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ABSTRACT

Lawsuits forcing states and local governments to enforce the Endangered Species Act in lieu of federal regulation have met with surprising success despite constitutional, statutory, and regulatory obstacles. Instead of directly punishing individuals who cause problems for endangered species, environmental interest groups are often suing states and municipalities, claiming state and local regulations are too lenient and therefore "cause" individuals to harm endangered species. This article concludes that the vicarious liability jurisprudence is too severely flawed to maintain vitality. The statute and its implementing regulations do not support it, the causation is too tenuous to provide standing, and the federalism jurisprudence forbids it.

INTRODUCTION

Within the last decade, three federal circuit courts—the First, Ninth, and Eleventh—have held that local and state governments violate the Endangered Species Act (ESA) if their regulations do not sufficiently restrain third-party actions that threaten endangered species. Because this imposes liability on governments for the criminal actions of individual constituents, the term "vicarious liability" is applied to

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describe the doctrine.[1] Courts have sought to remedy those "violations" not simply by striking down state and local statutes, but by requiring state and local governments to perform actions ranging from convening working groups to closing beaches. In light of the contemporary standing and federalism jurisprudence, as well as the structure of the statute and its implementing regulations, it is startling that this proposition has fared so well in federal courts. Examination of these doctrines, the statute, the regulations, and administrative interpretations of those regulations reveals that none of them offer a basis for allowing the federal government to hold state and local governments liable for the criminal acts of their constituents.

This article explores the potential weaknesses of the governmental vicarious liability jurisprudence under the ESA, especially in its application to state and local governments. After a summary of the doctrine's development, the article begins by discussing the statutory structure of the ESA, a structure that does not lend support to the vicarious liability jurisprudence. The regulatory interpretation of the Act and the informal guidance issued by federal agencies are then explored; very little support for vicarious liability exists here either. Finally, the article discusses constitutional obstacles to vicarious liability, including issues of standing (both injury in fact and redressability) and issues of commandeering.

HISTORY OF THE DOCTRINE: THE EMERGENCE OF VICARIOUS LIABILITY

The doctrine of vicarious liability has its roots in cases that are not strictly about "vicarious" liability at all, because no third-party action was necessary to cause harm to the species. Instead, in the two decisions that are often cited as the origins of the theory of vicarious governmental liability under the ESA, the government's own affirmative actions taken as part of management of public lands were at issue. In *Palila v. Hawaii*, the State managed non-indigenous wild sheep and goats on a state-owned preserve, and, as a result, the animals consumed much of a key food supply for an endangered species. The Ninth Circuit held this to be

1. J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, 16 NAT. RESOURCES & ENV'T 70, 70 (2001). The term vicarious liability is used both in civil tort and in criminal law; in this context, however, it is better understood as devolving from the criminal law. As LaFave's treatise notes, vicarious liability is most often imposed in the criminal realm on those who have not injured anyone directly for the purpose of imposing strict standards of performance on activities that, if improperly conducted, pose a danger to the public. WAYNE R. LAFAVE, CRIMINAL LAW § 3.9 (3d ed. 2000). The Supreme Court has never passed directly on the constitutional limits of such liability. *Id.* § 3.9(c).

a "taking" of that endangered species.[2] Similarly, in *Sierra Club v. Yeutter*, the Fifth Circuit found that the Forest Service's decision to allow harvesting of entire sections of national forest lands had the effect of harming an endangered species of woodpecker. The decision held that the Forest Service both "took" the woodpecker and violated its duties to consult with other federal agencies and to conserve endangered species.[3]

The next major circuit court step toward vicarious liability came in *Defenders of Wildlife v. Environmental Protection Agency*, where the Eighth Circuit held that the agency's decision to continue to register the pesticide strychnine (therefore making its use legal) caused harm to endangered species and thus constituted a taking of those endangered species.[4] This case was the first circuit court case to make the jump from liability for governmental actions taken as the owner and manager of public property to liability for third-party actions (in this case, the decision by farmers and others to use the pesticide). Because the agency was found liable simply for making something legal, *Defenders of Wildlife* became the key precedent for later cases finding vicarious liability.

The first hint that *Defenders of Wildlife* would be extended to cover state and local governmental regulatory programs came in *Ramsey v. Kantor*, a Ninth Circuit opinion withholding summary judgment on a claim arguing that states that regulated fishing could be liable for takes of endangered species unless such state regulations were in compliance with a federal permit allowing such takes.[5] Within the next two years, both the First and the Eleventh Circuits would find that state or local governments had taken species via regulatory regimes designed, at least in part, to protect endangered species.

The first of these two cases, *Strahan v. Coxe*, held that Massachusetts' regulation of its fishing industry constituted a take of endangered whales because it permitted the use of gillnets and lobster pots.[6] No users of nets or pots were charged as co-defendants for their

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2. Palila v. Haw. Dep't of Land & Natural Res., 639 F.2d 495, 498 (1981) (*Palila I*). The reasoning of *Palila I*, most particularly on the issue of causation, was specifically rejected by Justice O'Connor in a 1995 concurring opinion. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 713–14 (1995). However, the majority of the Court, in describing the *Sweet Home* circuit decision as a direct conflict with *Palila I*, overruled the lower court decision in *Sweet Home*, thus indicating that *Palila I* is good law. *Id.* at 695.

3. 926 F.2d 429 (1991). Deforestation of breeding habitat by a private corporation would likewise be a taking under the Act. Boise Cascade Corp. v. United States, 296 F.3d 1339 (Fed. Cir. 2002). However, the ability to bring cases similar to *Yeutter* today is called into question by the Fifth Circuit's focus on the economic interests of parties as providing standing in *Sierra Club v. Espy*, 18 F.3d 1202 (1994).

4. 882 F.2d 1294 (1989).

5. 96 F.3d 434 (9th Cir. 1996).

6. 127 F.3d 155 (1st Cir. 1997).

actions that, under this reasoning, were violations of the Act.[7] The court ordered the State to study ways to change its regulations to offer the protection to the whales that the ESA indicated was proper.[8]

The second case, *Loggerhead Turtle v. County Council of Volusia County,* held that a Florida county that promulgated beach lighting regulations could be liable for takes resulting when artificial light harmed endangered sea turtles.[9] Although the County's regulation had been enacted partly to protect beach turtles, the Eleventh Circuit found the County could still be liable for their failure to prohibit activities that might harass sea turtles.[10] Both *Strahan* and *Loggerhead Turtle* are analyzed extensively throughout this article.

ISSUES OF STATUTORY CONSTRUCTION: WAS VICARIOUS LIABILITY INTENDED?

The first section of the ESA explicitly states that the Act is based on two "polic[ies] of Congress": one that applies to the federal government and one that applies to state and local governments. For the federal government, the Act states that "all Federal departments and agencies shall seek to conserve endangered species...and shall utilize their authorities in furtherance of the purposes of [the Act]." The second policy is also issued in the form of a declaration to federal agencies, requiring them to "cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."[11] In other words, by its own language, the Act was intended to establish a duty for federal agencies to act affirmatively to preserve species and to require those federal agencies to cooperate with state and local governments.[12]

These dual purposes, the creation of an affirmative duty of action on the part of the federal government to preserve species and the establishment of a cooperative relationship with the states, are reflected throughout the Act. The first purpose of the Act is reflected in provisions

7. *Id.*

8. *Id.*

9. 148 F.3d 1231 (11th Cir. 1998), *cert. denied,* 526 U.S. 1081 (1999).

10. *Id.*

11. 16 U.S.C. § 1531(c) (2000). "'Conserve'...mean[s] to use...all methods and procedures which are necessary to bring any...species...to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id.* § 1532(3).

12. The interpretation of the statute that creates an affirmative duty for the federal agencies to take affirmative action to assist species (as opposed to a requirement to merely refrain from harm) also has support in the legislative history of the ESA. For instance, the House Committee Report noted that the Park Service might be required to feed grizzly bears in order to fulfill its duties under § 1536. H.R. CONF. REP. NO. 93-412, at 14 (1973).

laying out new responsibilities or powers for the federal agencies charged with implementing the Act. Secretaries of those agencies were given the mandatory duty to issue protective regulations to protect threatened species[13] and to make prompt regulations to prevent a significant risk to endangered species.[14] They were also given the power to issue emergency regulations with immediate binding effect to protect species.[15] Courts have generally found a strong basis for the affirmative nature of the commands to the federal agencies. For example, one court examining the provisions of the Act titled "federal agency actions and consultations"[16] said that the provisions' "affirmative nature...is beyond dispute."[17]

The second purpose of the Act, to promote cooperation between federal and state governments, is also reflected in the Act's structure. While the Act regulates the acts of state and local governments, it does so only to the extent that it regulates other entities, notably the federal government.[18] Moreover, cooperation is stressed in those provisions that set standards for government-to-government relationships in carrying out the Act. The regulation of state and local governments mirrors that of the federal government in at least three provisions: allowing citizen suits against governmental entities;[19] requiring adherence to federal regulations;[20] and defining a "person" such that a federal, state, or local government can be found in violation of the Act's prohibitions (*e.g.*, the prohibition against taking endangered species).[21] The Act directs the federal government to "cooperate to the maximum extent practicable" with state governments[22] and explicitly allows states to impose more stringent protections than the federal regulations do.[23] The Act also

13. 16 U.S.C. § 1533(d) (2000).
14. *Id.* § 1533(b)(2)(C)(iii).
15. *Id.*
16. *Id.* § 1533(b)(7).
17. Nat'l Wildlife Fed'n v. Nat'l Park Serv., 669 F.3d 384 (D. Wyo. 1987). However, in a caution against using phrases like "beyond dispute," other courts have held that this section does not require federal agencies to take affirmative steps to aid species. *See, e.g.*, Leatherback Sea Turtle v. Nat'l Marine Fisheries Serv., No. 99-00152 DAE, 1999 WL 33594329, at *13 (D. Haw. Oct. 18, 1999).
18. On the Act's face, the regulation is often identical for private parties. Shannon Petersen, *Endangered Species in the Urban Jungle: How the ESA Will Reshape American Cities*, 19 STAN. ENVTL. L.J. 423, 440 (2000).
19. 16 U.S.C. § 1540(g)(1)(A) (2000).
20. *Id.* § 1535(f).
21. *Id.* §§ 1532(13), 1538.
22. *Id.* § 1535(a).
23. *Id.* § 1535(f).

provides that enforcement authority can be shared with states "by agreement, with or without reimbursement."[24]

It is against this statutory background that vicarious liability cases, notably *Strahan v. Coxe* and *Loggerhead Turtle*, must be viewed. In these cases, the courts appear to graft the federal government's affirmative duty to act to protect endangered species onto state and local governments that choose to regulate in areas that might affect endangered species. In *Strahan*, the injunction upheld by the First Circuit required the State to convene a working group in order to consider changes that could be made to state regulations of commercial fishing and submit to the court a proposal "to restrict, modify, or eliminate the use of fixed-fishing gear." In *Loggerhead Turtle*, the Eleventh Circuit cited the relief granted in *Strahan* as an example of the obligations that could be imposed upon states and local governments.[25]

In upholding a requirement that states regulate to protect endangered species, these cases appear to ignore the statutory structure that gave differing duties and powers to the federal and state governments. In finding parallel federal, state, and local government obligations to act affirmatively, courts have relied on the fact that the authority granted to prevent takes is found in section 9 of the Act (§ 1538), which regulates federal and state governments as well as private parties, and not in section 7, which admittedly applies to the federal government alone. Specifically, in *Loggerhead Turtle*, the Eleventh Circuit held that, since *Defenders of Wildlife v. EPA* and similar cases had relied on the anti-take provisions of the statute found in § 1538 (Section 9 of the Act) and not on federal duties documented elsewhere in the Act in finding that the government had illegally taken a species, the local government's failure to impose regulations that protected the turtle could subject it to vicarious liability.[26] Similarly, because § 1538 makes

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24. *Id.* § 1540(e).

25. At least one district court has also relied on *Strahan* to impose even more serious obligations on local governments. In *United States v. Town of Plymouth*, 6 F. Supp. 2d 81, 92-93 (D. Mass. 1998), the injunction imposed by the court stated that "[t]he Town shall continue to protect the piping plover nesting habitat" and "shall close [the beach]."

26. Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231, 1251-52 (11th Cir. 1998). The decision's use of section 9 instead of section 7-based reasoning has been cited as a probable mistake by at least one commentator. Ruhl, *supra* note 1, at 71-72. Although *Defenders of Wildlife* applied provisions in section 9 that extend to all public and private entities and prohibit a take, there is little support in the language of section 9 to indicate that Congress intended the duties of action to be equally broadly applicable. Finally, since the Supreme Court has found that, unless a "clear statement" to the contrary is made, statutes should not be read as "subject[ing] the States to liability to which they had not been subject before," courts that read into section 9 the ability to impose liability on the States for regulations in areas that have always been within their police power are running

takings of endangered species equally illegal for federal and state governments, the First Circuit in *Strahan v. Coxe* rejected the claim that vicarious liability could only be imposed on the federal government under § 1536.[27] The *Strahan* court did not address the argument that the statutory text in § 1538 (unlike other provisions in the Act) does not appear to require affirmative use of the governmental power to conserve species.

Finally, decisions by courts to impose a requirement that state and local governments pass more stringent regulations to protect endangered species contradict two other provisions of the Act. Section 1535(f) explicitly states that state statutes that permit what is prohibited by the Act are "void." There is absolutely no discussion of ordering alteration to such statutes or creating requirements that states pass statutes that do conform with the Act. This provision shows that Congress considered the problem of more lenient state regulatory regimes and selected the remedy of voiding them (as opposed to requiring states to reform them). Therefore, by fashioning a method of repair for the statute instead of merely striking it, the courts run afoul of the statute's explicit direction in these situations. Second, 16 U.S.C. § 1535(c) gives states an option to attempt to meet federal standards and share enforcement under the Act through "cooperative agreements." However, as recently as 2000, no state had taken the federal government up on such an offer.[28] Thus, state and local governments legally lack authority to share enforcement duties with the federal government under the ESA framework.

ISSUES OF INTERPRETATION: REGULATORY DEFINITIONS AND ADMINISTRATIVE GUIDANCE

Another possible source of authority for imposing vicarious liability might be the regulatory interpretations of the Act by those Secretaries designated by Congress to enforce the Act. Such support, however, is minimal at best. An interpretation of the Act that would not reach the County's regulation (or lack thereof) at issue in *Loggerhead Turtle* was put forward by the agency in charge of implementing the Act on land, the U.S. Fish and Wildlife Service (USFWS). The Act's implementing regulations lend themselves most naturally to a finding that acts classified as a take do not include inadequate state and local

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afoul of this rule of statutory construction as well. Will v. Mich. Dep't of State Police, 491 U.S. 58, 64-65 (1989).

27. Strahan v. Coxe, 127 F.3d. 155, 168 n.4 (1st Cir. 1997).

28. 50 C.F.R. § 17.3 (2002).

government regulation of third parties. Moreover, the informal guidance developed by the agency also supports this point of view. In other words, findings of vicarious liability for inadequate regulation by state and local governments not only fly in the face of the Act's design; they also contradict agency interpretations of that statute. For instance, in order to reach its decision in *Loggerhead Turtle*, the Eleventh Circuit ignored key descriptive language in the regulation at issue and then used that interpretation to disregard the guidance issued by USFWS that did not support vicarious liability.

In the Act, "take" is defined to encompass many forms of conduct, including actions that "harm" and "harass" endangered species. The interpretative regulations define "harm" as follows: "an act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[29] This definition was upheld as valid by *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.[30] The definition of "harm" therefore clearly applies to activities that have an immediate on-the-ground impact. On its face, the regulation does not appear to reach regulatory modifications (or lack thereof) that have the effect of making such habitat modification legal under state or local law. To make the inference that the regulation does reach regulatory modifications despite the fact that no language explicitly does so leads to absurd results. For instance, if having a land use regulation that insufficiently protects endangered species classifies as "harm," then states are "harming" the species illegally even if absolutely no change to the habitat results. In other words, even if no citizen of the state ever makes the habitat modification that the state regulation "allows" him to,

29. 50 C.F.R. § 17.3 (2002).

30. 515 U.S. 687 (1995). *Sweet Home* engendered a debate between Justice O'Connor (concurring) and Justice Scalia (dissenting) about whether habitat modifications that can affect a population but are not currently affecting individual animals (by destroying likely future habitat, for instance) were proximate enough to be legally understood as possessing sufficient causation. O'Connor argued in the affirmative, Scalia in the negative. For a discussion of the O'Connor/Scalia disagreement, see Duane J. Desiderio, Sweet Home *on the Range: A Model for As-Applied Challenges to the "Harm" Regulation*, 3 ENVTL. L. 725, 732–40 (1997). The majority opinion noted that the statute imposed "ordinary requirements of proximate causation," as well as the "but for" standard of legal causation, as a requirement for finding a "take." *Sweet Home*, 515 U.S. at 700 n.13. No member of the Court addressed the thornier causation question of whether the promulgation of regulations that fail to prohibit acts that may qualify as takes would be the "cause" of takes that did (or did not) occur.

and therefore no animal is ever killed or injured as a result, the State is still liable for violating the Act.[31]

A similar problem is apparent in the Eleventh Circuit's interpretation of the definition of "harass" in *Loggerhead Turtle*, which interpreted the definition extremely broadly to include enacting regulatory regimes. The regulatory definition of "harass" is as follows: "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering."[32] Like the definition of "harm," the definition of "harass" applies to actions that have an immediate on-the-ground effect. However, the inclusion of "omission[s]" as a basis for regulatory violations could be helpful for claims involving vicarious liability, since such claims may rest on the failure of the governmental body to regulate stringently enough (or at all). However, as discussed below, the structure of the definition indicates that it should not be applied solely to regulatory acts or omissions.

The sentence essentially breaks down into two parts: the definition of the acts or omissions that qualify, and the explanatory prepositional phrase that modifies this subject. In other words, the subjects of the sentence, "act" and "omission," are modified by the restrictive clause beginning with "which"; this clause further defines subjects as actions or omissions creating a likelihood of injury to wildlife. The explanatory prepositional phrase "by annoying it..." is therefore structurally intended to inform how the likelihood of injury is created. A different presentation of the same sentence (with numbers added for clarification) illustrates the grammatical structure more clearly: "an intentional or negligent act or omission which (1) creates the likelihood of injury to wildlife by annoying it (2) to such an extent as to significantly disrupt (3) normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." The understanding of the grammatical structure is especially important in *Loggerhead Turtle* because of the light it sheds on the proper understanding of the role of the word "likelihood": the increased "likelihood" is not an increased likelihood of an intentional or negligent action occurring; it is the action's

31. The Ninth Circuit has found that habitat modification does not constitute harm unless it actually kills or injures wildlife. Defenders of Wildlife v. Bernal, 204 F.3d 920, 924–28 (2000); *accord* Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1238 (9th Cir. 2001). If an alteration to habitat that could but does not harm the species is not a violation of the Endangered Species Act, a regulation that may contribute to a decision by an individual to make a habitat modification that could or could not cause injury to wildlife should not be a violation of the ESA.

32. 50 C.F.R. § 17.3 (2002).

likelihood of injuring the wildlife by annoying it. Therefore, unless a regulation, by itself, is capable of "annoying" an animal, a regulation cannot create the likelihood of injury and is therefore not a prohibited "omission" or "act."

Properly understood therefore, Volusia County would be "harassing" turtles by annoying them and therefore increasing their chance of injury by turning on publicly owned beach lighting, or for failing to turn it off. However, in order to find that Volusia County has "harassed" a turtle by failing to force an individual to turn off a private light, the same inference of the definition of "harm" would have to be made: the "omission" of a regulation prohibiting turning on a private light would have to be seen as "harassing" the turtles, even if the private individual never flicked the switch and therefore no likelihood of injury to the turtle was ever created.

Thus, in order to find that regulations, by their simple existence, could "harass," the Eleventh Circuit interpreted the regulatory definition of harass to include actions or omissions that make it more likely that third parties will commit harassing acts. In essence, the Eleventh Circuit interpreted the regulation to mean that a government can hurt turtles *even if* no individual ends up doing something on the ground that actually increases any turtle's chance of injury.[33] This flies in the face of the purpose of the regulation, which indicates that the increased likelihood of injury is only created by actually annoying the turtles. Although the members of the groups that funded the litigation might be correctly characterized as being annoyed by the lack of regulation protecting the turtles even if no lights were turned on, these individuals are not members of an endangered species that the Act seeks to protect. The plaintiff turtles themselves are unquestionably annoyed by lights, not the inactivity of governmental bodies.

The awkward reading of the regulatory definition of "harass" created a further problem that the Eleventh Circuit had to address: such an interpretation clashes with guidance issued by the USFWS.[34] The USFWS guidance states that what is being authorized in an incidental take permit "is to authorize incidental take of threatened or endangered species, not to authorize the underlying activities that result in [the]

33. As noted previously, given that the statute provides that state and local laws that offer less protection to species than the Act does are void, the Eleventh Circuit's reading of this regulation is also less compatible with the statute than the alternative presented here.

34. U.S. FISH & WILDLIFE SERV. & NAT'L OCEANIC & ATMOSPHERIC ADMIN., DEP'T OF THE INTERIOR & DEP'T OF COMMERCE, HABITAT CONSERVATION PLANNING HANDBOOK (1996), *available at* http://endangered.fws.gov/hcp/hcpbook.htm (last visited Feb. 26, 2005) [hereinafter HABITAT HANDBOOK].

take."[35] This is consistent with the requirement that plaintiffs show an actual taking of a species occurred in order to have an injury in fact;[36] those individuals who engage in conduct that could cause a take, but "get lucky" when no takes occur, are therefore non-prosecutable. The Eleventh Circuit rejected this guidance because it conflicted with the court's erroneous reading of the regulatory language, and since guidance is informal and non-binding authority, binding regulations may trump it. However, it is quite possible—and correct—to read the regulatory language to say exactly what the guidance indicates. Reading the regulation in this way would mean that the agency is being internally consistent; reading the two in opposition forced the court to assume that the agency issued guidance explaining the regulation that contradicted the regulation itself.

In spite of its rejection of USFWS guidance interpreting "harass" to exclude issuing or failing to issue regulations, the court turned to the guidance to support the proposition that lack of regulation was potentially illegal when evaluating a second claim of the County. The County claimed that because USFWS had issued a incidental take permit conditioned on regulation of lighting, they already had federal permission to issue lighting regulations without fear of liability. In finding this defense inadequate, the court predicated its argument on a distinction between "actions" and "activities." In support, the court quoted the guidance document's provision asking applicants for incidental take permits to describe "'all actions...that...are likely to result in an incidental take' so that the permit holder 'can determine the applicability of the incidental take authorization to the activities they undertake.'"[37] Based on this and on its reading of statutory language, the Eleventh Circuit therefore found a distinction between "actions" and "activities." It held that "activities" are those things permittees seek permits for and therefore can be exempted from liability by permit;

35. *Id.* at 1-1.

36. Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231 (11th Cir. 1998); United States v. Town of Plymouth, 6 F. Supp. 2d 81, 90 (D. Mass. 1998); Michael J. Bean, *The Endangered Species Act and Private Land: Four Lessons Learned from the Past Quarter Century*, 28 ENVTL. L. REP. 10,701, 10,702-06 (1998).

37. *Loggerhead Turtle*, 148 F.3d at 1243. The court's piecing together of these two phrases into a single sentence does not reflect their actual placement in the document: the first quoted segment is from a sentence on page 3-12 of the guidance; the second phrase comes from a sentence that occurs two paragraphs later. The quote in this guidance that the court rejected as contradictory to the regulation language (the phrase quoted in the paragraph above) is the topic sentence of the intervening paragraph. HABITAT HANDBOOK, *supra* note 34, at 3-12, 3-13.

however, "actions" are mitigating measures and therefore are not exempted from liability.

The language of the guidance provides little support for the Eleventh Circuit's distinction between actions and activities. When the guidance document refers to "actions" in the context of mitigation, they are quite explicitly called "mitigation actions"[38] or "recovery actions"[39] or "corrective actions."[40] The guidance also uses the word "actions" several times in a way that is distinct from the meaning the Eleventh Circuit assigns to it (notably, federal "actions" as referred to in section 7 of the Act).[41] Finally, many uses of the word "actions" in the document clearly refer to things for which people are seeking permits. For example, "The section 10 regulations require that an HCP [Habitat Conservation Plan] specify the measures the applicant will take to "monitor" the impacts of the taking resulting from project *actions*."[42] The fact that the guidance does not appear to distinguish "actions" from "activities" in the manner the Eleventh Circuit suggests that it did calls its interpretation of the federal guidance into question.

The language of the regulations does not, on its face, support the proposition that the implementing agencies understood the ESA to provide for vicarious liability. The language of the interpretative guidance of those regulations clearly states that vicarious liability was not considered covered by the Act. Finding that the guidance did allow for vicarious liability required a reading of the guidance that can at best be characterized as selective and at worst as disingenuous. Thus, the statute, its implementing regulations, and the guidance interpreting those regulations all fail to provide for vicarious liability. The reason that the executive and legislative branches have not made provisions for vicarious liability for state and local governments in the ESA may be the high likelihood that the doctrine is unconstitutional, both because the situation does not create standing and because of the risk of running afoul of the commandeering jurisprudence.

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38. HABITAT HANDBOOK, *supra* note 34, at 3-19.

39. *Id.* at 3-23.

40. *Id.* at 3-25.

41. *Id.* at 3-15, 3-18.

42. *Id.* at 3-26. "The frequency, timing, and duration of the sampling regimen should also relate to the type of action being evaluated, the species affected by the action, and the response of the species to the effects produced by the action." *Id.* 50 CFR §§ 17.22(b)(1)(iii)(B), 222.22(b)(5)(iii) (emphasis added).

STANDING: INJURY IN FACT AND CAUSATION

One of the elements of standing stemming from the U.S. Constitution's Article III case and controversy requirement is the "injury in fact" requirement.[43] In *Lujan v. Defenders of Wildlife*, the Supreme Court stated that, when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed"[44] to prove causation than simply demonstrating that an injury exists. The plaintiff must instead show that, in response to the government's decision, the regulated or regulatable parties will act in such a way as to cause the injury.[45] The vicarious liability cases rightly assume that the third-party bad actors would be bound by the government regulations at issue.[46] They additionally assume that, by the state or local government's issuance of a regulation or a permit or by the failure to prohibit injurious action, individuals will respond by proceeding with actions that cause an injury, hence satisfying the *Lujan* requirement for injury in fact.[47] Therefore, the plaintiffs in vicarious liability cases argue that they meet the requirements the Supreme Court set forth in *Lujan* for injury in fact when challenging a government's regulation (or lack thereof). For instance, the Fourth Circuit found that if the federal government issues a permit for an activity that could not legally go forward "but for" such a permit, that is sufficient to satisfy the causation requirement for an injury that would result if the permitted activity goes forward.[48]

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43. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984).

44. 504 U.S. 555, 562 (1992).

45. *Id.* While some of the redressability concerns in *Lujan* did not command a majority of the court, this statement, and the previous quote, are drawn from Part II, which did garner five votes. In addition, four members of the Court found a lack of standing because "it is entirely conjectural whether the nonagency activity that affects respondents [dam construction] will be altered or affected by the agency activity they seek to achieve [removal of 10% of total funding for the dam]." *Id.* at 571. A large share of the majority's *Lujan* opinion focusing on whether the plaintiff had directly been injured would not be at issue where the endangered species itself is the plaintiff, as in *Loggerhead Turtle*.

46. For instance, the State of Massachusetts was permitted by the federal government to regulate the state's lobster fishing industry, Volusia County had authority from the state to regulate lighting, and the Town of Plymouth had the authority from the state to regulate the use of the beach and to punish offenders.

47. Moreover, on redressability issues, because the activities causing the harm are conducted on U.S. property and not abroad as in *Lujan*, there is less doubt that the activities that are proscribed would cause the injury to stop.

48. Pye v. United States, 269 F.3d 459, 471 (2001). This also is arguably a basis for a pre-*Lujan* decision in the Eighth Circuit, Defenders of Wildlife v. EPA, 882 F.2d 1294, 1301-02 (8th Cir. 1989). At least one commentator has suggested that *Lujan* requires a showing of proximate as well as "but for" causation. Desiderio, *supra* note 30, at 757. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 700 n.13 (1995), a majority of

The argument has an Achilles' heel, however. In order to satisfy the *Lujan* test of injury in fact, the government regulation must cause the injuries.[49] While there is little doubt that a government decision on how to manage government property (*e.g.*, *Palila*[50]) does cause the injuries produced under that management regime, it is less clear that, by issuing a permit, the State is causing injury. In a restatement of the *Lujan* test, the Supreme Court, in its unanimous decision in *Bennett v. Spear*, said that the injury "must be fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the court."[51] The Court noted that "injury produced by determinative or coercive effect upon the action of someone else" was not excluded from satisfying the causation injury, but it again stressed that the third party actions cannot be independent, and, in this case, the decision not to deliver the water was essentially coerced.[52] Because issuing a permit for an illegal activity may not cause a take if the third-party permittee does not then independently choose to engage in the activity, and because the individual is not coerced into performing the action through a government permit, it is not clear that sufficient causation would be present to address the Supreme Court's standards.[53]

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the court specifically mentioned both "but for" and proximate causation and found both were required by the take language in the ESA.

49. *Cf.* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (finding the government's decision to withhold permits for construction during a moratorium period sufficiently caused the injury in fact to the plaintiffs who were not able to build on their land).

50. Palila v. Haw. Dep't of Land & Natural Res., 639 F. 2d 495 (9th Cir. 1981). This differs from the injury in fact in *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), because in *Akins* the injury in fact stemmed directly from the lack of information the government was required to release. Here, the government's action causes no injury unless a third party acts as well.

51. 520 U.S. 154, 167 (1997). In the case, the court found that a decision by the government to meet a certain lake level would cause the government not to deliver water at previously expected levels and therefore sufficiently cause the injuries of water users dependent on that supply.

52. *Id.* at 169.

53. Citing long lists of judicial precedent on the issue, the Tenth Circuit ruled in 1987 that failure to regulate on the government's part does not satisfy the proximate cause requirement. Allen v. United States, 816 F.2d 1417 (10th Cir. 1987). The decision in this case is difficult to reconcile with the holding of the Fourth Circuit in *Pye*, 269 F.3d at 471, creating an apparent circuit split on this issue. *See also supra* note 48; Hobbs v. Sprague, 87 F. Supp. 2d 1007, 1011 (N.D. Cal. 2000) (holding that plaintiffs' injuries from timber harvesting were not traceable to a lack of consultation and review by USFWS); Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 663 (D.C. Cir. 1996) (stating that standing required that "the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff"). For a commentator's argument that private suits "against states alleged not to be performing their duties as regulators" violate the Tenth

The finding that permitting an activity makes the government liable for damages caused by that activity has wide-ranging impact, especially in the environmental context. This impact is illustrated by the opinion of a district court case in California. In finding that a government decision permitting mining to occur is "too remote from the generation of the [waste] to find that the United States' conduct was a 'cause' of the releases," the court noted that the opposite finding would make the United States legally liable for nearly every major cleanup in the country.[54]

Two federal circuit court's responses to the causation issue in the vicarious liability context are discussed below. The First Circuit in *Strahan v. Coxe* found that proximate cause was present where the state issued permits that explicitly allowed only conduct that the court found was illegal, and it was foreseeable that the permit holders would act in precisely the illegal ways specified.[55] The Eleventh Circuit, in *Loggerhead Turtle,* reserved the statutory causation question but found that *local* government regulations were the cause of the injury in fact (in essence ruling that federal inaction was not a cause) based on a theory of exclusive control or primary control over the activities in question.[56] Each of these approaches to the causation question is critiqued below.

Section A: Statutory Causation Requirements

Causation is necessary for standing not just for constitutional reasons, but because of the statutory basis of vicarious liability. The statutory argument for vicarious liability rests on the Act's provision making it unlawful to "attempt to commit [a take], solicit another to commit [a take], or cause [a take] to be committed."[57] Government regulation (or the lack thereof) would fall only under the third prohibition in this list.[58] In order for a county's regulation to be illegal

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and Eleventh Amendments, see Alfred R. Light, *He Who Pays the Piper Should Call the Tune: Dual Sovereignty in U.S. Environmental Law*, 4 ENVTL. LAW. 779, 823 (1998).

54. United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1263, 1274-75 (E.D. Cal. 1997). Considering that the costs of cleaning up one Superfund site contaminated with mining waste is estimated at well over a billion dollars, that liability is not insubstantial. Paul Koberstein, *Idaho's Sore Thumb (Pt. 7)*, CASCADIA TIMES, Spring 2002, *available at* http://cascadia.times.org/archives/2002/thumb7.htm (last visited Feb. 24, 2005).

55. Strahan v. Coxe, 127 F. 3d 155 (1st Cir. 1997).

56. Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231, 1247, 1249 (11th Cir. 1998).

57. 16 U.S.C. § 1538(g) (2000).

58. Government action could not fall under either of the first two provisions. The ESA provisions are correctly understood in the context of their common law meanings. *Strahan*, 127 F.3d at 163. The Act's separation of "attempt" and "solicitation," which reflects a

under the Act, the government action (in the form of insufficiently protective regulations) must "cause" a take. The statutory regime thus imposes its own causation requirement through the language of the statute. In *Sweet Home*, the Supreme Court found this language imported principles of proximate causation while noting that the statute also required "but for" causation in order to determine a take existed.[59] Since *Sweet Home*, only one case in the circuit courts has explicitly interpreted the "cause to be committed" statutory language in application to vicarious liability: *Strahan v. Coxe*.[60]

In *Strahan*, the First Circuit found sufficient causation by distinguishing state laws that permitted only activities that violated federal law from state laws that permitted activities that might be conducted either legally or illegally.[61] The First Circuit ruled that because the Massachusetts regulations and executory permits explicitly authorized the use of a gillnet, and because it was impossible to use a gillnet without conflicting with the ESA, the state was causing the violation to be committed.[62] It distinguished this from licensure of cars,

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debate about the potential overlap/inclusiveness of these two terms, further indicates that the Act is meant to be understood in terms of the common law. *See* LAFAVE, *supra* note 1, § 6.1(f). A government regulation clearly would not meet common law definitions of attempt or solicitation. Attempt is "an intent to do an act or to bring about certain consequences which would in law amount to a crime; and an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation." *Id.* § 6.2. It is ludicrous to assert that any government has an intent to encourage its citizens to commit crimes, or that a failure to regulate constitutes as an act of intent. Solicitation occurs when an actor, with intent that another person commit a crime, entices, advises, incites, orders, or otherwise encourages that person to commit a crime. *Id.* § 6.1. Again, it is nonsensical to view the absence of regulation or insufficient regulation as an affirmative enticement or incitement to crime.

59. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 700 n.13 (1995); *see also supra* note 30.

60. The Eleventh Circuit, in *Loggerhead Turtle*, explicitly reserved the statutory causation question. 148 F.3d at 1252 n.24. The only district court not bound by the *Strahan* decision to consider the provision explicitly was the Middle District of Florida in *Loggerhead Turtle v. County Council of Volusia County*, 92 F. Supp. 2d 1296, 1307 (M.D. Fla. 2000) (*Loggerhead Turtle III*), and that court found insufficient causation.

61. *Strahan*, 127 F.3d at 164. Permitting programs are among the state programs seen as most acceptable to be challenged as a "take," though general regulations may also be challenged. *See, e.g.*, Ramsey v. Kantor, 96 F.3d 434 (9th Cir. 1996) (implying that regulations not contemplated by an incidental take permit might violate the ESA). Activities that are not a form of legal license may not be challengeable. Envtl. Prot. Info. Ctr. v. Tuttle, No. C 00-0713 SC, 2001 WL 114422, at *5 (N.D. Cal. 2001); Nat'l Wildlife Fed'n v. Nat'l Park Serv., 669 F. Supp. 3d 384, 389-90 (D. Wyo. 1987).

62. *Strahan*, 127 F.3d at 163-64. The court found that the use of gillnets violated the Act despite the fact that a federal agency, the National Marine Fisheries Service, had expressly declined to prohibit their use under their Environmental Protection Agency authority. *Id.* at 164.

which could then be used in either an illegal or legal manner by the license holders.[63]

Making a distinction between these types of permits produces inconsistencies in light of the fact that having a state permit to engage in an activity is not considered a defense to a violation of other laws.[64] For instance, having a Clean Water Act permit allowing discharge of certain pollutants does not necessarily protect against liability for harm to an endangered species caused by that discharge.[65] Moreover, without explicit statutory language to the contrary, an erroneously issued permit cannot change the obligations or rights of the permittee, because administrative mistakes do not create rights that would not exist had the mistake not been made.[66] Therefore, there is absolutely no bar to federal prosecution of the third party created by the permit. Under the logic used by *Strahan v. Coxe* to make governments liable, a state can become liable for issuing a permit even though that permit has no legal effect whatsoever.

The logic used in *Strahan v. Coxe* may also indicate a circuit split on the issue of whether governments can be held liable for issuing permits. The Fifth and Tenth Circuits have either dismissed claims that

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63. *Id.* at 163–64. The First Circuit later returned to this distinction in an unpublished opinion to find the U.S. Coast Guard (U.S.C.G.) not liable for violations of the ESA by the vessels it regulates through permitting, because the permits issued by the U.S.C.G. were more analogous to car licensure. Strahan v. Linnon, 187 F.3d 623 (1st Cir. 1998).

64. *See, e.g.*, City of Tulsa v. Tyson Foods, Inc., 258 F. Supp. 2d 1263, 1309–10 (N.D. Okla. 2003) (having a valid Clean Water Act permit was not an adequate defense to other injuries protected by the common law), *vacated pursuant to settlement* (July 16, 2003). Similarly, the existence of a permit to use a particular pesticide, and use in line with that permit, was not considered adequate to defend from liability when the use resulted in water pollution. Altman v. Town of Amherst, N.Y., Docket No. 01-7468, 2002 WL 31132139 (2d Cir. Sept. 26, 2002); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002).

65. Elizabeth Rosan, *EPA's Approach to Endangered Species Protection in State Clean Water Act Programs*, 30 ENVTL. L. 447, 461 (2000). A contrary holding would conflict with the Supremacy Clause, as it would allow a state to override federal law. U.S. CONST. art. VI, cl. 2. Thus, permits cannot and have not provided a defense to violators of federal statutes absent an explicit provision providing such a defense in federal law, despite what advocates of vicarious liability have argued. *See, e.g.*, Sean W. Kerwin, Note, Loggerhead Turtle v. County Council of Volusia County, Florida: *Implied Permitting as a Justiciable Cause of Action*, 6 OCEAN & COASTAL L.J. 205, 220 (2001). In addition, a commentator's suggestion that the two provisions in the ESA regarding the supremacy of the Act over state law are in potential conflict has not appeared to trouble courts, which have consistently found in favor of federal law whether or not a cooperative agreement with the state government is in place. *See* Strahan v. Coxe, 127 F. 3d 155 (1st Cir. 1997); Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923 (D. Mont. 1992); Jean O. Melious, *Enforcing the Endangered Species Act Against the States*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 605, 630–31 (2001).

66. Fed. Crop Ins. v. Merrill, 332 U.S. 380 (1947); Office of Pers. Mgmt. v. Richmond, 496 U.S. 414 (1990).

permits were granted without proper consideration of endangered species or held that states do not have to consider the ESA when issuing permits.[67] It is inconsistent to find that states cannot be required to submit permits for consultation on endangered species and at the same time hold states liable if and when those permits do not fully comport with the requirements of the Act. The only way to reconcile the two holdings would be to determine that, while states cannot be required to ask what requirements the Act places on their activities, they will be found guilty of takes if they guess wrong. Since such a finding would be little more than a back door requirement that states engage in consultation under 16 U.S.C. § 1536 (section 7 of the Act)—despite statutory language limiting those duties to federal agencies. Such a finding is irreconcilable with the statute.

Section B: Exclusivity of Regulatory Power or Primary Authority to Regulate

What is notable about the vicarious liability cases is not just that they rely on government regulation "causing" the injury in fact, but that, where state and local regulations are insufficient to protect species, the responsibility for any under-protection of the species is not placed on the federal government but is instead assigned to the state and local governments. *Loggerhead Turtle* provides a circuit court argument about why causation, and hence liability, is correctly assigned to the local government. The opinion finds such liability at the local level due to "exclusivity" of regulatory power or "primary authority" to regulate. However, as discussed below, neither of these possible reasons can support finding liability for non-action at the local level.

In *Loggerhead*, the Eleventh Circuit found that Volusia County "indisputably" had exclusive power to regulate beachfront lighting.[68] This statement is indisputably false. Both the state and federal governments have the option of exercising regulatory power over the beachfront that the County regulated. While the court's failure to

67. Am. Forest & Paper Ass'n v. EPA, 137 F.3d 291 (5th Cir. 1998) (*Am. Forest I*); Am. Forest & Paper Ass'n v. EPA, 154 F.3d 1155 (10th Cir. 1998) (*Am. Forest II*). In the Fifth Circuit case, the Environmental Protection Agency's (EPA) requirement that Louisiana submit its Clean Water Act permits to the EPA so that the federal agency could engage in endangered species consultation was held to be an overreaching of EPA's authority. *Am. Forest I*, 137 F.3d at 298. The Tenth Circuit dismissed a case with a similar requirement on standing grounds. *Am. Forest II*, 154 F.3d at 1158. For a discussion of both cases, see Melious, *supra* note 65, at 612–14.

68. Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231, 1247 (11th Cir. 1998).

recognize the State's power to regulate the beach can be explained away by reliance on the State's explicit delegation of control to local governments, its failure to recognize federal power has no such explanation. The failure to recognize the non-exclusive nature of the County's power creates a mistake of law that bears significantly on the Eleventh Circuit finding of standing.

This problem in the doctrine of vicarious liability is being used by federal agencies to suggest that counties have a responsibility to break with state government on an issue the state has already considered. In California, a county commission's potential approval of a subdivision drew warnings from a federal agency that the county would face liability for the take of endangered fish and frogs that would result from the increase in use of water in a nearby stream.[69] This followed a decision by California's Water Resources Control Board, which had considered and rejected a petition to disallow the water usage on the basis that it would harm endangered species in the creek.[70] The threats of litigation existed despite the fact that, in California, local legislation in conflict with state legislation is void, and conflict exists when a local ordinance "duplicates, contradicts, or enters an area fully occupied" by the state.[71] The vicarious liability jurisprudence places the county in a difficult position: face litigation for their approval of an action already approved by the state on vicarious liability grounds or face litigation to have their decision struck for contradiction on state law grounds.

The federal government's power to regulate interstate commerce is not governed by provisions in state constitutions or local charters. The Eleventh Circuit's mistake regarding the power of the state in this matter is highlighted when it states that the Volusia County charter "grants" the authority to pass such regulations.[72] Unlike states, which are independent sovereigns deriving their powers directly from their people, counties are creatures of the state and their power is gained through a devolution from the state.[73] Therefore, because the State of Florida could

69. Jessica Lyons, *County v. Endangered Species*, MONTEREY COUNTY WEEKLY, Sept. 16, 2004, *available at* http://www.montereycountyweekly.com/issues/Issue.09-16-2004/news/Article.news1.

70. Protest by the Cal. Sportfishing Prot. Alliance, *In re* Water Rights App. No. A029282, Pet. T030980 (Cal. Water Res. Control Bd. 1999), *available at* http://users.rcn.com/ccate/SWRCBLasGarzasDec99.html (last visited Feb. 24, 2005).

71. *See, e.g.*, Morehart v. County of Santa Barbara, 872 P.2d 143, 156 (Cal. 1994).

72. *Loggerhead Turtle*, 148 F. 3d at 1249.

73. Local governmental units have police power only to the extent of authorization from the state, which holds the police power as an aspect of sovereignty. There is no independent basis for sovereignty for local governmental units or other subdivisions of the state. LAFAVE, *supra* note 1, § 1.7; *Municipal Corporations and Other Subdivisions*, 56 AM. JUR. 2D § 391 (2004). Thus, although Florida's counties do have limited sovereignty under the

override Volusia County's decisions, the county's power is not exclusive.[74] The county charter could not create "exclusive" control; only continued acquiescence by the State could do that. In *Loggerhead Turtle*, the State of Florida demonstrated acquiescence (and active interest in the way the delegated power was used) by promulgating guidelines on the protection of the turtles in 1993 and encouraging counties to adopt these guidelines.[75]

It is possible to explain the Eleventh Circuit's assumption that no state power existed to issue regulations in a way that eliminates the error. When the Eleventh Circuit relied on the exclusivity of enforcement powers to find standing on claims alleging inadequate enforcement,[76] it found that the county had no enforcement power in certain areas because it had delegated that power to the municipalities. In other words, the Eleventh Circuit did not find the ability to revoke powers as retaining a measure of control.[77] To be consistent, the court could find that states had no power over these beaches, implying that the state has given and not revoked the power to regulate. Therefore, the court's argument that the state has no power over these beaches can be interpreted to avoid the error.

The Eleventh Circuit's disregard of the federal power to regulate, however, cannot be reconciled by assuming a delegation occurred. As long as the regulations and enforcement desired by the plaintiffs were needed to protect the endangered loggerhead turtles (an assertion necessary to the plaintiffs' case in *Loggerhead Turtle*), the ESA

Florida constitution, that sovereignty is subordinate to and derives from the state's powers. City of Tampa v. Easton, 198 So. 753, 754 (Fla. 1941).

74. It is important to note that the same would not be unquestionably true of a federal revocation of state power because of the presence of the Tenth Amendment and an assumption that the federal government is one of limited powers. United States v. Oregon, 366 U.S. 643, 649 (1961); United States v. Darby, 312 U.S. 100, 124 (1941).

75. Katherine R. Butler, *Coastal Protection of Sea Turtles in Florida*, 13 J. LAND USE & ENVTL. L. 399, 423-24 (1998).

76. *Loggerhead Turtle*, 148 F.3d at 1250.

77. Constructing the Eleventh Circuit opinion to hold that delegation of power is sufficient to escape liability even when a revocation is possible could draw support from related precedents. There is support for the proposition that a delegation of powers strips the grantor of its power to act in the area, at least when the power is exercised by the grantee, even when revocation of the power is possible. Harmon Industries v. Browner, 191 F.3d 894, 898-99 (8th Cir. 1999). This precedent may not be strong in this situation, however, since, under the regime in *Harmon*, the federal government explicitly retained power and the duty to reject insufficient regulations and to act when the state did not, and therefore cannot escape liability via its delegation. *See, e.g.*, Envtl. Def. Ctr, Inc. v. EPA, 344 F.3d 832, 845 n.18 (9th Cir. 2003); Mo. Soybean Ass'n v. Mo. Clean Water Comm'n, 102 S.W.3d 10, 28-29 (Mo. 2003) (finding that a challenge to State action that required EPA approval was not ripe if no decision had been made by the EPA).

grants the federal government the power to make the same regulations for the beach.[78] No formal revocation of County power would be needed for such an exercise (as it would be for the State in this case); the Supremacy Clause simply would override any conflicting regulation by a state, county, or municipal government. (Indeed, if the Act did not give the federal government such regulatory power, the ability of a federal court to order any relief would be dubious, since Congress might not have delegated such a power at all.[79]) It is, in fact, "indisputable" that the federal government's ability to regulate in the area destroys any exclusiveness of power the county might otherwise possess.

Section C: Primary Authority to Regulate

The Eleventh Circuit's erroneous assumption of Volusia County's exclusive power resulted in the court's finding that the County also had exclusive liability. The importance the Eleventh Circuit places on exclusive power is particularly apparent when it distinguishes municipalities. When municipalities were delegated exclusive power to enforce regulations by Volusia County, there was found to be no standing in a suit against the County for those actions.[80] However, when municipalities shared enforcement authority with the county (*e.g.*, when the municipality could regulate, but Volusia County also could do so), the court found there was standing in the suit against the County.[81] Thus, from the municipalities' point of view, with exclusive power comes exclusive liability.

However, even shared power may not exempt counties from some share of the liability under the Eleventh Circuit's reasoning. Where counties were found to share regulatory authority, the court still found there to be standing to sue the counties.[82] Whether the Eleventh Circuit assumed the county bore full liability as the "primary" regulator[83] or

78. *See* 16 U.S.C. § 1533(b)(3)(C)(iii) (2000); Bean, *supra* note 36, at 10,704. The ability to regulate species and actions that are typically local under the aegis of the ESA has been found by several circuits to be a valid exercise of the Commerce Clause power, even given current Supreme Court jurisprudence defining limits to the Commerce Clause power. GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 624 (5th Cir. 2003); Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1068-70 (D.C. Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483, 492-98 (4th Cir. 2000).

79. *See infra* note 90 and accompanying text regarding the commandeering and redressability issues.

80. *Loggerhead Turtle*, 148 F.3d at 1250 (discussing Ormond Beach and New Smyrna Beach).

81. *Id.* (discussing Daytona Beach and Daytona Beach Shores).

82. *Id.*

83. *Id.* at 1249.

whether the court envisioned a regime of joint and several liability with the municipal authority is not altogether clear. The court did not require that the municipalities with shared regulatory power be joined as indispensable parties, and the county did not later assert claims against the municipalities.[84] The court also noted that Volusia County had the "authority—and arguably a duty" to pass regulations that protect the environment.[85] Without citing any authority from the record, the court stated that "Volusia County obviously contemplated that [the municipalities] will not employ any enforcement measures," apparently tacitly absolving the municipalities from any liability that could otherwise extend from their independent decision not to enact and enforce their own regulation.[86] Therefore, under the Eleventh Circuit decision, the best assumption appears to be that the "primary" regulator (one with the power and duty to enact such regulations) shoulders full responsibility.

Under this logic, the federal government's duty to enforce the ESA is significant. Since the federal government passed the ESA and has the primary and non-discretionary responsibility to enforce it,[87] the federal government is the entity that best fits the description of the "primary" regulator. Such a finding would be further supported by the Supremacy Clause, which would require federal regulations promulgated under a federal power to trump any state or local regulations.[88] Thus, applying the Eleventh Circuit's reasoning, at least some—and likely all—of the liability arising from these regulations would belong to the federal government, not the county government.[89]

In summary, the "exclusive" or "primary" nature of Volusia County's regulatory power is key to the Eleventh Circuit's finding of

84. *See generally id.*; *see also* Loggerhead Turtle v. County Council of Volusia County, 92 F. Supp. 2d 1296 (M.D. Fla. 2000). However, the Secretary of the Interior was added as a defendant. *See id.*

85. *Loggerhead Turtle*, 148 F.3d at 1249. The argument for a duty likely stems from the use of the word "shall" in the charter. Volusia County, Fla., Home Rule Charter, art. II, § 202.4.

86. 148 F.3d at 1250.

87. *See* 16 U.S.C. § 1533(b)(3)(C)(iii) (2000).

88. *But see* Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); Philip Morris, Inc. v. Harshbarger, 122 F.3d 58 (1st Cir. 1997).

89. Before the circuit court cases finding state and local government liability for insufficiently protective regulation regimes, at least one commentator suggested that, while the federal government lacks none of the constitutional authority needed to protect endangered species and biodiversity more generally, it does on a practical level lack the ability to exercise that authority and therefore requires state and local government participation to reach its policy goals. A. Dan Tarlock, *Biodiversity Federalism*, 54 MD. L. REV. 1315, 1331 (1995).

standing in the plaintiff's suit against the County, because the court found entities without such power were excused from liability for their regulatory action (or lack thereof). However, it was an error to find that Volusia County's power was exclusive, or even that it was "primary," given the power of the federal government (and arguably the state government) to regulate in this area. Because the nature of the power was key in determining whether or not a county was liable for "causing" an injury, this error as to the nature of the County's power propagated an erroneous finding of standing against Volusia County.

COMMANDEERING AND REDRESSABILITY

Even if a court could find that state and local governments violated the ESA by promulgating insufficiently stringent regulations, it is unclear what remedy would be constitutional. Most often, when statutes are found to conflict with the U.S. Constitution or federal law, they are invalidated, hence, the doctrine of severability.[90] However, courts finding vicarious liability have chosen different and more constitutionally questionable remedies. In *Strahan v. Coxe*, the court did not simply invalidate the Massachusetts regulations that were inadequate or find that the appropriate federal agency had a duty to promulgate more protective regulations. The court chose instead to require Massachusetts to prepare a proposal, through a working group, for how the permit system could be altered so that it would no longer permit takes.[91] In *Loggerhead Turtle*, the Eleventh Circuit cited the remedy given in *Strahan* as an example of permissible relief.[92] In *United States v. Town of Plymouth*, the court's injunction ordered the town to monitor piping plovers and to close areas of a beach to non-essential off-road vehicles during the plovers' reproductive season.[93]

To stress the unusual nature of the remedy in *Strahan*, imagine that, instead of striking down the regulatory interpretation at issue in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*[94] and leaving the administrative agencies free to use their own machinery to develop a new one consistent with the Court's mandates, the Supreme Court had instead required the Army Corps of Engineers to

90. This is the same approach reflected in the provision in the ESA calling for nullification of any state laws that are inconsistent with the Act. *See* 16 U.S.C. § 1535(f) (2000).

91. Strahan v. Coxe, 127 F.3d 155, 158 (1st Cir. 1997).

92. Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231, 1252 (11th Cir. 1998).

93. 6 F. Supp. 2d 81, Attachment A (D. Mass 1998).

94. 531 U.S. 159, 162 (2001).

prepare a proposal, to be submitted to the Court for approval, for reworked regulations via a judicially mandated working group. In other words, the court in *Strahan* was not just telling the state where it was out of line and voiding that part of the regulation; it was requiring the State to regulate a specific outcome and mandating court oversight of the process of reaching that outcome. In doing so, the First Circuit created a situation where "failure or refusal to establish the mandated program subjects the States to civil enforcement proceedings," and thus to the contempt power of the court.[95]

This is the description of a program that caused the Fifth Circuit to find a violation of the Tenth Amendment,[96] and there is Supreme Court jurisprudence stressing that states must be permitted to withdraw from regulating.[97] Thus, the most obvious constitutional problem with these remedies is that they impermissibly commandeer the states' governmental processes.[98]

Two Supreme Court cases largely establish the contours of the commandeering doctrine: *New York v. United States*,[99] which dealt with commandeering of state governments, and *Printz v. United States*,[100] which dealt with commandeering of local governments. *New York* held that the "Federal Government may not compel the States to enact or administer a federal regulatory program."[101] It also found that requiring states to enact an acceptable regulatory regime or take title to low-level nuclear waste did not give the states a sufficient choice as to whether or

95. *See* ACORN v. Edwards, 81 F.3d 1387, 1394 (5th Cir. 1996).

96. Koog v. United States, 79 F.3d 452, 457 (5th Cir. 1996) (impermissible commandeering occurs "either by forcing the States to administer a federal regulatory program or by compelling the States to enact state legislation according to a federal formula").

97. *See* FERC v. Mississippi, 456 U.S. 742, 766-67 (1982). In that case, the court noted that this is true even when there is no federal program in place to step into the gap.

98. The defendants in *Strahan v. Coxe* also argued that the court could only strike regulations under limitations imposed by the *Ex Parte Young* doctrine. 127 F.3d at 166. *See generally Ex Parte Young*, 209 U.S. 123 (1908). Arguing that the *Ex Parte Young* doctrine limits the court's ability to issue relief except "to halt" violations of federal law, they claimed the court could therefore only strike the statute, not mandate a process for future repairs. The court responded to this argument by stating that *Ex Parte Young* stands as a jurisdictional limit on the type of relief that can issue (equitable versus legal) but does not limit the type of equitable relief the court can issue. Strahan v. Coxe, 127 F.3d 155, 166-67 (1st Cir. 1997). The First Circuit also noted that the statute itself did not limit the equitable relief available. *Id.* at 170.

99. 505 U.S. 144 (1992).

100. 521 U.S. 898 (1997).

101. 505 U.S. at 188. This is contrasted with the ability of Congress to subject the states to generally applicable laws, which is permissible. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). A requirement to regulate cannot be a generally applicable law because private individuals cannot regulate.

not to regulate, because the state was required to take responsibility for the waste in either case.[102] In *Printz*, which invalidated a provision of the Brady Bill requiring county officials to perform background checks until a federal system could be implemented, the majority expressed concern that a law requiring county officials to stand between a gun purchaser and immediate possession of his gun would turn the county official into a puppet for a "ventriloquist" Congress[103] and destroy the checks inherent in concurrent state and federal authority.[104]

Arguably, the commandeering issue that *Loggerhead Turtle* raises is sufficiently different from the one in *Printz* to be considered as yet undecided by the Supreme Court. Unlike the counties in *Printz*, Volusia County was not prohibited by the State from issuing the regulations required by federal law; Volusia had the State of Florida's permission to regulate beaches and to protect turtles.[105] *Printz* specifically reserved the question of whether the commandeering of local governments would occur if the local government entity had the permission of the state to regulate in the area or was commanded by the state to do so.[106] However, *New York* certainly applies to *Strahan v. Coxe*'s command to Massachusetts, and the First Circuit addressed the case squarely in its opinion.

In *Strahan v. Coxe*, the First Circuit stressed that, because the defendants were not being ordered to "take positive steps," the remedy did not commandeer the state process.[107] The panel went on to explain that, because no affirmative steps were required, it implicitly recognized the state's option to decline to regulate, and, hence, the court did not violate the prohibitions laid out in *New York*.[108] The lack of requirement of affirmative steps, however, is in the eye of the beholder. The injunction upheld by the First Circuit in *Strahan v. Coxe*, instead of simply striking the state's regulation, required the state to form a working group and develop a proposal for fixing the regulations. In addition, *Loggerhead Turtle* relied on *Strahan v. Coxe* in discussing the remedies that were constitutionally permissible under the commandeering doctrine; yet, it is also cited by commentators as the first case imposing a duty to manage instead of to refrain from acting on behalf of

102. *New York*, 505 U.S. at 176–77.

103. *Printz*, 521 U.S. at 928.

104. *Id.* at 919–20.

105. The state's granting of authority to the counties to regulate such items stems from the Constitution and is illustrated by the guidance the state issued on the topic. Butler, *supra* note 75, at 423–24.

106. *Printz*, 521 U.S. at 934 n.18.

107. Strahan v. Coxe, 127 F.3d 155, 170 (1997).

108. *Id.*

endangered species.[109] Thus, the First Circuit required the county to set up an entire regulatory process, while claiming it had not required the county to take affirmative steps.

In answering the argument that the *Strahan v. Coxe* ruling appeared to impose requirements of affirmative actions on state government, the First Circuit offered a second argument that its order did not impermissibly commandeer Massachusetts' government. Noting that, in *New York* and *Printz*, the state and local governmental entities were not found to be in violation of a federal statute, the First Circuit suggested that the equitable powers of the court were not invoked in those cases, in contrast to the vicarious liability cases.[110] This argument is problematic because it assumes that the posture of the case was crucial in both *New York* and *Printz*—specifically, that the state or local government had to challenge the regulation before the federal government took action to force them to comply. Otherwise, those defendants would also have been subject to the court's equitable powers, because they would have violated a federal statute by failing to execute mandatory duties or take title to property. However, the decisions in the commandeering cases are based on the unconstitutionality of statutory provisions requiring affirmative actions from state and local governments in the first instance; the unconstitutionality of requiring them to take affirmative action would remove any authority to use the equity power.[111]

One commentator, Ellen D. Katz, offers the view that the Tenth Amendment does not prohibit Congress from requiring states to take affirmative actions; it instead prohibits Congress from requiring the states to regulate the conduct of third parties. Katz additionally posits that when a state chooses to regulate in an arena where federal law exists, the state should be required to implement federal law as well, because to do otherwise would be to discriminate against the federal laws that are also part of the state's legal system.[112] Drawing from a series of cases that hold that state courts must hear federal law claims when they have jurisdiction over analogous state law claims, Katz argues that the same is true for applying federal law where states have officials

109. Fred Bosselman, *What Lawmakers Can Learn from Large-Scale Ecology*, 17 J. LAND USE & ENVTL. L. 207, 306 (2002); Shannon Petersen, Note, *Endangered Species in the Urban Jungle: How the ESA Will Reshape American Cities*, 19 STAN. ENVTL. L.J. 423, 434 (2000).

110. Strahan v. Coxe, 127 F.3d at 169-71.

111. New York v. United States, 505 U.S. 144, 179 (1992).

112. Ellen D. Katz, *State Judges, State Officers, and Federal Commands After* Seminole Tribe *and* Printz, 1998 WIS. L. REV. 1465, 1499-1501.

applying analogous state law.[113] Under this theory, because Massachusetts and Volusia County chose to attempt to prevent harm to dolphins and sea turtles, they are liable for failures to follow federal law in doing so (although neither would be liable if it chose to cease protecting the species altogether).

Adoption of Katz' theory may pose practical problems in that states may choose not to protect the environment in particular ways or will abandon other arenas of regulation entirely.[114] Legally, the theory also has pitfalls. First of all, such a requirement would make every federal law a potential unfunded mandate for states, who would automatically be required to implement all laws (such as those impacting education) if they regulated in a certain area at all. Congress has paid a great deal of attention to unfunded mandates since the 1990s, and nothing in those debates suggests that Congress believed *every* law it passed with an enforcement component was potentially an unfunded mandate for all states to implement. Secondly, such a requirement might be viewed as states usurping powers explicitly delegated to the executive branch of the federal government by the U.S. Constitution: if states were automatically required to enforce federal law if they had any state regulations in the area, that would split the authority to ensure that the laws are faithfully executed between the president and 50 governors and countless mayors and county councils. Congress's ability to force state governments to enforce a law in a particular fashion could provide an avenue for Congress to usurp executive authority by finding other executors for the laws it passes.

Finally, the structure of other statutory regimes, notably the Clean Water Act and the Clean Air Act, seems inapposite with Katz' theory. In those regimes, the federal government is required to assume regulatory authority in states that do not sufficiently protect the

113. Some state laws have been interpreted by courts to block state and local agencies from aiding the federal government in its efforts to enforce the ESA. *See* Ass'n of Wash. Bus. v. Washington, SHB No. 00-037, 2001 WL 1022097 (Wash. Shore Hrg. Bd. 2001); William Snape et al., *Protecting Ecosystems Under the ESA: The Sonoran Desert Example*, 41 WASHBURN L. REV. 14, 39 (2001) (citing S. Ariz. Homebuilders Ass'n v. Huckleberry, No. C-2001 (Ariz. Sup. Ct., Pima County, May 23, 2001) .

114. Those who argue that this is unlikely should consider the potential response of a state like Idaho, whose annual budget is approximately $1.7 billion dollars, when told that if it chose to pass any environmental regulations that impacted the mining industry, and any mining resulted in a Superfund-level cleanup like the one currently ongoing, the state would be liable for cleanup and damages of approximately $1.4 billion. It is almost certain the state would choose to abandon any attempt to regulate mining rather than risk such severe liability. *See supra* note 54. On a smaller level, the costs of likely litigation may cause localities to decide to exit a regulatory arena altogether rather than devote a noticeable percentage of their budget to litigation costs.

environment under federal standards. If Katz' theory were accepted, the mere passing of statutes would automatically require states to themselves regulate according to federal law. Therefore, if Congress followed this theory, it would create a strong disincentive for the states to regulate any field, and would thereby create a heavy responsibility for the federal government both to regulate in a number of areas where there would be a governmental vacuum and to shoulder a much heavier enforcement burden than it currently has. When stated this way, the revolutionary nature of Katz' argument becomes apparent; in her view, those provisions of the Clean Water Act and Clean Air Acts are understood as a rare avoidance by states of an unfunded federal mandate to change their regulations. Certainly, this is not how these laws are normally understood, either by Congress or by the legal community.

In *New York v. United States*, one of the reasons the Supreme Court found commandeering to be a danger to the governmental system was the potential to decrease the accountability of the federal government for federal decisions. "[W]here the Federal government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[115] Similarly, in *Printz*, the Court expressed fears that state and local governments "would be put in the position of taking the blame for [the law's] burdensomeness and its defects."[116] The degree to which vicarious liability makes these concerns reality is best illustrated by the 1998 case of *United States v. Town of Plymouth*.

In *Plymouth*, the use of off-road vehicles threatened the habitat and feeding of the piping plover, an endangered species. The U.S. Fish and Wildlife Service knew of the threat and issued non-binding guidance on how to avoid taking the plover. The guidance included recommendations to close part of the beach to off-road vehicles.[117] However, the Service did not go through the rulemaking process to issue binding regulations. Restrictions on beach use proved to be hugely unpopular with the Plymouth community, resulting in several heated public meetings, a petition drive, and the firing of one city official (who was hanged in effigy by protesting citizens) who attempted to implement the non-binding federal guidance.[118] In response to the local council's

115. *New York*, 505 U.S. at 169.
116. Printz v. United States, 521 U.S. 898, 930 (1997).
117. United States v. Town of Plymouth, 6 F. Supp. 2d 81, 85–86 (D. Mass. 1998).
118. *Id.* at 88.

unwillingness to comply with the non-binding guidance, the USFWS filed a motion for a preliminary injunction in federal court requiring them to do so.[119] The injunction was granted.[120]

The outcome in Plymouth is startling for two reasons: first, unlike the facts in *Strahan* and *Loggerhead Turtle*, local and state officials were present while the birds were harassed by individuals driving on the beach, so the direct actors were identifiable and immediate enforcement of the ESA against those actors would have prevented harm to the piping plover. Secondly, a federal agency with the power to promulgate regulations of its own[121] had chosen to protect wildlife not through issuing regulations, but by asking a court to compel a local government to implement guidance that was officially non-binding. Both aspects of the case are problematic. First, for policy reasons, vicarious liability seems much less necessary in *Plymouth* as a last-ditch attempt to provide deterrence, because the direct actors were easily identifiable by the government. In other words, one of the better arguments for governmental liability for regulation or the lack thereof is that in cases where the third party violators are not easily identified, there is still a way to increase deterrence.[122] *Plymouth* is remarkable because there was an obvious way to deter destruction of the plover habitat: individuals harassing the birds in the presence of governmental authorities could have been punished. This case therefore demonstrates that vicarious liability is not limited in its use to cases in which no other deterrence is possible. Instead, it is used in place of direct liability for identifiable individuals actually committing takes when it is practically easier—or politically easier—to reach their behavior via state and local government liability.[123] This is an odd policy choice for agencies required to protect endangered species, because it selects lower levels of deterrence (through passing regulations that give the threat of punishment) over higher levels of deterrence (direct punishment of individuals causing harm).

Second, the nature of the injunction was essentially to order the town government to comply with non-binding federal guidance. Where a federal agency has chosen to issue non-binding guidance instead of a

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119. *Id.* at 89.

120. *Id.*

121. The Act even authorizes the federal agency to issue emergency regulations that become effective immediately. 16 U.S.C. § 1533(7) (2000).

122. Ruhl, *supra* note 1 (citing this situation as the most attractive one for use of vicarious liability); *see also supra* note 78.

123. Michael J. Bean, *Major Endangered Species Act Developments in 2000*, 31 ENVTL. L. REP. 10,283, 10, 285–86 (2001) (arguing increased practicality for influencing individual actions).

binding rule, the court's enforcement of the guidance as if it were a rule arguably usurped the delegated powers of Congress and violated the Act it is purportedly enforcing by creating an alternative rulemaking path to the one specified by statute. By requiring the town to enforce an extremely unpopular law, *Plymouth* is the manifestation of the fear expressed in commandeering jurisprudence that the federal government will attempt to cloak its responsibility for unpopular laws by forcing the states or local governments to be the visible enforcers. The prescience of that fear is demonstrated by *Plymouth*, because one of the examples of recalcitrant behavior the court cited was the town's insistence that it would not close the beach until the federal or state government required it in writing.[124] By finding this request to be obstructionist in nature, the court was penalizing the local government for attempting to create some degree of accountability for the entities truly calling the shots. This seems all the more unreasonable since the town officials could only point to supposedly non-binding guidance to justify their unpopular local actions.

The actions of the federal government in *Plymouth*, the strong negative local reaction to federal mandates, and the attempt by the federal government to place the blame for those mandates on the local government's shoulders justify the Supreme Court's fears that commandeering poses risks to our governmental system. *Plymouth* also illustrates how easily the doctrine of vicarious liability falls prey to the worst of these concerns. Such a demonstration calls into question the constitutionality of remedies like those in *Strahan v. Coxe* and *Loggerhead Turtle*, where the requirement that governments undertake affirmative action is less blatant, but hardly absent.

CONCLUSION

The recent cases finding vicarious liability for state and local governments under the ESA are not exceptional or isolated incidents: other vicarious liability cases are pending in the courts.[125] Some of those cases continue to push to extend the boundaries of current vicarious liability jurisprudence. For instance, the State of Florida recently settled a case focused on the regulation of boat speed,[126] despite the fact that

124. *Town of Plymouth*, 6 F. Supp. 2d at 91.

125. *See, e.g.*, Pac. Rivers Council v. Brown, Civ. No. 02-00243-BR (D. Or. Apr. 21, 2003) (surviving a motion to dismiss). For a discussion of other pending cases, see Steven P. Quarles & Thomas R. Lundquist, *The Endangered Species Act of 1973: Origins, Requirements, and Issues*, SG006 ALI-ABA 589, 603 (2002).

126. Ruhl, *supra* note 1.

federally sanctioned activities were also permitted by the speed limit regulation, and there was precedent in case law indicating boat licensing would not result in vicarious liability because it more closely approximated licensing of cars.[127] Because vicarious liability cases can be prohibitively expensive for localities to fight, it is likely that more settlements will occur and local authorities will be forced to implement federal policies more often.[128] Such a result should alarm not only advocates of local and state government sovereignty, but also those who seek maximum deterrence from harming endangered species. Because governments may face liability even for promulgating regulations intended to curtail currently damaging activities, states and local governments may have an incentive not to open the door to those suits by attempting to regulate where they otherwise would.[129]

Finally, as *Plymouth* shows, vicarious liability has been used as little more than a shell game. In one sense, it is a shell game because the harm created by individuals or third parties is encased in a protective shell of state or local government liability. In another sense, it is also a shell game for federal authority. Instead of spending federal resources (pursuant to federal authority) promulgating politically unpopular regulations to protect endangered species, the federal government may issue non-binding guidance as in *Plymouth* or even expressly decline to enact a prohibition on the use of equipment as in *Strahan v. Coxe* and then use vicarious liability theories to force the local government to put their own patina on it. This creates a real difficulty for constituents trying to determine which governmental entity is responsible for the regulation: the local government, which was the first entity to make such regulations binding law, or the federal government, which did not make such regulations binding law but sued the local government to force them to do so. Such a game is not simply confusing; it undermines the basis for representative government. Under that weight, the shell should crack—and soon.

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127. *Cf.* Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997), *with* Strahan v. Linnon, 187 F. 3d 623 (1st Cir. 1998).

128. Alan M. Glen & Craig M. Douglas, *Taking Species: Difficult Questions of Proximity and Degree*, 16 NAT. RESOURCES & ENV'T 65, 132 (2001). Localities may also end up bearing the costs of litigation, even if they eventually change their regulations unilaterally. Jennifer A. Mogy, *Recent Developments in Environmental Law*, 16 TUL. ENVTL. L.J. 231, 240–41 (2002).

129. Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 COLUM. J. ENVTL. L. 45, 87 (2002). Even developing a habitat conservation plan that permits takes may be beyond the reach of some local governments because of the resources needed. Madeline June Kass, *Threatened Extinction of Plain Vanilla 4(d) Rules*, 16 NAT. RESOURCES & ENV'T 78, 81 (2001).