The Interplay Between Land Use and Environmental Law

DAVID L. CALLIES*

I. INTRODUCTION

The overlap or interplay of land use and environmental law is, of course, well documented. Indeed, subjects like coastal zone management and floodplain controls regularly find their way into courses and books on both land use and environmental law.[1] What is not so widely perceived is the interaction between land use and environmental laws, sometimes with unintended regulatory consequences. Nowhere is this phenomenon more starkly demonstrated than in the interplay between the federal Endangered Species Act (ESA or Act)[2] and Hawaii's famous Land Use Law, which "zones" the entire state into four land use districts.[3]

II. THE ENDANGERED SPECIES ACT AND HAWAII'S STATE LAND USE LAW: INTERPLAY AND UNINTENDED CONSEQUENCES

The ESA controls land use activities on both federal and private land by prohibiting certain actions that may affect endan-

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* FAICP, ACREL, Benjamin A. Kudo Professor of Law, William S. Richardson School of Law. A.B., Depauw Univ; J.D., Univ. of Michigan; LL.M. (planning law) Nottingham University (England). This article is an extended version of a paper delivered at the Bettman Symposium during the annual conference of the American Planning Association in 2005. The author gratefully acknowledges the research assistance provided by Tina Wakayama, a Casenote Editor of the *University of Hawaii Law Review*.

1. *See, e.g.*, MORTON GITELMAN ET AL., CASES AND MATERIALS ON LAND USE (6th ed. 2004); DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII (1984) [hereinafter REGULATING PARADISE]; MORTON GITELMAN ET AL., LAND USE: CASES AND MATERIALS (6th ed. 2003); NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW (John R. Nolon ed., 2003).

2. 16 U.S.C. §§ 1533-1544 (2000).

3. For extensive coverage of the law and its effect, see PHYLLIS MYERS, ZONING HAWAII: AN ANALYSIS OF THE PASSAGE AND IMPLEMENTATION OF HAWAII'S LAND CLASSIFICATION LAW (1976); REGULATING PARADISE, *supra* note 1; FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971); DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK (1994).

gered or threatened species.[4] Under the Act, the Secretary of the Interior is authorized to list species of plants, fish, and wildlife as threatened or endangered. An endangered species is one "in danger of extinction throughout all or a significant portion of its range."[5] A threatened species is one that "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[6] Whether a particular species falls within one of these categories is determined on "the basis of the best scientific and commercial data available."[7]

Protection of a species requires protection of its habitat. In recognition of this, the ESA requires the Secretary of Interior to designate areas of "critical habitat" of endangered or threatened species.[8]

The regulatory impact of the ESA derives from sections 7 and 9. The former directs federal agencies to consider the impact proposed actions may have on protected species. Working with the Interior Department's Fish and Wildlife Service (FWS or Service), which administers most provisions of the ESA, agencies must conduct biological assessments if the FWS determines that protected or proposed species are present.[9]

Section 9 affects private development by its prohibition against the "taking" of protected species.[10] "'[T]ake' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[11] Within those proscribed actions, the most significant is "harm," defined as "an act which actually kills or injures a wildlife," including any habitat modification or degradation that "actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[12] The United States Supreme Court upheld this definition of "harm," and noted that "difficult questions of proximity and degree" could be addressed on a case-by-case basis.[13]

4. Endangered Species Act (ESA) of 1973, 16 U.S.C. §§ 1531-1544 (2000).
5. *Id.* § 1532(6).
6. *Id.* § 1532(20).
7. *Id.* § 1533(b).
8. *Id.* § 1533(a)(3).
9. *Id.* § 1536(c).
10. *See id.* § 1538(a)(1).
11. *Id.* § 1532(19).
12. 50 C.F.R. § 17.3 (2005).
13. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 708 (1995).

The ESA provides some flexibility to its otherwise apparent ban on actions that affect protected species through its allowance, since 1982, of so-called "section 10 incidental takings." An incidental taking is "any taking [that is] otherwise prohibited . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[14] The process of attaining an incidental taking permit differs slightly between a taking involving a federal action and one involving a private action.

Section 10 of the Act applies to private activity, and requires the private landowner seeking an incidental taking permit to submit a habitat conservation plan to the FWS.[15] The conservation plan must show the expected effects of the proposed act, the steps that will be taken to minimize and mitigate any takings that will or might occur, and what alternative actions were considered and why they were not used.[16] The Service must also be assured that there will be adequate funding for the conservation plan and that "the taking will not appreciably reduce the likelihood of the survival" of the species; it may then issue the permit subject to conditions.[17]

The Fifth Amendment taking implications of the ESA are an often discussed, but seldom litigated, topic. With Section 9's prohibition against the taking of an endangered species, two types of cases may arise: (1) the loss of livestock or damage to real property by protected species, and (2) the inability to engage in economically viable uses of land due to the presence of a protected species.

The second of these potential claim types elicits a riddle: When is a prohibition against taking a taking? In light of the "horror stories" of landowners being compelled to leave their land unused due to the presence of protected species, it is surprising that there are no officially reported successful claims (and not many reported unsuccessful claims) of regulatory takings involving denials of economically viable use.[18]

One successful case is *Boise Cascade Corp. v. Board of Forestry*.[19] There, the Oregon Supreme Court found that the denial of

14. 16 U.S.C. § 1539(a)(1)(B); *see also* Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 982 (9th Cir. 1985) (discussing allowance for otherwise prohibited takings).

15. *See* 16 U.S.C. § 1539(a)(2)(A).

16. *Id.*

17. *Id.* § 1539(a)(2)(B).

18. For one unsuccessful case, see Good v. United States, 39 Fed. Cl. 81, 84 (1997).

19. 935 P.2d 411 (Or. 1997).

a logging plan on private land due to the presence of a spotted owl nesting site stated a claim for relief under the Takings Clause and remanded the case for trial.[20] Though not officially reported, at trial, the denial of harvesting timber on fifty-six of sixty-four acres was held to be a taking of all economically viable use.[21]

Even less litigated is the potentially devastating linkage between the FWS designation of critical habitat and state (or local) land use laws designed to protect critical areas in various conservation or preservation zones. Hawaii presents an excellent example of such a linkage and the potential land use problems such linkages pose.

III. HAWAII'S LAND USE LAW

Hawaii's State Land Use Law, embodied in Act 187 and Act 100, creates a dual zoning system whereby land is zoned by both the state and county.[22] Act 187, passed in 1961, authorized the division of Hawaii's land into conservation, agricultural, and urban districts.[23] A 1963 amendment added the rural district; this, however, has rarely been used.[24] The Act also created the Land Use Commission[25] (Commission) whose primary responsibility was to divide the state's lands into the appropriate districts.[26] Currently, Hawaii is divided into the four district classifications in roughly this way: conservation, 47 percent; agriculture, 47 percent; urban, 5 percent; and rural, 1 percent.[27]

The urban districts contain land currently used for urban purposes, as well as land reserved for urban development in the fore-

20. *Id.* at 420, 422.

21. *See* Robin L. Rivett, *Why There Are So Few Takings Cases Under the Endangered Species Act or Some Major Obstacles to Taking Liabilities*, SC43 A.L.I.-A.B.A. 383, 405 (1998).

22. *See* Regulating Paradise, *supra* note 1, at 7.

23. *Id.*

24. *Id.*

25. *Id.* The Commission is comprised of nine members, including at least one citizen of each of the state's four counties. *Id.* at 10. Originally, the Commission had to renew the district boundaries every five years. *Id.* Now, however, the Commission usually redraws boundaries only when landowners petition for reclassification, or "boundary change," in a process similar to county rezoning. Although the Commission was originally required to undertake a district boundary review every five years, it now acts almost exclusively on landowner's petitions for reclassifications, called boundary changes, a process roughly comparable to the county rezoning process. *Id.*

26. *Id.* at 7.

27. *Id.*; STATE OF HAWAII, DEP'T OF BUS., ECONOMIC DEVELOPMENT AND TOURISM, STATE OF HAWAII DATA BOOK, tbl.6.04 (2004), *available at* http://www.hawaii.gov/dbedt/info/economic/databook/db2004/section06.pdf.

seeable future.[28] Urban classification does not create a right of urban use, however.[29] The county still must issue a permit based on county zoning.[30] In effect, the state's urban classification is an invitation for the county to place such land in an urban zone, if the county so chooses.[31] The state, however, is hesitant to classify land as urban because then the county has sole control over which uses and activities are permitted.[32]

The agricultural classification encompasses traditional agricultural purposes, such as cultivation and grazing, and also related uses, including open space for recreation and processing facilities for agricultural products (for example, sugar mills).[33] Under Land Use Commission standards, high-quality agricultural land "'shall'" be classified as agricultural, while adjacent land "'may'" be classified as agricultural, even if it is topographically or geographically unsuitable for farming.[34] The list of permissible uses on agricultural lands is extensive and other uses are permitted by special permit, which may be issued by a county alone if the land for which the permit is sought is less than fifteen acres.[35] If the land is more than fifteen acres a special permit may be issued in conjunction with the Commission.[36] In order to obtain a special permit, the applicant must satisfy the Commission that the special use is "'unusual and reasonable,'" as defined in the Commission's guidelines.[37]

The conservation district includes watersheds, coastal and stream floodplains, wildlife reserves, historic or scenic sites,

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28. REGULATING PARADISE, *supra* note 1, at 7.
29. *Id.*
30. *Id.*
31. *Id.*
32. *See* HAW. REV. STAT. § 205-2(b) (2005).
33. REGULATING PARADISE, *supra* note 1, at 8.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* The guidelines include the following:
    1. That the desired use would not adversely affect surrounding property.
    2. Such use would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, and police and fire protection.
    3. Unusual conditions, trends, and needs have arisen since the district boundaries and regulations were established.
    4. The land upon which the proposed use is sought is unsuited for the uses permitted with the District.

Id. at 8-9 (quoting State of Hawaii, LUC, *Rules of Practices and Procedure*, § 5.2).

parks, mountains, and outlying islands.[38] The areas included are both publicly and privately owned.[39] The land use in this district is controlled by the Board of the State Department of Land and Natural Resources (DLNR, or Land Board), which has further divided Hawaii's conservation lands into forest and water reserve subzones:[40]

1. Protective: "to protect valuable resources . . . such as restricted watersheds, marine, plant, and wildlife sanctuaries, significant historic, archaeological, geological, and volcanological features and sites, and other designated unique areas."[41]
2. Limited: when "natural conditions suggest constraints on human activities," such as lands "susceptible to floods and soil erosion."[42]
3. Resource: sustained use of natural resources including for future parkland, outdoor recreation, and harvesting.[43]
4. General: open space where urban development would be "premature."[44]
5. Special: "areas possessing unique developmental qualities which complement the natural resources of the area."[45]

Pursuant to its statutory discretion and per individual application, the Land Board determines what is permitted within the above subzones and whether or not to grant a permit.[46] Boundary amendments for conservations lands, regardless of acreage, must be approved by the Commission.[47]

Finally, the rural district is primarily used for rural subdivisions and small farms that would be inappropriate in the urban or agricultural districts.[48]

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38. *Id.* at 9.
39. *Id.*
40. *Id.*; HAW. CODE R. § 13-5-10 (Weil 2005).
41. HAW. CODE R. § 13-5-11.
42. *Id.* § 13-5-12.
43. *Id.* § 13-5-13.
44. *Id.* § 13-5-14.
45. *Id.* § 13-5-15.
46. REGULATING PARADISE, *supra* note 1, at 9.
47. HAW. REV. STAT. § 205-3.1(a) (2005).
48. REGULATING PARADISE, *supra* note 1, at 9-10.

IV. THE LINKAGE BETWEEN HAWAII'S LAND USE STATUTES AND ESA HABITAT DESIGNATION

Pursuant to the ESA, the FWS is required to designate critical habitat for all listed endangered species, whether on private or public land. The purpose of the designation is to designate specific areas within the geographical area occupied by such listed species essential to its conservation.[49] Conservation is further defined to include not only survival, but also recovery, if necessary, of the listed endangered species.[50]

Pursuant to this statutory authority and mandate, in early 2003 the FWS proposed to designate several thousand acres in the county of Kauai, including thousands of acres of private land, in order to protect two listed species: the cave wolf spider and the cave amphipod. While the FWS has repeatedly claimed that such designation only affects federal activities on federal lands in areas so designated as critical area, such designation will almost certainly trigger further designation and regulation under certain Hawaii statutes, resulting in severe restrictions on the use of private land with dire economic consequences for affected landowners.

A. The Land Use Commission

The Commission is charged with the basic responsibility for classifying all lands in the state.[51] The state land use law further defines uses in each district, requiring for the conservation district that "[c]onservation districts *shall* include areas necessary for . . . conserving indigenous or endemic plants, fish, and wildlife, including those which are threatened or *endangered*."[52] Given further language in the "State Plan"[53] which requires that the state's physical environment planning "[e]ncourage the protection of rare or *endangered plant and animal species and habitats* native to Hawaii," it is difficult to avoid the conclusion that the Commission will be required to reclassify into the state conservation zone all endangered species habitat land that is not already so classified.[54] Further increasing the likelihood of such redistricting, the state DLNR is required by statute to "initiate amendments to the con-

49. *See* 16 U.S.C. § 1532(5)(A) (2000).
50. *See id.* § 1532(3).
51. *See* HAW. REV. STAT. § 205-2(a).
52. *Id.* § 205-2(e) (emphasis added).
53. *Id.* §§ 226-1 to -107.
54. *Id.* § 226-11(6) (emphasis added).

servation district boundaries consistent with section 205-4 in order to include high quality native forests *and the habitat of rare native species of flora and fauna* within the conservation district."[55] It is difficult to see how the Commission can thus avoid immediately reclassifying land which the FWS designates as critical habitat for listed endangered species into the state conservation district.

Moreover, it will be extremely difficult to persuade the Commission to reclassify designated endangered species habitat lands from the conservation district to any of the other three state land use districts, and equally difficult to persuade the Commission to reclassify any such lands in any of the other districts (say, agriculture to rural or urban) to any district but conservation. This is so because the land use law further provides that "[i]n its review of any petition for reclassification of district boundaries pursuant to this chapter, the commission shall specifically consider. . . the impact of the proposed reclassification on . . . areas of state concern [such as the] [p]reservation or maintenance of important natural systems *or habitats*."[56] The land use law also requires that any such boundary amendments (reclassifications) conform to the aforementioned state plan, which, as noted above, encourages the protection of endangered plant and animal habitats.[57]

B. Department of Land and Natural Resources and Conservation-Classified Lands

Once the Commission classifies lands—private and public alike—in the state conservation district, control of such lands for regulatory purposes passes to the state DLNR, which has jurisdiction over their use.[58] The DLNR is further required by statute to establish subzones within the conservation district.[59] Finally, except for uses established in 1964 and the rare variance, only those uses permitted in these subzones are permitted uses in the conservation district.[60]

The DLNR has by regulation established five such subzones. Very little is permitted in any of them. The most restrictive of these is the Protective subzone. The Protective subszone "shall

55. *Id.* § 195D-5.1 (emphasis added).
56. *Id.* § 205-17 (emphasis added).
57. *Id.* § 205-16.
58. *See id.* § 183C-4(b).
59. *See id.* § 183C-4(d).
60. *See id.* § 183C-4(b), (c).

encompass . . . [a]reas necessary for preserving natural ecosystems of native plants, fish, and wildlife, *particularly those which are endangered.*"[61] The only uses permitted are "[b]asic data collection, research, education and resource evaluation."[62]

It is thus nearly certain that DLNR will reclassify any conservation district lands under its jurisdiction that the FWS designates as critical endangered species habitat, into the most restrictive—Protective—subzone, which permits virtually no economic use of such land. Its value would accordingly plummet. Indeed, should either the Commission or the DLNR fail to so classify FWS-designated endangered species critical habitat lands, they may well be forced to do so under the rules of *Loggerhead Turtle v. County Council of Volusia County*,[63] which held that a county may be charged with violation of the ESA for harmfully inadequate regulation of activity that endangers a listed species.

C. Miscellaneous Linkages Between the ESA Critical Habitat Designation and Hawaii Statutes

1. Impacts Through Hawaii's Environmental Impact Statements Law

Hawaii's Environmental Impact Statement ("EIS") Law, which applies to a broader range of activities than does the National Environmental Policy Act ("NEPA"), would almost certainly be triggered by the ESA.[64] This is because any proposed use would now be in a state conservation district, or even in the unlikely event that land in which a use is contemplated is not in a state conservation district, because the use would "[s]ubstantially [affect] a rare, threatened, or endangered species, *or its habitat.*"[65] Any use of Commission-classified Conservation Lands (or, for that matter, any state or county lands, even if that use consists only of intersecting such lands through an underground pipe or overhead wire) triggers at least an environmental assessment, if not a full-blown EIS.[66] This results in several impacts from the ESA critical habitat designation.

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61. HAW. CODE R. § 13-5-11(b) (Weil 2005) (emphasis added).

62. *Id.* § 13-5-22(A-1).

63. 148 F.3d 1231 (11th Cir. 1998), *cert. denied*, 526 U.S. 1081 (1999).

64. *See* HAW. REV. STAT. § 343-5.

65. HAW. CODE R. § 11-200-12(b)(9) (emphasis added).

66. *See* Kahana Sunset Owners Ass'n v. County of Maui, 947 P.2d 378 (Haw. 1997); Sierra Club v. Office of Planning, 126 P.3d 1098 (Haw. 2006).

First, as noted above, to the extent such critical habitat designation requires the Commission to reclassify agricultural land to conservation land, any proposed use on that land so reclassified would require an assessment or impact statement under Hawaii's EIS law. Because present administrative rules require a full-blown EIS in the event of any significant action affecting the environment, and because one of the "significance" criteria applies to an action which "substantially affects a rare, threatened or endangered species, *or its habitat*,"[67] clearly designation under the ESA would almost certainly require an EIS under Hawaii law. This will be required even if no endangered species is discovered on the designated land.

2. Coastal Zone Management Act and the ESA

In common with most coastal states, Hawaii has adopted a Coastal Zone Management Act[68] ("CZMA"), largely in response to the federal CZMA[69] and what it offers participating states in the form of grants and input on otherwise virtually unregulatable federal use of federal land located in a federally approved state coastal zone.[70] Hawaii's CZMA requires a Special Management Area permit ("SMAP") from the appropriate county for any development in the designated coastal zone special management area, which extends around each of the state's islands, inland for a mile or more in some instances. The statute provides that the counties must minimize any development that would "adversely affect . . . wildlife habitats "[71] and requires that the counties may not approve any development unless they find that it is "consistent with the objectives, policies and . . . guidelines" of the CZMA.[72] The list of CZMA policies in the statute includes ensuring "that the use and development of marine and coastal resources are ecologically and environmentally sound."[73]

It will be difficult to obtain an SMAP in ESA-designated critical habitats because it is more than arguable that the mere designation of development will adversely affect the habitat of an endangered species.

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67. HAW. CODE. R. § 11-200-12(b)(9) (emphasis added).
68. HAW. REV. STAT. §§ 205A-1 to -71.
69. Coastal Zone Management Act, 16 U.S.C. §§ 1451-1466 (2000).
70. For a thorough discussion, see Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987).
71. HAW. REV. STAT. § 205A-26(3)(E).
72. *Id.* § 205A-26(2)(B).
73. *Id.* § 205A-2(c)(10)(A).

V. THE LINKAGE BETWEEN OTHER STATES' LAND USE STATUTES AND ESA HABITAT DESIGNATION

Although under the ESA itself, critical habitat designation is intended to affect only federal agency activities on designated land, some states have statutorily extended the impact of critical habitat designation to private landowners. Critical habitat designation "provides extra-legal benefits to listed species simply because federal agencies or even other entities are more likely to go to greater lengths to avoid impacts on an area labeled as critical to a particular species . . . . [S]tate regulatory schemes accord areas designated as critical habitat greater protections."[74] For example, Washington and Virginia have passed statutes forbidding the placement of municipal landfills on federally designated critical habitat.[75] Similarly, Oregon conditions issuance of state surface coal mining and reclamation permits on "[n]o loss of existing critical habitat of any . . . federally listed threatened or endangered species."[76] Lastly, New Jersey and Indiana do not forbid specific types of development in federally designated critical habitat, but they require that landowners establish that the development would not affect the continued existence of endangered or threatened species or result in destruction or adverse modification of their critical habitats, language that parallels federal agencies' requirements under Section 7 of the ESA.[77] Clearly, critical habitat designation has implications beyond requiring that federal agencies consult with the FWS about activities on designated land; critical habitat designation can, through state statutes, reach the activities of private landowners as well.

VI. CONCLUSION

The linkage between the ESA and state land use regulations demonstrates that there is substantial interaction between traditional environmental and traditional land use regulation. The Land Use Commission and the State Department of Land and

74. Daniel J. Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues for the Next Thirty Years*, 34 ENVTL. L. 483, 528 n.178 (2004).

75. *See* WASH. ADMIN. CODE 173-304-130(2)(j)(ii) (2004); VA. CODE ANN. § 10.1-1408.4(B)(6) (2004).

76. OR. REV. STAT. § 517.956(2)(c) (2003).

77. *See* N.J. STAT. ANN. § 13:9B-9 (West 2003) (in wetlands development context); IND. CODE ANN. § 14-34-4-7 (West 2004) (in surface coal mining and reclamation context), respectively.

Natural Resources all have explicit responsibility under their applicable enabling statutes and regulations for the protection of endangered species habitat. It would therefore be logical to assume that the designation of critical habitat for endangered species by the U.S. Fish and Wildlife Service will trigger processes by means of which the Commission would reclassify (by means of a boundary amendment) any lands so designated into the state Conservation Zone. Once so classified, such land falls under the jurisdiction of the DLNR, which then decides in which of several subzones to place or classify the land. Under current DLNR rules and regulations, it is logical to assume that land designated as critical habitat for the protection of endangered species would be classified in the most restrictive of the five subzones, which permits virtually no economically beneficial use of land so designated. Moreover, should either the Commission or DLNR fail to exercise their authority as above-described, it is likely that environmental organizations in Hawaii would bring litigation to force them to act. Based on current case law from other jurisdictions, the likelihood of success in such litigation is high. Such designation could not help but substantially reduce or eliminate the private use of land so designated, reclassified and zoned. Hawaii's experience with critical habitat designation (and to a lesser extent, the experiences of Washington, Virginia, Oregon, New Jersey, and Indiana) may portend future developments in other states, which have also extended the impact of critical habitat designation to private landowners by statute.

All of which perhaps goes to one of John Nolon's major theses in his many articles and books: Often the regulation of land is, for all practical purposes, the regulation of our environment. This may be as it should be. Nevertheless, it is worth some careful examination of the (likely) unintended and potentially significant consequences of environmental laws well beyond the goals and purposes stated in the rationales for their passage and implementation, as the experience in Hawaii and other states clearly demonstrates.