sup>102</sup> This dissuasion is particularly likely because states continue to enjoy procedural favoritism in individual forest planning.<sup>103</sup> Only Idaho and Colorado have taken steps to move forward with a petition.<sup>104</sup> Other states criticize the new rule as “an attempt to pass the buck” on controversial management decisions about roadless areas.<sup>105</sup> Indeed, the states of California, New Mexico, and Oregon have filed suit challenging the roadless rule for failure to comply with the environmental impact analysis required under the National Environmental Policy Act.<sup>106</sup>

*c. 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

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<sup>101</sup> National Forest Roadless Rule, 70 Fed. Reg. at 25,661–62.

<sup>102</sup> See Berman, *supra* note 100.

<sup>103</sup> *Id.* (As the Utah public lands policy coordinator stated, “There’s no need to go into an independent parallel action if the [individual national forest plan] revision process is going to be acceptable to the state . . . . It would be a [sic] rather extensive and rather expensive to have the state take right off on its own and create a roadless access recommendation plan independent of what’s in the Forest Service planning process.”).

<sup>104</sup> *Idaho Says It Will Petition for Own Roadless Area Rule*, PUBLIC LAND NEWS, July 1, 2005; *Rey Says Many States Interested in FS Roadless Area Rule*, *supra* note 100, at 8.

<sup>105</sup> Berman, *supra* note 100 (quoting Montana Governor Brian Schweitzer).

<sup>106</sup> *Rey Says Many States Interested in FS Roadless Area Rule*, *supra* note 100, at 7.

criterion.<sup>107</sup> The CZMA provides funding and guidelines for states to use in developing coastal zone management plans.<sup>108</sup> 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 plan.<sup>109</sup> Federal licenses, leases, and permits are covered by the consistency criterion,<sup>110</sup> 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.<sup>111</sup> Though it is administered by the U.S. EPA, the CWA contains many "natural resources" provisions seeking to protect ecological resources.<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup>

Compared to the consistency provision of the CZMA, the CWA 401 certification is more deferential to the state 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.

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<sup>107</sup> 16 U.S.C. § 1456(c) (2000).

<sup>108</sup> *Id.* § 1455.

<sup>109</sup> *Id.* § 1456(c)(2).

<sup>110</sup> *Id.* § 1456(c)(3).

<sup>111</sup> 33 U.S.C. § 1341 (2000).

<sup>112</sup> *See, e.g.*, 33 U.S.C. § 1251; Robert L. Fischman, *Biological Diversity and Environmental Protection: Authorities to Reduce Risk*, 22 ENVTL. L. 435 (1992) (describing CWA programs aimed at protecting biological diversity).

<sup>113</sup> 33 U.S.C. § 1341.

<sup>114</sup> PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700 (1994).

### C. *The Lessons of Inducement in Cooperative Federalism*

The great value of examining natural resources law in a review of cooperative federalism is to broaden our conceptual understanding. Natural resources programs enrich the discourse of cooperative federalism by illustrating coordination approaches overlooked in pollution control, even if those approaches are seldom recognized as belonging to a common category. Also, a review of the full spectrum indicates a critical predictor of success: effective inducement. The elements of inducement are the tools creating both positive and negative incentives that promote coordination. Challenges to coordination exist where federal and state interests diverge. In those cases, inducements must prompt the governments into cooperative federalism.

Usually, the federal government has ultimate authority to make a preemptive determination.<sup>115</sup> Also, the federal government generally shapes the playing field by defining the tools of inducement. However, situations do occasionally arise where states induce the federal government to cooperate, sometimes after adopting a variety of regimes, which regulated industries seek to preempt with uniform federal legislation.<sup>116</sup>

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. Money, especially federal grants, almost always sweetens a cooperative deal. The sad truth about the 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 participation by states. The strength of the inducement in cooperative federal relationships will depend on the significance of the funds at stake.

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<sup>115</sup> See *supra* note 37 and accompanying text. However, the practical ability of the federal government to take on all environmental implementation falls far short of its theoretical reach. For instance, the EPA barely has the resources to assume a state's permit program. See Pendergrass, *supra* note 37 (discussing the inability of the EPA to administer Maryland's air pollution permit program, which failed to meet federal standards).

<sup>116</sup> See E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326 (1985). See also Rabe et al., *supra* note 35, at 43–46.

Some programs, such as CWA nonpoint source planning,<sup>117</sup> are notoriously weak due to paltry funding.<sup>118</sup> In contrast, the highway funds at stake in the CAA do induce states to participate in comprehensive planning and regional cooperation.<sup>119</sup>

Other inducements to cooperative federalism similarly come in gradations of strength. Participation in cooperative federalism is most attractive when the federal government is largely bound by the state determination, as in CZMA consistency.<sup>120</sup> 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 FLMPA general management planning. On the weak end of the spectrum, the 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.<sup>121</sup>

Place-based collaborations suggest another form of inducement as they offer attractive political rewards and are supported by the literature addressing ecosystem management.<sup>122</sup>

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<sup>117</sup> 33 U.S.C. § 1329 (2000).

<sup>118</sup> See, e.g., David Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 HARV. ENVTL. L. REV. 515, 527 (1996); U.S. GEN. ACCOUNTING OFFICE, WATER POLLUTION: GREATER EPA LEADERSHIP NEEDED TO REDUCE NONPOINT SOURCE POLLUTION 29–30 (1990).

<sup>119</sup> See *supra* note 28–29 and accompanying text; see also David Firestone, *Collapse of Atlanta Talks Keeps Road Builders Idle*, N.Y. TIMES, Jan. 4, 2001, at A18 (describing how first the EPA and then environmental groups used the CAA penalty provisions to halt new road construction in Atlanta in order to induce reduced vehicle emissions); *Air Pollution: OTAG States Failing to Abide by Commitments Can Be Required to Take Action*, EPA OFFICIAL SAYS, 27 ENV'T REP. 781 (1996) (reporting on the Ozone Transportation Assessment Group of thirty-seven states seeking to find regional solutions to interstate air pollution), available at 27 ER 781 (Westlaw); *Air Pollution: Plan to Cut Emissions of Nitrogen Oxides Beyond RACT Agreed to by 10 Northeast States*, 25 ENV'T REP. 1119 (1994) (quoting EPA's Assistant Administrator for Air and Radiation calling the agreements "a wonderful example of state initiative and regional cooperation for environmental progress), available at 25 ER 1119 (Westlaw).

<sup>120</sup> See *supra* notes 107–113 and accompanying text.

<sup>121</sup> See *supra* Section II.B.2.b.

<sup>122</sup> See, e.g., KEITER, *supra* note 60, at 244–48; R. Edward Grumbine,

Though aspects of the Superfund remediation process resemble place-based collaboration, pollution control law lags behind in this aspect of cooperative federalism.<sup>123</sup> A fruitful area for pollution control reform would be to integrate the ecosystem management elements of interagency cooperation and organizational change<sup>124</sup> into such EPA programs as nonpoint source control and total maximum daily load setting under the CWA,<sup>125</sup> and environmental impact statement review under the CAA.<sup>126</sup> These efforts can hardly succeed without greater involvement of stakeholders in the most centrally affected area.

### III. IMPORTING COOPERATIVE FEDERALISM TOOLS FROM POLLUTION CONTROL TO RESOURCE MANAGEMENT LAW

The resource management law menu offers some cooperative approaches that pollution control law might benefit from adopting; but they are not nearly as developed as the core, traditional, narrow approach of state programs administering tailored standards. Though the pollution control model exists in at least one Interior Department program, the regulation of surface mining,<sup>127</sup> it is largely absent from resource management. This lacuna in resource management hampers the federal government, already stretched thin from fiscal austerity, from achieving many conservation goals, but particularly those requiring land use control.

This section uses the ESA as a focus for exploring how to adapt the narrow pollution control model of cooperative federalism to national resource management. The ESA is a particularly good

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*Reflections on "What is Ecosystem Management?"*, 11 CONSERVATION BIOLOGY 41, 44–46 (1997).

<sup>123</sup> For a discussion of place-based collaboration in Superfund, see generally Jonathan Z. Cannon, *Adaptive Management in Superfund: Thinking like a Contaminated Site*, 13 N.Y.U. ENVTL. L.J. 561 (2005).

<sup>124</sup> R. Edward Grumbine, *Reflections on "What is Ecosystem Management?"*, 11 CONSERVATION BIOLOGY 41, 44–46 (1997).

<sup>125</sup> 33 U.S.C. §§ 1313(d), 1329 (2000).

<sup>126</sup> 42 U.S.C. § 7609(a) (2000). See generally Robert L. Fischman, *The EPA's NEPA Duties and Ecosystem Services*, 20 STAN. ENVTL. L.J. 497 (2001) (describing the EPA EIS review program).

<sup>127</sup> 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]").

example because its strong regulatory component provides a close analogy to many of the EPA-administered pollution control programs.<sup>128</sup> Therefore, if any resource management statute can make use of the narrow version of cooperative federalism, it should be the ESA. 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 region 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 experiment contained in the Puget Sound salmon 4(d) rule.

A. *The ESA: Movement Towards the Narrow Conception of Cooperative Federalism*

A look at the development of the protection of endangered species demonstrates the movement from national management to cooperative federalism. The ESA traces its roots to the earliest federal laws concerning wildlife protection. These roots still surface in section 9 of the ESA, which prohibits the “take” of listed species.<sup>129</sup> A federal ban on take, which is a term whose statutory definition has broadened over the decades, originated in the Lacey Act of 1900.<sup>130</sup> The current definition of take for the ESA includes “harm.”<sup>131</sup> 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 nesting, feeding, and breeding.<sup>132</sup> As a strict prohibition, the

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<sup>128</sup> 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, *Predictions and Prescriptions for the Endangered Species Act*, 34 ENVTL. L. 451, 454–66 (2004).

<sup>129</sup> 16 U.S.C. § 1538(a)(1)(B)–(C) (2000).

<sup>130</sup> Ch. 553, 31 Stat. 187 (1900) (current version at 16 U.S.C. § 701 (2000)). The Migratory Bird Treaty Act of 1918 used the anti-take mechanism to protect a roster of birds from being hunted, captured and killed. Ch. 128, §§ 2–4, 40 Stat. 755, 755–56 (1918) (current version at 16 U.S.C. § 703 (2000)).

<sup>131</sup> 16 U.S.C. § 1532(19).

<sup>132</sup> 50 C.F.R. § 17.3 (2004) (“Harm in the definition of ‘take’ 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

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.<sup>133</sup>

In 1973, after Congress had begun rewriting environmental policy and reinventing cooperative federalism with the CAA and CWA, it enacted the modern ESA with a number of legislative tools that demanded greater administrative action.<sup>134</sup> The most important new element was the interagency consultation requirement of section 7, which provides specialized biological review of all actions authorized, funded, and carried out by federal agencies.<sup>135</sup> Interagency consultation originated in resource management laws such as the Fish and Wildlife Coordination Act of 1934.<sup>136</sup> But section 7 of the ESA owes a great debt to the impact analysis tools pioneered in the 1966 National Historic Preservation Act,<sup>137</sup> which employed an early form of cooperative federalism, and the 1969 National Environmental Policy Act,<sup>138</sup> which launched the modern environmental law era.

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.<sup>139</sup> Incidental takes are generally indirect, unintended harms to habitat that result from otherwise lawful activities.<sup>140</sup> The permit allows incidental takes where a permittee develops an HCP, makes commitments to fund the plan, and mitigates the effects of the

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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).

<sup>133</sup> See J.B. Ruhl, *Is the Endangered Species Act Eco-pragmatic?*, 87 MINN. L. REV. 885, 920 (2003).

<sup>134</sup> Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531–1544 (2000)).

<sup>135</sup> 16 U.S.C. § 1536(a)(2) (2000).

<sup>136</sup> Ch. 55, 48 Stat. 401 (codified as amended at 16 U.S.C. §§ 661–667).

<sup>137</sup> 16 U.S.C. § 470f.

<sup>138</sup> 42 U.S.C. § 4332(2)(c) (2000) (though signed into law in 1970, NEPA was a 1969 legislative effort).

<sup>139</sup> Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, sec. 6, 96 Stat. 1411, 1422 (codified as amended at 16 U.S.C. § 1539 (2000)).

<sup>140</sup> 50 C.F.R. § 17.22 (2004).

permitted action.<sup>141</sup>

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 section 301 prohibition on discharge<sup>142</sup>—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 a permit 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.<sup>143</sup>

The evolution from strict proscription to federal interagency review, and then to permitting, reflects a movement of federal resource protection law toward the pollution control model. The next adaptive step would be the importation of cooperative federalism. This is especially true when one considers the major substantive shortcomings of the ESA as it is currently implemented.

The most glaring obstacle to accomplishing the national objectives of the ESA<sup>144</sup> is that the greatest cause of species endangerment is habitat modification and destruction.<sup>145</sup> The activities causing habitat degradation typically result from private land uses, such as forestry and residential/commercial

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<sup>141</sup> 16 U.S.C. § 1539(a)(2) (2000).

<sup>142</sup> Compare 16 U.S.C. § 1539 (2000) and 33 U.S.C. § 1311 (2000).

<sup>143</sup> Up until 1992, the federal government had issued only fourteen incidental take permits. U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., HABITAT CONSERVATION PLANNING HANDBOOK 1–8 (1996). By October 2005, the federal government had issued almost 700 permits based on 438 habitat conservation plans. U.S. Fish & Wildlife Serv., Habitat Conservation Plans, [http://ecos.fws.gov/conserv\\_plans/index.jsp](http://ecos.fws.gov/conserv_plans/index.jsp) (follow “HCPs” hyperlink under “Reports”; then follow “Nationwide” hyperlink; then follow “Regional (Summary) Report” hyperlink) (last visited Oct. 27, 2005). For a discussion of the administrative reforms that prompted greater implementation of the permits see J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 367, 372–400 (1998).

<sup>144</sup> 16 U.S.C. § 1531(b) (2000) (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).

<sup>145</sup> See DAVID S. WILCOVE, *THE CONDOR'S SHADOW: THE LOSS AND RECOVERY OF WILDLIFE IN AMERICA* 8 (1999).



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. Pollution control law's experience with cooperative federalism suggests several strategies for enlisting the state participation in a national ESA project.

B. *Using the Narrow Cooperative Federalism Model to Revitalize the ESA*

The ESA program can, with a little tweaking, incorporate the elements of the narrow pollution control conception of cooperative federalism as outlined above in Section II.B.1. The two key elements in this model are (1) fostering state programs with federal grants and local permitting, a federal stringency floor, and federal oversight and penalties; and (2) delegating state standard-setting with site-specific tailoring.

Section 6 of the Act, which authorizes funding for state programs, is the centerpiece of the ESA's longstanding but minor program of cooperative federalism.<sup>146</sup> 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.<sup>147</sup> When Congress enacted the modern ESA in 1973, it envisioned that state programs would play a key role in the Act's recovery program.<sup>148</sup> 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.<sup>149</sup>

Nonetheless, section 6 is an important foundation upon which

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<sup>146</sup> 16 U.S.C. § 1535 (2000).

<sup>147</sup> *Id.* See Fischman, *supra* note 128, at 462.

<sup>148</sup> See Fischman, *supra* note 128, 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).

<sup>149</sup> DEFENDERS OF WILDLIFE, SAVING BIODIVERSITY: A STATUS REPORT ON STATE LAWS, POLICIES, AND PROGRAMS (1995), available at <http://www.defenders.org/pb-bst00.html> (follow "Section Two: Findings and Analysis" hyperlink; then follow "Endangered Species" hyperlink). The FWS outlines the variety of funding options for states in U.S. Fish & Wildlife Serv., Endangered Species Grants to States, Territories and Private Landowners, <http://www.fws.gov/endangered/grants/index.html> (last visited Nov. 28, 2005).

to build more cooperative federalism. In an era of ever-shrinking state and federal budgets, section 6 grants are one of the very few natural resources funds that have grown in the past fifteen years; from no funding in fiscal year 1990,<sup>150</sup> the section 6 budget line has increased in fits and starts<sup>151</sup> to \$82 million for the fiscal year 2006.<sup>152</sup> 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.<sup>153</sup>

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.<sup>154</sup> 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.<sup>155</sup>

<sup>150</sup> See Act Making Appropriations for the Department of the Interior and Related Agencies for the Fiscal Year Ending September 30, 1990, and for Other Purposes, Pub. L. No. 101-121, 103 Stat. 701 (1989).

<sup>151</sup> Department of the Interior and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-156, 1321-160-61 (1996) (appropriating \$8 million for fiscal year 1996); Department of the Interior and Related Agencies Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-181, 3009-186 (1996) (appropriating \$14 million for fiscal year 1997); Department of the Interior and Related Agencies Appropriations Act of 2000, Pub. L. No. 106-113, 113 Stat. 1501A-135, 1501A-140 (1999) (appropriating \$23 million for fiscal year 2000); Department of the Interior and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-291, 114 Stat. 922, 927 (2000) (appropriating \$27 million for fiscal year 2001).

<sup>152</sup> Department of the Interior, Environment, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-54, 119 Stat. 499, 504 (2005).

<sup>153</sup> See U.S. Fish & Wildlife Serv., Cooperative Endangered Species Conservation Fund (Section 6) Grants to States & Territories, Fiscal Year 2005, <http://www.fws.gov/endangered/Grants/Section6/index.html>.

<sup>154</sup> 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.”).

<sup>155</sup> 16 U.S.C. § 1539(a)(2)(B)(iv) (2000), as interpreted in U.S. Fish & Wildlife Serv., ENDANGERED SPECIES HABITAT CONSERVATION PLANNING HANDBOOK 7-4 (1996); Notice of Availability of a Final Addendum to the

This standard fails to ensure progress toward recovery and often allows for further declines in the viability of the listed species.<sup>156</sup>

There is another option for permitting that could delegate operational responsibilities to state and local jurisdictions.<sup>157</sup> ESA section 4(d) offers an outstanding opportunity to advance the goal of species recovery through cooperative federalism. Section 4(d) allows the federal government to promulgate special rules that “provide for the conservation” of species listed as threatened.<sup>158</sup> 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

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Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35,242, 35,243 (June 1, 2000).

<sup>156</sup> See Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 279, 311 (1998).

<sup>157</sup> Another option for delegating ESA tasks is a state-wide 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 (2002), 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 “certificates 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.

<sup>158</sup> 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 footholds 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 U.S. protected by the ESA, some 22 percent are listed as threatened. U.S. Fish & Wildlife Serv., Summary of Listed Species, [http://ecos.fws.gov/tess\\_public/TESSBoxscore](http://ecos.fws.gov/tess_public/TESSBoxscore) (last visited Oct. 11, 2005). This percentage is substantially higher for fishes (38%) and reptiles (61%). *Id.*

and protection of permittees, 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 ways in which section 4(d) could be made more effective through the incorporation of cooperative federalism tools from the pollution control model. First, though most 4(d) rules either adopt the section 9 take prohibition without modification or grant blanket immunity to certain classes of activities,<sup>159</sup> 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.<sup>160</sup> This kind of 4(d) rule is the most promising vehicle for importing cooperative federalism to address habitat disturbance. Unlike habitat conservation plans, 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.<sup>161</sup>

Moreover, permit programs authorized under the criteria of a 4(d) rule would cover a larger area than most incidental take permits.<sup>162</sup> This is important because large-scale planning for biological diversity is essential for long-term success in recovery.<sup>163</sup> 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

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<sup>159</sup> See generally 50 C.F.R. pt. 17D (2005).

<sup>160</sup> 50 C.F.R. § 223.203 (2005).

<sup>161</sup> 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.

<sup>162</sup> *Id.*

<sup>163</sup> See Reed F. Noss, *Some Principles of Conservation Biology, as They Apply to Environmental Law*, 69 CHI-KENT L. REV. 893, 904–07 (1994); Michael A. O'Connell, *Improving Habitat Conservation Planning Through a Regional Ecosystem-Based Approach*, ENDANGERED SPECIES UPDATE, July–Aug. 1997, at 18–19; see also William H. Rodgers, Jr., *Adaptation of Environmental Law to the Ecologists' Discovery of Disequilibria*, 69 CHI-KENT L. REV. 887, 890–91 (1994).

plans. In fact, 82 percent of incidental take permits are issued to single landowners.<sup>164</sup> In contrast, the 4(d) rule permit programs are based on an entire jurisdiction's plan, which leaves much more room for legitimate trade-offs, mitigation, and restoration, even if the jurisdiction does not encompass the entire habitat for a threatened species.<sup>165</sup>

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.<sup>166</sup> Notwithstanding potential Eleventh Amendment constitutional problems,<sup>167</sup> federal courts have found state and local governments liable under the take prohibition for inaction, where it causes a take "to be committed."<sup>168</sup> A jurisdiction administering land use permit programs, therefore, may be liable for takes resulting from habitat modification that it allows through permits.<sup>169</sup> For instance, the

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<sup>164</sup> PETER KAREIVA ET AL., USING SCIENCE IN HABITAT CONSERVATION PLANS 14 (1999), available at <http://www.nceas.ucsb.edu/nceas-web/projects/97KAREI2/hcp-1999-01-14.pdf>. Excellent summaries and analyses of this report include Frances C. James, *Lessons Learned from a Study of Habitat Conservation Planning*, 49 *BIOSCIENCE* 871, 873-74 (1999) and Laura Watchman et al., *Science and Uncertainty in Habitat Conservation Planning*, 89 *AM. SCIENTIST* 351, 353-54 (2001). As of 1999, approximately 63 percent of HCPs covered 100 acres or less, and 78 percent of HCPs covered 500 acres or less. Only 2 percent of HCPs covered 500,000 acres or more. Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 *Fed. Reg.* 35,242, 35,248 (June 1, 2000).

<sup>165</sup> See Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 *ENVTL. L.* 369, 382-83 (1994); Fischman & Hall-Rivera, *supra* note 1, at 133-60.

<sup>166</sup> See Valerie J.M. Brader, *Shell Games: Vicarious Liability of State and Local Governments for Insufficiently Protective Regulations under the ESA*, 45 *NAT. RESOURCES J.* 103, 108-09 (2005); Fischman & Hall-Rivera, *supra* note 1, at 81-89; Shannon Petersen, *Endangered Species in the Urban Jungle: How the ESA Will Reshape American Cities*, 19 *STAN. ENVTL. L.J.* 423, 428-35 (2000); see generally J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, 16 *NAT. RES. & ENV'T* 70 (2001).

<sup>167</sup> Several courts recognize the Eleventh Amendment's confirmation of principles of state sovereign immunity and its barring of suits by citizens against their states in other contexts. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996); *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 291 (4th Cir. 2001).

<sup>168</sup> See, e.g., *United States v. Town of Plymouth, Mass.*, 6 F. Supp. 2d 81, 82, 90 (D. Mass. 1998) (granting preliminary injunction against town's allowance of off-road vehicles where future takes would occur without injunction).

<sup>169</sup> *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 148 F.3d 1231, 1251-53 (11th Cir. 1998), *cert. denied*, 526 U.S. 1081 (1999), *remanded*

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.<sup>170</sup> 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.

C. *Recent Lessons from the Puget Sound: Limitations of Cooperative Federalism Through Section 4(d)*

The most important experiment using a 4(d) rule to promote cooperative federalism is the regulation governing Puget Sound Chinook salmon.<sup>171</sup> The Fisheries Service issued a 4(d) rule for fourteen threatened fish “evolutionarily significant units” (“ESUs”) in 2000.<sup>172</sup> An ESU is the Fisheries Service’s application of the “distinct population segments” qualifying for protection under the ESA’s definition of species.<sup>173</sup> 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 enormous. Many salmon runs, which roughly correspond to ESUs, have already disappeared completely from the region.<sup>174</sup> Of the remaining runs, the fish populations have diminished to less than ten percent of their historic numbers.<sup>175</sup> Moreover, the salmon crisis indicates a larger problem within the regional ecosystem. More than 137 species of

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to 92 F. Supp. 2d 1296 (M.D. Fla. 2000).

<sup>170</sup> *Strahan v. Coxe*, 127 F.3d 155, 165–66 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 (1998).

<sup>171</sup> Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units, 65 Fed. Reg. 42,422 (July 10, 2000) (codified at 50 C.F.R. pt. 223).

<sup>172</sup> *Id.*

<sup>173</sup> 16 U.S.C. § 1532(16) (2000).

<sup>174</sup> SHARED STRATEGY FOR PUGET SOUND, DRAFT PUGET SOUND SALMON RECOVERY PLAN, EXECUTIVE SUMMARY 3 (2005), *available at* <http://www.sharedsalmonstrategy.org/plan/index.htm> (follow “Executive Summary” hyperlink).

<sup>175</sup> *Id.*

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.<sup>176</sup> Compounding existing problems is the likelihood that the Puget Sound region will grow by more than a million people during the next fifteen years.<sup>177</sup>

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.<sup>178</sup> 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.<sup>179</sup> These categorical exceptions are programs that the Service certifies as contributing to recovery; and are called “limits on the take prohibitions.”<sup>180</sup> Some of the thirteen 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.<sup>181</sup> But, for cooperative federalism, the most important category is the limit on take for municipal, residential, commercial and industrial (“MRCI”) development activities.<sup>182</sup>

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.<sup>183</sup> This determination requires the evaluation of the local program against

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<sup>176</sup> *Id.* at 5.

<sup>177</sup> *Id.*

<sup>178</sup> For a more detailed analysis of the 4(d) rule, see Fischman & Hall-Rivera, *supra* note 1, at 109–19.

<sup>179</sup> Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units, 65 Fed. Reg. 42,422, 42,423–24 (July 10, 2000).

<sup>180</sup> *Id.*

<sup>181</sup> 50 C.F.R. § 223.203(b) (2004).

<sup>182</sup> *See id.* § 223.203(b)(12).

<sup>183</sup> *Id.*

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.”<sup>184</sup> 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.<sup>185</sup>

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.<sup>186</sup> 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.<sup>187</sup> Local programs that fail to implement modifications face revocation of their limits on the take prohibition.<sup>188</sup>

In 2002, I optimistically predicted that the MRCI development limit on take would usher in a new era of ESA effectiveness through the application of cooperative federalism.<sup>189</sup> 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.<sup>190</sup> Unlike Richard Stewart’s “pyramids of sacrifice,” where uniform federal standards override local environmental

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<sup>184</sup> *Id.* § 223.203(b)(12)(iii).

<sup>185</sup> *Id.* § 223.203(b)(12)(i).

<sup>186</sup> *Id.* § 223.203(b)(12)(iv).

<sup>187</sup> *Id.* § 223.203(b)(12)(ii).

<sup>188</sup> *Id.* § 223.203(b)(12)(iii).

<sup>189</sup> Fischman & Hall-Rivera, *supra* note 1, at 89, 133–41.

<sup>190</sup> Susan Gordon, *State’s Salmon Strategy Panned: Panel Says Plan Lacks Scientific Approach; Federal Guidelines to be Announced Today*, NEWS TRIB. (Tacoma, Wash.), June 20, 2000, at A1.



preferences,<sup>191</sup> salmon recovery is a popular goal in the Puget Sound region, especially around the urban Seattle area.<sup>192</sup> 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.<sup>193</sup>

In addition to harnessing the pollution control cooperative federalism approach, the 4(d) rule addressed many of the ESA's widely criticized shortcomings.<sup>194</sup> 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 cooperative federalism seemed justified when, in early 2002, the Bush administration extended the 4(d) MRCI development limitation approach to three California salmon ESUs.<sup>195</sup> 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

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<sup>191</sup> Stewart, *Pyramids of Sacrifice?*, *supra* note 23, at 1221–22.

<sup>192</sup> See, e.g., Joel Connelly, *Public Wants to Aid Salmon, Poll Reveals; Survival of Runs Rated as "Very Serious"*, SEATTLE POST-INTELLIGENCER, Mar. 28, 1995, at A1; Josh Harkinson & Elissa Reiling, *Sacrificing to Save Salmon*, E MAG, Jan.–Feb. 2000, at 16.

<sup>193</sup> 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.

<sup>194</sup> See Fischman & Hall-Rivera, *supra* note 1, at 132–60.

<sup>195</sup> Rule Governing Take of Four Threatened Evolutionarily Significant Units of West Coast Salmonids, 67 Fed. Reg. 1,116 (Jan. 9, 2002).

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 Development 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.<sup>196</sup> 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.<sup>197</sup> 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.<sup>198</sup> 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.<sup>199</sup> Rather than appeal this decision, the federal government announced that it would conduct biological status reviews of all west coast salmon listings, including the Puget Sound ESUs, and rewrite its hatchery policy.<sup>200</sup>

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<sup>196</sup> *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1161 (D. Or. 2001).

<sup>197</sup> Interim Policy on Artificial Propagation of Pacific Salmon Under the Endangered Species Act, 58 Fed. Reg. 17,573, 17,575 (Apr. 5, 1993).

<sup>198</sup> Kristen M. Fletcher, *Status of Endangered Salmon Challenged in Northwest*, WATER LOG, Nov. 4, 2001, at 1, 9, available at <http://www.olemiss.edu/orgs/SGLC/MS-AL/Water%20Log%20PDF/21.4.pdf>.

<sup>199</sup> *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.").

<sup>200</sup> See Sam Howe Verhovek, "Saving" Wild Salmon's Bucket-Born Cousins, N.Y. TIMES, Feb. 4, 2002, at A1. The relevant policies to be re-written were the 1991 Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58,612 (Nov. 20, 1991), and the 1993 Interim Policy on Artificial Propagation of Pacific Salmon Under the Endangered Species Act, 58 Fed. Reg. at 17,573.

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.<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup>

The second reason why the 4(d) rule has not been implemented is because 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.<sup>204</sup> 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 open the possibility that the MRCI development provision, as applied by the Fisheries Service in a particular program approval, might run afoul of the ESA.<sup>205</sup>

There is good news from this case for the cooperative federalism approach: the court upheld the authority of the Fisheries Service, pursuant to the ESA, to create a take limitation under section 4(d).<sup>206</sup> 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

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<sup>201</sup> See, e.g., Matthew Preusch, *Birthplace Is Crucial Issue for Scientists Counting Salmon*, N. Y. TIMES, Apr. 6, 2004, at F2; Ransom A. Myers et al., *Hatcheries and Endangered Salmon*, 303 SCIENCE 1980, 1980 (2004).

<sup>202</sup> 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).

<sup>203</sup> 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).

<sup>204</sup> Wash. Env'tl. Council v. Nat'l Marine Fisheries Serv., No. C00-1547R, 2002 WL 511479, at \*1 (W.D. Wash. Feb. 27, 2002).

<sup>205</sup> *Id.* at \*9.

<sup>206</sup> *Id.* at \*7-8.

detailed review of the considerations for a qualifying MRCI program until the Fisheries Service actually approves a program.<sup>207</sup> 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.<sup>208</sup>

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 actual application for a limit on take.<sup>209</sup> NEPA places the legal responsibility for conducting an environmental impact analysis on federal agencies.<sup>210</sup> 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 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

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<sup>207</sup> *Id.* at \*9.

<sup>208</sup> For a more detailed critique of the 4(d) rule, see Fischman & Hall-Rivera, *supra* note 1, at 116–19.

<sup>209</sup> *Wash. Env'tl. Council*, 2002 WL 511479, at \*9; Telephone Interview with John Lombard, Senior Policy Analyst, Steward & Associates, in Snohomish, Wash. (Mar. 21, 2005).

<sup>210</sup> 42 U.S.C. § 4332 (2000).

. . . where necessary, to offset unavoidable damage to PFC due to MRCI development impacts to riparian management areas.”<sup>211</sup> 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.”<sup>212</sup> 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.<sup>213</sup> Though the Fisheries Service retained discretion to approve plans that fail to meet one or more of the twelve considerations,<sup>214</sup> failure to meet as important a standard as PFC might be fatal to a program application.<sup>215</sup> 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,<sup>216</sup> indicated that the habitat restrictions and restoration programs of the counties would not meet the PFC standard.<sup>217</sup> For instance, limitations on tree clearing would not do enough to restore previously cleared riparian forest cover. The federal government has indicated its agreement

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<sup>211</sup> 50 C.F.R. § 223.203(b)(12)(i)(C) (2004).

<sup>212</sup> *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. *Id.* § 223.203(b)(12)(i).

<sup>213</sup> Rule Governing Take of 14 Threatened Salmon and Steelhead Evoluntarily Significant Units, 65 Fed. Reg. 42,422, 42,431 (July 10, 2000).

<sup>214</sup> *Id.* § 223.203(b)(12)(i).

<sup>215</sup> See Rule Governing Take of 14 Threatened Salmon and Steelhead Evoluntarily Significant Units, 65 Fed. Reg. at 42,431–32 (discussing the PFC as a basis for evaluating habitat).

<sup>216</sup> Tri-County Model 4(d) Rule Response Proposal: A Salmon Conservation Plan (May 18, 2001) (on file with author). For a detailed discussion of the multi-county effort, see Fischman & Hall-Rivera, *supra* note 1, at 127–31.

<sup>217</sup> PARAMETRIX, BIOLOGICAL REVIEW: TRI-COUNTY MODEL 4(D) RULE RESPONSE PROPOSAL 8-1 to 8-13 (2002); Interview with John Lombard, *supra* note 209.

with the unfavorable assessment.<sup>218</sup> 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.<sup>219</sup> 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,<sup>220</sup> and to improve local parks, roads, and storm/waste water systems<sup>221</sup> have led to better plans and ordinances that are environmentally protective by any national measure.<sup>222</sup> Moreover, regional cooperation with the federal government has resumed under a new place-based collaboration called the “Shared Strategy.”<sup>223</sup> Though the Shared Strategy represents a path-

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<sup>218</sup> PARAMETRIX, *supra* note 217; Letter from D. Robert Lohn, Regional Administrator, Fisheries Service, to Tri-County Executives (Apr. 19, 2002) (on file with author); letter from Ken S. Berg, U.S. Fish & Wildlife Serv., to Tri-County, ESA Response Effort (Apr. 18, 2002) (on file with author).

<sup>219</sup> Interview with John Lombard, *supra* note 209.

<sup>220</sup> WASH. REV. CODE § 36.70A.040 (West 2003) (growth management); WASH. REV. CODE § 90.54.020 (West 2004) (water management); WASH. REV. CODE § 90.58.050 (West 2004) (shoreline management).

<sup>221</sup> Press Release, Ron Sims, King County Executive, 2002 Endangered Species Act (ESA) Policy Direction (Apr. 26, 2002), <http://www.metrokc.gov/exec/news/2002/0426022.htm>.

<sup>222</sup> See, e.g., Press Release, Ron Sims, *supra* note 221; CITY OF SEATTLE'S SALMON TEAM, SEATTLE'S URBAN BLUEPRINT FOR HABITAT PROTECTION AND RESTORATION (2003), available at <http://www.cityofseattle.net/salmon/blueprintdoc.htm>; City of Bellevue, Bellevue's Efforts to Save Salmon, <http://www.ci.bellevue.wa.us/page.asp?view=1274> (last visited Oct. 28, 2005).

<sup>223</sup> See SHARED STRATEGY FOR PUGET SOUND, 1 DRAFT PUGET SOUND SALMON RECOVERY PLAN 13–19 (2005), available at <http://www.sharedsalmonstrategy.org/plan/index.htm> (follow “Volume I” hyperlink; then follow “Download the complete document” hyperlink).

breaking collaborative approach to 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.<sup>224</sup> The Fisheries Service will likely use this plan to fulfill its ESA section 4(f)<sup>225</sup> requirement to prepare a recovery plan.<sup>226</sup> Unlike MRCI development limitation programs, however, section 4(f) recovery plans are non-binding. Moreover, the draft plan is not site specific enough at this time to identify whether it will succeed in maintaining PFC.

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 section 4(f) recovery planning, a program that has been a notorious underachiever.<sup>227</sup> 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 Strategy participants have the same access to nationally sponsored science as most conventional recovery planning teams.

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<sup>224</sup> Letter from William D. Ruckelshaus, Chair, Dev. Comm., Shared Strategy for Puget Sound, to Bob Lohn, Reg'l Adm'r, Nw. Region, Nat'l Marine Fisheries Serv., and Ken Berg, W. Field Office Supervisor, U.S. Fish & Wildlife Serv. (June 30, 2005), *available at* [http://www.sharedsalmonstrategy.org/plan/docs/DC%20plan%20submittal%20letter\\_final.pdf](http://www.sharedsalmonstrategy.org/plan/docs/DC%20plan%20submittal%20letter_final.pdf).

<sup>225</sup> 16 U.S.C. § 1533(f) (2000). This section of the ESA requires the Fisheries Service to “develop and implement plans . . . for the conservation and survival of endangered species and threatened species.” *Id.* § 1533(f)(1).

<sup>226</sup> Press Release, Nat'l Oceanic and Atmospheric Admin., NOAA Chief Praises Shared Strategy's Puget Sound Salmon Plan, Calls It a Historic Accomplishment (July 7, 2005), *available at* <http://www.publicaffairs.noaa.gov/releases2005/jul05/noaa05-r125.html>.

<sup>227</sup> See Federico Cheever, *Recovery Planning, the Courts and the Endangered Species Act*, 16 NAT. RES. & ENV'T 106, 108–10 (2001); Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1, 26, 58–59 (1996).

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.<sup>228</sup> On the other hand, salmon will likely decline further if the region does not push recovery. 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<sup>229</sup> and advances the theme of the administration's cooperative conservation.<sup>230</sup> As a result, the federal government plans to promulgate the Shared Strategy's draft plan as its own in fulfillment of the ESA section 4(f) requirement.

The Shared Strategy, therefore, is a significant improvement over the traditional recovery planning process. It incorporates a more robust set of cooperative 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.

### 3. *Concluding Observations*

The stalled effort to import the standard 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

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<sup>228</sup> See Press Release, NOAA, *supra* note 226; SHARED STRATEGY FOR PUGET SOUND, *supra* note 174, at 18.

<sup>229</sup> 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).

<sup>230</sup> The George W. Bush administration's cooperative conservation initiative is discussed in *supra* notes 57–59 and accompanying text.



requiring compliance with each consideration.<sup>231</sup> 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.<sup>232</sup>

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.<sup>233</sup> 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<sup>234</sup> 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

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<sup>231</sup> This was the Washington Environmental Council's central criticism. *See* Wash. Env'tl. Council v. Nat'l Marine Fisheries Serv., No. C00-1547R, 2002 WL 511479, at \*1-2 (W.D. Wash. Feb 27, 2002).

<sup>232</sup> Press Release, Ron Sims, *supra* note 221.

<sup>233</sup> *See, e.g.,* Pac. Rivers Council v. Brown, 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).

<sup>234</sup> 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).

any harm “will not appreciably reduce the likelihood of the survival and recovery”<sup>235</sup> as authorizing a more relaxed standard for approval. Despite legislative history and good policy arguments to the contrary,<sup>236</sup> 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.<sup>237</sup> Though this interpretation has been questioned in the context of interagency consultations under similar language in another provision of the ESA,<sup>238</sup> 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.<sup>239</sup> Another key advantage of the incidental take permit for potentially liable parties is that it offers a “no surprises guarantee”<sup>240</sup> 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 programs (incidental take permit or a 4(d) MRCI limitation) to satisfy 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 4(d) arrangement.<sup>241</sup> While the Shared

<sup>235</sup> 16 U.S.C. § 1539(a)(2)(B)(iv) (2000).

<sup>236</sup> See Fischman & Hall-Rivera, *supra* note 1, at 144–45.

<sup>237</sup> See Patrick A. Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction*, 22 WM. & MARY ENVTL. L. & POL’Y REV. 227, 293–94 (1998); Sheldon, *supra* note 156, at 313; U.S. FISH & WILDLIFE SERV., *supra* note 143, at 7-4; Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35,242, 35,243 (June 1, 2000).

<sup>238</sup> 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).

<sup>239</sup> See Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. at 19,926, 19,933–35 (June 3, 1986).

<sup>240</sup> For more information regarding the “no surprises guarantee”, see Notice of Availability of Draft Addendum to the Final Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 64 Fed. Reg. 11,485, 11,486–87 (1999); Press Release, U.S. Dep’t of the Interior, Administration’s New Assurance Policy Tells Landowners: “No Surprises” in Endangered Species Planning (Aug. 11, 1994), *available at* <http://news.fws.gov/historic/1994/19940811.pdf>.

<sup>241</sup> See Sam Casne, *Muddy Waters: The New 4(d) Salmon Rule*, SEATTLE DAILY J. COM., July 12, 2001, *available at* <http://www.djc.com/news/enviro/11123678.html>. Accordingly, an enormous amount of acreage in Washington—

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.<sup>242</sup> 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.

#### IV. CONCLUSION: COMPARATIVE COOPERATIVE FEDERALISM

The danger in broadening the definition of cooperative federalism to include a greater range of federal inducements for state and local participation is that it grows shallow. Too permissive a definition includes so many programs as to render cooperative federalism almost a meaningless category. Yet cooperative federalism deserves to find more diverse applications than just the narrow model common in pollution control programs.

More diverse applications enable cooperative federalism to dissolve many of the stumbling blocks that frustrate comprehensive approaches to the protection of natural resources and human health. The common theme to cooperative federalism's successes is not just attentiveness to realpolitik, but that cooperative federalism enables a more holistic ecological approach to environmental ills than would a legal system that

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about one-quarter of the state—is expected to be covered by incidental take permits. Robert McClure & Lisa Stiffler, *A License to Kill: Flaws in Habitat Conservation Plans Threaten the Survival of Scores of Species*, SEATTLE POST-INTELLIGENCER, May 3, 2005, at A1.

<sup>242</sup> 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. Kerry Brophy, *Feds Oppose State’s Effort to Empower Landowners*, HIGH COUNTRY NEWS, Aug. 22, 2005, at 6.

dances to the call of a single master. This is as true for place-based governance, such as for the Columbia River Gorge, as it is for more complex interweaving of authority, such as for the coastal zone management program.

Lessons for natural resources law from the pollution control sector deepen the sophistication of tools that are standard in the EPA shop. This is a huge challenge for the resource management agencies, which historically have been uncomfortable with imposing stringent standards of behavior. The ESA experience with the 4(d) rule illustrates the difficulties of adopting the narrow conception of cooperative federalism across the environmental law divide. This type of importation challenges all participants to innovate and interact in new ways but offers an easy out for stakeholders seeking weaker standards.

Nonetheless, it is difficult to imagine how else the federal program will be able to achieve success in the crucial realm of habitat conservation, which is so dependent upon land use control. The 4(d) rule limitation on the take prohibition should be strengthened through the provision of more attractive carrots in the form of conditioned federal grants, as well as of stronger sticks in the form of more aggressive enforcement of the harm prohibition. Finally, the single greatest contribution to 4(d) cooperative federalism that agencies can make immediately would be tightening the incidental take permit standard. The overarching lesson is that it is hard to graft the narrow conception on even a regulatory natural resources statute where underlying enforcement is weak and less stringent alternatives are available (and encouraged by the administration).

Cooperative federalism highlights the split between pollution control and resource management in environmental law; however, it also offers ways to bridge the divide. We are now seeing encouraging movement past these historical differences and some application of the lessons from each side of the environmental law field. It is my hope that this experimentation will continue to increase in the future. The broader, collaborative approaches to cooperative federalism that have already left their mark on natural resources law can boost the success of pollution control. And, as the Puget Sound example shows, the pollution control model can link local land use control with national species recovery goals. All of the cooperative federalism successes derive from patching together some parts of the jurisdictional and geographic fragments

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of environmental law.

Because many of the natural resources tools are voluntary and soft on clear standards, they have received heightened attention during the George W. Bush administration. But their use is not limited to a Republican or deregulatory agenda. The cross-cutting, current policy preference for downsizing, outsourcing, and devolving federal environmental administration began before 2001 and will continue to drive new forms of cooperative federalism. In particular, place-based collaboration will likely grow in importance. We will see more recovery planning and other statutorily required plans in environmental law generated from the (state/local) ground up, as the Puget Sound Shared Strategy gains prominence as a model.