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## Loggerhead Turtle v. County Council Of Volusia County, Florida: Implied Permitting As A Justiciable Cause Of Action

Sean W. Kerwin

*University of Maine School of Law*

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**LOGGERHEAD TURTLE v.  
COUNTY COUNCIL OF VOLUSIA COUNTY,  
FLORIDA:  
IMPLIED PERMITTING AS A JUSTICIABLE  
CAUSE OF ACTION**

*Sean W. Kerwin\**

I. INTRODUCTION

In its March 2000 decision, *Loggerhead Turtle v. County Council of Volusia County, Florida*,<sup>1</sup> the Federal District Court for the Middle District of Florida refused to grant the plaintiff turtles an injunction under the Endangered Species Act of 1973, and did grant partial summary judgment to the defendant county.<sup>2</sup> This ruling was based on the court's finding that the lighting ordinance in question was not responsible for causing harm to endangered sea turtles. The court reached this holding based on the conclusion that the County was not responsible for enforcement of the Endangered Species Act, and that the terms of the ordinance were aimed at preventing, not causing, harm.<sup>3</sup>

This Note advocates that the court should have recognized the plaintiff's assertion that the County's passage of a lighting ordinance constituted an "implied permit" for all activities in compliance with the ordinance such that the County could be held liable if such activities were deemed to be in violation of the Endangered Species Act, and that the District Court erred in finding that there was no available remedy which the court could issue.

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\* University of Maine School of Law, Class of 2002.

1. 92 F. Supp. 1296 (M.D. Fla. 2000).

2. *See id.* at 1309.

3. *See id.* at 1308.

## II. BACKGROUND

The coast of Florida has been home to various species of sea turtles<sup>4</sup> for approximately one hundred seventy-five million years.<sup>5</sup> Today, more sea turtles nest in Florida than in any of the other 48 continental states.<sup>6</sup> However, despite the longevity of their blood line and the relative concentration of their breeding population in the state of Florida, the sea turtle is becoming increasingly threatened and endangered in this state and elsewhere.<sup>7</sup> Sea turtles have always had a high infant mortality rate caused by predation from animals, birds and fish, which they have compensated for by producing numerous young.<sup>8</sup> The mother leaves the young turtles to incubate in the sand of a beach for about two months; the young then hatch en masse at night and head for the sea guided by the bright light of the moon and the stars reflecting off of the water.<sup>9</sup>

In recent years the principal cause of mortality in the sea turtle population has come from various forms of human activity.<sup>10</sup> Driving on beaches and beachfront lighting are two human activities that pose particular threats to nesting sea turtles.<sup>11</sup> Bright lights can prevent female sea turtles from ever coming onto a beach to lay their eggs.<sup>12</sup> When sea

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4. Today, the five species of sea turtles found in Florida are the green (*Chelonia mydas*), loggerhead (*Caretta caretta*), leatherback (*Dermochelys coriacea*), hawksbill (*Eretmochelys imbricata*), and Kemp's Ridley (*Lepidochelys kempi*). See Katherine R. Butler, Comment, *Coastal Protection of Sea Turtles in Florida*, 13 J. LAND USE & ENVTL. LAW 399, 403 (1998).

5. See *id.* at 399 (citing JACK RUDLOE, *TIME OF THE TURTLE* 17 (1979) (estimating 175 million years); VICTORIA B. VAN METER, *FLORIDA'S SEA TURTLES* 3 (1992) (estimating 150 million years); ROBERT BUSTARD, *SEA TURTLES: NATURAL HISTORY AND CONSERVATION* 9 (1973) (estimating 90 million years)).

6. See Butler, *supra* note 4, at 400. See also Florida Marine Research Institute, *Sea Turtles, Nomads of the Deep* (visited Oct. 6, 2000) <[www.fmri.usf.edu/turtle/turtle.pdf](http://www.fmri.usf.edu/turtle/turtle.pdf)> [hereinafter *Nomads of the Deep*] (noting that the Archie Carr Wildlife refuge in Florida (not located in Volusia county) serves as home to one quarter of nesting loggerhead sea turtles in the Western Hemisphere).

7. See Butler, *supra* note 4, at 400.

8. See *id.*

9. See *Nomads of the Deep*, *supra* note 6.

10. See generally Butler, *supra* note 4, at 405-414. See also *Nomads of the Deep*, *supra* note 6 (noting that sea turtles are threatened by coastal development encroaching on nesting areas, encounters with pollutants and marine debris, entanglement and drowning in fishing gear and international trade in turtle products).

11. See generally Butler, *supra* note 4, at 409, 412-414.

12. See BLAIR E. WITHERINGTON & R. ERIK MARTIN, *FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, UNDERSTANDING, ASSESSING, AND RESOLVING LIGHT-POLLUTION PROBLEMS ON SEA TURTLE NESTING BEACHES* (Florida Marine Research Institute Technical Report TR-2, 1996) at 2-4.

turtles hatch they instinctively head for the brightest light source, which in the absence of human development, is the ocean which reflects the light from the moon and the stars.<sup>13</sup> However, when there are artificial lights visible from the dunes the baby turtles will often head for these lights rather than toward the ocean.<sup>14</sup> Such misorientation and disorientation<sup>15</sup> may draw the young into housing developments, onto roads or anywhere except the sea.<sup>16</sup> Before long, the young often succumb to exhaustion, dehydration, predation,<sup>17</sup> entrapment in vegetation and debris, or being struck by vehicles.<sup>18</sup>

Beach driving also has a significant impact on survival rates of the young.<sup>19</sup> Vehicles driving on the sand may cause compaction of sand over nests, which can result in crushed eggs or a lack of air circulating to the eggs.<sup>20</sup> Newly hatched turtles may be run over by vehicles traveling on the beach.<sup>21</sup> Turtles may get stuck in tire tracks left by vehicles and not be able to climb out.<sup>22</sup> Finally, headlights on vehicles traveling on the beach may disorient the turtles in the same way that stationary light sources do.<sup>23</sup>

In 1970 the National Fish and Wildlife Service (NFWS) listed the leatherback sea turtle as an endangered species.<sup>24</sup> In 1978 the National Wildlife Service listed the loggerhead sea turtle as a threatened species and the green sea turtle as an endangered species.<sup>25</sup> These actions placed these

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13. See *Nomads of the Deep*, *supra* note 6.

14. See WITHERINGTON & MARTIN, *supra* note 12, at 5–15.

15. Disorientation involves the sea turtles loss of bearing while misorientation involves the sea turtle fixing on an incorrect bearing. See *id.* at 13.

16. See *id.* at 5. See also NATIONAL RESEARCH COUNCIL, DECLINE OF THE SEA TURTLES: CAUSES AND PREVENTION 21 (1990) at 79 [hereinafter NRC] (Beachfront lighting can even draw sea turtles that have already entered the ocean, back out and onto the beach).

17. See WITHERINGTON & MARTIN, *supra* note 12, at 5–6.

18. See NRC, *supra* note 16, at 79.

19. See Butler, *supra* note 4, at 409.

20. See *Loggerhead Turtle v. County Council of Volusia County, Florida*, 896 F. Supp. 1170, 1175 (M.D. Fla. 1995) *rev'd*, 148 F.3d 1231 (11th Cir. 1998).

21. See NRC *supra* note 16, at 81.

22. See *id.*

23. See *id.* Volusia County uses special yellow headlights on its county vehicles that reduce this effect on the turtles. See *Loggerhead Turtle*, 896 F. Supp. at 1175.

24. See *Loggerhead Turtle v. County Council of Volusia County, Florida*, 148 F.3d 1231, 1257 (11th Cir. 1998).

25. See *id.* at 1234. “The term endangered species means any species which is in danger of extinction throughout all or a significant portion of its range . . . .” 16 U.S.C. § 1532(6) (1999); “The term threatened species means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20) (1999).

turtles under the protection of the Endangered Species Act of 1973 (ESA).<sup>26</sup> Listing of a species on the ESA makes it illegal for federal or state government, any individual, or other entity to "take" any of these species.<sup>27</sup> The term "take" has been broadly defined to include any action that harms or harasses these species.<sup>28</sup>

The United States Supreme Court has determined that Congress intended the protection of endangered species to be afforded the highest of priorities under the ESA.<sup>29</sup> In order to ensure enforcement of this Act Congress provided a citizen suit clause<sup>30</sup> that enables individuals to sue as the species itself and bring an enforcement action for breach of the statute.<sup>31</sup>

### III. THE SUBJECT CASE

#### A. *Factual Background*

Volusia County is located in northeast Florida and has about forty miles of Atlantic coastline.<sup>32</sup> Loggerhead, green and leatherback sea turtles

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26. See 16 U.S.C. §§ 1531–1544 (1999). The purpose of the Endangered Species Act is to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . ." *Id.* § 1531(b).

27. The ESA take prohibition states that it is unlawful for any person to "take any [threatened or endangered] species within the United State or the territorial sea of the United States." *Id.* § 1538(B). The term take "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19).

28. The United States Fish and Wildlife Service has defined harass, for the purposes of the ESA as "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 behavior patterns which include but are not limited to, breeding, feeding or sheltering." 50 C.F.R. § 17.3 (1999). Harm has further been defined as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or impairing essential behavioral patterns, including breeding, feeding or sheltering." *Id.*

29. See *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1977). "[T]he language, history, and structure of the [Endangered Species Act] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Id.* "[The Endangered Species Act is] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.* at 180.

30. See 16 U.S.C. § 1540(g).

31. A species protected under the ESA has standing to sue "in its own right" to enforce the provisions of the Act. See, e.g., *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp 1343, 1346 (N.D. Cal. 1995).

32. See *Loggerhead Turtle v. County Council of Volusia County, Florida*, 896 F. Supp. 1170, 1175 (M.D. Fla. 1995) *rev'd*, 148 F.3d 1231 (11th Cir. 1998).

are all known to nest on the beaches of Volusia County.<sup>33</sup> In an attempt to reduce the impact of coastal lighting on nesting sea turtles, Volusia County passed a beachfront lighting ordinance.<sup>34</sup> Some municipalities within Volusia County undertook to pass and enforce, subject to Volusia County's approval, their own beachfront lighting ordinances.<sup>35</sup> In 1990, Volusia County was also empowered by the state of Florida to regulate vehicular access to the County's coastal beaches.<sup>36</sup>

In 1994, the United States Fish and Wildlife Service (USFWS) warned Volusia County that allowing vehicular access on its beaches was violating the take prohibition of the Endangered Species Act.<sup>37</sup> In 1995, Volusia County applied to USFWS for an incidental take permit (ITP).<sup>38</sup> During this period the county worked with USFWS to develop a conservation plan to address concerns related to takes from beachfront lighting and beach vehicles.<sup>39</sup>

### B. *The District Court Opinion*

In 1995, a citizen suit was filed under the ESA against the County Council of Volusia County with the loggerhead turtle, green turtle, Shirley Reynolds and Rita Alexander (Turtles) as name plaintiffs.<sup>40</sup> The Turtle's

33. See *Loggerhead Turtle v. County Council of Volusia County*, Florida 148 F.3d. at 1297.

34. See *Loggerhead Turtle County Council of Volusia County*, Florida, 896 F. Supp. at 1173.

35. See *id.* (enforcing their own ordinances, these municipalities were exempted from the county ordinance).

36. See FLA. STAT. ANN. § 161.58 (West 1990). In 1990 the County was permitting vehicles to drive on the beach from one hour before sunrise to one hour after sundown. During sea turtle nesting season these times were further restricted in an effort to protect the nesting turtles and their eggs. See *Loggerhead Turtle*, 896 F. Supp. at 1174.

37. See *Loggerhead Turtle*, 896 F. Supp. at 1175-76.

38. See *id.* at 1176. An incidental-take permit authorizes a person or entity to "take" endangered or threatened species. See also 16 U.S.C. § 1539 (a)(1994). The applicant must be able to demonstrate that the takes will be incidental to a lawful action, that the resulting takes will not appreciably reduce the likelihood that the species will survive, that a conservation plan has been developed with plans for mitigatory action for the impact of the takes, that the plan is funded, and that all measures required by the secretary of the USFWS pursuant to the conservation plan can and will be met. See *id.* § 1539 (a)(2)(b) (1994).

39. See *Loggerhead Turtle*, 896 F. Supp. at 1176. This plan included: "(1) restrict[ing] beach access; (2) protecting the 'conservation zone;' (3) hiring an environmental coordinator; (4) working with the volunteer 'turtle patrol;' (5) raking the beach to remove tire ruts; and (6) enforcing a turtle-friendly light ordinance." *Id.* The "conservation zone" extends seaward from the dunes for thirty feet. See *id.* at 1174.

40. See *id.* at 1170.

complaint alleged that Volusia County's beach lighting ordinance and beach driving ordinance posed immediate danger to the loggerhead and green sea turtles in violation of the take prohibition of the ESA and that this threat warranted the issuance of a preliminary injunction to prevent such takes.<sup>41</sup>

Volusia County raised four affirmative defenses that were quickly rejected by the court: standing;<sup>42</sup> primary jurisdiction;<sup>43</sup> *res judicata*;<sup>44</sup> and laches.<sup>45</sup> The court then turned to the Turtle's plea for a preliminary injunction. The court noted that the standard of review under the ESA is that any harm rendered to a species is *per se* irreparable harm and the court may not engage in a traditional balancing of equities, and that the public interest always favors the imposition of an injunction under the ESA.<sup>46</sup> Under this standard, the court dismissed Volusia County's claim that the harm alleged was not sufficient to invoke the act.<sup>47</sup> The court determined

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41. *See id.* Specifically, the plaintiffs sought to have the county enjoined to prevent vehicular access to beaches during the turtle nesting season, and to compel the county to enforce Florida's "Model Lighting Ordinance for Marine Sea Turtle Protection." At this point the USFWS had not ruled on Volusia County's application for an ITP. *See id.* at 1177.

42. *See id.* Volusia County claimed that plaintiffs Reynolds and Alexander lacked sufficient interest in the case for standing. The court, citing *Marbled Murelet*, found that the turtles had a right to sue in their own right under the citizen suit provision therefore the point was irrelevant. *See id.* (citing *Marbled Murelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1346 (N.D. Cal. 1995)).

43. *See* *Loggerhead Turtle*, 896 F. Supp. at 1177. Volusia County claimed that the pending ITP required the court to refrain from hearing the case until the USFWS ruled on the application. The court ruled that since there currently was no ITP in place the court would proceed. The resolution of the ITP application was not dispositive of whether takings were happening at that time. *See id.*

44. *See id.* Volusia County asserted that the fact that plaintiff Reynolds had previously filed a suit to prevent beach driving precluded this lawsuit. However, the court found that there was no identity of the cause of action and therefore, no basis for *res judicata*. *See id.* at 1177-78.

45. *See id.* at 1178. Volusia County argued that driving has been permitted on its beaches for all of the years that the turtles have been listed, and that the plaintiff's delay in bringing this suit bars the action by virtue of the doctrine of laches. *See id.* The court dismissed this argument with little discussion, merely categorizing the argument as "so tenuous as to be absurd." *Id.*

46. *See, e.g., id.*; *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1977); *but see* *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 708 (1995). The *Loggerhead* Court determined that Sweet Home called for the court to make a case by case determination of what constitutes a term such as "harm" under the act. However, they determined that this case does not give them the authority to balance the order to protect species with general social and economic concerns. *See* *Loggerhead Turtle*, 896 F. Supp. at 1179-80.

47. *See* *Loggerhead Turtle*, 896 F. Supp. at 1180. The court stated that "[a]ny taking and every taking—even of a single individual of the protected species—is prohibited by the

that to resolve whether an injunction should issue it had to look to whether the loggerhead and green sea turtles were protected by the Act, and if so, whether it was likely that the defendant would commit future violations of the Act.<sup>48</sup>

The court found that the evidence overwhelmingly supported the conclusion that beachfront lighting was resulting in takes of turtles on the beaches of Volusia County.<sup>49</sup> They found the difficult issue to be whether there was any remedy that they were authorized to issue.<sup>50</sup> There was a lighting ordinance in place, the ordinance was adopted with the intention of protecting sea turtles, and when violations were brought to the County's attention, the ordinance had been enforced.<sup>51</sup> The Turtle's requested that Volusia County be enjoined from exempting several municipalities, and allowing them to enforce their own inadequate ordinances.<sup>52</sup> The court found that it would be a violation of separation of powers for the court to issue an injunction compelling the County to enforce its own ordinance in municipalities that it had chosen to exempt from their ordinance.<sup>53</sup> The court concluded its consideration of the lighting ordinance by stating that there appeared to be no "legal authority by which the Court has the power to tell the County to pass and enforce a specific piece of legislation."<sup>54</sup> The court was, however, tentative on this point, stating "[i]t may be that the Endangered Species Act vests such power in a federal court . . . however, [we] will not exercise such authority without guidance from the higher courts."<sup>55</sup>

The court then turned to a consideration of the beach driving issue. On this it found that nighttime driving does affect takes of the sea turtles and the court issued an injunction preventing the town from permitting such driving.<sup>56</sup> The court determined that the evidence proffered did not yet

Act." *Id.*

48. *See id.*

49. *See id.* at 1180–81.

50. *See id.* at 1181.

51. *See id.* Plaintiff's argued that the ordinance is, in fact, ineffective. *See id.* The court found that the record presented by the plaintiffs was inadequate to make a definitive ruling on the adequacy of the current ordinance. *See id.*

52. *See id.*

53. *See id.*

54. *Id.* The court went on to state that if the County's ordinance violated the ESA it could be struck down by the Supremacy Clause, however, the court could find no authority that would allow it to compel a county to enforce local legislation. *See id.*

55. *Id.*

56. *See id.* at 1182. The court ordered that no vehicles would be permitted on the beach from one hour before sunset until one hour after sunrise. It exempted County vehicles equipped with yellow "turtle-friendly" headlights on official business. All vehicles, without



indicate that daytime driving was a threat to the turtles when considered in conjunction with the County's tire rut rake out program.<sup>57</sup> Finally, the court summarily dismissed three emergency motions filed by the County as being without merit.<sup>58</sup>

After discovery,<sup>59</sup> Volusia County filed, and the District Court granted, a motion for partial summary judgment finding that the Turtles lacked standing against non-party municipalities that enforce their own lighting ordinances because the Turtles had shown no causal relationship between the County's regulatory acts and turtle takings in these municipalities.<sup>60</sup> The court also denied the Turtles' motion for leave to amend the complaint to add the leatherback sea turtle as a plaintiff.<sup>61</sup> In November of 1996, the USFWS issued an ITP that covered beachfront driving.<sup>62</sup> Pursuant to this, and over the plaintiffs' protest that this permit did not cover beachfront lighting, the District Court dismissed the entire case.<sup>63</sup>

### C. The Appeals Court Opinion

On appeal, the Eleventh Circuit Court considered three issues: the scope of the ITP,<sup>64</sup> standing,<sup>65</sup> and an issue of pleading amendment.<sup>66</sup> As

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exception, were enjoined from entering the "conservation zone." *See id.*

57. *See id.* The County had a policy of regularly raking the ruts left by beach vehicles to eliminate the impediment that these tracks posed to baby sea turtles. *See id.* at 1175, 1182.

58. *See id.* at 1183.

59. Following the District Court's opinion on the motion for preliminary injunction, trial was set for April of 1996 and later moved to October of 1996. *See* Loggerhead Turtle v. County Council of Volusia County, Florida, 148 F.3d 1231, 1236 (11th Cir. 1998).

60. *See id.*

61. *See id.* The court was unable to find a necessary document that the plaintiffs' claimed to have submitted. Additionally, the court determined that the plaintiffs' had unduly delayed in filing for joinder and determined that inclusion of this turtle would prejudice Volusia County, because the leatherback nests earlier in the spring, thereby potentially subjecting the County to a plea for a broader injunction. *Id.*

62. *See id.*

63. *See id.*

64. *See id.* at 1234 ("presenting an issue of first impression, whether the incidental take permit exception to the ESA's take prohibition applies to an activity performed as a purely mitigatory measure upon which the issuing agency conditions the permit . . ."). *Id.*

65. *See id.* (presenting an "issue of standing, whether a governmental entity's regulatory control of minimum wildlife protection standards can cause redressable injury to protected wildlife in locations where non-party governmental entities possess supplemental authority to regulate and/or exclusively control enforcement"). *Id.*

66. *See id.* (presenting "whether another federally protected sea turtle should have been allowed to join the Turtles as a party"). After the conclusion of the District Court hearing, the Turtles filed a motion for leave to amend the complaint so as to add the leatherback turtle

to the first issue, the Turtles argued that the ITP did not cover takes resulting from beachfront lighting, and therefore the suit should not have been dismissed.<sup>67</sup> After careful review of the terms of the actual ITP issued and the structure of ITP's in general, the Court of Appeals determined that beachfront lighting was not covered within the scope of allowable takes under the ITP.<sup>68</sup>

The Court of Appeals then turned to the issue of standing, looking first to whether a causal connection existed between Volusia County and turtle takes in municipalities that enacted and enforced their own beachfront lighting ordinance in lieu of that of the County or were exempted altogether.<sup>69</sup> The County's charter enables towns to enact more restrictive ordinances, but provides that the County's ordinance shall preempt all less restrictive ordinances.<sup>70</sup> The court determined that there was a sufficient causal connection for the Turtles to seek to hold the County liable for takes in Daytona Beach, Daytona Beach Shores, Ormond Beach and New Smyrna Beach.<sup>71</sup>

as a plaintiff. *See id.* at 1235.

67. *See id.* at 1236.

68. The ITP allowed some vehicular access conditioned, in part, upon certain mitigatory measures to be enacted by the town. Among these mitigatory measures were the passage and enforcement of an approved beachfront lighting plan. *See id.* at 1239–42. The ITP addressed beachfront driving as an authorized activity (with certain restrictions). However, beachfront lighting was only listed in the section on mitigatory measures. As such, the court determined that beachfront lighting was not intended to be an activity excepted from the take prohibition, but an activity upon which, the allowance of “takes” from beach driving was conditioned. *See id.* at 1244–45. The court determined that it should only look within the four corners of the permit itself and not read into the permit that which is not explicit. Furthermore, it will assume that the only takes that are allowed are those listed under the section laying out “authorized activities.” *See id.* at 1242.

69. *See id.* at 1247. Ormond Beach and New Smyrna Beach were enforcing their own ordinances. Daytona Beach and Daytona Beach Shores were completely exempted from any lighting ordinance at all because the County determined that it was unlikely that any turtle would nest in these areas in the first place. *See id.* at 1248.

70. *See id.* at 1248–1249. As an example, during 1995–1996 Volusia County amended its beachfront lighting ordinance making it more “turtle-friendly” by requiring that lights be turned out at sunset rather than at 8:30 p.m. *See also id.* at 1247–1248 (citing VOLUSIA COUNTY, FLA., HOME RULE CHARTER, art. II, § 202.4 (1989) (additional citation omitted)).

71. *See Loggerhead Turtle* 148 F.3d at 1247–1249. The Court of Appeals saw a causal connection between Volusia County and Daytona Beach and Daytona Beach shores, because the County could enforce its ordinance in these locations, but chose not to. The court saw a causal connection between the County and Ormond Beach and New Smyrna Beach, because the self-enforced ordinance within these two municipalities, though in compliance with the original Volusia County ordinance, was not in compliance with the County ordinance as amended. The court was careful to note that the Turtles could seek to hold Volusia County liable for failing to assert the County ordinance only if these two municipalities' ordinances were not in compliance with the County's ordinance. The Turtles did not

The court went on to conclude that the regulatory acts of a governmental entity are, in and of themselves, capable of causing actionable takes of protected wildlife.<sup>72</sup> The ESA's harm regulation encompasses indirect as well as direct injuries.<sup>73</sup> On the facts of this case, the Court of Appeals determined that the regulatory actions of Volusia County were sufficient to grant standing to the Turtles.<sup>74</sup> That the actions of third party actors may have contributed to the harm did not absolve Volusia County of liability.<sup>75</sup>

Even if the County is liable for takes, the court must be convinced that a favorable decision will likely redress the harm in order to grant standing.<sup>76</sup> Volusia County argued that a favorable decision would essentially require the court to order it to legislate, which would be in violation of separation of powers.<sup>77</sup> The court determined that, at least with respect to the issue raised (Volusia County's potential liability for the non-party municipalities of Daytona Beach, Daytona Beach Shores, New Smyrna Beach and Ormond), there are potential remedies that would not

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have standing to seek to hold Volusia County liable for these municipalities' failure to enforce their own ordinances, if their own ordinances were otherwise valid. If that were the case, the Turtles would have to bring suit against the municipalities themselves. *See id.* at 1249-50.

72. *See id.* at 1251-53.

73. *See id.* at 1250 (citing *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995)).

74. *See* *Loggerhead Turtle*, 148 F.3d at 1250-51. In *Defenders of Wildlife v. Administrator, Environmental Protection Agency*, 882 F.2d 1294 (8th Cir. 1989), the EPA registered strychnine, allowing farmers to use it, which caused actionable harm. *See id.* at 1301. In this case the County is alleged to allow beachfront lighting all day and night (Daytona Beach and Daytona Beach Shores), until 8:30 p.m. (Ormond Beach and New Smyrna Beach) and during daylight hours (the rest of the County), which is causing harm to the turtles. *See* *Loggerhead Turtle* 148 F.3d at 1251. In *Strahan v. Cox*, 127 F.3d 155 (1st Cir. 1997), a state agency responsible for issuing fishing licenses to gillnetters was enjoined because the actions of the regulatory agency which permitted the fishing, resulted in harm to the endangered Right Whale. *See id.* at 165-166. Drawing parallels to these two cases, the Court reasoned that the Turtles have alleged that Volusia County's lighting ordinance is permitting third party actors to engage in an activity that harms protected sea turtles. *See* *Loggerhead Turtle*, 148 F.3d at 1251-53.

75. *See id.* at 1251-53. The non-party municipalities may be enforcing inadequate ordinances, but Volusia County is liable for approving those ordinances. *See id.* Individuals may be turning on the lights that harm the turtles, but the County is permitting those lights to be turned on. *See id.*

76. *See id.* at 1253 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

77. *See* *Loggerhead Turtle*, 148 F.3d at 1254. "Unique constitutional implications exist whenever a federal district court is asked to order a state entity to take regulatory action." *Id.* (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998)). The court notes that Volusia County has not raised, and they do not consider, Tenth or Eleventh Amendment Immunity nor federalism concerns. *See* *Loggerhead Turtle*, 148 F.3d at 1054.

violate separation of powers.<sup>78</sup> Notably, the Court of Appeals explicitly refrained from ruling on whether “ordering Volusia County to implement and enforce county-wide a turtle-friendlier ordinance would violate the separation of powers. . . .”<sup>79</sup>

Finally, the Court of Appeals reversed the District Courts denial of the Turtles’ motion to amend and ordered that the Leatherback sea turtle be added as a plaintiff.<sup>80</sup> The case was then remanded for further proceedings consistent with their opinion, including a trial on the issue of beachfront lighting.<sup>81</sup>

#### D. District Court Opinion on Remand

On remand, the court considered motions for partial summary judgment from both parties, as well as the Turtles’ motion for preliminary injunction against Volusia County’s permitting of artificial light sources that harm the Turtles.<sup>82</sup> The issues presented to the District Court on remand were whether Volusia County could be held liable for light related takings in municipalities under the County’s direct regulatory control<sup>83</sup> and whether the County’s lighting ordinance itself violated the Endangered Species Act.<sup>84</sup> The posture of the case had changed significantly at this time because of modifications in Volusia County’s lighting ordinance.<sup>85</sup> As a

78. As illustrations, the Court of Appeals indicated that the District Court might strike the exemption of Daytona Beach and Daytona Beach Shores from the County ordinance and order Volusia County to form a committee to propose a solution, etc. The Court of Appeals does not attempt an exhaustive list of possibilities, but merely noted that options exist—the fact that one potential solution might be violative of separation of powers, did not destroy the redressability prong of standing. *See id.* at 1254–1255.

79. *Id.* at 1254 (internal quotation marks omitted).

80. *See id.* at 1258. The Court of Appeals found the District Court’s conclusion that there was not appropriate documentation simply false, as there were two copies of the necessary document on record with the court, also there was not undue delay, since the status of leatherback sea turtles on the beaches of Volusia County was unknown at the time of the original complaint, and there was no undue prejudice that could reasonably be found, since Volusia County was aware of the status of the leatherback turtle and had even included them in their ITP application. *See id.* at 1255–1257.

81. *See id.* at 1258. A dissent was filed that argued the takes from beachfront lighting were covered by the beach driving ITP and the court should have dismissed the case. *See id.* at 1258–1260.

82. *See Loggerhead Turtle v. County Council of Volusia County, Florida*, 92 F. Supp. 2d 1296, 1298 (M.D. Fla. 2000).

83. Due to changes in the ordinance this now included all municipalities in Volusia County. *See infra* note 85.

84. *See Loggerhead Turtle*, 92 F. Supp. 2d at 1300.

85. The new ordinance is much more stringent, meeting the standards laid out by the USFWS as a condition of granting the County’s ITP for beach driving (*see Loggerhead Turtle* 148 F.3d 1231, 1240–1242 (11th Cir. 1998)). The exemption of Daytona Beach and

preliminary matter, the court dismissed the County's plea for Eleventh Amendment Immunity.<sup>86</sup>

The court reiterated its previous findings that "artificial beachfront lighting significantly increases the incidence of injury to and mortality of sea turtle hatchlings . . . , the effects of disorientation are frequently fatal . . . , [therefore] artificial lighting is responsible for the 'taking' of . . . sea turtles on the beaches of Volusia County."<sup>87</sup> However, Volusia County argued that it does not "permit" any beach lighting that harms turtles.<sup>88</sup> The plaintiff's relied, in part, on the Court of Appeals decision to argue that Volusia County can and should be held liable.<sup>89</sup> The District Court found the Court of Appeals opinion inapplicable to the instant case.<sup>90</sup>

The County contended that it was not permitting an otherwise unlawful act or licensing an act likely to violate the Endangered Species Act.<sup>91</sup> Rather, the ordinance was drafted to limit beachfront lighting, protect sea turtles and to be in compliance with the Endangered Species Act.<sup>92</sup> Agreeing with the County's arguments, the court held that Volusia County's ordinance itself does not cause harm to sea turtles as written.<sup>93</sup>

The Turtles argued that the County was responsible for the takes effected by its citizens through a theory of "implied permitting" since the County is solely responsible for regulation in this area.<sup>94</sup> Rather than

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Daytona Beach Shores from regulation was absolved. Furthermore, any municipality that wished to enforce its own ordinance would have to submit such for the County's review against the amended County ordinance. Instead, all municipalities opted to have Volusia County enforce the new County ordinance, rendering the County the sole regulatory agent of beachfront lighting throughout the entire county. As such, the issue of the County's vicarious liability was rendered moot and the Court turned to whether the County could be held liable for takes occurring directly under its ordinance. *See* Loggerhead Turtle, 92 F. Supp. 2d at 1300-1301.

86. "It is well-settled that counties do not enjoy Eleventh Amendment immunity from suit in federal court." *Loggerhead Turtle*, 92 F. Supp. 2d at 1303.

87. *Id.* at 1304-1305. Nor does Volusia County dispute these findings. *See id.* at 1305.

88. *See id.* at 1306.

89. Essentially, the Turtles argued that takes from beachfront lighting were happening in the County and since the County is the only one with the authority to regulate beachfront lighting, the court must enjoin the County from permitting such takes. *See id.*

90. First, the ordinance had since been amended. Second, the Court of Appeals only resolved the issue of standing, explicitly leaving questions of proximity, degree and the standard of causation for liability to the District Court. *See id.* at 1306-07.

91. *See id.* at 1307.

92. *See id.*

93. *See id.*

94. *See id.* The plaintiff's do not base their action on failure to enforce. In any case, the court notes that there is evidence that the County does enforce the ordinance. *See id.*

directly address whether this theory of liability is valid to state a claim, the court dismissed the whole issue for a purported lack of any suitable remedy.<sup>95</sup>

The court noted that the ESA authorizes the regulatory agency to enter into management and cooperation agreements with the States, but the ESA requires no affirmative action on the part of State or local governments.<sup>96</sup> Based on this reasoning, the court found no basis upon which to hold the County liable for takes effected by its citizens merely because it has passed a beach lighting ordinance.<sup>97</sup> The court opined that some proper remedies available for the Turtles lie in bringing suit directly against individuals who are in violation of the Act, lobbying the regulatory agency to pass its own beachfront lighting ordinance that would supercede the County's or advocating for more stringent conditions when the ITP comes up for renewal.<sup>98</sup>

#### IV. DISCUSSION

The holding of the court in *Loggerhead Turtle* was essentially based on the court's findings that the County was not responsible for enforcement of the ESA; that the terms of the ordinance were aimed at preventing, not causing, harm to sea turtles; and that there were no remedies available that the court could issue. The court also found that the ordinance was being adequately enforced but dismissed that issue as not having been raised. However, a different result in the case was possible, perhaps required, based on the Turtles' theory of "implied permitting."

While not responsible for enforcement of the ESA, the County may be in violation of it. The purpose of the ordinance is not dispositive; rather, the court must look to its effect. The Turtles' theory of finding the County liable for "implied permitting" when it has promulgated an ordinance that causes takes under the ESA is logical, consistent with Congressional intent,

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95. "[T]he plaintiffs have not presented the Court with any legal authority by which the Court has the power to tell the County to pass and enforce a specific piece of legislation. Volusia County's lighting ordinance does not violate, in and of itself, the Endangered Species Act. If it did, the Court could strike the ordinance down by authority of the Supremacy Clause. But by what authority may the Court compel the County to enforce a proposed item of local legislation? It may be that the Endangered Species Act vests such power in a federal court. This Court, however, will not exercise such authority without guidance from the higher courts." *Id.* at 1307-1308.

96. *See id.* at 1308. "The Act neither compels nor precludes local regulation; it preempts that which is in conflict." *Id.* There is no applicable federal lighting ordinance. *See id.*

97. *See id.*

98. *See id.* at 1308-09.

and brings this case under a precedent of justiciability. Furthermore, the court's determination that no remedies were available is less than convincing. Finally, while purportedly not in issue, the adequacy of enforcement may have been a larger question than given credit by the court. At the very least, the defendants' motion for summary judgment should have been denied and the case allowed to go to trial.

### A. *Liability*

The three following facts have been conclusively established in the *Loggerhead* case: 1) endangered sea turtles are being harmed in Volusia county as a result of beachfront lighting;<sup>99</sup> 2) such harm constitutes a forbidden take under the ESA;<sup>100</sup> and 3) Volusia County's ITP for beach driving does not permit such takes.<sup>101</sup> Two principal questions (related to Volusia County's beachfront lighting ordinance) arise from these facts: 1) is the ordinance valid and legal as it is written; and 2) is the ordinance being adequately enforced? To the latter the District Court on remand intimated the answer was yes, but noted that the issue was not presented.<sup>102</sup> To the former, the court, after some consideration, determined the answer was also yes.<sup>103</sup>

For the purposes of this discussion, we will assume that the ordinance *is* being fully enforced. However, it is worth noting that this assumption seems far less clear than is made out by the court. It is perfectly plausible, and no facts presented in the *Loggerhead* opinion indicate otherwise, that the ordinance is valid, but that enforcement is less than complete. If this is the case a difficult issue of remedy arises. In certain areas of the law, municipalities, due to budgetary constraints and other valid concerns, are given some leeway in prosecuting the violation of laws.<sup>104</sup> However, the ESA does not provide for such leeway in the protection of endangered species.<sup>105</sup> Yet, if such leeway is not permitted, may the court compel the County to enforce its ordinance? Such an action would be more akin to mandamus than injunction. However, whether it is because the ordinance

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99. *See id.* at 1304-05.

100. *See id.*

101. *See id.* at 1300.

102. *See id.* at 1307.

103. *See id.* at 1308.

104. *See Esmail v. Macrane*, 53 F.3d 176, 179-80 (7th Cir. 1995) (selective prosecution of law in and of itself is not sufficient to constitute violation of equal protection); *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (selective prosecution of criminals does not violate the rights of those who are prosecuted).

105. *See Loggerhead Turtle*, 92 F. Supp. 2d at 1301-02.

actually is being fully enforced or because of tactical reasons on the plaintiffs' part, the Turtles did not frame their claim as an action to compel enforcement and the court was correct in refraining from ruling on this point. Future cases should note that the court's comments on this subject are purely *dicta* because of this posture.

The primary question remains as to whether the ordinance is valid as written. The court answered this question in the affirmative; however, the court's opinion should have more carefully parsed the issue of whether the County was in violation of the ESA from whether there was any remedy that it had the authority to issue. Assuming for the present analysis that the County is fully enforcing its ordinance, it must be the case that the ordinance permits some takes in violation of the ESA.<sup>106</sup>

The District Court asserted that the Turtles' complaint was properly directed at either the USFWS or the individuals who are violating the ESA, that there was no responsibility borne by the County.<sup>107</sup> The issue is not so simply resolved. Volusia County is recognized as having sole regulatory power over beachfront lighting on beaches within the County. While the county is not responsible for enforcing the ESA,<sup>108</sup> they may be permitting their citizens to maintain lighting that harms sea turtles.<sup>109</sup> While the citizens are responsible for the act of turning those lights on, the citizens' actions are carried out under a presumption of legality since they are acting in compliance with the only current authority on the matter: the Volusia County ordinance. If the County is permitting such action, there is precedent for holding them liable.

*Defenders of Wildlife v. Administrator, Environmental Protection Agency*<sup>110</sup> was a case concerning the EPA's registration of strychnine, allowing farmers to use it as a pesticide.<sup>111</sup> The EPA has discretion to register chemicals for agricultural use, and it is true that the farmers, not the EPA, were the ones applying the strychnine. However, the fact that the

106. Since the County is responsible for regulating all beachfront lighting in the County, if we assume the ordinance is being fully enforced and takes still ensue, the only possible conclusion is that takes in violation of the ESA are permitted by the ordinance.

107. See *Loggerhead Turtle*, 92 F. Supp. 2d at 1308.

108. The federal government may not commandeer state government into service for federal regulatory purposes. See *New York v. United States*, 505 U.S. 144, 175 (1992).

109. It can only be said that the County *may* be permitting such harm because the factual record has not been developed enough to render a conclusion as to the effect of the current ordinance. This is a major point that should have been allowed to go to trial.

110. 882 F.2d 1294 (8<sup>th</sup> Cir. 1989).

111. The EPA allowed farmers to use strychnine laced bait to kill rodents that attacked their crops. However, endangered black-footed ferrets would also consume the bait and be killed. The plaintiffs successfully sued to enjoin the permitting of strychnine for such use due to the resulting violation of the ESA. See *id.* at 1297, 1303.



permitting actions of the EPA essentially created a license for the use of strychnine, and a presumption of its legality, rendered the EPA liable for its actions.<sup>112</sup> In *Strahan v. Coxe*,<sup>113</sup> a state agency issued fishing licenses to gillnet fishermen whose nets caused harm to the endangered right whale.<sup>114</sup> The state agency was not responsible for enforcement of the ESA, and their permitting actions were within their legitimate state authority.<sup>115</sup> However, they were enjoined because the actions of the state regulatory agency (permitting the fishing) resulted in harm to an endangered species (the Right Whale).<sup>116</sup> In both of these cases the court looked to the result of the permitting activity of the agency and state, not the purpose.

Volusia County asserted that, unlike the defendants in these cases, it was not permitting an unlawful activity. However, in neither of these cases was the activity itself inherently illegal.<sup>117</sup> Lighting one's property in compliance with the only applicable ordinance is no more illegal than *Defender's* licensed fisherman gillnetting, or *Strahan's* permitted farmers spreading pesticides. However, it is true that the County is not actively "permitting" an activity such as in these cases.<sup>118</sup> Plaintiffs argued that the court should recognize a theory of "implied permitting" when citizens can defend their illegal actions as in compliance with a valid ordinance.<sup>119</sup> The County, with sole regulatory authority in the area of beachfront lighting, is condoning an activity that, even when carried out under the terms of the ordinance, is violating the ESA take prohibition. There is nothing inherently illegal about fishing, but fishing, even in compliance with the

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112. *See id.* at 1303.

113. 127 F.3d 155 (1<sup>st</sup> Cir. 1997).

114. Massachusetts required all gillnet fishermen to be licensed with the state. However, the terms of the license did not restrict gillnet fishing sufficiently to prevent harm to the Right Whale. The plaintiffs successfully sued to enjoin the state from continuing to license gillnet fishing to the extent, or in such a manner, as would cause harm to the whales. *See id.* at 158–59, 170.

115. *See id.* at 159.

116. *See id.* at 163.

117. Neither applying pesticides authorized by the EPA, nor fishing with a valid license are inherently illegal activities. It was their effect that violated the law. In *Strahan* the state argued that its licensing of gillnet fishermen was no different than the licensing of automobile drivers who go on to commit a crime with their car. The court, however, differentiates these scenarios because the automotive driver can (in fact most do) operate their vehicle in a manner that complies with the law. Conversely, even if the gillnet fisherman strictly adheres to the terms of her license she may still violate the law. *See id.* at 163–64.

118. Volusia County's lighting ordinance is aimed at restricting lighting, not licensing it.

119. *See* Loggerhead Turtle, 92 F. 2d at 1306–07.

permit, was causing harm in *Strahan*. While it is true that there is some volition on the part of the person to turn on the light, it is the same volition held by the fisherman who throws his nets over the side of the boat. Both are empowered by the grant of a license from (or being in compliance with an ordinance of) the regulatory authority.

Recognizing the Turtles' theory of implied permitting would force the County to ensure that the actions that it enables are in compliance with the ESA. The distinction between promulgating an ordinance, licensing fishermen, and registering a pesticide, is largely semantic. The critical point is that in all three cases the effected individuals are behaving as they do because they are operating under, and within, the authority of the relevant regulatory body. The ESA's "harm" prohibition does encompass indirect as well as direct injury, including the licensing of activities that affect takes.<sup>120</sup>

### B. Remedies

Based on the above reasoning (and assuming full enforcement), Volusia County is guilty of permitting takes in violation of the ESA. However, the District Court asserted that there was no available remedy that it could issue.<sup>121</sup> Yet, aside from a cursory statement that separation of powers prevented it from ordering the County to enforce its ordinance,<sup>122</sup> the court did not proceed to render any analysis in its opinion as to what its remedial options were and why those remedies could not issue. Insofar as the requested injunction could be equated with an order from the court that the County take legislative action, the court's position is correct.<sup>123</sup> However, an injunction would not commandeer the County into enforcing the ESA, it would merely give the parameters within which the County's permitting must fall. While the County is not required to enforce the ESA, if it does choose to promulgate a beachfront lighting ordinance, the County must do so in compliance with the ESA. Furthermore, there are other avenues of remedy available to the court, which were never considered.

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120. "[U]nless the statutory term 'harm' encompasses indirect as well as direct injuries, the word has no meaning . . ." See *Babbit v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 697-98 (1995); "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA." See *Strahan v. Coxe*, 127 F.3d at 163; "[Massachusetts licensing of gillnet fishermen] cannot continue insofar as its operation is inconsistent with the intent of the ESA." *Id.* at 168.

121. See *Loggerhead Turtle*, 92 F. Supp. 2d at 1308.

122. See *id.* at 1307.

123. See *id.* See also *New York v. United States*, 505 U.S. 144, 162 (1992).

The source that “permits” takes are clauses in the ordinance that allow lighting at times and in places harmful to the turtles. Without requiring the County to legislate, the court has the authority pursuant to the Supremacy Clause, to strike the components of the ordinance that allow violations of the ESA.<sup>124</sup> If this can not be done, then the court should strike the entire ordinance as violative of the ESA.<sup>125</sup> Such action would leave the County with the option of either not regulating beachfront lighting at all and violating their ITP,<sup>126</sup> or rewriting the Ordinance in a manner that prevents any takes.<sup>127</sup>

There are other creative remedies that the court could have fashioned. In *Strahan*, the court ordered the state agency to apply for an ITP, submit to the court a proposal to eliminate, or sufficiently modify, fixed fishing gear in the whales habitat, and to convene a committee that included the plaintiff and other interested parties in an effort to reach a consensus solution on the issue.<sup>128</sup> Similarly, the *Loggerhead* court could have conditioned the continuing operation of the ordinance upon the County obtaining a second ITP for incidental takes resulting from beachfront lighting.<sup>129</sup> The *Loggerhead* court could have required the County to submit to the court a proposal that would eliminate takes from beachfront lighting.<sup>130</sup> Finally, the *Loggerhead* court could have required the County,

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124. U.S. CONST. art. VI, cl. 2.

125. “Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.” *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). This is a strong remedy, but under the ESA the court does not have the traditional power to “balance the equities” and consider the economic impact of imposing an injunction to prevent takes. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1977).

126. One of the mitigating factors that Volusia County’s ITP for beach driving was conditioned on was the implementation of an adequate beachfront lighting ordinance. *See Loggerhead Turtle*, 92 F. Supp. 2d at 1299–1300. If the court were to strike the existing ordinance, and the County took no further action, they would be in violation of, and likely loose, their ITP, rendering all beach driving illegal.

127. Given the ramifications of taking no action (*see supra* note 126) the County most likely would choose to promulgate a revised ordinance. However, this would be a secondary impact of the court’s injunction and is distinct from a direct order by the court mandating that the County legislate.

128. *See Strahan v. Coxe*, 127 F.3d at 158.

129. Such a measure would allow the agency responsible for implementing the ESA to make the ultimate determination on the appropriate standard that the lighting ordinance would be held to the mitigation measures that it would be premised on. Note that, unlike the court considering an injunction for takes, the USFWS has some authority to balance competing interests in considering the issuance of an ITP. *See* 16 U.S.C. § 1539(a)(2).

130. As a public policy matter this solution is less preferable because it requires the court to become involved in the administration of the solution, whereas demanding that the County apply to the USFWS for an ITP places that responsibility on the federal implement-

the plaintiffs, FWS, and any other effected parties, to form a task force to arrive at a consensus solution.<sup>131</sup> Creative orders such as these, while having precedent, are not the normal fare of judicial remedy. However, such examples are evidence that the District Court shirked its duties in summarily dismissing the issue as having no available remedy.

## V. CONCLUSION

The Turtles' theory of "implied liability" should have been recognized by the District Court. Implied liability should be recognized when the plaintiff can show that a particular governmental entity is responsible for regulation in a given area, and that that entity has issued regulations under which a citizen can violate the ESA while remaining in compliance with the regulation. Determining whether a particular case meets this standard is a fact intensive inquiry that involves looking into the precise language of the ordinance, whether the ordinance is being enforced, and if (and exactly what) harm is ensuing from it. Trial courts must take a careful look at these details in order to resolve the underlying legal questions; summary judgment should issue only in cases whose underlying fact patterns are undisputed. State and local ordinances that are found guilty of implied liability can be struck in a suit for injunction. Furthermore, there are many creative solutions to such issues that, while not the traditional remedial fare of the courts, offer permissible means for the court to provide constructive resolution to the affected parties.

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ing agency where it belongs.

131. Given the potentially contentious relationship among the parties, the court would have to place an incentive on reaching a solution. For example, if the County did not show a good faith effort to find an agreeable resolution, or if a satisfactory resolution were not reached in a mandatory time frame, then they might become liable for all takes then occurring.

