

## RESPONSE

### Comment on *Trading Species: A New Direction for Habitat Trading Programs*

by Virginia S. Albrecht

Like many commentators who have gone before him, Jonathan Remy Nash argues that the Endangered Species Act's (ESA's) command-and-control structure produces results that "flout[ ] both science and efficiency."<sup>1</sup> According to Nash, the ESA "fails to achieve species or habitat preservation in a cost-effective way," and its "inflexibility gives rise to initiatives that run counter to preservation and expansion of species' habitat."<sup>2</sup>

Nash is correct on these points. The ESA's regulatory system can only react to development proposals at the time they are proposed by someone else. As a result, the U.S. Fish and Wildlife Service (FWS) (one of the agencies that administer the ESA) proceeds pretty much on a first-come/first-served basis, and its regulatory analyses are predictably piecemeal and myopic. Further, he is right about the perverse incentives. The rigid rules that kick in when a species is listed or when a listed species occupies theretofore unoccupied land can motivate landowners to develop their land before a species that lives on the land is listed, or to manage their land so as to discourage a listed species from inhabiting the land. Nash finds habitat conservation plans authorized under §10 of the ESA more attractive, but the transaction costs are still too high and the regulatory scope still too narrow. He quotes Richard Stewart approvingly to the effect that "[w]ithout further progress toward fungibility and commodity-like markets, resource-tracking systems are likely to remain . . . hostage to regulatory discretion in the permitting process."<sup>3</sup>

As an antidote to that stifled outcome, Nash proposes what he calls a "constrained development permit regime" for trading in endangered species' habitat.<sup>4</sup> Building on an analogy to the trading of air emissions credits, Nash's scheme would have a governmental authority to make an initial allocation of development permits for an identified unit of land. The allocation would be designed to ensure that the population of all species would remain at viable levels if all the development permits were exercised according to their initial allocation. According to Nash, "the initial allocation of development permits would be loaded onto a computer website, along with all data necessary for a computer model to predict how development of various plots would affect the population of various species."<sup>5</sup> Thereafter, a landowner could develop land only if he or she holds a development permit. Landowners who propose development in excess of their initial allocation would have to trade with other landowners to obtain enough permits for their pro-

posed development. Proposed trades would be submitted to the website which would then "use the computer model to compare the effect of development [on] species populations at the buyer's location with the effect at the seller's."<sup>6</sup> If the model predicted that all species would remain viable, the trade could proceed. If not, then no trade. Whatever the outcome, the model would incorporate the results of the trade (or not) into its database for use in evaluating future trade proposals.

The idea of conserving valuable land by allowing the owners of restricted parcels to sell credits generated from their foregone development to other landowners in areas designated for development is not new. Transferable development rights have long been a tool of local land use planners, and wetland mitigation banks and endangered species conservation banks at the federal level are built on similar principles. But the analogy to air emissions trading is weak. To take Nash's concept to the next level, it will be necessary to explore and account for the distinctions between habitat trading and air emissions trading and to build a new system that reflects the unique characteristics of habitat. There are several points to consider in this regard.

The vast majority of terrestrial habitat is privately owned (as are 75% of the nation's wetlands). Air, by contrast, is a common good not subject to private ownership. No individual has a right to use a particular piece of the air or to exclude others from using it. Thus, establishing the government as overseer or regulator of the private use of this public good, so as to ensure that the air can continue to provide the public service, does not run afoul of public or private expectations about the use of air. By contrast, landowners do own particular pieces of the land which gives them the right to use and develop their land and to control access to, and use of it by, others, subject only to limited government oversight and restriction. The treatment of land as private property is a core principle of our constitutional system, and deeply engrained in the American body politic. Any permit allocation scheme must take account of this indelible reality. Unlike in the air context, governmental authority allocating development rights among various parcels of habitat is not starting from a blank slate.

Additionally, air is largely fungible, i.e., it all has an equal capability to provide the services for which it is protected. Land that is designated "habitat," however, is not fungible. It could be habitat because it is suitable for breeding of a particular species, or because it is suitable for feeding but not breeding for the same species. Although both are habitat, they are not interchangeable. Moreover, how well habitat serves its function depends on many additional factors—the physical characteristics of the land, its location, its proximity to other habitat that provides complementary functions, etc.

On the development side, different kinds of development will have different impacts, and how those impacts are ad-

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1. Jonathan Remy Nash, *Trading Species: A New Direction for Habitat Trading Programs*, 38 ELR (ENVTL. L. & POL'Y ANN. REV.) 10539, 10541 (Aug. 2008) (a longer version of this article was originally published at 32 COLUM. J. ENVTL. L. 1 (2007)).

2. *Id.* at 10539.

3. *Id.* (quoting Richard B. Stewart, *A New Generation of Environmental Regulation?*, 127 CAP. U. L. REV. 21, 127 (2001)).

4. *Id.* at 10545.

5. *Id.* at 10547.

6. *Id.*

dressed will depend on which species is at issue. A highway project would have different impacts on Florida panthers than it would on red cockaded woodpeckers. It seems unlikely that a single computer model could take into account all these variations. But manual assessment methodologies developed case by case by the FWS (and sometimes by other experts) to evaluate impacts to particular species have been successful in taking into account these variations to produce fungible units for assessing impacts of development proposals and identifying suitable mitigation. Rigorous examination of these ad hoc methodologies—often developed at the field level—could yield valuable insights for refining Nash's scheme.

Finally, air is valued and protected for one reason, i.e., because we breathe it. Whereas habitat, i.e., land or water, is subject to many legitimate competing demands. Land can be protected as habitat or farmed or developed for recreation, schools, housing, etc. Water is habitat, but we also drink it, swim in it, and use it in numerous industrial pro-

cesses, including the generation of electricity. All of these competing uses have social utility, and in our federal system, the choice of how land will be used is usually made by local government. Any habitat trading scheme will have to account for these competing uses for habitat and respect the pre-eminent role of local government in making land use decisions. Many in the environmental community are stuck in the race-to-the-bottom theory that once was conventional wisdom about local government. But experience since the ESA was enacted 35 years ago shows that local stakeholders, deeply committed to their local resources and with a long-term interest in economic and ecological sustainability, can and will come up with workable on-the-ground solutions to local challenges.<sup>7</sup>

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7. Examples include the Natural Community Conservation Planning in southern California, and Special Area Management Plans in Anchorage, Alaska; Orange County, California; and Superior, Wisconsin.