

**DRAFT**

**SONORAN DESERT CONSERVATION PLAN  
STEERING COMMITTEE**

**EDUCATION SESSION # 1**

**May 22, 1999 (9:00 - 11:30 a.m.)  
Arizona-Sonora Desert Museum (Gallery)  
2021 N. Kinney Road / Tucson, Arizona, 85743**

---

**CONSERVATION PLANS,  
THE ENDANGERED SPECIES ACT,  
AND THE CONSTITUTION**

**The Origins of Habitat Conservation Plans  
Gail Kobetich, Office of the Secretary of the Interior**

---

**THE ORIGINS OF HABITAT CONSERVATION PLANS  
Gail Kobetich, Special Assistant to the Secretary of the Interior**

The idea of developing a process that would establish a method for conserving native flora and fauna and the habitats on which they depend evolved from the confrontation of urban expansion and the provisions of the Federal Endangered Species Act.

That this confrontation first developed in California should not be a surprise since the rapid rate of growth of the human population in many areas of California was consuming millions of acres of habitat occupied by a host of species which often existed nowhere else. California was rapidly losing many of its endemic species and unique habitats.

However, with the passage of the Federal Endangered Species Act in 1973 and the subsequent listing of many of California's endemic species, the stage was set for a confrontation between urban development and the provisions of Federal Law.

The Federal Endangered Species Act clearly states that anyone subject to the jurisdiction of the United States Government cannot take a species listed as endangered or threatened unless that take is authorized by a provision in the act.

The 1973 Endangered Species Act, as it was originally written, did not have a process that would allow for the take of a listed species unless the activity being proposed was a project of, or needed a permit from the Federal Government.

Federal agencies could use a consultation process with the United States Fish and Wildlife Service that would allow the project to go forward, even if it took an Endangered Species as long as the agency complied with the list of conditions imposed by the Fish and Wildlife Service. There was no similar process for the private sector.

In 1982, in San Mateo County, California, a developer began planning for a massive housing project around and on San Bruno Mountain, the last large remaining open space in the area. San Bruno Mountain contained habitat for a number of endemic species, two of which were listed as endangered under the provisions of the Endangered Species Act.

The project's proponent soon discovered that they would be subject to severe penalties of the act if they proceeded with their project because their activity would take some of the endangered species; in this case, two butterflies. Rather than giving up on their project or alternatively violating the Act they in concert with local environmentalists, approached the Fish and Wildlife Service and proposed a solution not unlike the consultative process allowed Federal agencies under the Act.

The solution being proposed would allow a take of a listed species providing a project proponent developed a plan that would protect the listed species, and that any take would be incidental to and not the purpose of the otherwise lawful activities.

Since the land development process in California is largely a local jurisdictional process, governments of the cities around San Bruno Mountain and San Mateo County were involved in and contributed to the development of the language that would guide this and subsequent efforts.

This language was amended into the Endangered Species Act and it established standards that a plan would have to meet before the Fish and Wildlife Service could approve it and issue a permit for the take of a listed species.

The intent of this new process was to produce a plan that would cover all or a significant portion of a species range and would need to have clearly defined conservation goals and process requirements. Also, it quickly became apparent that efficiency would be served if permits were given to jurisdictions rather than to individual developers, although permits for single development could still be issued.

By issuing permits to jurisdictions rather than to individual developers there would not be a need to do a habitat conservation plan every time another development was proposed. The Fish and Wildlife Service would delegate its take authority to the local jurisdiction as long as the local jurisdiction enforced the provisions of the Habitat Conservation Plan when permitting development.

The provisions in the plan required that preservation of a listed species must be assured by actions available to the jurisdiction through their land use authorities. Generally, this resulted in habitats being set aside in preserves that were managed.

Developers generally had to pay a significant part of the cost of the preserve and the management, a cost that they accepted because this innovative process provided them with assurances that their projects would not be stopped by the Endangered Species Act.

What was the significance of this planning process?

It has been truly significant because in order to avoid violation of the Endangered Species Act it has given jurisdictions the impetus and the need to control land use over which they have authority in order to obtain incidental take permits. It has allowed the jurisdictions to use all of their land use decision making tools to be brought to bear on the issue of conserving listed species and their habitats while accommodating development.

For those jurisdictions that have listed species within their boundaries, they now have the opportunity to develop a program meeting the standards for species protection in the Endangered Species Act and that regulates growth and development in relation to these standards. The basic provisions of the plans that have been completed and approved have been to allocate between listed species and development where each would occur and what percentages and configurations of remaining open space each would occupy. As a part of the basic elements of these plans, the permit recipients, in this case the jurisdictions, have to commit to the implementation of the plan.

In negotiating components of a Habitat Conservation Plan and the means to implement them, local jurisdictions often discover that they must change the ordinances governing how and what they permit and quite often, amend their general plans.

Some jurisdictions have inserted new elements into their general plans that raise the consideration of conservation of habitat and species to the same level as other major elements in the general plan such as transportation, etc.

The ability of local jurisdictions to change ordinances and amend their general plans in order to implement Habitat Conservation Plans has been one of the more significant developments in the efforts to protect listed species.

In the past, many local jurisdictions gave the protection of species and habitats only passing consideration, if at all. The result has been the passing of laws such as the Federal Endangered Species Act and other statutes at the state level designed to provide protection to species and habitats in order to correct this lack of responsibility at the local level.

The passage of tough federal and state laws, however, has forced local jurisdictions to realize that they must plan for the conservation of habitats and the species that are dependent on them if they want development to proceed and do not want to violate the provisions of these laws. The incidental take provisions of the Federal Endangered Species Act have given these local jurisdictions the way to do this.

This is having a truly positive effect on the way in which local jurisdictions confront of contingent between development and conservation. In those jurisdictions that have adopted this approach, conservation of natural resources is no longer an afterthought but a major element that has to be considered during the regular land use permitting process.

This is a profound change in the way these local jurisdictions treat the conservation and natural resources and if adopted, more widely promises to correct the lack of action in the past. An essential element of this process is the commitment to implement the plan after is it completed.

Local jurisdictions must not rely on the take provisions of Section 9 of the Endangered Species Act as the enforcement mechanism, especially if the local jurisdictions have requested coverage for unlisted species and plants.

Another impact of the Habitat Conservation Planning process that has resulted in a fundamental change in the manner in which conservation of natural resources is accomplished at the local level regards the creation of partnerships. Before violation of the Endangered Species Act became a real possibility for many jurisdictions in rapidly urbanizing areas, Federal resource agencies were rarely involved in the land use planning process. Even state resource agencies were relegated generally to minor roles. With the advent of Habitat Conservation Planning, however, both state and Federal resource agencies have played a much more important part.

The two basic reasons for this are that the Federal Endangered Species Act is regulatory and must be complied with, which automatically gives the Federal agencies leverage in the process, and secondly, resources available to local jurisdictions are generally not enough to implement the provisions in the Habitat Conservation Plan. Therefore, this has necessitated the formation of partnerships among Federal, state and local governments that had not occurred before.

The local jurisdictions get the benefit of resources available to the Federal agencies to implement their Habitat Conservation Plans such as purchasing and managing preserve systems. The Federal agencies get the benefit of local land use planning methods to implement their responsibilities under the laws.

In addition, local jurisdictions can establish other protective measures for species in their habitats in addition to establishing their preserves. One of the more important of these methods is zoning. It can protect slopes, waterways, specific habitat types and wildlife corridors.

In addition to partnerships among the governmental agencies involved in Habitat Conservation Planning, the private sector also becomes, in most instances, part of the mix. Private land trusts can play an important and critical role in purchasing land for a preserve system. Private land managing entities can manage habitats that governmental agencies at any level cannot easily oversee. Private industry, in the environmental community, play a pivotal role in helping to negotiate the plan and by supplying innovative ideas and resources to help with its implementation.

The formation of partnerships to protect the natural resources in urban areas in a manner not seen or contemplated before has been one of the most beneficial aspects of habitat conservation planning.

Another important aspect of the Habitat Conservation Planning process is the issue of multi-species coverage under one plan. This is a common sense issue: if there are more than one listed species in a planning area then it is much more efficient to include protective provisions for them in one plan rather than doing a separate plan for each.

This generally has been easy to do, however, a controversy arose early in the development of the Habitat Conservation Planning process of how to treat species that were not listed under the provisions of the Federal Endangered Species Act. Some of these species were

candidates for listing and might need to be listed in the near future if protective measures were not instituted. Fortunately, when Congress amended the Endangered Species Act in 1982, they in a special report, specifically stated that if non-listed species in a planning area were addressed as if they were listed, then there would be no need to do an additional plan if the species were later listed. For many plans then, a long list of species were addressed and coverage was provided to listed as well as non-listed species.

This also has been a major innovation in this type of planning effort and raises the protection of unlisted species and plants to the same level as listed animals. It also enhances the development of HCP's if a local jurisdiction is willing to impose mitigation and avoidance requirements for these unlisted species. In some planning areas, the area under consideration has crossed jurisdictional boundaries which has necessitated imaginative solutions to address these additional complexities and has allowed for planning on a larger regional scale. Generally the answer has been to draft an umbrella document under which each jurisdiction in a planning area can submit their Habitat Conservation Plan providing it does not violate the provisions of the umbrella document.

There are usually two major phases in the development of Habitat Conservation Plans.

The first phase considers a species for which coverage is being requested and entails a collection and analysis of all available data. This includes all information that will be of use in designing a preserve system and developing special conservation measures such as closures during nesting or flowering seasons.

The second phase consists of evaluating information provided from the first phase and then devising methods to implement the plan. It is during this phase that adjustments are made to the plan in relation to socioeconomic and political needs and therefore, because of these realities, be a difficult process.

As the plan nears completion and the major provisions have essentially been agreed to, an implementing agreement is drafted that is, in essence, the contract that all parties who have responsibilities under the plan will sign, this is a legally binding agreement.

Once a Habitat Conservation Plan and pertinent documents are completed the major work of implementation begins. Since it is impossible to include in a plan all the possible contingencies that might arise, the plan and the other documents will continually require interpretation and clarification. The initiative here, after the completion of a plan can be very difficult and all parties interested in the success of the effort must be ready and willing to provide positive help to solve these problems. It helps to have some of those individuals who were instrumental in negotiation of the plan to be available for consultation during the early phases of the implementation, and regulatory agencies must maintain involvement in the implementation because they must assure compliance with the permit.

And finally, a Habitat Conservation Plan is not about just saving an Endangered Species, although this a rational for its development, but also about improving the overall quality of life for humans. The preserve systems that are established as the result of the planning process will allow for the conservation of species and vegetation communities, while at the same time preserving uncluttered hillsides, keeping streams flowing and clean and providing open space. An important issue is that the local citizenry must have access to the preserve system. When developing the Habitat Conservation Plan, consideration for this human use must be included,

otherwise, use will occur that will be haphazard and detrimental to the values for which the preserve was established. It is essential that the management of human use be considered as an integral part of the plan.

In summary then, the Habitat Conservation Planning process amended into the Endangered Species Act in 1982 not only provides a vehicle for preservation of species and habitats but also can have a major, positive effect on the overall quality of life for the citizens in the planning area.

In the packets of information provided to you by the County, I have included a list of items that can be expected from this type of planning process and if you will look in your book, this list is included in there and it is essentially a condensation of my comments.