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LAND USE AND ENVIRONMENTAL PLANNING

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## THE ENDANGERED SPECIES ACT AND INTRASTATE SPECIES: RECENT COMMERCE CLAUSE CHALLENGES TO FEDERAL POWER TO PROTECT BIODIVERSITY

*By*
*Katherine Trisolini**

## I. Introduction

As Justice Holmes famously explained, "hard cases make bad law." A pending certiorari petition from a recent decision in the Fifth Circuit may test this aphorism. At issue is the Endangered Species Act [16 U.S.C. § 1531 et seq.] ("ESA"), the powers of Congress under the Commerce Clause, the entrepreneurial plans of a developer, and tiny eyeless cave-dwelling bugs. People generally don't like little eyeless bugs and they generally do like entrepreneurs. Having to evaluate something as important as congressional power to protect biodiversity in the context of such an apparently unattractive species may make this a hard case for some jurists.

In *GDF Realty v. Norton* [(5th Cir. 2003) 326 F3d 622] ("*GDF Realty*"), the Fifth Circuit rejected an as-applied challenge to the Commerce Clause power of the federal government under the ESA. It held that regulation by the Fish and Wildlife Service ("FWS") of six purely intrastate species of cave-dwelling insects pursuant to the ESA did not exceed federal power under the Commerce Clause.

Petitioners and several amici have sought certiorari by the Supreme Court. Although the Supreme Court has previously refused to grant certiorari in several cases raising the same issue [*see Rancho Viejo v. Norton* (D.C. Cir. 2003) 323 F.3d 1062, cert. denied, 124 S.Ct. 1506 (2004)] ("*Rancho Viejo*"); *Gibbs v. Babbitt* [(4th Cir. 2000) 214 F.3d 483, cert. denied, 531 U.S. 1145 (2001)] ("*Gibbs*"); *National Ass'n of Homebuilders v. Babbitt* [(D.C. Cir. 1997) 130 F.3d 1041, cert. denied, 524 U.S. 937 (1998)] ("*NAHB*"), the Court's retention of the petition in *GDF Realty* long after the completion of briefing suggests that this case may be the first to obtain review.

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Briefing was completed in September 2004, and as of this writing, the Court had not ruled on the certiorari petition. (Petitioners speculate that the Court is holding the petition pending its decision in *Raich v. Ashcroft* [(9th Cir. 2003) 352 F.3d 1222], another Commerce Clause case that is currently under review by the Court.) If the Court grants certiorari of *GDF Realty*, the case will be important for its potential impact on the ESA as well as the Commerce Clause. Because approximately half of the species listed as endangered or threatened under the ESA reside entirely within one state [*see NAHB*, 130 F.3d at 1052], the potential impact of the case is staggering.

Even if the Court rejects the certiorari petition, this issue is worth close scrutiny. The District of Columbia and Fourth Circuits previously rejected similar challenges in *Rancho Viejo*, *Gibbs*, and *NAHB*. However, the legal theory will likely appear in future cases until it has either been settled by the Supreme Court or each circuit individually; it is a position advocated by a number of property rights attorneys who are taking aim at the ESA.

This article will provide a brief overview of the ESA, recent Commerce Clause jurisprudence, and the circuit cases raising a Commerce Clause challenge to federal protection of species found only in one state. It will also argue that, although their analyses have diverged, the circuit courts correctly concluded that the Commerce Clause gives Congress the power to regulated takes of species living entirely in one state. This is so because the ESA, like other environmental statutes, regulates interstate commercial activity and because environmental protection in general and preservation of biodiversity in particular is a matter of national concern.

### Biodiversity and the Endangered Species Act

Harvard scientist E.O. Wilson predicts that one-fifth of the world's species could be extinct or doomed to early extinction by 2020 absent vastly improved efforts to save them. [E.O. Wilson, The Diversity of Life 346 (1992) (hereinafter "Wilson")]. Comparing the modern human created biodiversity crisis with earlier natural extinctions, he estimates that recovering the lost species would take ten to one-hundred million years [Wilson at 330]. By one approximation, the rate of extinction is 100 to 1000 times higher than in pre-human times [F. Stuart

Chapin, et al., *Biotic Control over the Functioning Ecosystems*, 277 Science 500 (1997)]. For tropical rainforest species, Wilson places the extinction rate from habitat loss alone much higher, at 1,000 to 10,000 times the historic background rate (the rate at which species naturally disappear) [Wilson at 280].

Finding that "various species of fish, wildlife and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation" and that other species were in danger of disappearing [16 U.S.C. § 1531(a)], Congress passed the ESA in the 1970s amidst growing concern over species extinctions. The ESA, signed into law in 1973 by Richard Nixon, was uncontroversial at the time, passing nearly unanimously [Stanford Environmental Law Society, The Endangered Species Act, 13 (2001) (hereinafter "Stanford")]. The ESA has three enumerated purposes: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . . to provide a program for the conservation of such endangered species and threatened species. . . . to take such steps as may be appropriate to achieve the purposes of the treaties and conventions" [16 U.S.C. § 1531(b)].

The ESA employs several mechanisms to accomplish these goals. First, Section 4 requires that the Secretaries of Interior and Commerce determine which species are endangered and threatened, publish lists of endangered species in the Federal Register, promulgate regulations to protect the species, develop and implement recovery plans, and designate critical habitat for listed species [16 U.S.C. § 1533]. The Secretary of the Interior has delegated authority to implement the ESA to the FWS. The FWS implements the ESA for terrestrial and freshwater species while the National Marine Fisheries Service implements the ESA through its delegated power from the Secretary of Commerce. Section 5 requires the Commerce, Interior, and Agriculture departments to develop and implement a land acquisition program to assist in the preservation of listed species [16 U.S.C. § 1534]. Section 7 provides for the evaluation of other federal agencies' activities on listed species [16 U.S.C. § 1536]. Section 8 provides for international cooperation on species preservation [16 U.S.C. § 1537].

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Section 9 prohibits various individual actions that impact members of a listed species, providing civil and criminal penalties [16 U.S.C. § 1538]. It proscribes importation, exportation, and introduction into commerce of listed species, as well as "takes" of the species. Section 10, added in the 1982 amendments to the ESA, provides a permitting process for "incidental" takes. It allows for the issuance of permits for takings that would otherwise be prohibited "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity" [16 U.S.C. § 1539(a)(1)(B)].

Section 9's prohibition on "takes" of members of a listed species [16 U.S.C. § 1538(a)(1)(B)], at issue in *GDF Realty*, has spawned much controversy and litigation. ESA defines "take" to include activities that "harass, harm, pursue, hunt, shoot, would, kill, trap, capture, or collect" a listed species [16 U.S.C. § 1532(19)]. The Supreme Court has upheld a FWS regulation defining harm to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering" [*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (1995) 515 U.S. 687, 703–709, 1995 CELR 218 (upholding the definition of "harm" in 50 C.F.R. § 17.3 (1994))]. Expert analysis supports the necessity of this interpretation; adverse habitat modification is by far the leading human factor in species extinction. [Wilson at 253–4, Stanford at 9].

Although the ESA was widely supported when it passed in 1973, decisions impeding development and impacts on private property owners have led to a backlash [Stanford at 13, 297ndash;30]. The ESA has been the primary target of property rights groups and some members of Congress, but legislative attacks have thus far been unsuccessful [Stanford at 13, 29–30]. Two recent decisions by the Supreme Court apparently limiting the reach of Congress' legislative power under the Commerce Clause has created what some challengers see as a new avenue of attack.

## III. Commerce Clause Background

Commerce Clause jurisprudence begins from the basic federalism principle that Congress may act only within its enumerated powers, while other powers are reserved for the states. Among the enumerated powers, the Constitution provides for Congress "to regulate Commerce . . . among the several States" [U.S. Constitution, art. I, § 8, cl. 3]. While Congress is limited to its enumerated powers, the Supreme Court has determined that "due respect for a coordinate branch of Government" requires that congressional enactment can be invalidated as exceeding the commerce power only on a "plain showing that Congress has exceeded its constitutional bounds" [*United States v. Morrison* (2000) 529 U.S. 598, 607 ("*Morrison*")].

For most of the twentieth century, Congress' power to regulate under the Commerce Clause was viewed as quite broad [*Morrison*, 529 U.S. at 608 ("in the years since *NLRB v. Jones Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted")]. In two recent cases, however, the Supreme Court has begun to circumscribe Congress' legislative power exercised under the Commerce Clause. In *United States v. Lopez* [(1995) 514 U.S. 549] ("*Lopez*"), the Court invalidated a section of the Gun Free School Zone Act of 1990, which forbade "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone." In *Morrison*, the Supreme Court held that the Commerce Clause did not provide Congress with authority to enact Section 13981 of the Violence Against Women Act of 1994 ("VAWA"), which provided compensatory and punitive damages as well as equitable relief for victims of violent crimes motivated by gender [529 U.S. at 602].

*Lopez* clarified that Congress may regulate three categories of activities pursuant to its Commerce Clause power: "First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things interstate commerce, even though the threat may come only from intrastate activities. . . . [Third], Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce" [*Lopez*, 514 U.S. 549, 558–559 (internal citations omitted)] (the "Lopez categories"). *Lopez* also clarified the standard for the third category, holding that an activity must "substantially affect" interstate commerce [514 U.S. 549, 558–559].

In *Lopez*, the Court dismissed the first two categories of congressional power out of hand [514 U.S. at 559]. Reviewing the last category, it found that possession of a gun in a school zone is not an economic activity with a substantial effect on interstate commerce. It based this conclusion on several factors. First, the court identified Section 922(q) as "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms" [514 U.S. at 561]. The Court rejected the possibility of aggregating all gun possessions to find the commerce nexus because the regulation was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated" [514 U.S. at 561]. Therefore, the Court held that "it cannot . . . be sustained under our cases upholding regulations of activities that arise out of or are connect with a commercial transaction, which viewed in the aggregated, substantially affects interstate commerce" [514 U.S. at 561].

The Court therefore considered only whether the regulation substantially affected interstate commerce (the third *Lopez* category). The Court first noted that the section "contains no jurisdictional element which would ensure through case-by-case inquiry, that the firearm possession in question affects interstate commerce" and that Congress made no findings about the legislation's role in interstate commerce [514 U.S. at 561–562]. Finally, the Court rejected the government's argument that the regulation substantially affected interstate commerce by protecting "national productivity" and by reducing the "cost of crimes." The Court found this rationale too attenuated, requiring it to "pile inference upon inference" in a manner that would provide Congress a general police power [514 U.S. at 567].

In *Morrison*, the petitioners did not contend that section 13981 of the VAWA was a regulation of the "channels" or "instrumentalities" of interstate commerce [529 U.S. at 598]. Reviewing *Lopez*, the *Morrison* Court identified and applied four factors to assess whether the regulated activity substantially affects interstate commerce and thereby falls under the third *Lopez* category: (1) whether the regulated activity is economic in nature; (2) whether the statute contains an express jurisdictional element that limits its application to activities with "an explicit connection with or effect on interstate commerce"; (3) whether there are congressional findings about the regulated activity's effects on interstate commerce; and (4) whether the connection between the activity and a substantial effect on commerce is attenuated [529 U.S. at 610–13 ("*Morrison* factors")]. Considering the first factor, the Court emphasized that section 13981 of VAWA regulated criminal conduct and therefore affected a non-economic matter of local concern [529 U.S. at 618]. Although the Court rejected the possibility of aggregating multiple instances of gender-based violence to find an impact on commerce, with some limitation, it left open the possibility of viewing actions in the aggregate in other cases [529 U.S. 613 ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature")].

Turning to the additional factors, the Court noted that the statute contained no jurisdictional element [529 at 613]. The Court dismissed the VAWA's congressional findings that, among other things, gender-motivated violence would reduce productivity and discourage interstate travel and employment, as using reasoning it had "already rejected as unworkable if we are to maintain the constitution's enumeration of powers" [529 U.S. at 615]. The Court found the link between gender-motivated violence and interstate commerce "too attenuated." [529 U.S. at 615]. Reviewing *Lopez* to support its invalidation of Section 13981 of VAWA, the Court then explained that the Commerce Power "is not without effective bounds" [529 U.S. at 608].

## IV. Commerce Clause Challenges to the ESA

### Introduction

The limitations on the commerce power articulated in *Lopez* and *Morrison* spawned new challenges to the ESA. Aside from the Fifth Circuit's decision in *GDF Realty*, the District of Columbia and Fourth Circuits were also presented with challenges to federal protection of intrastate species pursuant to the ESA in three other cases. All three circuits upheld the regulations.

### A. District of Columbia Circuit

In *National Association of Homebuilders v.*

*Babbitt* [(D.C. Cir. 1997) 130 F.3d 1041], the D.C. Circuit considered a post-*Lopez* challenge to the ESA's listing of the Delhi Sands Flower-Loving Fly. The plaintiffs sought a declaration that the listing of the species, which lives only in California, exceeded Congress' Commerce Clause power and sought an injunction against applying the ESA to prevent construction in the Flower-Loving Fly's habitat. The fly, located only in an eight mile radius of two southern California counties, plays a role in pollinating native plants and survives as the only remaining subspecies of its species [130 F.3d at 1043–1044].

The court rejected the challenge, but each judge wrote separately, generating a court opinion, a concurrence, and a dissent. The opinion of the court, written by Judge Wald, found that protection of the Fly could be proper under either the first or third *Lopez* categories. The court opined that the regulation addressed the "channels of interstate commerce" (the first *Lopez* category) both because it prevents trafficking in endangered animals and because it "falls under Congress' authority 'to keep the channels of interstate commerce free from immoral and injurious uses' " [130 F.3d at 1046, quoting *Lopez* and *Heart of Atlanta Motel Inc. v. United States* (1964) 379 U.S. 241, 256]. Judge Wald also found that the regulation properly falls under *Lopez*'s third category because species extinction diminishes biodiversity, limiting the pool of natural resources that could otherwise be used for present and future commercial uses [130 F.3d at 1053]. The opinion further concludes that Congress may seek to regulate destructive interstate competition that can lead to an environmental race to the bottom [130 F.3d at 1054–1055]. Concurring, Judge Henderson rejected Judge Wald's position that the ESA falls under the first *Lopez* category as regulating the "channels" of commerce [130 F.3d at 1058]. In addition, on the third category, she opined that "uncertain" future uses of biodiverse species did not create a substantial effect on interstate commerce [130 F.3d at 1058]. However, Judge Henderson argued that biodiversity in and of itself affects interstate commerce. The concurrence argues that, because of the way species are woven together in ecosystems, Congress could rationally conclude that the extinction of one species would impact other objects in interstate commerce [130 F.3d at 1058–1059]. Judge Henderson also opined that Congressional findings demonstrating concern with untempered development, the ESA's focus on habitat, and the fact that Congress aimed at "regulation of land and its development," demonstrated its intent to regulate such commerce [130 F.3d at 1059]. The dissent, however, found none of the *Lopez* categories applicable [130 F.3d at 1060–1067].

In *Rancho Viejo v. Norton* [(D.C. Cir. 2003) 323 F.3d 1062], the plaintiff asserted that the ESA's protection of the arroyo southwestern toad, a species found only in California, exceeded the federal commerce power [323 F.3d at 1064]. The circuit court reiterated its holding in *NAHB*, rejecting the plaintiff's contention that *Morrison* had undermined that decision [323 F.3d at 1070–1073]. In *Rancho Viejo*, the panel members agreed on how to frame the issue, focusing on the activity of the plaintiffs [323 F.3d at 1070–1073]. Explaining that "the ESA regulates takings, not toads," the court framed its analysis around the plaintiff's development plans: "The regulated activity is Rancho Viejo's planned commercial development, not the arroyo toad that it threatens. The ESA does not purport to tell toads what they may or may not do. Rather, section 9 limits the taking of listed species, and its prohibitions and corresponding penalties apply to the persons who do the taking, not to the species that are taken" [323 F.3d at 1072].

### B. Fourth Circuit

In *Gibbs v. Babbitt* [(4th Cir. 2000) 214 F.3d 483], the Fourth Circuit found that the FWS program to protect red wolves did not implicate either the first or second *Lopez* categories [214 F.3d at 490–491]. The court held that the transportation of the wolves between states for a reintroduction program was "not sufficient to make the red wolf a 'thing' in interstate commerce" [214 F.3d at 491]. Assessing the third prong, the court reasoned that economic activity must be understood broadly because "a cramped view of commerce would cripple a foremost federal power and in so doing would eviscerate national authority" [214 F.3d at 491]. Framing the regulated activity as the "taking of red wolves," the court found this to impact interstate commerce because "with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts" [214 F.3d at 492]. Thus, even individual red wolf takes had a sufficient nexus to interstate commerce.

Aggregation was also appropriate because the

regulation " 'as an essential part of a larger regulation of economic activity in which the regulatory scheme could be undercut unless the intrastate activity were regulated' " [214 F.3d at 497, quoting *Lopez*, 514 U.S. at 561]. The court rejected the appellants' claim that individual takes of wolves would have only an insubstantial effect on interstate commerce by stating that the impact had to be viewed from the "potential commercial differential between an extinct and a recovered species." Citing *Lopez*, the court noted that the "de minimis character of individual instances" of a regulation will not undermine the substantial relationship to interstate commerce [214 F.3d at 498].

### C. Fifth Circuit Decision

On a purely aesthetic level, the facts of *GDF Realty* could not be better for those challenging the ESA. The case involves what most people would regard as particularly unappealing species. Little ugly bugs are pitted against human developers who made attempts to comply with government regulations only to have their plans stymied.

In 1983, Dr. Purcell and his brother bought a seventy percent interest in 216 acres of land in a rapidly growing area of Travis County, Texas [*GDF Realty*, 326 F.3d at 624]. The other share was owned by GDF Realty. In their efforts to develop the land, the Purcells and GDF made a number of improvements, which they dedicated to the City of Austin [326 F.3d at 624-625]. Between 1988 and 1993, the FWS listed six species of invertebrates that are found on the property as endangered under the ESA [326 F.3d at 625]. These include: the Bee Creek Cave Harvestman, the Bone Creek Harvestman, and the Tooth Cave Pseudoscorpion, which are subterranean, eyeless arachnids ranging in size from 1.4 to 4 mm; the Tooth Cave Spider, a subterranean arachnid with eyes, measuring 1.6 mm in length; the Tooth Cave Ground Beetle and the Kretschmarr Cave Mold Beetle, both subterranean insects (the latter being eyeless), ranging in size from 3 to 8 mm [326 F.3d at 625]. The FWS listed all the species because they were threatened with "potential loss of habitat owing to ongoing development activities," because no state or federal laws protected their habitat, and because they "require the maximum possible protection provided by the [ESA] because their extremely small, vulnerable, and limited habitats are within an area that can be expected to experience continued pressures from economic and population growth" [326 F.3d at 625]. These species are exclusively found in subterranean portions of two Texas counties [326 F.3d at 625]. As the species are not commercially marketed, the only activities that appear to have moved the members of these species across state lines include their transportation to museums in New York, California, Pennsylvania, Illinois, and Kentucky for research [326 F.3d at 625]. Approximately fifteen scientist have published fourteen scientific articles about the species [326 F.3d at 625].

In 1989, after FWS notified the Purcells that their development plans might constitute a take of the Cave Species, the Purcells took several actions recommended by a Cave Species expert to protect the species, including deeding approximately six acres of the land to a non-profit environmental organization and constructing gates over the most sensitive caves [326 F.3d at 625]. In 1993, FWS advised Dr. Purcell that he was under criminal investigation for a possible endangered species take [326 F.3d at 625]. In their application for an incidental take permit, the Purcells stated that they planned to develop a shopping center, including a Wal-Mart, and residential subdivision and office buildings [326 F.3d at 625]. In 1999, after belatedly receiving a final rejection of their application, plaintiffs filed this action, claiming that the application of the ESA take provisions to the Cave Species exceeded Congress' power under the Commerce Clause [326 F.3d at 625]. (They also challenged the action as an unconstitutional taking in the Court of Claims. 326 F.3d at 625.)

Citing, among other things, the D.C. Circuit's reasoning in *NAHB*, the district court framed the regulated activity as "plaintiffs' alleged take of the Cave Species through their proposed commercial development of the Property" [*GDF Realty Investments Ltd. v. Norton* (S.D. Tex. 2001) 169 F. Supp. 2d 648, 656]. Noting that the plaintiffs' plans included building a Wal-Mart and an apartment complex on the property, the district court easily found that the regulated activity substantially affected interstate commerce, either standing alone or when aggregated with other takes [169 F. Supp. 2d at 658–660]. The court rejected plaintiffs' argument that the commercial nature of the Cave Species themselves, rather than the activity leading to the take was at issue [169 F. Supp. 2d at 658–660]. Employing the four *Morrison* factors, the court again noted the commercial

nature of building a Wal-Mart in support of the first factor finding the regulated activity to have an economic nature [169 F. Supp. 2d at 661 ("activity doesn't get much more economic or commercial in character than building a Wal-Mart, office buildings, and an apartment complex")]. For the same reason, the court found the relationship to interstate commerce not to be attenuated [169 F. Supp. 2d at 662 ("Indeed, the Court is hard-pressed to find a more direct link to interstate commerce than a Wal-Mart")]. The court also found that the third factor weighed in favor of finding a substantial relationship, given the Congressional findings in support of the ESA which discussed the impact of development on species and the commercial value of species [169 F. Supp. 2d at 661].

On appeal, the Fifth Circuit rejected the district court's manner of framing the issue. Refusing to consider the regulation in light of the plaintiff's planned development, it framed the issue as "whether takes, be they of Cave Species or of all endangered species in the aggregate, have the substantial effect [on commerce]" [326 F.3d at 633]. Finding the impact on commerce of scientific interest in the species negligible and the potential future uses of the species too attenuated, the Circuit rejected the FWS' contention that, standing alone, takes of Cave Species have a substantial impact on interstate commerce [326 F.3d at 637–638]. However, the Fifth Circuit held that takes of intrastate species could be aggregated with takes of all endangered species to demonstrate a substantial effect on interstate commerce. Therefore, they sustained the regulation.

## V. Reflections on the Circuit Cases

Among other things, these cases highlight the potential for viewing the connection to interstate commerce through multiple frameworks. The courts have conceptualized the regulated activity in various ways: takes of all of the members of a specific species (e.g., Red Wolf Takes in *Gibbs*); takes of all endangered species in the aggregate (Fifth Circuit in *GDF Realty*); actions through which a take occurs (district court in *GDF Realty*; D.C. Circuit in *Rancho Viejo*); and the species itself is what is regulated (dissenters in *GDF Realty* and *NAHB*). The petition for certiorari complains that, although all circuits have upheld the respective regulations, the differing rationales represent a circuit split. While it is superficially tempting to seek only one approach, Congress' exercise of its commerce power is appropriately supported by several rationales. At a minimum, the district court in *GDF Realty* and the D.C. Circuit must be correct that the ESA regulates commercial actors, aiming at "takings not toads." Congress' finding that overdevelopment has caused species extinction demonstrates that it was aiming at commercial activity that damages the environment, a focus that closely comports with the empirical evidence that the vast majority of species extinctions are due to habitat modification. Similarly, most environmental regulation actually regulates human commercial activity that damages resources rather than regulating, for example, the air or water per se.

But recognition of the connection between environmental protection and interstate commerce need not stop there. Although we do not yet know all the details of how ecosystems work, we do know that species are interconnected in a highly complex manner. The species, their predators and their impact on the human environment do not know political boundaries. Moreover, vastly reducing biodiversity clearly undermines the natural resource base on which the economy relies.

More importantly, one of the key factors in *Lopez* and *Morrison*, the distinction between traditionally local and national areas of regulation, counsels that the circuit courts were correct to uphold the challenged regulation of intrastate species, even if the analyses of the issues diverged. The *Morrison* Court emphasized this distinction:

> The Constitution requires a distinction between what is truly national and what is truly local. . . . In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed we can think of no better example of the police power, which the Founders denied that National Government and reposed in the States than the suppression of violent crime and the vindication of its victims [529 U.S. at 618].

In both *Lopez* and *Morrison*, the Court was particularly concerned that Congress not regulate violent crime [529 U.S. at 610 ("A fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.")]. As the Court repeatedly stressed in *Morrison*, the regulation of crime is an area uniquely

within state power [529 U.S. at 613, 618]. Unlike crime, the environment has long been a subject of both state and federal regulation [see, e.g., *Gibbs*, 214 F.3d at 492, 496 (noting the "historic power of the federal government to preserve scarce resources in one locality for the future benefit of all Americans," and commenting that "Congress has long been involved in the regulation of scarce and vital natural resources")]. This is particularly necessary to avoid a "race to the bottom" between the states. A race to the bottom in this arena would be particularly troubling because once extinct, a species cannot be recovered.

## VI. Conclusion

A few years ago, the Washington Post reported on a poll of 400 biologists that found that the vast majority believed we are in the midst of a "mass extinction" of plants and animals caused by habitat destruction with potential losses of one-fifth of the world's species within thirty years [J. Warrick, "Mass Extinction Underway, Majority of Biologists Say," Washington Post (April 21, 1998)]. When the magnitude of this human-created problem is understood, it is clear that the solutions are not susceptible to exclusively local regulation, but rather require national and international action.

# ADMINISTRATIVE LAW AND ENVIRONMENTAL LITIGATION

## Cases

## Action to Compel City to Process Coastal Development Permit Not a SLAPP Suit

*Visher v. City of Malibu*
No. B173471, 2d App. Dist., Div. 8
2/3/05 Daily J. D.A.R. 1355, 2005 Cal. App. Lexis 162
February 1, 2005

***An action seeking to compel the City of Malibu to issue the plaintiffs a coastal development permit was not a SLAPP suit arising out of the city's appeal in another action brought by the city concerning its duty to issue permits under a Local Coastal Plan prepared for the city by the Coastal Commission.***

**Facts and Procedure.** Under the California Coastal Act, a city cannot issue Coastal Development Permits (CDP) to city property owners until it adopts a Local Coastal Plan (LCP). For the nine years of its existence as a city following its incorporation in 1991, the City of Malibu refused to adopt a LCP. In 2000, the Legislature authorized the California Coastal Commission to prepare a LCP for Malibu [Pub. Res. Code § 30166.5]. Immediately after the Coastal Commission's issuance of the LCP, city residents submitted a petition to city officials demanding to subject the LCP to a local referendum. The city filed a petition for writ of mandate against the Coastal Commission seeking a declaration that the referendum suspended the LCP and restored to the Commission the burden of processing Malibu CDPs. The trial court held that the city could not lawfully subject a state-enacted LCP to a local referendum, and ordered it to process the CDPs of city residents. The city filed a notice of appeal in June 2003. By a published decision in August 2004, the court of appeal affirmed the trial court [*City of Malibu v. California Coastal Comm.* (2004) 121 Cal. App. 4th 989, 18 Cal. Rptr. 3d 40, 2004 CELR 380].

While that appeal was pending, plaintiffs asked the city to issue a CDP to allow them to build a home on their vacant lot. The city rejected the request on the basis that honoring it would prejudice its appeal because it would constitute voluntary compliance with the trial court's order directing the city to process CDPs, citing *Ryan v. California Interscholastic Federation* [(2001) 94 Cal. App. 4th 1033, 114 Cal. Rptr. 2d 787 (voluntary compliance with court order waives right to appeal from that order)]. Plaintiffs then filed a petition for writ of mandate seeking to force Malibu to process their CDP.

The city moved to dismiss plaintiffs' petition pursuant to the anti-SLAPP statute [Code Civ. Proc. § 425.16(b)(1)]. The city alleged that the petition satisfied the statutory definition of a SLAPP as a "cause of action against a person arising from any act of that person in furtherance of the person's right