

Sunday, December 21, 2003

Last modified Saturday, December 20, 2003 9:44 PM PST

Habitat protection plan suddenly in question

By: DAVE DOWNEY - Staff Writer

After battling for years over how to balance demand for new houses against needs of endangered species, builders and environmental groups are in danger of losing a proven tool for resolving conflicts: the habitat conservation plan.

A federal judge in Washington, D.C., has thrown out a key rule that provided powerful incentive for warring parties to come to the table and craft deals.

That's key for San Diego County, which has more endangered species than any other county in the nation, in large part because of its diverse ocean-to-desert wildlife zones and enormous development pressures.

It is important as well for neighboring Riverside County, one of the last remaining large swaths of open space in Southern California, and even Riverside is exploding with urban development.

Origin of the species act

Congress authorized the crafting of habitat conservation plans in 1982, when it amended the Endangered Species Act.

Generally speaking, such plans carve up undeveloped portions of rapidly urbanizing counties such as San Diego and Riverside. They save land for preservation of wildlife, then open other territory for neighborhoods and shopping centers.

The federal law protects rare animals and plants. The 1982 law allows landowners, builders and government agencies to destroy some habitat, resulting in the loss of some animals and plants, as long as they formulate plans to prevent the species themselves from becoming extinct.

Some plans were crafted after the law's passage. But it took a 1994 federal rule called "No Surprises" to really get the ball rolling.

That is because leery landowners, agencies and builders became more willing to give up land for wildlife preserves when promised there would be "no surprises" years later. Under No Surprises, if biologists determine an adopted plan is not enough to save a rare critter, the government must pay the unforeseen extra cost of retooling it, not property owners.

No more surprises

"It's a guarantee that, once they've given up 75 percent of their land, they won't be asked to give up more land or more money," said Jerry Livingston, attorney for the San Diego County Building Industry Association.

But some environmental groups see the rule as an affront to the protections meant to be provided by the Endangered Species Act.

In 1996, a group called the Spirit of the Sage Council challenged the rule, charging that the guarantee dismantles part of the law's protective shield. On Dec. 11, bringing to a close a seven-year legal battle, U.S. District Judge Emmet G. Sullivan voided No Surprises, saying the federal Fish and Wildlife Service did not properly provide for public comment in developing the rule.

What the judge did not do is decide whether the substance of the rule violates the law.

Cloudy days

And, so, experts on all sides are uncertain where the ruling will ultimately lead. Some say the No Surprises guarantee could be lost forever. Others say the judge was making sure the wildlife agency adopts the rule correctly.

In any event, said David Smith, general counsel for the Building Industry Association of Southern California, "There is now a significant cloud over habitat conservation plans."

Among those are the 20,000-acre North County cities conservation plan approved this year by the San Diego Association of Governments and the 150,000-acre western Riverside County plan adopted by the Riverside County Board of Supervisors. In both cases, some cities have yet to sign on. And the Fish and Wildlife Service has yet to issue so-called "incidental take permits" allowing for the destruction of habitat fragments in exchange for creation of a system of preserves.

"Unfortunately this lawsuit has been very counterproductive," said Dan Silver, the executive director for the Endangered Habitats League, a moderate environmental group based in Los Angeles that helped craft the Riverside County plan.

"It has discouraged agencies from developing habitat conservation plans," Silver said. "They (plaintiffs) are actually making it less likely that conservation will occur. And that doesn't benefit the wildlife."

Chances are

The Spirit of the Sage Council sharply disagrees.

Leeona Klippstein, the executive director for the North Carolina-based group, said the court ruling increased the chance that habitat conservation plans will make sure rare birds, butterflies and toads do not disappear. The decision does not mean agencies can no longer develop conservation plans, she said.

That may be true, but it does remove the incentive for landowners to step forward to participate in such plans, said Smith, the building industry lawyer. Without the guarantee, many would not put land into conservation. They would wait until they actually develop property, then strike a deal with the Fish and Wildlife Service directly.

Smith said the result would be a return to the piecemeal approach to conservation of earlier years, when preserves were largely scattered and disconnected.

Whether to appeal

Ultimately, Silver said, the government could lose the opportunity in many counties to assemble ecosystemwide preserves with large chunks of land that are connected by corridors along which wildlife can travel.

It is unclear whether the Fish and Wildlife Service will appeal the ruling.

"At this point we are waiting for guidance from Washington, D.C.," said Jane Hendron, Fish and Wildlife spokeswoman in Carlsbad.

Smith, who also serves as general counsel for the Building Industry Legal Defense Foundation, a defendant in the lawsuit, said the foundation also had not decided as of late last week whether to appeal.

Underlying the lawsuit is a sharp dispute over the validity of guarantees.

A deal is a deal

San Diego County Supervisor Pam Slater, who helped direct the 170,000-acre central and southern San Diego County conservation plan adopted in 1997, said guaranteeing a landowner won't have to commit more later is a matter of fairness.

"We have been very, very adamant that a deal is a deal," Slater said. "How can you say, a deal is a deal, kind of? You can't go back on your word."

But David Hogan, San Diego spokesman for the Tucson, Ariz.-based Center for Biological Diversity, which supports the suit, said No Surprises advocates are missing a point: The Endangered Species Act wasn't meant to treat animals' survival like a business deal.

"We've always had concerns about the policy," Hogan said. "No Surprises is an anti nature policy designed, really, to relieve developers of their conservation obligations in

the event that endangered species continue to decline."

Timing is everything

Hogan said federal wildlife agencies should have the ability to retool plans if they discover that a rare bird, for example, is not going to make it after all. And he said taxpayers should not have to shoulder the cost.

However, by the time biologists discover a plan wasn't working, it would probably be too late to save the species anyway, said Silver, the Los Angeles environmentalist. Decades would, in all likelihood, have passed and the area paved over, he said.

What the controversy points out more than anything else is the need to write a good plan upfront, Silver said.

The No Surprises rule is an example of where moderate and more-aggressive environmental groups part company.

"Fundamentally this is about people who don't like HCPs (habitat conservation plans) and have very big egos," Silver said.

Taking sides

Klippstein of the Spirit of the Sage Council countered by suggesting that the Endangered Habitats League is a pro-development group on the side of builders and landowners.

"We've never considered them an environmental group," Klippstein said. "And we've never been a part of their coalition. If they're a green group, they're a pretty pale green group."

Klippstein said there is no need to provide an incentive for developers to come to the table in the first place.

"Whether you have No Surprises or not, you have the law," Klippstein said. "And the law says you need to protect endangered species."

"You know what? I don't need an incentive to stop at a red light," she said. "It's the law. We don't get incentives to abide by the law. Why should corporations get incentives?"

Contact staff writer Dave Downey at (760) 740-3529 or ddowney@nctimes.com.