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Natural Community Conservation Planning (NCCP)

The Origins of an Ambitious Experiment to
Protect Ecosystems

PART 1 OF A SERIES

By Daniel Pollak

*Prepared at the request of
Senator Byron D. Sher*

MARCH 2001

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Executive Summary

The Natural Community Conservation Planning (NCCP) program was initiated by the Wilson administration at a time of growing concern and controversy about endangered species. The California and Federal Endangered Species Acts (CESA and FESA) were under fire both for failing to prevent the decline of wildlife populations and for conflicting with economic activity. NCCP was supposed to represent a new approach to conservation, one focused on preserving intact ecosystems across an entire region. This was in contrast to CESA and FESA, which focused on individual species and the impacts of individual development projects.

The NCCP Act of 1991 (AB 2172) was intended to help the California Department of Fish and Game foster voluntary collaboration between government wildlife agencies, local governments, and private development interests. The program would, it was hoped, provide development interests with a more predictable, streamlined regulatory process, while providing species with a more effective, ecosystem-based conservation strategy.

The NCCP Act was very general and some worried about whether it provided strong enough protections for species and habitat. There have been several efforts to address such concerns, including regulations proposed by the Department of Fish and Game, and a succession of bills considered by the legislature. However, a number of unresolved questions remain:

- 1) What was the intended purpose and scope of the NCCP program?
- 2) What is the NCCP program's relationship to the state and federal Endangered Species Acts (CESA and FESA)?
- 3) What standards are NCCP plans required to meet for the conservation of species and habitat?
- 4) What sort of rules or guidelines should govern the NCCP planning process (including issues such as scientific input and public participation)?
- 5) How much will NCCP plans cost and who will fund them?
- 6) Is the NCCP program voluntary or regulatory? Does it (or should it) have its own regulatory "teeth"?

The first use of the NCCP Act has been a pilot program to protect Southern California's coastal sage scrub ecosystem. A future report will shed further light on the above questions by reviewing the results of the NCCP experiment in Southern California.

Introduction

The Natural Community Conservation Planning (NCCP) Act of 1991 was an ambitious and innovative effort to resolve one of California's most difficult dilemmas. The NCCP program aims to conserve ecosystems and reconcile wildlife conservation with land development and population growth. This paper is about the origins of the NCCP program – why it exists and how it took form. A forthcoming report will assess the impacts of the NCCP program and policy issues raised by our experience with the first 10 years of the program.

The NCCP program was ambitious and daring in many ways. One of its early proponents declared that “Nowhere in the nation or the world has something so complex been undertaken.”¹ This may have been hyperbole, but it was understandable hyperbole. The Southern California NCCP pilot program attempts to shape land use in a 6,000 square-mile area containing a human population of 18.5 million. One subregional plan alone covers the conservation of 85 species. There are 11 Southern California subregional planning efforts involving five counties, 17 cities, and numerous state, federal, and local agencies, not to mention landowners, developers, environmental groups, and the general public. And, as one commentator has observed, the NCCP program is being implemented “smack in the middle of some of the most expensive, desirable and booming real estate in America ... This is not environmentalist country, and any proposal to limit growth faces instinctual and widespread opposition.”²

The NCCP program originated at a time of growing concern and controversy about endangered species. The California and federal Endangered Species Acts (CESA and FESA) were under fire both for failing to prevent the decline of wildlife populations and for conflicting with economic activity. NCCP was supposed to represent a new approach to conservation, one focused on preserving intact ecosystems across an entire region. This was in contrast to CESA and FESA, which focused on individual species and the impacts of individual development projects. The goal of NCCP was to prevent wildlife populations from declining to the point where their conservation would pose an irreconcilable conflict with land development and population growth.

The first use of the NCCP Act has been a pilot program to protect Southern California's coastal sage scrub ecosystem. The coastal sage scrub is a habitat type found only in Southern California and parts of Mexico. It is home to many rare native species. In 1991, one of these, a small bird called the California gnatcatcher, was being considered for the state and federal endangered species lists. Because the gnatcatcher occupied so much valuable land, it was feared that a gnatcatcher listing could provoke another “birds vs. economy” conflict on the scale seen in the Pacific northwest with the listing of the Northern spotted owl.

This paper is about both the legislative history of the NCCP Act and the formative first two years of implementation (1991-1993). This review will highlight a number of questions that arose when the NCCP program began and which have never been completely resolved. These include the following:

- 1) What is the intended purpose and scope of the NCCP program?
- 2) What is the NCCP program's relationship to the state and federal Endangered Species Acts (CESA and FESA)?*
- 3) What standards should NCCP plans be required to meet for the conservation of species and habitat?
- 4) What sort of rules or guidelines should govern the NCCP planning process (including issues such as scientific input and public participation)?
- 5) How much will NCCP plans cost and who will fund them?
- 6) Is the NCCP program voluntary or regulatory? Does it (or should it) have its own regulatory "teeth"?

* Readers not already familiar with these laws may refer to Appendix 1, which summarizes their main provisions.

Endangered Species: Calls for a New Approach

When the NCCP program was created in 1991, CESA and FESA were being criticized as costly and ineffective. Governor Pete Wilson heralded the NCCP Act as a major new initiative, and the program was eventually embraced by the U.S. Secretary of the Interior as a national model. What were the perceived shortcomings or limitations in wildlife conservation that the NCCP program was meant to address?

EFFICACY OF FESA AND CESA QUESTIONED

In the years leading up to 1991, there were growing concerns that the goals of CESA and FESA were not being met. In 1990, the California Department of Fish and Game reported that 71 percent of the plants and animals on the state's threatened and endangered lists were continuing to decline. The Department noted that many of the populations maintained a precarious existence as small, fragmented populations in habitat already degraded by human activities.³

Human activities are usually the greatest threat to endangered species, and between 1970 and 1990 the human population of California had grown from 19.9 million to 29.8 million, a 50 percent increase.⁴ Nationwide, the number of species becoming imperiled threatened to overwhelm protection efforts. In 1990, an internal investigation by the Department of the Interior found that the U.S. Fish and Wildlife Service was seriously backlogged in its species protections efforts. According to the report, hundreds, if not thousands, of potentially endangered and threatened species had not been listed, and some of these already had become extinct.⁵

ECONOMIC COSTS OF FESA AND CESA FEARED

At the same time, CESA and FESA were being criticized for their economic impacts. By 1991 the economy was in a recession, compounding these fears. In the U.S. Congress, the federal Endangered Species Act was coming up for reauthorization and foes and supporters of the Act were floating reform proposals.⁶

The 1990 listing of the Northern spotted owl highlighted the potential economic effects of FESA. The listing had the potential to take millions of acres of timber out of production and affect thousands of jobs in California and the Pacific Northwest.⁷ In Southern California, a similar watershed was the 1988 federal listing of the Stephens' kangaroo rat as endangered. Riverside County tried to resolve the conflict between this endangered species and land development by instituting a controversial Habitat Conservation Plan that set aside "K-Rat" preserves at a cost of tens of millions of dollars. By 1991, participants in that effort were dismayed to learn that they might have to begin the process all over again due to the impending listing of the California gnatcatcher.⁸

CESA, FESA, AND THE GNATCATCHER: A FORMULA FOR CONFLICT

The gnatcatcher exemplified many of the issues that had brought a sense of crisis to conservation issues. The proposed FESA and CESA listings of the bird seemed to place urbanization and wildlife laws on a collision course in Southern California.

From 1950 to 1990, Southern California's human population had tripled, from 5.5 million to 17 million.* The decline of the gnatcatcher and its habitat, the coastal sage scrub, was an indicator of the toll Southern California's population growth took on wildlife. As late as the 1940's, gnatcatchers were considered common, but they were in significant decline by the 1960's. By the early 1990's, it was believed that only a few thousand of their numbers remained. They had disappeared from Ventura and San Bernardino counties and were on the brink of extirpation in Los Angeles County. All but an estimated 14-18 percent of the coastal sage scrub had been lost, and what was left was often severely fragmented.⁹

What was left included a great deal of valuable real estate. Gnatcatcher habitat occupied 343,000-444,000 acres of coastal sage scrub spread across four counties (Los Angeles, Riverside, Orange, and San Diego). An estimated 79 percent of it was privately owned.¹⁰ Gnatcatcher habitat also threatened to tie up high-priority infrastructure projects planned by local governments, such as new roads and highways.

A spokesman for the Building Industry Association of Southern California predicted that a gnatcatcher listing "would inevitably lead to more confrontation, to hopelessly deadlocked habitat conservation planning programs, and to significant economic hardship. Litigation would be inevitable. Efforts to weaken the Endangered Species Act itself, which are already under way since the recent listing of the Northern spotted owl, would only gain momentum."¹¹

CESA and FESA Prohibitions on "Take"

At the heart of the potential conflict were the CESA and FESA prohibitions on the "take" of listed species.¹² A broad range of activities are included in the prohibition against "taking." Federal law defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."¹³ State law defines "take" as to "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill."¹⁴ The state law also applies the "take" prohibition to species listed as threatened and even to species that are merely candidates for listing.

According to federal regulations, alteration of listed species' habitat is unlawful if it "actually kills or injures wildlife by significantly impairing essential behavioral patterns,

* Based on California Department of Finance population estimates for Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura counties.

including breeding, feeding or sheltering.”^{15*} Federal court decisions have upheld the principle that habitat modification could constitute a prohibited taking, even if no death or injury to individual members of the species could be proven. It would be enough to show that the modification harmed the species as a whole.¹⁶

Unlike federal law, CESA does not include “harm” or “harass” in the definition of take. Nevertheless, the Department of Fish and Game interprets the take prohibition as extending to destruction or modification of habitat essential to the species’ survival.^{17†}

Review and Permitting of Projects

Landowners, developers, and local governments feared a gnatcatcher listing because it would submit so many of their development projects to regulatory review by the state and federal wildlife agencies. When development that could impact listed species involves any state or federal participation, including funding or permits, then CESA and FESA require a “consultation” process. If the activity will harm the species or its habitat, the outcome of consultation will likely be requirements to avoid or mitigate the impacts on the listed species.¹⁸

When the proponent of a development project is a private party, the CESA and FESA prohibitions on taking give the wildlife agencies significant regulatory power. If a project threatens to take a listed species, CESA or FESA can bring it to a halt.

ARGUMENTS FOR TRYING A NEW APPROACH

Although the endangered species laws and the gnatcatcher listing were highly controversial subjects, there was, surprisingly, some basis for consensus. The viewpoints of conservationists and development interests often converged on two perceived structural flaws of the endangered species acts: that the laws were usually enforced one development project at a time, and that they focused conservation efforts one species at a time. When the gnatcatcher listing appeared imminent, there were reasons for both sides to be receptive to new approaches that would avoid these pitfalls.

* A U.S. Supreme Court decision upheld this regulation, endorsing the idea that “harm” could reasonably be construed to encompass indirect effects of habitat modification on individuals of the listed species. (*Babbitt v. Sweet Home*, 115 S. Ct. 2407).

† These rules should not be confused with the issue of “critical habitat.” The federal ESA requires the designation of “critical habitat” for listed species. Critical habitat consists of areas determined to contain physical or biological features essential to the species’ conservation (16 U.S.C. §1532(5)(A); 50 CFR §424.02(d)). Critical habitat is therefore not limited to areas that are currently occupied by the species. Although critical habitat designations are often controversial, destruction of critical habitat does not necessarily constitute a “taking” of the species. The actual legal impact of a critical habitat designation is limited to certain actions funded, permitted, or proposed by federal agencies.

Criticisms of the Project-by-Project Approach

The project-by-project review process had been criticized for several reasons:

- Much of the remaining land needed to conserve species was under private ownership. Interfering with development projects would, it was claimed, impede economic growth and conflict with private property rights. Depending on your perspective, this could cause economic damage or an undesirable political backlash against the endangered species laws.
- Project-by-project application of the endangered species acts could lead to patchy, ad hoc mitigation measures. Such an approach takes into account the impacts of individual projects, not the overall needs of the species or populations at risk. Hence, it had not done enough to prevent the fragmentation of habitat and ecosystems.
- The separate review of each development project could create costly delays, red tape, and uncertainty for local governments, landowners, and developers.
- The endangered species laws were reactive. The emphasis on individual projects limited the ability to plan for species recovery or prevent species from declining.
- Enforcement of the “project-by-project” approach would be contentious and litigious, often ending in expensive and time-consuming court battles.

Criticisms of the “Single Species” Approach

A related set of criticisms focused on what has been termed the “single-species” approach of traditional ESA enforcement.

- Ecosystems may require large areas of unfragmented habitat or landscapes that encompass large-scale natural processes and multiple habitat types (not just the immediate areas where the listed species live).
- Functioning ecosystems depend on the interactions of a wide variety of plant and animal species, not just those that happen to be listed. Species-by-species mitigation does not fully take these interactions into account.
- The single-species approach was also criticized as an “emergency room” model that did not enforce protections until a given species’ habitat and populations were so badly eroded that recovery would be difficult or impossible.
- If local governments and development interests participated in single-species conservation efforts, they still might find their development plans thwarted when new listings occurred (as occurred with the Stevens’ kangaroo rat in Riverside County).

In Southern California, it was widely understood that the gnatcatcher’s decline was only an indicator of what was happening to numerous species as the region’s open space

disappeared. Douglas Wheeler, the California Resources Agency Secretary who presided over the introduction of the NCCP process, observed:

Why such an unsatisfactory result, both economic and environmental? The federal ESA codified the favored approach to conservation in 1973, but it is not reflective of current scientific, fiscal and social realities ... because of our preoccupation with protection of individual species and our neglect of ecosystems, many endangered species survive as only very small, fragmented populations in habitat degraded by human activities.¹⁹

HCPs AND CONSULTATIONS FALL SHORT AS SOLUTIONS

When the NCCP program was created in 1991, there were two primary means of resolving endangered species-development conflicts. One was the so-called “consultation” process under Section 7 of FESA. The other was the Habitat Conservation Plan (HCP), a tool authorized by Section 10(a) of FESA.

Section 7 Consultation

Consultations epitomize the type of project-by-project, species-by-species review that was criticized from both the development and conservation perspectives described above. Section 7 of the federal ESA prohibits federal entities from authorizing, funding, or carrying out any action that could “jeopardize the continued existence of any endangered species.” In addition, it prohibits federal agencies from any action that is likely to “result in the destruction or adverse modification” of federally designated “critical habitat.”²⁰ The range of actions encompassed by Section 7 is broad, including among other things the issuance of federal permits or funding. This means that the consultation requirements can have an impact on projects that are not federally sponsored, but involve some form of federal permit or grant.

According to federal regulations, an action “jeopardizes” the species if it appreciably reduces both the likelihood of survival and recovery of a listed species in the wild “by reducing the reproduction, numbers, or distribution of that species.” Similarly, the prohibition on the harming of critical habitat applies to actions that diminish the habitat’s value for both survival and recovery of the species.²¹

The federal entity proposing the actions that could harm listed species or their critical habitat must consult with the wildlife agency responsible for enforcing the ESA (either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service). If the proposed action will result in either “jeopardy” or the destruction/adverse modification of critical habitat, then the wildlife agency will issue a biological opinion that discusses “reasonable and prudent alternatives” to the proposed action to minimize or avoid the adverse effects.²²

Habitat Conservation Plans (HCPs)

Section 10(a) allows the federal wildlife agencies to issue permits for “incidental take” of listed species, provided the permit holder agrees to implement a conservation plan to mitigate the impacts of the taking. Congress amended FESA to allow HCPs in 1982. In exchange for issuing such permits, the wildlife agencies could in theory gain conservation measures that the developers or landowners would not otherwise be inclined to take. HCPs were intended to “reduce conflicts between listed species and economic activities, and to provide a framework that would encourage ‘creative partnerships’ between the public and private sectors ...”²³

Congress had hoped that HCPs would facilitate comprehensive long-range, wide-area planning that could encompass multiple landowners, multiple jurisdictions, and multiple species.²⁴ However, the first ten years of experience with HCPs had not lived up to these promises. Between 1982 and 1992, only fourteen HCPs were approved. They tended to cover small areas and single property owners, and were ineffective in preventing habitat fragmentation.²⁵

A major limitation of HCPs prior to the NCCP Act was the fact that they tended to address impacts on only the habitat of individual listed species. A complete ecosystem may require conservation of lands or local populations that play a key role in the ecosystem but are not protected by endangered species listings. Or it could require protecting areas of habitat that are not occupied by listed species but provide important connections or buffers for fragmented patches of endangered species habitat.

In addition, the HCP law only requires mitigation of impacts. It does not require taking actions that provide a net *benefit* for the species in question.²⁶ Conserving an ecosystem may require not only mitigation but also enhancement (for example controlling invasive exotics, protecting “corridors” for wildlife to travel between habitat areas, and restoring degraded habitat).²⁷

Legislative History of the NCCP Act of 1991

The NCCP Act was crafted to resemble the HCP process but with more flexibility and an explicit multiple-species focus. It reflected the administration's belief that the conventional approach to endangered species was costly and ineffective, and that an alternative was needed. A cornerstone of the administration's new approach was the belief that it should be primarily *voluntary*: regional, ecosystem-based conservation through willing collaboration among stakeholders. A major incentive to participate would be the enhanced predictability about the future regulatory environment. The process would give landowners, developers, and local governments more certainty about what they would have to conserve and what they could develop.

The NCCP Act passed with near unanimity in the legislature, reflecting the broad consensus that a new approach was needed. But the NCCP Act also set up a tug-of-war between those who have wanted to maximize the program's flexibility and critics who were apprehensive that without more precautions the NCCP process might prove detrimental to the species it was meant to protect. This led to repeated disputes over attempts to define more explicitly the program's scope, standards, and procedures through law or regulation.

“RESOURCEFUL CALIFORNIA”: ORIGINS AND PURPOSE OF THE LEGISLATION

By 1991 Southern California was beginning to experiment with regional, multiple-species habitat conservation. The City of Irvine was engaged in discussions with its largest landowner, the Irvine Company, to formulate a plan for conserving threatened habitat. The City of San Diego was engaged in an ambitious multi-species planning effort that arose from the environmental review of a municipal sewer system upgrade.

Governor Pete Wilson's new administration soon took up the challenge. Shortly after taking office, Douglas Wheeler, the Secretary of the California Resources Agency, asked the Department of Fish and Game to provide him with a summary paper on “Habitat Conservation Planning.” The Department prepared a report recommending a regional approach that would expand “the narrow Federal [habitat conservation plan] concept to include other sensitive species and their habitats.” In addition to protecting ecosystems, a regional approach would also provide “a framework to increase the speed and consistency of project review by identifying areas where development could proceed with minimum conflicts with wildlife resources and by identifying areas that should be protected from development.”²⁸

The Department recommended legislation to “add to CESA a regional habitat conservation planning and incidental take permitting process similar to that in FESA. This regional HCP should be broader than that presently authorized by FESA so as to allow multispecies/habitat considerations and promote early proactive planning as a mechanism to resolve conflicts between development and sensitive species.”²⁹

The administration decided to pursue these recommendations. The Irvine Company, whose extensive Orange County land holdings could be severely impacted by a gnatcatcher listing, played an active role in shaping the proposed program. In an April 2, 1991 letter to Wheeler, Irvine Company Vice President Monica Florian discussed in detail the approach favored by the company:

I believe there is a general consensus among major Southern California landowners and development interests to proceed with habitat conservation plan for coastal sage scrub prior to any species' listing...

The goal of this approach is to establish a preservation and management program that could assure protection of adequate coastal sage scrub habitat, thereby making any listing of the gnatcatcher and other coastal sage scrub-dependent species unnecessary.

In essence, the program envisions preparation of coastal sage scrub HCPs by landowners and local governments for sub-areas of the habitat range in Southern California, based on regional standards and guidelines established by a scientific advisory panel of conservation biologists. During the working period of the scientific advisory panel (about 3 to 4 months) and the preparation of HCPs (approximately 18 to 24 months), State and Federal listing consideration would be tolled* or deferred ... The goal of the program would be to eliminate the need for species listing; but if future listing of a species already covered by the HCPs did prove necessary, no mitigation beyond that already designated in the HCPs would be required.³⁰

A few weeks later, on Earth Day, Governor Wilson announced an ambitious 14-part environmental initiative called "Resourceful California." The initiative called for a variety of conservation efforts. Among these was a proposal for a regional Southern California "Habitat Conservation Plan." "We will bring together developers, environmentalists and public officials to create a plan to protect the endangered wildlife and allow needed development," Wilson said. "This program will be tested in Southern California and, if successful, will be expanded statewide."³¹

THE EVOLUTION OF AB 2172[†]

The Resources Agency and Department of Fish and Game staff soon drafted legislation to put this into effect. The legislation was introduced as an amendment to a bill, AB 2172, being carried by Assemblymember David Kelley.

The new legislation authorized the Department of Fish and Game to enter into agreements with other public agencies or private interests for the purpose of preparing

* "Toll" is a legal term meaning "to bar, defeat or take away."

[†] For a more detailed timeline of the legislative progress of AB 2172, see Appendix 2.

habitat conservation plans “to provide comprehensive management and conservation of multiple wildlife species, including but not limited to” species listed as endangered or threatened under CESA. A “habitat conservation plan” was defined as a plan providing for “the regional or area wide protection and perpetuation of natural wildlife diversity, while allowing compatible development and community growth.” In keeping with the notion that this was a pilot program, the bill’s language explicitly limited this authority to areas in Imperial, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura counties.

The legislation had little else to say about the content or implementation of these plans. The bill did, however, require the Department of Fish and Game to adopt guidelines for the development and implementation of the plans, including conservation standards and objectives. The guidelines would also cover funding, monitoring, and the appointment of a scientific advisory committee to “review and make recommendations regarding the preparation and implementation of habitat conservation plans.”

On June 6, the bill was passed unanimously (74-0) in the Assembly and sent to the Senate. A July 15, 1991 amendment removed the language limiting the program to a specified region of Southern California. Although the administration would continue to refer to the NCCP concept as a pilot program to be tested in Southern California, the bill’s sponsors did not want to have to pass further legislation to expand the program, and believed the program’s scope could be adequately controlled through the budget process.³²

On August 30, 1991, on AB 2172’s third reading in the Senate, the bill was amended to allow the Department of Fish and Game to authorize the taking of any candidate species, or any “identified species whose conservation and management is provided for in a department approved natural communities conservation plan.” This would make the NCCP Act resemble the federal HCP law, with take authorizations providing a potential incentive for participation in the planning process.

These amendments also softened the requirements for the issuance of guidelines:

- Instead of requiring the Department to issue guidelines, it only *authorized* them to do so.
- It specified for the first time that the such guidelines would be “*nonregulatory*.”
- A requirement for guidelines on the appointment of a scientific advisory committee to review and make recommendations regarding the plans was replaced with more general language authorizing the appointment of “one or more advisory committees.”
- A requirement for guidelines on “funding for full implementation of the plan” was replaced with more general language authorizing guidelines on “provisions for implementation of the plan.”

In addition, the amended bill exempted preparation of NCCP plans from the California Environmental Quality Act (CEQA).

The Senate passed AB 2172 unanimously (36-0) on September 4 and sent it back to the Assembly for concurrence. There, the bill's progress was briefly interrupted because of concern about the language exempting NCCP plans from CEQA review. An analysis by the staff of the Assembly Committee on Natural Resources commented that "there are almost no standards in the bill to replace CEQA for evaluating the contents and policy of the plans ... this lack of statutory guidance gives DFG [the Department of Fish and Game] almost total discretion and leaves the public little grounds for legal challenge if DFG makes mistakes."³³

On September 13, AB 2172 was returned to the Senate for further amendment. Senator Dan McCorquodale (chair of the Senate Natural Resources Committee) amended the bill to remove the language exempting from NCCP plan preparation from CEQA.

The Senate then approved the bill 39-0, and it returned to the Assembly, where the Senate amendments were concurred to and the bill received final passage by a 63-3 vote. The three dissenting votes were cast by Assemblymembers Doris Allen, Tom Bates, and Tom Hayden. AB 2172 was approved by the Governor on October 9, 1991 and became Chapter 10 of Division 3 of the Fish and Game Code.

NO FORMAL OPPOSITION TO AB 2172

During the legislative process, AB 2172 received formal support from local governments including the City of San Diego, the San Diego Association of Governments, and the Riverside County Habitat Conservation Agency. In addition, it was supported by the California Building Industry Association and the Lusk Company (commercial builders). It also received support from a conservation organization, the Mountain Lion Foundation.

Although there was no organized opposition, some environmental groups expressed reservations about the proposal and were concerned that it might not provide protection equal to that afforded through the Endangered Species Act.³⁴ It appears that at least some legislators shared these apprehensions and voted for AB 2172 in the belief that a trailer bill would be passed shortly afterward to address some of their concerns. This will be discussed in more detail in a later section.

PROVISIONS OF AB 2172

The Wilson administration wanted the NCCP to be a voluntary program. It wanted local governments, landowners, developers, and other parties to willingly collaborate on regional, multi-species conservation plans. AB 2172 was designed to facilitate this planning process without imposing new rules or regulations. Accordingly, the NCCP Act contained very few substantive provisions.

Among other things, the legislative findings of the Act declared:

- “There is a need for broad-based planning to provide for effective protection and conservation of the state’s wildlife heritage while continuing to allow appropriate development and growth.”
- The purpose of natural community conservation planning “is to sustain and restore those species and their habitat identified by the Department of Fish and Game which are necessary to maintain the continued viability of those biological communities impacted by growth and development.”

Note that the second item placed the emphasis on “biological communities.” Protection of individual species (and their habitat) was to be a means of conserving whole ecosystems.

The legislative findings anticipated a variety of benefits from Natural Community Conservation Planning:

- *Coordination* “among public agencies, landowners, and other private interests” and “a mechanism by which landowners and development proponents can effectively participate in the resource conservation planning process”
- *Regional planning* “which can effectively address cumulative impact concerns, minimizes wildlife habitat fragmentation, promotes multispecies management and conservation, provides one option for identifying and ensuring appropriate mitigation from impacts on fish and wildlife, and promotes the conservation of broad based natural communities and species diversity.”
- *An early planning framework* “for proposed development projects within the planning area in order to avoid, minimize, and compensate for project impacts to wildlife.”

What mechanisms does the NCCP law create for achieving these goals? The NCCP Act authorizes the Department of Fish and Game to do three things:

1. *Negotiate agreements*: the law authorizes the Department of Fish and Game to “enter into agreements with any person for the purpose of preparing and implementing a natural community conservation plan to provide comprehensive management and conservation of multiple wildlife species...”³⁵ The Act defines a “natural community conservation plan” as a plan that “identifies and provides for the regional or area wide protection and perpetuation of natural wildlife diversity, while allowing compatible and appropriate development and growth.”³⁶

2. *Issue guidelines*: the Department of Fish and Game may prepare “nonregulatory guidelines for the development and implementation of natural community conservation plans.”³⁷ Among the areas identified as appropriate for development of guidance are plan implementation, conservation standards and guidelines, appointment of advisory committees, incorporation of public input, monitoring and reporting on plan implementation, and amendments to a plan.

3. *Issue take permits*: the law allows the Department to permit the taking of “any identified species whose conservation and management is provided for in a department approved natural communities conservation plan.”³⁸ It also allows the Fish and Game Commission, upon recommendation of the department, to authorize the taking of any candidate species whose “conservation, protection, restoration, and enhancement is provided for” in an approved NCCP plan.³⁹

It is worth noting that although the NCCP Act parallels Section 10(a) of FESA in allowing take authorizations, it lacks several elements of the federal statute. There are no explicit standards regarding the mitigation or minimization of the impacts of the taking, but instead a requirement that the taking be authorized under the auspices of an approved NCCP plan that provides for the “conservation and management” of the species. In addition, there is no language in the NCCP Act paralleling the federal requirement that the approved taking “not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” Nor is there a requirement that the applicant provide funding to mitigate and monitor, as there is in the federal law.*

THE GOAL OF NCCP: A NEW FORM OF HABITAT CONSERVATION PLAN

The NCCP Act to some extent is a California analog of the federal Habitat Conservation Plan (HCP) provisions of FESA. In fact, the earliest versions of the bill referred to the plans as “Habitat Conservation Plans,” and Governor Wilson used this term in introducing the proposal to the public.

However, the NCCP Act was intended to be broader and more flexible. Like the HCP law, the NCCP Act would encourage voluntary participation by allowing the regulators to enter into planning agreements and issue incidental take authorizations. A key difference with the HCP process was that these NCCP take authorizations could cover *any* species, including unlisted species that might become listed.⁴⁰

This could provide valuable assurances to participants about their future regulatory environment, as they would not have to worry about having new conservation requirements in the event that species and habitats covered by the plan were listed in the future.

In return for such incentives they would, it was hoped, agree to conservation measures for these species and habitats. In this way, conservation planning could encompass the whole suite of species and habitats making up an ecosystem. In time the federal government would embrace the NCCP approach and new regulations would be issued clarifying that HCP permits could also be used in this way.

* In 1997, Section 2081 of the California Fish and Game Code was amended to allow incidental take permits and an HCP-like process, but at the time of the NCCP Act of 1991, these provisions did not exist. Section 2081 of the Fish and Game Code is more limited than the NCCP Act in that it deals only with listed species. Section 2081 also resembles Section 10(a) of FESA in that it contains explicit conservation standards and mitigation requirements.

The NCCP Program Takes Shape

Three related developments shaped the program during the period 1991-1993:

- 1) Even before the NCCP Act was enacted, the Department of Fish and Game and the Resources Agency began the process of coordinating with other agencies and stakeholders and laying the groundwork for NCCP plans in Southern California. In the process, they discovered that creating NCCP plans would be more difficult and time-consuming than originally anticipated.
- 2) Several efforts to give the program more regulatory “teeth” failed. In 1991 the administration opposed a petition to list the California gnatcatcher as threatened under CESA. In 1991-1992, a bill adding new regulatory powers to the NCCP program died in committee. And in 1992, the administration abandoned an effort to develop regulations to protect the coastal sage scrub during the NCCP planning process.
- 3) In 1993, the federal government decided to list the gnatcatcher as threatened under the Federal Endangered Species Act. That listing fundamentally altered the NCCP program, grafting the regulatory power of FESA onto the state’s heretofore voluntary habitat planning process.

EARLY IMPLEMENTATION: SUCCESSES AND SETBACKS

By the end of 1992, the fledgling NCCP program had made a number of strides:

- Formation of an advisory committee of landowners, environmental representatives, local government officials, and others.
- Requesting \$1.8 million for the Department of Fish and Game to administer the program in FY 92-93.
- Reaching a memorandum of understanding with the U.S. Fish and Wildlife Service to cooperate and share information for the pilot program, as well as provide funding and in-kind support.⁴¹
- Appointment in June 1991 of a five-member Scientific Review Panel of independent experts, which soon began drafting guidelines on coastal sage scrub conservation and delineating the boundaries of the NCCP planning region.⁴²

In March 1992, the administration began the process of voluntary landowner enrollment in the NCCP program.⁴³ In May the official plan development period was to begin, and it was expected to conclude 18 months later, in October 1993.⁴⁴ While plans were being developed, private and public landowners with enrolled lands would agree not to disturb the enrolled habitat, to cooperate with scientific surveys on their lands, and to cooperate in plan development.⁴⁵ Enrolled local governments agreed to assess impacts to coastal sage scrub under CEQA and make findings on whether significant unmitigated impacts would occur that could preclude regional conservation planning.⁴⁶

According to the Resources Agency, this voluntary process succeeded in enrolling 37 private landowners and 33 jurisdictions. The Agency said that enrolled lands represented more than half the coastal sage scrub habitat in the planning region.^{47*} However, critics of the program were concerned that the voluntary enrollment process was inadequate to protect the coastal sage scrub. They pointed to the fact that some of the unenrolled coastal sage scrub was being lost to development[†] and that important lands were not being enrolled.

At the same time, it soon became clear that the planning process would take considerably longer than 18 months. For one thing, some key players, such as the County of Riverside, were reluctant to participate. Furthermore, laying the scientific groundwork for NCCP plans was proving more difficult than the administration had assumed it would be. As Undersecretary Mantell told the Fish and Game Commission in June 1992:

[An] unexpected reality became apparent: the existing scientific data on Coastal Sage Scrub, which had been thought to be extensive and adequate, was found to be neither ... the information on the extent, quality, condition, and location of the habitat was incomplete. As a result, several of the deadlines and targets that I had offered in August before the Commission proved impossible to achieve.⁴⁸

In retrospect, this turn of events is not surprising, given that the Department of Fish and Game had thirteen months earlier (prior to the initiation of the NCCP program) informed the Agency in a memorandum:

Effective regional conservation planning requires a substantial data base which is not usually available. The lead time required is much longer than most agencies anticipate. Existing HCPs have required two to six years to complete the necessary surveys and finalize the plans. Such early planning is expensive ... The Department is not currently staffed to perform its essential role in this process; therefore, additional staffing and funding will be required. While the initial costs

* The record as to the actual extent of enrollments is ambiguous, with the California Resources Agency reporting different totals than reported by the U.S. Fish and Wildlife Service. According to the Service, the voluntary private enrollments, when combined with the lands enrolled by public agencies, offered protection to about 14-15 percent of coastal sage scrub in San Diego, Orange, and Riverside Counties, covering an estimated 30 percent of California's gnatcatcher population. Given that these three counties contained the vast majority of the remaining coastal sage scrub, this figure seems incompatible with the Resources Agency estimate of half the habitat being protected. See U.S. Fish and Wildlife Service, "Determination of Threatened Status for the Coastal California Gnatcatcher," 58 FR 16742-16757, March 30, 1993, 22-23.

† In June 1992 the Department of Fish and Game released a partial inventory of coastal sage scrub loss during the previous year. They were able to document the loss of 1,910 acres in Orange, San Diego, and Riverside counties, but acknowledged there were probably additional losses in San Diego, San Bernardino and Riverside counties. (Memorandum from Glenn Black, Natural Heritage Supervisor, California Department of Fish and Game, to Fred Worthley, Susan Cochrane, and Larry Eng, "Substantiation of Coastal Sage Scrub Losses for June 18-19, 1992 CF&G Commission Meeting," June 11, 1992.

of preparing regional HCPs will be substantial, much of these costs may ultimately be recouped from the development projects that will directly benefit.”⁴⁹

FAILED EFFORTS TO SHARPEN REGULATORY “TEETH”

The single most difficult issue during the formative years of the NCCP program was the question of whether to enact some concrete regulatory requirements for protecting the coastal sage scrub. The proponents of the program hoped that NCCP would make a CESA listing of the gnatcatcher unnecessary, and they believed a gnatcatcher listing would derail their effort to develop a voluntary, collaborative conservation plan for the coastal sage scrub.⁵⁰ Environmentalists worried that without a listing there would be no legal mechanism to protect the gnatcatcher and the coastal sage, particularly in the “interim” period before NCCP plans were implemented. Some suspected the NCCP program was simply a means of circumventing CESA and facilitating development.

The Gnatcatcher Listing Controversy

In May 1991, shortly after the introduction of AB 2172, the Department of Fish and Game had recommended that the California Fish and Game Commission list the gnatcatcher under CESA. Developers and landowners predicted that such a listing could have a devastating impact on new development in Southern California.⁵¹

The administration argued that the protections afforded by the fledgling NCCP program would eventually be sufficient to protect the gnatcatcher without the need for a listing under CESA. On August 30, 1991, the Fish and Game Commission held a hearing and Undersecretary Mantell testified against the listing, saying that it would put too much emphasis on the gnatcatcher when the state needed to work toward “a broader habitat focus.”⁵² Mantell told the Commission that the state would adopt measures to strengthen the incentives for landowners to enroll their lands in the NCCP program. These as-yet unspecified measures would make it “very hard for them to develop” if they did not enroll their lands.⁵³ Mantell said that the program would be in place in 18-24 months, and that if it failed to meet its timeline, the administration would seek a state listing for the gnatcatcher.⁵⁴

The Commission voted 3-1 not to list the gnatcatcher. The move was criticized strongly by environmental groups such as the Natural Resource Defense Council (which soon sued to challenge the decision).⁵⁵

The Elusive Coastal Sage Scrub Protection Regulations

From the very beginning the Resources Agency acknowledged the desirability of special measures to protect coastal sage scrub during the development of habitat plans.⁵⁶ In a July 30, 1991 letter to the Natural Resources Defense Council, Undersecretary Mantell indicated that the administration was considering designating “all biologically important coastal sage scrub habitat as a significant natural area, in accordance with the provisions

of Fish and Game Code Section 1930 et seq.”^{57*} In addition, the administration was reviewing the Fish and Game Code in an attempt to identify an authority for regulating the taking of species and the alteration of habitat in the planning area. He also indicated that the Resources Agency would issue new guidance to strengthen the CEQA process in the NCCP planning region. “It is critical that we both strengthen habitat protections under available mechanisms in existing law and also immediately pursue appropriate changes in regulations,” Mantell wrote.⁵⁸

On April 21, 1992, the Department of Fish and Game submitted regulations to the Office of Administrative Law to address these habitat protection issues. The proposed regulations would have allowed the Department to designate Habitat Protection Zones that would be subject to heightened CEQA review. Activities that adversely modified a Habitat Protection Zone would have been presumed to have a significant effect on the environment for purposes of CEQA. Projects would have been exempted if they affected less than 0.5 acres or were judged to result in a “de minimus” impact.⁵⁹

The proposed regulations were discussed at a May 15, 1992 meeting of the Fish and Game Commission.⁶⁰ They immediately provoked fierce opposition from the regulated community. A revision that explicitly restricted the regulations to a designated Coastal Sage Scrub Habitat Protection Area⁶¹ did little to assuage the opposition, and the administration eventually dropped the proposal altogether.

According to the administration, the proposed regulations “were widely misunderstood and aggressively opposed, largely from individuals and organizations from outside” the NCCP planning area. Consequently, the Commission placed the issue on hold to “pursue nonregulatory options.”⁶²

Ultimately, the administration did not develop any new interim controls to prevent coastal sage scrub loss. Mantell said later that some of the proposals were “the effective equivalent of a [gnatcatcher endangered species] listing” and “would have created enormous administrative burdens and raised serious constitutional challenges, especially given the condition of the data.”⁶³ Another Resources Agency official said the interim controls were “something that proved legally and practically impossible ... It’s just impossible to impose new regulations on people when they’re trying to escape old ones.”⁶⁴

Legislating NCCP Regulatory Powers: SB 1248

There were also efforts to revise the NCCP program through the legislative process. In August of 1991, shortly before final passage of SB 2172, the Los Angeles Times reported that the administration hoped to “introduce legislation next year to cement the conservation effort.”⁶⁵ In September, NCCP follow-up legislation was introduced by Senator Dan McCorquodale. A Senate bill analysis described the intent behind the bill: after passage of AB 2172, “subsequent implementation efforts led to widespread

* Such designation would not in itself have provided any specific protections for such habitat.

concerns regarding the size of the program, the intent and objectives of the program and interim protections for habitat while plans were being prepared. [SB 1248] is an attempt to resolve these concerns.”⁶⁶

SB 1248 went through several forms, each of which proposed sweeping revisions and additions to the NCCP statute.* The first version, created by amendments on September 10, 1991, specifically addressed the issue of interim habitat protection for areas where plans were being developed:

- The bill would have made it “unlawful to alter, convert, or modify habitat identified by the department as essential to the continued viability of any species located within an area designated by the department as a significant natural area”
- The bill provided for civil and criminal penalties for harming identified species or their habitat within a significant natural area, as well as providing authority for halting such activities through injunctions or abatement orders.

In addition, the new language added standards and requirements for the development of NCCP plans:

- The planning agency would have to conduct at least one noticed public hearing and provide written notice to all significant environmental issues presented.
- No plan could be approved “if implementation of the plan will adversely impact any threatened or endangered species listed under federal or state statute.”
- No plan could be approved “if the cumulative effects of the plan, as implemented, will jeopardize the continued existence of any threatened or endangered species, or result in the destruction of, or have an adverse impact on, habitat essential to the continued existence of those species.”

In June 1992, SB 1248 was amended to include a \$1.4 million appropriation for the NCCP program. This was subject to several conditions, including the enactment of legal authority to prohibit interim loss of coastal sage scrub and establishment of an enforcement unit within the Department of Fish and Game.

On July 21, 1992, SB 1248 was essentially re-written by amendments. The new bill contained the following provisions:

- The Department of Fish and Game was to establish a planning area for a “one-time pilot program” to prepare a natural community conservation plan for Los Angeles, Orange, Riverside, San Bernardino, and San Diego counties.

* For more details on the history of AB 2172, see Appendix 2.

- Signatories to an NCCP agreement would have to agree to a moratorium on disturbance of coastal sage scrub.
- NCCP agreement signatories would also have to conduct surveys according to NCCP Scientific Review Panel survey guidelines.

The bill also contained provisions with regard to the CEQA environmental review process. Any activity within the NCCP planning area would be considered a discretionary project. Any activity on land in the planning area that was not enrolled in the NCCP plan would be considered to have a “significant impact on the environment” if it disturbed coastal sage scrub, and such impacts would have to be avoided or mitigated if feasible.

The bill also specified that “any interested person in the natural community conservation planning process has standing to enforce the terms of the voluntary enrollment and this section.”

SB 1248 went through another substantial transformation on August 10, 1992. The new version contained in its goals and objectives a set of “criteria for ecosystem functions,” including the following:

- Sufficient populations of target species designated by the Department, “in order to ensure their existence.”
- “Appropriate open space and habitat connectivity to ensure species dispersal across the region.”
- “Protection of a wide range of floral diversity.”
- “A full representation of the range of environmental gradients, including latitude, distance from the coast, elevation, slope, aspect, soil type, vegetation subcommunities, and disturbance regimes.”

This bill would have limited the issuance of incidental take permits for any species or subspecies identified in an NCCP or HCP. The incidental take could only be authorized “if the approved plan addresses the conservation of the species and its habitat as if the species were listed under the California and federal endangered species acts.”

In addition, this version of SB 1248 contained CEQA-related language very similar to the aborted Department of Fish and Game regulations. It stated that any activity within the planning area on land not enrolled in an NCCP plan affecting more than a half-acre of coastal sage scrub would be considered to have a “significant impact” on the environment. Any such project would be required to mitigate any impacts “that could significantly prejudice the development of the natural community conservation plan.”

As it went through its various incarnations, SB 1248 encountered substantial and vocal opposition. By August 1992, a wide array of organizations had weighed in against the bill: the California Farm Bureau Federation, Property Owners Association of Riverside County, Pardee Construction Company, California Association of Realtors, California

Mining Association, Artesia Companies, Kern County Board of Supervisors, Tuolumne County Alliance for Resources and Environment, Helix Water District, California Forestry Association, California Building Industry Association, Western States Petroleum Association, California Cattlemen's Association, County of Riverside, Western Growers Association, California Council of Civil Engineers and Land Surveyors, Governmental Affairs Council, and the Greater Bakersfield Chamber of Commerce.

Supporters included the San Diego Association of Governments, Planning and Conservation League, Midpeninsula Regional Open Space District, Endangered Habitats League, Natural Resources Defense Council, and the City of San Diego.

Much of the opposition focused on the attempts to modify CEQA or put into place new restrictions and enforcement mechanisms regarding habitat alteration. Many of the objections could be boiled down to the phrasing used by the California Building Industry Association: "SB 1248 seeks to place regulatory controls upon a voluntary program."⁶⁷ The last action taken on SB 1248 was a hearing on August 17, 1992. The bill died in the Assembly Committee on Water, Parks and Wildlife on November 30.

Senator McCorquodale was disappointed that the administration did not back SB 1248. The administration had supported the bill when it was first introduced. A Republican staff analysis of an early version noted that the bill was supported by the administration as a "companion" to AB 2172. The analysis stated that "This measure provides the enforcement tools, such as criminal and civil actions, which can make these plans work."⁶⁸

McCorquodale would later state that he had "urged my colleagues to vote for [AB 2172] despite the sketchy language in the bill because I had a commitment from the administration that they would support a bill the following year to add the environmental protections and enforcement authority necessary to make this a meaningful program."⁶⁹ Shortly before the NCCP Act passed, there was evidently an unsuccessful effort to persuade the governor to agree to sign SB 1248 or "double-join" AB 2172 with SB 1248.⁷⁰

By March 1992, the administration no longer supported SB 1248. McCorquodale wrote in a letter to Secretary Wheeler:

I was very disappointed that you decided not to uphold your commitment to work this year to strengthen the Natural Community Conservation Planning process permitted by AB 2172 last year. The current law is very general and does not include any enforcement authority or require any interim controls to be put in place while the planning process is proceeding. Several legislators supported AB 2172 last year only because we believed your promise to follow with a "clean-up bill" this year.

Unfortunately, several of the worst fears over the looseness of this program have come true. You cited the existence of the NCCP process to argue against listing

the California Gnatcatcher as endangered ... The case for listing is even stronger now than before the passage of AB 2172.^{*71}

He concluded by offering his assistance and the use of SB 1248 to “fix these gaping problems to the current NCCP program.” If this were not done, “I do not see that funding the NCCP effort is a wise use of the very limited resources we have.”

The Federal Gnatcatcher Listing Brings Fundamental Changes

In 1992, the NCCP program appeared to be struggling. For several months, Senator McCorquodale had been holding up funding for the program in an effort to try to win passage of SB 1248. In September, one year after the NCCP Act's passage, the legislature cut the first proposed NCCP appropriation by three-quarters, from \$1.45 million to \$362,000. Some predicted this would spell the demise of the entire program.⁷²

Meanwhile, the failure to win interim protection for coastal sage scrub or a state listing of the gnatcatcher frustrated environmentalists. Litigation was underway to challenge the state's listing decision, and some key environmental representatives were threatening to reject the NCCP program altogether. Also undermining the hoped-for spirit of collaboration were battles between environmentalists and developers over specific development proposals such as three proposed toll roads in Orange County.⁷³ In Riverside County, officials were still taking heat from landowners and developers over prior habitat conservation plans, and the county was declining to participate in the NCCP program.⁷⁴

Ironically, one of the sources of conflict turned out to be a key development in moving the program forward: the listing of the gnatcatcher under FESA. Although the state had decided not to list the bird, the federal listing petition was still in process. In early 1993, the U.S. Fish and Wildlife Service began indicating the outline of a compromise that could provide listed status for the bird without derailing the NCCP program.

Under Section 4(d) of FESA, the U.S. Fish and Wildlife Service has great latitude to develop special regulations for species listed as “threatened.” On March 25, 1993, Interior Secretary Bruce Babbitt announced that the gnatcatcher would be listed as threatened, but that rules would be issued under section 4(d) of FESA that would mesh the listing with the NCCP process. The take of gnatcatchers would be allowed as long as the take resulted from activities conducted in accordance with NCCP plans. During the interim period of plan development, take would be allowed as long as it was in accordance with forthcoming conservation guidelines being developed by the NCCP Scientific Review Panel.⁷⁵

In August 1993, the NCCP Scientific Review Panel issued its conservation guidelines, in which it recommended that loss of coastal sage scrub in the planning region be limited to 5 percent of the existing habitat during the planning process. This was formally adopted

* Some typographical errors were corrected in the passages quoted.

as federal policy when the final 4(d) rule for the gnatcatcher was published by the U.S. Fish and Wildlife Service on December 10, 1993. Development projects could take gnatcatchers during the interim period, but only up to the 5 percent limit on habitat loss.

The 4(d) rule did much to diffuse tension about the NCCP program, and the rule turned out to be one of the definitive events in the evolution of the NCCP pilot program. Observers ranging from the Irvine Company to the Natural Resources Defense Council praised the compromise.⁷⁶ Some key environmentalists who had threatened to oppose the program because of its lack of “teeth” in enforcing interim protection of coastal sage scrub were reassured because it brought the gnatcatcher’s habitat under the purview of FESA. Landowners, developers, and local governments who had feared that a listing would freeze development were reassured that at least some flexibility would be permitted under the 5 percent limit on coastal sage scrub loss. Those not wishing to participate in NCCP could opt out of the 4(d) rule, and would be subject to project-by-project review under the normal provisions of FESA.

Interior Secretary Babbitt viewed the compromise as having national importance: “We have to be able to point to one community and prove they were able to, from start to finish, protect both a species and the local economy... This may become an example of what must be done across the country if we are to avoid the environmental and economic train wrecks we’ve seen in the last decade.”⁷⁷

The gnatcatcher 4(d) rule also put the federal government squarely in the center of the NCCP process. The U.S. Fish and Wildlife Service would hold the regulatory “hammer” and would become more intimately involved in plan development and approval. The new federal role also carried the promise of more federal funding, further bolstering optimism about the program.⁷⁸

THE NCCP PROGRAM SINCE 1993

By the time of the federal gnatcatcher listing, the 6000 square mile NCCP planning region had been defined, encompassing lands within Los Angeles, Riverside, San Diego, Orange and San Bernardino Counties. Ultimately the process would come to encompass 11 subregional planning efforts. In late 1993, the Department of Fish and Game and the Resources Agency released guidelines for the NCCP planning process.⁷⁹ Around the same time, the Scientific Review Panel issued a variety of documents, including descriptions of the biological resources in the NCCP planning region, guidelines for conserving these resources, and a series of recommendations for further research.⁸⁰

To date, two NCCP subregional plans have been approved and are being implemented: the Orange County Central-Coastal NCCP and the San Diego Multiple Species Conservation Program (MSCP). Since this report is concerned with the origins and legislative history of the NCCP program, I will not discuss the outcome of NCCP planning efforts here. A subsequent report will examine the outcomes of the NCCP program, detailing what has been accomplished and learned in Southern California so far.

A Perennial Legislative Issue

Legislative efforts to shape or change the NCCP program did not end with the demise of SB 1248 in 1992. The legislature has made efforts to influence the program every year since then, either through the budget process or through new statutory language. These bills have reflected a number of issues that were debated but not resolved when the NCCP program was first created:

- What is the intended purpose and scope of the NCCP program?
- What is the NCCP program's relationship to the state and federal Endangered Species Acts (CESA and FESA)?*
- What standards are NCCP plans required to meet for the conservation of species and habitat?
- How much will NCCP plans cost and who will fund them?
- What sort of rules or guidelines should govern the NCCP planning process (including issues such as scientific input and public participation)?
- Is the NCCP program voluntary or regulatory? Does it (or should it) have its own regulatory "teeth"?

NCCP BILLS THAT HAVE BECOME LAW

Since 1992, two bills regarding the NCCP program have become law: AB 3446 (Brewer 1996) and SB 1679 (Sher 2000).

AB 3446 (Brewer 1996): This bill amended Section 2825 of the NCCP Act, making permissive, rather than mandatory, the NCCP Act requirement that the Department of Fish and Game be reimbursed for costs incurred in the preparation and implementation of NCCP plans. Backers of the bill argued that requiring participants to reimburse the Department would be an impediment to broadening participation by stakeholders. The bill passed and was chaptered on September 17, 1996.

SB 1679 (Sher 2000): This bill added Sections 2801, 2811 and 2815 to the NCCP Act. It required that any future NCCP planning agreement establish a process for the collection of independent scientific input and analysis in the development of the plan. The bill also required the NCCP planning agreement to provide a process for the appointment of independent scientists for the development of conservation criteria or guidelines. In addition, the bill required the Department of Fish and Game to establish a process for public participation throughout the development and review of any future NCCP plan. The bill passed, and was chaptered July 5, 2000.

* Readers not already familiar with these laws may refer to Appendix 1, which summarizes their main provisions.

BILLS INTRODUCED BUT NOT PASSED

In addition to these bills, a variety of bills have been introduced but not passed. They reflect the continuing questions about the nature of the NCCP program. Two of them, SB 107 (Sher) and AB 1172 (Keeley) were introduced in the 2001-2002 session and are still under consideration by the legislature.

SB 1549 (Hart 1994): This bill would have required any local government that entered into an NCCP planning agreement to enact a local ordinance or adopt a policy that would protect the natural community from any disturbance that compromised the planning process. The bill would also have required the amendment of the land use element of the general plan to incorporate the approved NCCP plan. The bill would have authorized specified local governmental entities to form habitat conservation agencies.

SB 131 (Maddy 1995): This bill would have repealed and reenacted CESA with substantial changes. Among other things, it would have prohibited the use of the Act “in a manner that would deny the economically viable use of private property.” It also proposed substantial changes to the listing process. Regarding the NCCP program, the bill would have removed Department of Fish and Game discretion over incidental take and made such authorization automatic for any project in compliance with an approved NCCP plan.

SB 1751 (Marks 1996): This bill would have prohibited taking under a Natural Community Conservation Plan unless the department found a net conservation benefit for each species identified in the plan. The bill would require scientific peer review before final approval of a plan and specified findings of the department relating to the plan.

AB 795 (Goldsmith 1996): This bill would have exempted projects located in NCCP areas from CEQA environmental review and mitigation for impacts to plant, fish and wildlife species if the project was in conformity with the approved conservation plan.

SB 1120 (Hayden 1997): Would have required the Department of Fish and Game to prepare and adopt as regulations a manual to govern scientific input in the natural community conservation process. The regulations would have specified procedures for selecting an independent scientific panel of consultants. The regulations would also have identified planning milestones that would have timely scientific input, including preparation of databases, biological standard-setting, reserve design alternatives, and management plans.

AB 2726 (Aroner 1998): Would have stated that the NCCP process was not intended to supersede, modify, or alter CESA or FESA. It also contained language about the purposes of the NCCP program. According to the author, it was intended to clarify that the NCCP program was voluntary and allay fears that it might be a new regulatory scheme to control land use.⁸¹

AB 2479 (Ducheny 1998): This bill would have authorized the Department of Fish and Game, upon appropriation by the legislature, to expend funds for NCCP-related land acquisition.

AB 981 (Ducheny 2000): Essentially the same as AB 2479 from the previous year.

AB 2379 (Keeley 2000): This bill would have added a requirement that the Department of Fish and Game report every three years on the functioning and effectiveness of the NCCP Act. The report would include information on “appropriate biological baselines and benchmarks necessary for the department to determine the effectiveness of a natural community conservation plan.” For plans already underway, it would report on “the status in achieving the defined baselines and benchmarks.”

AB 2310 (Ducheny 2000): This bill addressed a conflict between the Department of Fish and Game and the California Coastal Commission over the Commission’s desire to impose its own regulatory review on projects within the coastal zone that had already been cleared by the Department under the NCCP process. The bill would have required the Department to submit to the Commission for review and approval those portions of NCCP plans dealing with habitat within the coastal zone. It also would have prohibited the commission from establishing or imposing “any controls ... that duplicate or exceed regulatory controls” established by the Department of Fish and Game with respect to wildlife and fisheries. It would have required the Resources Agency to develop procedures for involving the Coastal Commission in the NCCP process and resolving conflicts between the Commission and the Department.

SB 107 (Sher 2001)

This bill would substantially re-write the NCCP Act. As of February 2001, the bill would require that NCCP agreements establish processes for independent scientific input and public participation. The bill proposes specific requirements for NCCP-related documents to be made available for public review and comment. It also proposes a special review of development projects by Department of Fish and Game to determine whether projects proposed prior to the completion of an NCCP plan might conflict with the NCCP goals. The bill would require that the Department make decisions about incidental take permits according to specified criteria, and would require findings applying these criteria to each species covered. The bill would require NCCP plans to provide for mitigation, monitoring, and implementation plans, including funding mechanisms. It would require that mitigation and conservation measures be “roughly proportional in time and extent to the impact of any taking or habitat disturbance authorized under the plan.”

AB 1172 (Keeley 2001)

As of February 2001, this bill was essentially the same as Keeley’s AB 2379 from the previous year.

THE NCCP BUDGET LEGISLATION

As noted earlier, the Wilson administration proposed NCCP as a pilot program to be tested in Southern California, and early versions of AB 2172 stipulated this. This language was removed because the bill's backers did not want to have to pass another bill should the state want to expand the NCCP program to other regions. They reasoned that the legislature could exert sufficient control over the scope of the program through the budget process.⁸²

It is not surprising, then, that issues about the policy direction of the NCCP program have often spilled over into the budget process. The Legislative Analyst's Office has repeatedly questioned whether the program should be expanded before it is more fully evaluated. The annual budget bills have on occasion reflected similar concerns about the scope and definition of the program.

NCCP Funding Levels

In 1996-1997 the cost of the NCCP program began to grow as appropriations were made for local assistance grants and land acquisition. Program administration and local assistance are handled by the Department of Fish and Game, while appropriations for land acquisition are made to the Wildlife Conservation Board or the Coastal Conservancy.

A recent development was the passage by California voters of Proposition 12, the Safe Neighborhood Parks, Clean Water, Clean Air, and Coastal Protection Bond Act of 2000. The Act included \$100 million that may be appropriated by the Legislature to the Wildlife Conservation Board for the acquisition of land for NCCP plans. In addition, the Act provided \$50 million for the Department of Parks and Recreation to acquire lands "that are a high priority for both the state parks system and for habitat purposes, with priority given to projects that protect habitat for rare, threatened, or endangered species pursuant to a natural community conservation plan" The legislature appropriated the \$100 million to the Board in the 2000-2001 budget, as well as \$10 million of the funds for the Department of Parks and Recreation. Other NCCP-related appropriations are summarized in Table 1.

Table 1: Appropriations for NCCP Program (Other Than Prop 12)

Budget Yr	Program Support	Local Assistance	Land Acquisition		Total
			Wildlife Conservation Board	Coastal Conservancy	
1992-1993	362,000	--			362,000
1993-1994	1,006,000	--			1,006,000
1994-1995	1,006,000	--			1,006,000
1995-1996	1,006,000	--	1,700,000		2,706,000
1996-1997	1,531,000	600,000	4,400,000		6,531,000
1997-1998	1,468,000	600,000	6,400,000		8,468,000
1998-1999	1,049,000	1,600,000	6,400,000	5,000,000	14,049,000
1999-2000	1,033,000	1,600,000	---	5,000,000	7,633,000
2000-2001	1,114,000	1,600,000	5,000,000	---	7,714,000

Full Costs of Program Not Anticipated

As Table 1 shows, costs for land acquisition did not become a significant part of the state program until 1996-1997. LAO then sounded a warning about this aspect of the program. The Analyst's report for that year's budget noted that the "proposed costs are the tip of the iceberg" (the report cited an estimate of \$136-257 million to fund the state and federal shares of one of the subregional NCCPs, the San Diego Multiple Species Conservation Program). The Analyst's report asserted that the NCCP Act did not authorize the state to fund land acquisition. The Analyst also asserted that the Department and local and federal agencies were determining their relative roles in funding the program "without the benefit of legislative review or oversight."⁸³

This issue had not been anticipated when the NCCP Act was originally passed. During the debate on AB 2172, LAO stated that "This bill could result in unknown annual costs to the Fish and Game Preservation Fund ... possibly over \$300,000, for DFG [Department of Fish and Game] to assist agencies in the habitat conservation planning process ... The bill requires that agencies fully reimburse the DFG for its costs to assist in this process. In addition, the DFG would incur one-time costs ... up to \$50,000 to adopt the required planning guidelines."⁸⁴ The \$300,000 figure was used by legislative staff in their analyses of the bill.⁸⁵ Accordingly, the legislature did not anticipate that the program would cost much, and believed that the costs would be shared by the participants through reimbursement agreements they would sign with the Department of Fish and Game.

There have been some attempts by the legislature to limit the costs of the program. As discussed earlier, the first NCCP budget request of \$1.8 million was cut by the legislature to \$362,000, in part because of the dispute over passage of Senator McCorquodale's SB 1248. Since the beginning the Department of Fish and Game repeatedly requested permanent personnel for the NCCP program, but no permanent appropriation was made until the FY 2000-2001 budget, which made 14 positions permanent.

Scope of the Program Has Been in Question

Since the passage of AB 2172, there have been various moves to expand the size and scope of the NCCP program beyond Southern California. For example, the Department of Fish and Game considers the Placer County habitat program known as "Placer Legacy" to be a candidate for NCCP status. In addition, the CALFED Bay-Delta Program contains a "Multi-Species Conservation Strategy" that the Department of Fish and Game has approved as a "programmatic NCCP." Future projects found to be in compliance with this program could receive incidental take permits for a variety of species.⁸⁶ A multiple species conservation plan for the Coachella Valley in Riverside County that was not counted among the original eleven NCCP subregions is now under review as an NCCP plan. A recent Department of Fish and Game budget request proposed an expansion of the NCCP program to the central coast and Sierra Nevada.

The legislature has on occasion placed geographical limits on its appropriations. In the budget bills for 1997-1998, 1998-1999, and 2000-2001, the legislature placed restrictions on appropriations for NCCP land acquisition, limiting them to Orange and San Diego Counties.⁸⁷ In 2000-2001, there was a stipulation that funds for land acquisition appropriated to the Wildlife Conservation Board would have to be used on approved NCCP plans in Orange or San Diego County, “unless a statute is enacted that establishes scientific and procedural standards for natural community conservation plans.”⁸⁸ The 1998-1999 and 2000-2001 budget bills contained similar restrictions with regard to local assistance funding.⁸⁹

LAO Urges Caution

The Legislative Analyst’s Office has issued several reports on the NCCP program.* LAO has repeatedly recommended reductions in funding for a number of reasons:

- Concerns that the Department of Fish and Game was not being reimbursed for planning costs as called for in the NCCP statute.
- Lack of any plans to evaluate the results of the Southern California pilot program or to specify measurable goals and objectives.
- Requested appropriations that appeared to expand the program beyond a pilot project.
- Lack of criteria for distributing local assistance grants.
- Questions about the statutory authority for acquiring land for NCCP plans.
- Concerns about the potential costs of the program, especially the land acquisition component.

* LAO has commented on the NCCP program in its analyses of the 1992-1993, 1993-1994, 1996-1997, 1997-1998, and 2001-2002 budgets.

Conclusions and Unresolved Issues

The NCCP began with a minimal enabling statute and subsequently grew and developed in various ways, both expected and unexpected. In the process, important questions about the program have never been fully resolved. I will summarize these issues below. Many of them will be discussed further in a forthcoming report that will examine the results of the Southern California NCCP program and the NCCP plans implemented to date.

INTENDED PURPOSE AND SCOPE OF NCCP

The NCCP program was initiated as a pilot program to test a new approach to wildlife conservation in Southern California. In order to create an alternative to the preexisting regulatory regime, the state initiated a program that must walk a fine line between encouraging creative cooperation and being too permissive. Thus, there has been an ongoing tug-of-war ever since the NCCP Act was proposed over whether to make its statutory and regulatory mandates more detailed and specific. At the same time, there has been a lingering question of whether the NCCP should still be considered a Southern California “pilot” program or should be expanded statewide.

RELATIONSHIP TO CESA AND FESA

The hardest-fought issue in the early days of the program was the question of whether the gnatcatcher should be listed under CESA or whether its protection should be left to the NCCP program. Concerning the fate of the gnatcatcher, the federal listing rendered the point more or less moot. Furthermore, the federal listing did not spell the end of the NCCP experiment, as some predicted, because the flexible FESA Section 4(d) rule allowed the listing and the NCCP experiment to coexist. It established a mechanism for restricting coastal sage scrub loss during the interim period of NCCP plan development, while still leaving some latitude for limited “take.”

This provides a clear precedent in cases where a key target species of an NCCP plan is proposed for FESA listing. The species can be listed as “threatened” and a special 4(d) rule issued to provide for its protection and compatible development during the formulation of NCCP plans. However, it is not clear how such an issue would be resolved in cases where there was not a federal candidate or “threatened” species closely associated with an ecosystem targeted by an NCCP process. CESA does not contain flexible listing provisions analogous to FESA’s Section 4(d).

A related question is whether the promise of a future NCCP plan should be sufficient to defer the listing of a species as threatened or endangered under CESA or FESA. In the case of the gnatcatcher, this was the reason for the controversial decision not to list the bird under CESA. The federal listing of the gnatcatcher removed this issue from the table in Southern California but did not resolve the underlying question. Is the NCCP process a sufficient alternative to the protections afforded by CESA and FESA? To shed light on this question, in a subsequent report I will look in more detail at the conservation

measures that have been implemented in connection with NCCP plans in Southern California

CONSERVATION STANDARDS

Questions also remain regarding the statutory *standards* for NCCP plans. As noted earlier, the NCCP statute does not contain any explicit definition of what is meant by the requirement to “provide for the conservation and management” of species and habitats affected by an NCCP plan.

In contrast, there are explicit conservation standards in the laws governing incidental take permits for HCPs. Section 10(a) of FESA requires that an incidental take permit applicant minimize and mitigate the impacts of the taking to the maximum extent practicable. It also requires that the taking not appreciably reduce the likelihood of the survival and recovery of the species in the wild. Parallel provisions Section 2081 of CESA (as amended in 1997) contains similar requirements. Section 2081 requires impacts to be “minimized and fully mitigated.” The mitigation measures must be “roughly proportional in extent to the impact of the authorized taking on the species.” The permit applicant must ensure adequate funding to implement and monitor these measures.⁹⁰

The Department of Fish and Game maintains that the NCCP statute does in fact contain conservation standards. It has stated in a report to the legislature that the term “conservation” as used in the NCCP law has the meaning defined in Fish & Game Code Section 2061: “to use ... all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provide pursuant to this chapter are no longer necessary.”⁹¹ This would make the conservation standard in the NCCP law an arguably higher threshold than that required to approve an HCP or Section 2081 permit. It would mean that an NCCP requires actions to bring about *recovery* of the species. HCPs only require mitigation and the avoidance of “jeopardy” to the species, not recovery.

Regardless of how the Department currently implements the statute, the question remains of whether this standard is *statutorily mandated*. The definition of “conservation” in Fish and Game Code Section 2061 is meant to govern Chapter 1.5 of the Fish and Game Code, which contains CESA (see Section 2060). The NCCP Act comprises Chapter 10 of the Fish and Game Code, and contains its own definitions (see Section 2805). There is no support in the legislative history of AB 2172 for the assumption that the legislature meant for the Chapter 1.5 definition of “conservation” to apply.⁹²

A related issue concerns whether the NCCP Act in some way incorporates the conservation standards defined for incidental take permits in CESA. At the time the NCCP law was passed, Section 2081 of CESA provided for the Department of Fish and Game to permit the taking of listed species for “scientific, educational, or management purposes.” In 1997, this was amended to allow for incidental take permits, subject to requirements that the taking not jeopardize the continued existence of the species. In addition, the taking would have to be “minimized and fully mitigated,” with mitigation measures “roughly proportional in extent to the impact of the authorized taking on the

species.” Meanwhile, §2825(c) of the NCCP law says “Natural community conservation plans, as appropriate, shall be implemented pursuant to Section 2081.” This language is ambiguous, and has been interpreted by some as meaning that the incidental take permits issued under an NCCP plan are governed by the requirements of Section 2081. The Department maintains that the NCCP law provides an authority for permitting incidental take that is separate from Section 2081.

FUNDING NCCP PLANS

As already discussed in more detail above, the legislature did not anticipate how much it can cost to implement NCCP plans. Land acquisition is one major area of implementation costs, as noted by LAO. Another area is the long-term management and monitoring of habitat lands. These issues will be discussed further in the forthcoming report on the Southern California plans.

THE NCCP PROCESS: SCIENTIFIC AND PUBLIC INPUT

Since the earliest days of the program, there have been numerous proposals to add more statutory or regulatory requirements concerning the NCCP process. Two of the leading questions have been the role of science and the role of public input. The NCCP Act did not contain any specific requirements on these issues. Since then, legislation (SB 1679 of 2000) has been enacted to require a public participation process and independent scientific input. It remains to be seen how these mandates will be carried out. In a forthcoming report I will discuss the precedent that has been set by the NCCP plans that have been approved so far.

NCCP: REGULATORY OR VOLUNTARY?

The NCCP program was originally conceived as a voluntary alternative to an existing regulatory framework that many considered problematic. It was hoped that it would operate more through incentives than through regulation. As the program developed, it proved difficult to maintain the voluntary approach while simultaneously satisfying those who feared a weakening or circumventing of the state’s Endangered Species Act.

Can the NCCP process fulfill these contrasting expectations? In Southern California this question posed a formidable barrier to launching the NCCP program. The federal gnatcatcher listing helped the program to continue moving forward, but did not completely settle this issue. The forthcoming report on the results of the Southern California NCCP experiment will shed more light on this question.

Appendix 1: The State and Federal Endangered Species Acts (CESA & FESA)

To understand the workings of the NCCP program, it is necessary to understand its relationship to CESA and FESA. I will cover the following:

- 1) Conservation goals: what are the endangered species laws supposed to accomplish?
- 2) What provisions do FESA and CESA contain for meeting these conservation goals?
- 3) What provisions do FESA and CESA make for reconciling conflicts between development and conservation?
- 4) How does the NCCP Act relate to the above provisions?

1) CONSERVATION GOALS OF ESA AND CESA.

The stated purposes of the Federal ESA are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of such endangered species and threatened species.”⁹³

The term “conserve” means not only to protect species from going extinct but also to bring about their recovery so that they will no longer be endangered. “Conservation” is defined as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”⁹⁴

The California ESA declares that “it is the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat ...”⁹⁵ The definition of “conserve” here is essentially the same as in Federal law: “to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”⁹⁶

It is also worth noting that the federal law calls for the protection and recovery of *ecosystems* upon which listed species depend. The state law does not explicitly apply to ecosystems, but does require the protection and restoration of the habitat of listed species.

2) CESA AND FESA PROVISIONS FOR CONSERVING LISTED SPECIES

A full overview of FESA and CESA is beyond the scope of this paper.* I will touch briefly on those aspects that are most relevant.

Recovery Plans

Under FESA, the Secretary of the Interior is required to develop and implement plans for the recovery of endangered and threatened species. Recovery plans are supposed to include management actions that would lead to the species being removed from the threatened or endangered list.⁹⁷ Due in part to funding constraints, many listed species do not currently have recovery plans, and many of the plans that have been approved have been criticized as ineffectual.⁹⁸

Prohibitions Against “Take”

Both CESA and FESA prohibit the “take” of species listed as endangered.⁹⁹ A broad range of activities are included in the prohibition against “taking.” Federal law defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹⁰⁰ State law defines “take” as to “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.”¹⁰¹

The state law also applies the “take” prohibition to species listed as threatened and even to species that are merely candidates for listing. Federal law does not automatically extend its protections to threatened and candidate species. However, Section 4(d) of the federal ESA authorizes the Secretaries of the Interior and Commerce to issue “such regulations as he deems necessary and advisable” to conserve threatened species.¹⁰² The Secretary of the Interior often uses this section to apply take prohibitions to listed threatened species.¹⁰³

Take Restrictions Sometimes Apply to Habitat Destruction

The federal ESA includes “harm” in the definition of “taking” a listed species. Often in practice this protects not only individual members of the species but also their habitat. According to federal regulations, alteration of listed species’ habitat is unlawful if it “actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”^{104†} Federal court decisions have upheld the principle that habitat modification could constitute a prohibited taking, even if no death or injury to individual members of the species could be proven. It would be enough to show that the modification harmed the species as a whole.¹⁰⁵

* A good overview is provided by Tara L. Mueller, *Guide to the Federal and California Endangered Species Laws*, Planning and Conservation League, January 1994.

† A U.S. Supreme Court decision upheld this regulation, endorsing the idea that “harm” could reasonably be construed to encompass indirect effects of habitat modification on individuals of the listed species. (*Babbitt v. Sweet Home*, 115 S. Ct. 2407).

Unlike federal law, CESA does not include “harm” or “harass” in the definition of take. Nevertheless, the Department of Fish and Game interprets the take prohibition as extending to destruction or modification of habitat essential to the species’ survival.^{106*}

3) CESA AND FESA MECHANISMS FOR RESOLVING CONFLICTS BETWEEN SPECIES AND LAND DEVELOPMENT

CESA and FESA empower the state and federal wildlife agencies to review development projects that could affect listed species. This may result in requirements to change or halt the project, or to mitigate project impacts. When the project proponent is a state or federal agency, this review process is known as “consultation.” When the proponent is a private landowner, the project proponent may have to acquire special “incidental take” permits.

Section 7 of the federal ESA prohibits federal entities from authorizing, funding, or carrying out any action that could “jeopardize the continued existence of any endangered species.” In addition, it prohibits federal agencies from any action that is likely to “result in the destruction or adverse modification” of federally designated “critical habitat.”¹⁰⁷ The range of actions encompassed by Section 7 is broad, including among other things the issuance of federal permits or funding. This means that the consultation requirements can have an impact on projects that are not federally sponsored, but involve some form of federal permit or grant.

According to federal regulations, an action “jeopardizes” the species if it appreciably reduces both the likelihood of survival and recovery of a listed species in the wild “by reducing the reproduction, numbers, or distribution of that species.” Similarly, the prohibition on the harming of critical habitat applies to actions that diminish the habitat’s value for both survival and recovery of the species.¹⁰⁸

The federal entity proposing the actions that could harm listed species or their critical habitat must consult with the wildlife agency responsible for enforcing the ESA (either the U.S. Fish and Wildlife Service (USFWS) within the Department of the Interior or the National Marine Fisheries Service (NMFS) within the Department of Commerce). If the proposed action will result in either “jeopardy” or the destruction/adverse modification of critical habitat, then the wildlife agency will issue a biological opinion that discusses “reasonable and prudent alternatives” to the proposed action to minimize or avoid the adverse effects.¹⁰⁹

* These rules should not be confused with the issue of “critical habitat.” The federal ESA requires the designation of “critical habitat” for listed species. Critical habitat consists of areas determined to contain physical or biological features essential to the species’ conservation (16 U.S.C. §1532(5)(A); 50 CFR §424.02(d)). Critical habitat is therefore not limited to areas that are currently occupied by the species. Although critical habitat designations are often controversial, destruction of critical habitat does not necessarily constitute a “taking” of the species. The actual legal impact of a critical habitat designation is limited to certain actions funded, permitted, or proposed by federal agencies, as discussed in the following section.

Reconciling Development and FESA: Habitat Conservation Plans

When the proponent of a development project is a private party, the CESA and FESA prohibitions on take give the wildlife agencies significant regulatory power. If a project threatens to take a listed species, CESA or FESA can bring it to a halt. In the case of FESA, the wildlife agencies are authorized to allow such taking if it is “incidental” to other lawful activities. The permit holder must agree to take certain actions to minimize and mitigate the harm done by the taking. This process is the primary way the system tries to reconcile federal endangered species protections and private land development.

The provisions for minimizing and mitigating the project impacts are spelled out in a “habitat conservation plan” (HCP). The FESA provisions for incidental take permits and HCPs were introduced by amendment to the Act in 1982.*

Requirements for HCPs

Under Section 10(a), incidental take permits can be issued if the following conditions are met:

- The taking will be incidental to otherwise lawful activities.
- The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking.
- The applicant will ensure that adequate funding for the plan will be provided.
- The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

In 1985, U.S. Fish and Wildlife Service regulations spelled out additional conditions for the granting of incidental take permits in conjunction with HCPs. In addition to requiring that the applicant minimize and mitigate the impacts of the taking, the regulations require that the conservation plan specify how it will be funded and contain procedures to deal with unforeseen circumstances. In addition, each permit would have to contain terms and conditions for implementation, including monitoring and reporting requirements.¹¹⁰

HCPs and the California Endangered Species Act

At the time the NCCP Act was passed in 1991, the California Endangered Species Act contained no explicit authority to issue incidental take permits. Section 2081 of CESA allowed the Department of Fish and Game to authorize take for “scientific, educational, or management purposes.” In 1997, the code was amended to allow incidental take permits in a manner analogous to Section 10(a) of FESA. As under FESA, such permits cannot be issued if doing so would jeopardize the continued existence of the species. In

* The term “Habitat Conservation Plan” is not actually used in the Act, but was coined later.

addition, the impacts must be “minimized and fully mitigated.” The mitigation measures must be “roughly proportional in extent to the impact of the authorized taking on the species.” The permit applicant must ensure adequate funding to implement and monitor these measures.¹¹¹

HCPs and ESA Conservation Goals

HCPs are a tool allowed by FESA, but the requirements for HCPs are not in themselves sufficient to meet all of the goals of the Endangered Species Act. Recall that the overall goal of FESA is to bring about the *recovery* of endangered species and their ecosystems. According to Section 10(a) of the Act, incidental take authorized under an approved HCP “will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” The HCP must “to the maximum extent practicable, minimize and mitigate the impacts” of the taking. (16 U.S.C. §1539(a)(2)(B)).

The potential advantages of HCPs come from the fact that they allow *negotiation* to occur. The wildlife managers are given something of value they can offer to the landowners (permits). As a further incentive, landowners can be offered assurances that the terms of the agreement, including required mitigation measures, will not change over the life of the plan.¹¹²

In exchange, the wildlife agency can obtain beneficial conservation measures that might not otherwise be required by the Act. As one observer has noted, HCPs provide a way to “convene the meeting and draw a bottom line ... The ESA provides the muscle for the discussions: a reason for them to take place, and a boundary below which they cannot fall. The reason is the presence of a salmon, owl, or desert tortoise, an ultimate indicator species. The boundary is impairment of these species’ ability to maintain viable populations.”¹¹³

4) HOW DO THE PROVISIONS OF THE NCCP ACT RELATE TO THE PROVISIONS OF CESA AND FESA?

The NCCP law itself contains very few substantive provisions. First, the law contains a statement of legislative intent. Among other things, the legislative findings of the Act declare:

- “There is a need for broad-based planning to provide for effective protection and conservation of the state’s wildlife heritage while continuing to allow appropriate development and growth.”
- The purpose of natural community conservation planning “is to sustain and restore those species and their habitat identified by the Department of Fish and Game which are necessary to maintain the continued viability of those biological communities impacted by growth and development.”¹¹⁴

Note that the second item places the emphasis on “biological communities.” Protection of species (and their habitat) is a means to that end.

The legislative findings anticipate a variety of benefits from Natural Community Conservation Planning:

- *Coordination* “among public agencies, landowners, and other private interests” and “a mechanism by which landowners and development proponents can effectively participate in the resource conservation planning process”
- *Regional planning* “which can effectively address cumulative impact concerns, minimizes wildlife habitat fragmentation, promotes multispecies management and conservation, provides one option for identifying and ensuring appropriate mitigation for impacts on fish and wildlife, and promotes the conservation of broad based natural communities and species diversity.”
- *An early planning framework* “for proposed development projects within the planning area in order to avoid, minimize, and compensate for project impacts to wildlife.”¹¹⁵

What mechanisms does the NCCP law create for achieving these goals? The NCCP Act authorizes the Department of Fish and Game to do three things:

1. *Negotiate agreements*: the law authorizes the Department of Fish and Game to “enter into agreements with any person for the purpose of preparing and implementing a natural community conservation plan to provide comprehensive management and conservation of multiple wildlife species ...”¹¹⁶
2. *Issue guidelines*: the Department of Fish and game may prepare “nonregulatory guidelines for the development and implementation of natural community conservation plans.”¹¹⁷ Among the areas identified as appropriate for development of guidance are plan implementation, conservation standards and guidelines, appointment of advisory committees, incorporation of public input, monitoring and reporting on plan implementation, and amendments to a plan.
3. *Issue take permits*: the law allows the Department to permit the taking of “any identified species whose conservation and management is provided for in a department approved natural communities conservation plan.”¹¹⁸

The NCCP Act thus somewhat resembles the HCP provisions in Section 10(a) of the federal ESA, in that it offers the wildlife agency the ability to authorize incidental take, as long as the regulated parties agree to a plan for the conservation of the species in question. Like the HCP statute, the NCCP Act provides the wildlife agency with an incentive (take authorizations) with which it can win participation and cooperation from other parties in implementing a conservation plan.*

* As noted already, Section 2081 of the California Fish and Game Code now allows incidental take permits and an HCP-like process, but at the time of the NCCP Act of 1991, these provisions did not exist.

The NCCP's mechanism is more flexible than the federal incidental take permit, though. While HCPs are intended to allow conservation planning and incidental take for listed species, NCCP plans and take authorizations can cover any species, not just those listed as threatened or endangered. So the take authorizations and conservation planning can be expanded more readily to encompass an entire ecosystem, including those species not yet listed that might become threatened later, or that might be needed to aid in the conservation of listed species.

It is worth noting that although the NCCP Act parallels Section 10(a) of FESA in allowing take authorizations, it lacks several elements of the federal statute. There are no requirements regarding the mitigation or minimization of the impacts of the taking, merely a requirement that the taking be authorized under the auspices of an approved NCCP plan that provides for the "conservation and management" of the species. In addition, there is no language in the NCCP Act paralleling the federal requirement that the approved taking "not appreciably reduce the likelihood of the survival and recovery of the species in the wild." Nor is there a requirement that the applicant provide funding to mitigate and monitor, as there is in the federal law.

The lack of a clearly stated conservation standard and mitigation requirements could be interpreted as making the NCCP law weaker than the HCP law. Nevertheless, some argue that there is a conservation standard in the NCCP law, and that it is actually stronger than in the federal HCP law. In particular, the Department of Fish and Game has stated in a report to the legislature that the term "conservation" as used in the NCCP law has the meaning defined in Fish & Game Code Section 2061: "to use ... all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provide pursuant to this chapter are no longer necessary."¹¹⁹ This would make the conservation standard in the NCCP law stronger than that required to approve an HCP. It would mean that an NCCP requires actions to bring about *recovery* of the species, while an HCP must only "not appreciably reduce the likelihood of the survival and recovery of the species in the wild."

The definition of "conservation" in Fish and Game Code Section 2061 is meant to govern Chapter 1.5 of the Fish and Game Code, which contains CESA (see Section 2060). The NCCP Act comprises Chapter 10 of the Fish and Game Code, and contains its own definitions (see Section 2805). There is no support in the legislative history of AB 2172 for the assumption that the legislature meant for the Chapter 1.5 definition of "conservation" to apply.^{120*}

* In reviewing the history of the Act, including interviews with the author and legislative staff, I found no evidence that the drafters of AB 2172 intended for the definition of "conservation" in Chapter 1.5 to apply to the NCCP Act.

Appendix 2:

Legislative Chronologies of AB 2172 and SB 1248

CHRONOLOGY OF AB 2172

March 8, 1991

AB 2172, a bill sponsored by the Wilson administration, was introduced by Assemblymember David Kelley on March 8, 1991. As originally introduced, the bill simply added to the State's Endangered Species Act a declaration that it is "the policy of the state to protect lands for habitat for endangered or threatened species."

April 25, 1991

On April 25, the bill was substantially amended by the author. The re-written bill proposed a new chapter to the Fish and Game Code, which it named the "Habitat Conservation Planning Act." The declarations of legislative intent noted the existence of a conflict between population growth and wildlife, and offered "habitat conservation planning" as "effective tool" for reducing this conflict:

- Population growth will result in "increasing demands for dwindling natural resources and result in the continuing decline of the state's wildlife."
- "There is a need for broad-based planning to provide for effective protection and conservation of the state's wildlife heritage while continuing to allow development and community growth."
- "Habitat conservation planning is an effective tool in protecting California's natural diversity while reducing conflicts between protection of the state's wildlife heritage and reasonable use of natural resources for economic development."
- "Habitat conservation planning promotes coordination and cooperation among public agencies and private interests ... provides a regional planning focus which can effectively address cumulative impact concerns, minimizes wildlife habitat fragmentation, promotes multispecies management and conservation, and promotes the conservation of broad based natural habitats and species diversity."
- "Habitat conservation planning is an effective planning process which can facilitate early coordination to protect the interest of the state, the federal government, and local public agencies and private parties ... [it] is a mechanism that can provide an early planning framework for proposed development projects within the planning area in order to avoid, minimize and compensate for project impacts to wildlife."

The bill would have authorized the Department of Fish and Game to enter into agreements with other public agencies or private interests for the purpose of preparing and implementing a habitat conservation plan. Such plans would “provide comprehensive management and conservation of multiple wildlife species, including, but not limited to species listed under the California Endangered Species Act.”

The bill only authorized Habitat Conservation Plans in “that part of the state existing south and southeast of the Tehachapi Mountains within the Counties of Imperial, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura.”

The legislation would have required the Department to adopt guidelines for the development and implementation of the plans, including:

- Defining the scope of a conservation planning area
- Determining conservation standards, guidelines and objectives for the planning area
- Appointing a scientific advisory committee “consisting of representatives of the scientific community to review and make recommendations regarding the preparation and implementation of habitat conservation plans.”
- Coordinating with other agencies and incorporating public input
- Funding for full implementation of the plan
- Monitoring and reporting on plan implementation

The bill would have required that habitat conservation plans “shall be prepared consistently with the guidelines adopted by the department and shall meet the standards adopted by the department for habitat conservation.”

The bill stated that habitat conservation plans “as appropriate, shall be implemented pursuant to Section 2081.” Section 2081 is the section of the Fish and Game Code that allows the Department, under certain conditions, to authorize the taking of listed and candidate species under CESA. At the time of AB 2172, Section 2081 authorized the taking of listed such species for “scientific, educational, or management purposes.”*

Finally, the bill required the Department to determine the costs associated with implementing the new program, including the costs of preparing guidelines, compiling data, developing and reviewing plans, and implementing and monitoring the plans. It provided that “The department shall be reimbursed” for these costs “according to a schedule contained in an agreement with the agency undertaking a habitat conservation planning effort.”

* In 1997 Section 2081 was amended to allow take of protected species “incidental to an otherwise lawful activity” provided that the impacts were “minimized and fully mitigated.”

May 2-June 6, 1991

On May 2, the Assembly Committee on Water, Parks and Wildlife voted unanimously (11-0) to recommend passage of the bill and re-referred it to the Committee on Ways and Means. The bill left that Committee on June 3 and went to the consent calendar. On June 6 it was passed unanimously (74-0) in the Assembly and sent to the Senate.

July 15, 1991

In the Senate, AB 2172 was referred to the Senate Committee on Natural Resources and Wildlife. On July 15, that Committee recommended additional amendments, which were adopted before the bill was re-referred to the Senate Committee on Appropriations with a unanimous (5-0) “do pass” recommendation.

The July 15 amendments replaced the phrase “habitat conservation” throughout the bill with the phrase “natural community conservation.” The purpose of this was to avoid confusion between the state program and Habitat Conservation Plans authorized by the Federal Endangered Species Act.¹²¹ Accordingly, the bill’s name was changed to the Natural Community Conservation Planning Act. The only major change made in the bill was the removal of the requirement limiting implementation to a specified region of Southern California. Although the bill was still being referred to as a pilot program to be tested in Southern California, this was no longer reflected in the statute in any way.

August 27, 1991

On August 27, Assemblymember Kelley transmitted a memorandum to the Department of Fish and Game with language for some “priority amendments” for AB 2172. These would have done the following:

- “Make clear that the Department is authorized to issue permits for taking” of candidate, threatened or endangered species incidental to actions or projects covered by a conservation plan.
- In addition, the amendments would “clarify that preparation of the guidelines” by the Department should be “optional.”
- Finally, the new amendments would “make clear that the NCCP shall constitute the functional equivalent of an Environmental Impact Report under the California Environmental Quality Act.”¹²²

August 30, 1991

On August 30, on AB 2172’s third reading in the Senate, these and other amendments were proposed by Senator Marian Bergeson and adopted. In addition to the three changes describe above, the following additional changes were made:

- In addition to making the adoption of guidelines optional, the bill was amended to specify that the guidelines would be “nonregulatory.”

- The language requiring that the plans be “prepared consistently with the guidelines” was deleted. It was replaced with language requiring that a plan be consistent with the planning agreement between the Department and the other parties to the plan.

A number of changes were made regarding the content of the guidelines themselves:

- The previous version required guidelines concerning the appointment of a scientific advisory committee to review and make recommendations regarding the preparation and implementation of plans. The new language instead authorized the appointment of “one or more advisory committees” to serve this function.
- The requirement for guidelines on “Funding for full implementation of the plan” was replaced with language authorizing guidelines on “Provisions for implementation of the plan.”
- Instead of requiring the department to “determine the amount of its reasonable costs” in connection with preparing and implementing the plans, the bill said that the Department “shall be compensated for the actual costs incurred in participating in the preparation and implementation of natural community conservation plans.”

The August 30 amendments also made some changes to the declarations and findings. The most substantive of these was the addition of a statement that “The purpose of natural community conservation planning is to sustain and restore those species and their habitat identified by the Department of Fish and Game which are necessary to maintain the continued viability of those biological communities impacted by growth and development.”

As already noted, the administration hoped that the NCCP plan could prevent an eventual listing of the gnatcatcher under CESA. The Resources Agency appears to have seriously considered pursuing additional amendments to AB 2172 that would have made this purpose explicit, requiring that “Natural Community Conservation Planning shall provide protections for habitat sufficient to prevent the need of placing species in the threatened and endangered categories.” At the same time, the law would provide more flexibility in listing decisions by allowing the Commission to defer action on proposed CESA listings for species covered by NCCP plans.¹²³ It appears that the administration decided not to pursue these amendments.

The Senate passed AB 2172 unanimously (36-0) on September 4 and sent it back to the Assembly for Concurrence. On September 9, Assemblymember Byron Sher requested that the bill be removed from the Assembly consent calendar.

September 13, 1991

Several pointed objections were noted to AB 2171 by the staff of the Assembly Committee on Natural Resources chaired by Assemblymember Byron Sher. The staff analysis for September 13 hearings on the bill argued that the CEQA exemption “exempts these plans from the environmental standards and public scrutiny which is part

of CEQA. DFG [the Department of Fish and Game] contends that this exemption is needed because some are using the economic/environmental balancing required by CEQA to challenge good DFG environmental work ... However, CEQA has been the means by which environmentalists have challenged DFG for inadequately protecting wildlife. This exemption insulates the DFG from public challenge on the plans.”¹²⁴

On September 13, Assemblymember Sher requested that AB 2172 be returned to the Senate for further action. In the Senate, Senator Dan McCorquodale requested, and was granted unanimous consent, to rescind the previous Senate vote passing AB 2172. This allowed him to amend the bill. McCoquodale’s amendment removed the language exempting from CEQA the preparation of natural community conservation plans.

The Senate then approved the bill 39-0, and it returned to the Assembly, where the Senate amendments were concurred to and the bill received final passage by a 63-3 vote. The three dissenting votes were cast by Assemblymembers Doris Allen, Tom Bates, and Tom Hayden. AB 2172 was approved by the Governor on October 9, 1991.

CHRONOLOGY OF SB 1248

March 14 – May 16, 1991

SB 1248 was introduced by Senator Dan McCorquodale on March 14, 1991. The original bill was intended to facilitate the transportation of water through the State Water Project for purposes of fish and wildlife habitat preservation and enhancement.

During the next two months, SB 1248, still a bill about water transfers, worked its way through the Senate. On May 16, it passed the Senate by a 35-0 vote and went to the Assembly.

September 10, 1991

On September 10, 1991, SB 1248 was completely re-written by amendments. These removed the language about water transfers and substituted language linking the bill to AB 2172, the NCCP Act.

1) The bill was amended to make it “unlawful to alter, convert, or modify habitat identified by the department as essential to the continued viability of any species located within an area designated by the department as a significant natural area ...” At the time, this increased level of protection for “Significant Natural Areas” was being considered by the administration as a possible remedy to the question of how sensitive species and habitat would be protected during the interim period while NCCP plans were being prepared and were not yet in force. This was particularly important given that the administration was seeking to defer or avoid entirely the listing of additional species within the NCCP planning area under CESA.

2) The bill as amended proposed several additions to the NCCP framework of AB 2172. Under SB 1248, NCCPs would have the following additional features. These would become effective if AB 2172 were passed:

- The planning agency would have to conduct at least one noticed public hearing and provide written notice to all significant environmental issues presented.
- No plan could be approved “if implementation of the plan will adversely impact any threatened or endangered species listed under federal or state statute.”
- No plan could be approved “if the cumulative effects of the plan, as implemented, will jeopardize the continued existence of any threatened or endangered species, or result in the destruction of, or have an adverse impact on, habitat essential to the continued existence of those species.” The language defined “cumulative effects” as incremental effects of the plan that are considerable “when viewed in connection with the effects of past projects, the effects of current projects, and the effects of probable future projects.”

3) The bill introduced new enforcement provisions and legal sanctions.

- Any violation of this statute that resulted in the loss of identified species or their habitat within a significant natural area would be a misdemeanor punishable by a fine of up to \$5,000 or imprisonment up to one year, along with a civil penalty of up to \$25,000 for each violation.
- The Department of Fish and Game was authorized to retain or appoint legal counsel to prosecute civil actions, and authorized the Department to abate “all conditions and activities which threaten to, or have resulted in, the loss of any threatened or endangered species ... ”
- The bill declared any act injurious to state’s wildlife resources to be a “public nuisance” that may be remedied by injunction, abatement, or civil action by the Department. It also made failure to abate such a nuisance a misdemeanor.

January 23, 1992

The bill was placed on inactive file at the request of Assemblymember Kelley.

May 27, 1992

The bill was re-referred to the Committee on Water, Parks and Wildlife.

June 3, 1992

On June 3, 1992, the bill was amended again. The main change was to add provisions about the funding of the NCCP program. The language appropriated \$1.4 million from the Environmental License Plate Fund for the program, subject to several provisions:

- At least 70 percent of the acreage on nonfederal habitat lands would have to be subject to agreements to prepare and implement NCCP plans. These plans would be subject to agreements to implement mitigation measures identified by the Department of Fish and Game and U.S. Fish and Wildlife Service “that do not undercut the

Natural Community Conservation Planning Act's long-term goal of habitat protection [and] commitments to implement the plan.”

- A majority of cities in the coastal sage scrub habitat area in at least two counties would have to have signed agreements pursuant to the NCCP Act.
- The Department of Fish and Game had established a process for participants to fully reimburse the department for the actual costs of the review and approval process.
- The Director of the Department of Fish and Game had established a special enforcement unit to enforce the agreements and the plans.
- Legal authority existed to “prohibit the destruction of coastal sage scrub on lands not subject to a natural communities conservation plan or on lands that are not protected in a natural reserve or are not subject to a habitat conservation plan that will provide a level of protection equivalent to a natural communities conservation plan.”

July 21, 1992

Senator McCorquodale again amended SB 1248 on July 21, 1992. This version essentially gutted and re-wrote the bill. It deleted virtually all the language from the previous version, including the legislative findings, the provisions on enforcement, the prohibitions of habitat alteration and sanctions for harming species, and the \$1.4 million appropriation for the NCCP program.

The new bill contained findings that declared that “Nothing in [the NCCP] planning process is intended to alter, limit, or replace the application of the California or federal endangered species acts or other wildlife protection measures. The goal of the planning process under this act is to prevent any net loss of coastal sage habitat acreage or values.” The new bill also required the following:

- The Department of Fish and Game was to establish a planning area for a “one-time pilot program” to prepare a natural community conservation plan for Los Angeles, Orange, Riverside, San Bernardino, and San Diego counties.
- Signatories to an NCCP agreement would have to agree to a moratorium on disturbance of coastal sage scrub.
- NCCP agreement signatories would also have to conduct surveys according to NCCP Scientific Review Panel survey guidelines.

The bill also contained provisions with regard to the CEQA environmental review process. It would have established that any activity within the NCCP planning area would be considered a discretionary project. Any activity on land in the planning area that was not enrolled in the NCCP plan would be considered to have a “significant impact on the environment” if it disturbed coastal sage scrub. Projects impacting coastal sage scrub on lands not enrolled in the NCCP program would be required to make changes to “avoid or

lessen the project impacts on coastal sage scrub based upon the recommended mitigation measures proposed by the Department of Fish and Game unless the lead agency determines that the mitigation measures are unfeasible.” The burden of proof for showing infeasibility would rest with the lead agency and project proponent.

These CEQA-related provisions would sunset on January 1, 1995.

The bill also specified that “any interested person in the natural community conservation planning process has standing to enforce the terms of the voluntary enrollment and this section.”

August 10, 1992

These amendments by the author again substantially re-wrote SB 1248. The new version began with a set of findings and declarations. It began by stating that the NCCP process was not intended to supersede the state or federal endangered species acts or other wildlife protection measures. It then listed goals and objectives of the NCCP process. Many of these were similar to the language in AB 2172, for example, the language stating that the program was to resolve conflicts “between the need to protect the state’s wildlife heritage and the use of natural resources for economic development.” Others findings added more specificity about the purposes of the program. For example, it declared that the goals and objectives of the NCCP process included:

- Providing an early planning framework for proposed development projects “so as to eliminate threats to fish or wildlife species that might otherwise require listing under the California Endangered Species Act ... and to ensure, consistent with that planning, that the department will be able to authorize the taking of any fish or wildlife if so listed.”
- “To preserve and enhance the long-term viability of the ... coastal sage scrub ecosystem... ”
- “To promote multispecies management and conservation, to promote the conservation of broad-based natural biological communities and species diversity, and to provide a procedure for identifying and satisfying appropriate mitigation requirements for the impacts of projects and planned projects on fish and wildlife.”

In addition, the goals and objectives included providing “criteria for ecosystem functions,” including the following:

- Sufficient populations of target species designated by the Department, including the California gnatcatcher, the Coastal cactus wren, and the orange-throated whiptail lizard, “in order to ensure their existence.”
- “Appropriate open space and habitat connectivity to ensure species dispersal across the region.”
- “Protection of a wide range of floral diversity.”

- A full representation of the range of environmental gradients, including latitude, distance from the coast, elevation, slope, aspect, soil type, vegetation subcommunities, and disturbance regimes.”

The revised bill contained language authorizing the issuance of incidental take permits for any species or subspecies identified in an NCCP or HCP. However, it restricted this to the coastal sage scrub effort, which it identified as “a pilot program to test the efficacy of the process of this chapter.” For listed or candidate species under CESA, or species that “may become a candidate for listing,” the incidental take could only be authorized “if the approved plan addresses the conservation of the species and its habitat as if the species were listed under the California and federal endangered species acts.”

The incidental take language also provided authority for the state to offer developers and landowners to receive greater certainty about the regulatory process: “subject to the provision for significant and unforeseen circumstances in the approved plan, no further mitigation shall be required by any public agency for the impact of any project on any species or subspecies that is the subject of a natural community conservation plan approved by the department after public hearing ... ”

The bill contained language relating to the CEQA process. It declared that any activity affecting more than one-half acre of coastal sage scrub would be considered a discretionary project. In addition, any activity within the planning area on land not enrolled in an NCCP plan affecting more than a half-acre of coastal sage scrub would be considered a “significant impact” on the environment. Any project with a significant impact on coastal sage scrub would be required to mitigate any impacts “that could significantly prejudice the development of the natural community conservation plan.” Mitigation measures found to be infeasible by the lead agency could be rejected, but only with a finding that the project would “not unreasonably prejudice the preparation of the applicable natural community conservation plan” The bill also required the Secretary of the Resources Agency to determine, by March 1, 1993, whether the NCCP pilot program met the requirements of Fish and Game Code Section 21080.5 to be certified a functional equivalent of the CEQA environmental review process.

The bill retained a January 1, 1995 sunset for the CEQA-related provisions.

It included a provision that any violation of an NCCP agreement would result in the termination of the agreement after 60 days notice to the landowner. It also stated that any person in the planning process could notify the Department of violations of permits or agreements, and that the Department must investigate and enforce the terms of these permits or agreements.

August 12, 1992

On August 12 SB 1248 went through a last set of amendments. Several of these amendments tempered the language about conservation in the findings and declarations.

- The previous goals and objectives had said that NCCP plans were meant to “sustain and restore those species and their habitat” necessary to maintain the continued viability of biological communities affected by growth and development. This wording was changed to “sustain and enhance.”
- The earlier version stated that an objective of the NCCP process was to “avoid, minimize, and compensate for the impacts” of projects on fish and wildlife. This was changed to read “more comprehensively address the impacts” of projects on fish and wildlife.
- The goal to “preserve and enhance the long-term viability” of the coastal sage scrub ecosystem was changed to “sustain and enhance.”

Other amendments were minor modifications or clarifications. For example, the previous version required that projects impacting more than one-half acre of coastal sage scrub be considered discretionary projects. The new bill restricted this requirement to projects requiring a permit from the city or county.

August 17, 1992

The Committee on Water, Parks and Wildlife held a hearing on SB 1248 but made no recommendation. The bill died on November 30.

Endnotes

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