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A report for the
Montana Department of
Fish, Wildlife & Parks

The Role of Fish and Wildlife Evidence in Local Land Use Regulation



Presented by the
Land Use Clinic,
The University of Montana
School of Law

Director
Michelle Bryan Mudd

Students
DarAnne Dunning
Melissa Hayes



The Land Use Clinic
The University of Montana School of Law
32 Campus Drive
Missoula, MT 59812
206.243.2528

Cover photo by Randy McIntyre of Eureka, Montana.
McIntyre was named a 2009 Treasured Montana Artist by the Montana Secretary of State.

INTRODUCTION

Recognizing that local land use decisions can affect fish and wildlife resources, the Montana Department of Fish, Wildlife & Parks commissioned this report on the role of fish and wildlife evidence in local land use regulation. The Department presented the Land Use Clinic with a series of questions designed to understand how Montana courts, as well as other courts nationwide, review local government land use decisions that implicate fish and wildlife issues.

This report addresses four topics: (1) the role of fish and wildlife evidence in enacting land use regulations; (2) the role of fish and wildlife evidence in decisions on specific development proposals; (3) the level of specificity required when using fish and wildlife evidence; and (4) resolving conflicting fish and wildlife evidence.

For each topic, the report provides a short answer, summarizes the general rules that apply to local governments, describes any Montana fish and wildlife cases on point, compares Montana law to other jurisdictions, and then concludes with suggested best practices for local government.

Research Approach

In preparing this report, the Clinic surveyed court cases across the country. Whenever possible, the Clinic relied on land use cases that directly implicated fish and wildlife issues. When such cases could not be found, the Clinic relied on other land use and local government cases, and analyzed how those decisions might be applied to cases involving fish and wildlife.

Because local governments derive their land use authority from state statutes, the outcomes of the cases from other states often hinged on statutes and local ordinances that are different than those in Montana. In such cases, the report notes the regulatory differences involved.

Citations to authority appear as endnotes to the report (App. C). Also appended to the report are a list of related articles of interest (App. A) and a summary of selected land use statutes from other states that relate to fish and wildlife (App. B).

Background Law

This report builds from the premise that a local government in Montana has the authority to consider fish and wildlife issues when it regulates land use. This premise is based on Montana's growth policy, zoning, and subdivision statutes, which are

enabling statutes that give local governments land use planning authority. These statutes draw explicit connections between land use and natural resources. These statutes also generally enable a local government to exercise its “police powers” – powers to protect the health, safety, and general welfare of the community. Montana and other states nationwide have recognized that the regulation of natural resources is implicit within the general police powers of a local government, even when natural resources are not explicitly mentioned in a state’s enabling legislation.¹

Montana law enables local governments to comprehensively plan for land use in their communities through a non-regulatory “growth policy.” If a local government opts to have a growth policy, the statutes require, among other things, that the local government inventory and set planning goals for the “natural resources” within the community.² A growth policy may also address how projected development will impact “threatened or endangered wildlife and critical wildlife habitat and corridors,” and describe measures to mitigate those impacts.³ Zoning and subdivision regulations then implement the planning goals in the growth policy. These regulations must “substantially comply” with the growth policy.⁴

Zoning regulations, which are optional in Montana, allow a local government to determine what land uses and densities are appropriate in various areas of the community. Although Montana’s zoning statutes do not expressly mention wildlife, a local government has the implicit authority to zone based on wildlife concerns.⁵ Additionally, to substantially comply with the “natural resources” element in its growth policy, a local government must consider what natural resource characteristics exist in the community and what the “most appropriate use of land” may be when natural resources are involved.⁶

Subdivision regulations, which are mandatory in Montana, require a local government to consider impacts caused by the division of land. Among the impacts a local government must consider are impacts on “the natural environment” and impacts on “wildlife and wildlife habitat.”⁷ Many subdivision applications must include an environmental assessment that details these impacts.⁸ The local government may then require the reasonable mitigation of impacts identified during subdivision review, or may deny a subdivision proposal if the unmitigable impacts are too great.⁹

Thus, the Montana growth policy, zoning, and subdivision statutes give broad police powers that implicitly allow for the regulation of natural resources, and also contain explicit provisions that include natural resources as a factor to be considered in land use regulation and decision making at the local level. This report focuses on how a local government exercises that implicit and explicit authority when fish and wildlife issues are involved.

SUMMARY OF RESEARCH

I. The Role of Fish & Wildlife Evidence in Enacting Land Use Regulations

Question Presented

What level of scientific evidence is required when a local government enacts a land use ordinance that protects fish and wildlife resources?

Short Answer

When enacting a land use ordinance that protects fish or wildlife resources, a court will likely defer to the judgment of the local government and presume that the ordinance is valid. So long as there is a “reasonable” factual basis for the ordinance, the ordinance will be upheld. While no Montana cases define what level of scientific evidence is “reasonable,” cases from other states suggest that basic types of scientific evidence will be sufficient, and that local government need not initiate complex, property-specific studies at the enactment stage.

General Rules

In Montana, a local government ordinance is presumed valid and reasonable if it substantially relates to public health, safety, or welfare.¹⁰ A court reviewing the local government action will not substitute its discretion for that of the local government and will review the record only for an abuse of discretion.¹¹ An abuse of discretion occurs when the action is “so lacking in fact and foundation” that “it is clearly unreasonable and constitutes an abuse of discretion.”¹² Thus, a local government does not abuse its discretion if the record contains reasonable evidence to support the land use ordinance.

Under this deferential standard of review, the party challenging the ordinance has the burden of showing that the ordinance is unreasonable.¹³ In other contexts, the U.S. Supreme Court has held that local governments may rely on credible studies from other jurisdictions, so long as the studies “fairly support the . . . rationale for the ordinance.”¹⁴ Scholars also observe that even when the proof is “fairly debatable,” local government will likely prevail.¹⁵ Notably, however, the government’s rationale must be in the record before it takes an action; local governments generally cannot “cure” a defective record by adding further rationale after the fact.¹⁶

The case of *Lowe v. City of Missoula*¹⁷ illustrates how the abuse of discretion standard is applied in a Montana land use matter. In *Lowe*, the City of Missoula rezoned a parcel of land – an act that required amendment of the zoning ordinance and

triggered Montana’s 12 statutory zoning criteria.¹⁸ The City failed to make factual findings concerning each of the 12 criteria. Further, where the record did contain evidence, that evidence suggested the relevant criteria were not met. Thus, an absence of factual findings, coupled with evidence disfavoring the zoning amendment, led the Montana Supreme Court to conclude that an abuse of discretion occurred.¹⁹

Although deferential review favors local government, the *Lowe* decision suggests that the local government nonetheless should place into the record all evidence that it has to support the land use ordinance. Whatever evidence is used should then be joined with findings of fact that are consistent with the evidence and that show the relationship to public health, safety, and welfare. Where evidence conflicts, the local government should explain why it chose to follow certain evidence and disregard other evidence (*see* Part III below). These protective measures reduce the risk that a court will impose its judgment on matters more appropriately within the sphere of local government.²⁰

While a “reasonable” public record enables a local government to pass deferential review, the local government must also be mindful of Montana’s rigorous constitutional protections of the public’s right to know about and participate in government actions.²¹ In *North 93 Neighbors, Inc. v. Board of County Commissioners*, Flathead County received over 4,400 public comments concerning an amendment to the county zoning ordinance. Many of those comments were made during the public hearing on the amendment, and many opposed the amendment. Despite these significant public comments, the County approved the amendment based on a staff report that predated the public hearing and did not address the public comments received.²²

The Montana Supreme Court held that the Board was unreasonable and abused its discretion by failing to consider the public comments and “incorporate them into its decision-making process.” Absent sufficient factual findings about the comments, the court “cannot know whether the public raised novel issues . . . and whether the Board appropriately responded to those issues.”²³

If there had been no public comment in *North 93 Neighbors*, the court concluded that the local government’s reliance on a staff report would have “generally complied” with the reasonableness requirements. The report contained basic factual findings addressing the applicable criteria, and those findings supported a rezone.²⁴ Thus, the public participation increased the local government’s fact finding responsibility by requiring additional findings that explained how the public comments did or did not affect the governing body’s decision.

Montana Fish & Wildlife Cases

No Montana land use cases specify the type of scientific evidence that would be considered “reasonable” for purposes of enacting a land use ordinance protecting fish and wildlife. Montana case law has considered the related question of whether a local government is required to consider fish and wildlife evidence when enacting a land use regulation. In *Montana Wildlife Federation v. Sager*,²⁵ environmental groups challenged the creation of two zoning districts because the effects on wildlife had not been considered. The Montana Supreme Court held that state zoning laws do not expressly require consideration of wildlife and that “when dealing with the police power” it is up to the local government “to decide what regulations are needed.”²⁶ The holding thus suggests that a local government can zone without considering effects on wildlife, although other decisions such as *Greater Yellowstone Coalition* (discussed in Section II) leave a different impression.²⁷ The court also observed that state subdivision laws would require the local government to review effects on wildlife and wildlife habitat if landowners later proceeded to subdivide property within the zoning districts.²⁸

Fish & Wildlife Cases from Other Jurisdictions

Other jurisdictions have more specifically explored the level of evidence necessary to support a wildlife-related land use ordinance. Not surprisingly, Florida and Washington have the most case law due to state planning laws that require local governments to protect critical wildlife habitat in their land use regulations. In both states, the state wildlife agencies assist local governments by providing the basic wildlife evidence needed to support the land use regulations.²⁹

In *Department of Community Affairs v. Moorman*,³⁰ a landowner challenged an ordinance in Big Pine Key, Florida. The ordinance protected the endangered Florida Key Deer by restricting fencing so that the deer could roam freely in search of food and water. The Florida Supreme Court stated that government “is given wide range in exercising its lawful powers to regulate land use for environmental reasons, and any such land-use regulations are valid if supported by a rational basis consistent with overall policies of the State.” The Big Pine Key ordinance was rational because the record contained “competent substantial evidence that the unregulated erection of fencing in the affected area is contrary to Florida’s overall policy of environmental stewardship.”³¹ That evidence included proof that the deer is “largely concentrated” in Big Pine Key, that human development and roads endanger the deer, that there are only 350 – 400 deer left, and that 100 – 250 deer are needed to sustain a viable species.³²

*Glisson v. Alachua County*³³ involved 3,100 acres of private land in Florida that were adjacent to a state wildlife management area. Alachua County placed

development restrictions on the land to protect wetlands, areas of “exceptional upland habitat,” and “hammock” zones that would be a transition area between the upland habitat and outside development. The County intended these restrictions to make the area’s uses more compatible with uses on nearby state lands. The case suggests that the County relied on general evidence about the types of habitat in the area and how those habitat types benefit wildlife. The County also had evidence that 6 of the county’s 45 active eagle nests were in the restricted area.³⁴

The affected landowners challenged Alachua County’s restrictions because the protected area was not unique and had already experienced moderate levels of human development. Further, other areas in the county had higher ecological values and higher numbers of eagle nests.³⁵ Applying deferential review, the Florida District Court held that, regardless of the landowners’ evidence, the County had a reasonable evidentiary basis for its regulation and had validly exercised its police powers.³⁶

In *Ferry County v. Concerned Friends of Ferry County*,³⁷ the Washington Supreme Court applied a state statute that specifically requires local government to address wildlife protection when creating a comprehensive plan.³⁸ Under the statute, local government must use “best available science” when planning for species protection. Although best available science is arguably a more rigorous standard than deferential review, the *Ferry County* decision is worth reviewing for its detailed discussion of wildlife evidence.

In 2000, Ferry County enacted a comprehensive plan that listed only two species, the bald eagle and the lynx, as being endangered, threatened, or sensitive. The Washington Department of Fish and Wildlife submitted contrary evidence suggesting that there were actually 12 species that should have been listed. The Department’s evidence was based on Department data, categorized by region, that identified priority fish and wildlife species based on GIS mapping technology.³⁹ Washington law expressly allows local governments to use the Department’s data when implementing local wildlife protection.⁴⁰

Ferry County officials disregarded the Department’s evidence because the regional data did not conclusively establish that the missing species were present in the county. The County consulted with a retired wildlife planner from Alaska, who relied on field guides, wildlife texts, and interviews with a county biologist to form his opinion that listing the other species was not necessary. The County’s consultant submitted short summary letters to support his opinion, but the letters did not indicate what process the consultant used to reach his opinion. The consultant also failed to do any on-site field observations and failed to coordinate with federal, local, and tribal scientists with expertise in Ferry County.⁴¹

The court concluded that Ferry County failed to use best available science. One important factor for determining best available science is “whether the analysis of the local decision-maker of the scientific evidence . . . involved a reasoned process” While the County’s expert was qualified to provide an opinion, he did not employ a scientific methodology in reaching the opinion and the court deemed his opinion to be “unscientific” and “speculation or surmise.”⁴²

While recognizing that local government may not have the resources to conduct large studies, the court nonetheless concluded that a local government still has a responsibility to show “that it is complying with the law in considering best available science.”⁴³ The court stated that the County “need not develop the scientific information through its own means, but it must rely on scientific information.” The County was entitled to “disagree with or ignore scientific recommendations and resources” from the state and tribes, but by doing so it “necessarily had to unilaterally develop and obtain valid scientific information.” Further, the court did not require the county to affirmatively prove the absence of species within its jurisdiction, only that it “provide a reasoned analysis of the range of alternatives presented by scientific evidence in the record.”⁴⁴ Subsequent to this decision, Washington codified criteria to assist local governments in determining what qualifies as best available science.⁴⁵

Conclusion

While each land use case presents its own unique facts, the above cases collectively suggest some best practices for local governments enacting land use ordinances that protect fish and wildlife:

(1) *Use Basic Scientific Evidence.* Foremost, a local government needs to have a basic level of scientific evidence in the record – perhaps a combination of broad regional data, national or regional studies relevant to the types of wildlife and habitat in the regulated area, and testimony from a local or state biologist who has observed wildlife in the regulated area. This combination allows a local government to rely on studies and data it has not commissioned, but still envisions that the local government will show some general connections between the outside studies and the regulated area. What does not appear to be required is a local government commissioned study that definitively details the presence of wildlife on each property within the regulated area.

(2) *State the Relationship to the Police Powers.* Whatever evidence a local government uses should be directly connected to the health, safety, and welfare of the community through findings of fact. The local government should make explicit

findings of fact showing that connection and should not assume that it can “cure” the record later by relying on new evidence or findings.

(3) *Avoid Speculation and Address Conflicting Evidence.* The local governments most vulnerable to challenge are those that assume or merely speculate about the effects the land use ordinance will have. As the cases show, even relying on a qualified expert may not be enough if that expert is merely speculating. Equally vulnerable are local governments that ignore scientific evidence without explaining why. In Montana, failing to address public comment also makes the local government appear unreasonable and makes a decision less likely to survive deferential review.

II. The Role of Fish & Wildlife Evidence in Decisions on Development Proposals

Question Presented

What level of scientific evidence is required when a local government makes a decision on a specific development proposal that affects fish and wildlife resources?

Short Answer

A substantial evidence standard applies to a local government’s land use decision. This standard requires a reasonable and adequate amount of evidence to support a decision, amounting to more than mere conjecture or a scintilla of evidence. If a decision meets the substantial evidence standard, the court will treat the decision with deference, not substituting its own judgment for that of the government.

General Rules

After the local government enacts a land use ordinance, it will apply that ordinance to specific land use proposals. When deciding a land use proposal, the local government typically receives an application and considers evidence regarding whether the proposal meets the terms of the ordinance. That evidence can come from a variety of sources, including the applicant, the local planning staff, opposing parties, and other interested government agencies. The local government then weighs the evidence, makes findings of fact about the evidence, and explains how the evidence supports its decision on the proposal.

A local government decision will be upheld unless the decision is “arbitrary and capricious.”⁴⁶ Reversal will not occur “merely because evidence is inconsistent or might support a different result.” Rather, arbitrary and capricious decisions are those that

“appear to be random, unreasonable or seemingly unmotivated, based on the existing record.”⁴⁷ The Montana Supreme Court has observed that a standard requiring a local government to “not act unreasonably” is a “broad and subjective standard [that] implicitly vests a substantial level of discretion in the governing body.”⁴⁸

*Kiely Construction, LLC v. City of Red Lodge*⁴⁹ demonstrates how a local government acted arbitrarily and capriciously in denying a subdivision proposal. In that case, the City of Red Lodge disregarded applicable subdivision law and ultimately denied the developer’s proposal without issuing any written statement or findings explaining the basis of the denial.⁵⁰ Because the City of Red Lodge acted contrary to the law and did not support its decision with a record, the decision was deemed arbitrary and capricious.⁵¹

The principal way a local government acts arbitrarily and capriciously is by committing “clear error,”⁵² which can occur if the government’s actions are not supported by substantial evidence.⁵³ Thus, the “substantial evidence” standard is the touchstone that guides local government as it decides land use proposals. Substantial evidence is defined as “that evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. Although it may be based on weak and conflicting evidence, in order to rise to the level of substantial evidence it must be greater than trifling or frivolous.”⁵⁴

The case of *Christianson v. Gasvoda*⁵⁵ illustrates the substantial evidence standard in the subdivision context. There, Cascade County denied a developer’s subdivision application. The developer had previously subdivided adjacent lands, and the lot owners in that subdivision suffered draining and flooding issues. The developer submitted an engineering plan for dealing with drainage issues in the new subdivision, and an expert testified on the developer’s behalf. Several residents of the existing subdivision objected to the new development and argued it would exacerbate drainage issues in the area. The County also “investigated further” of its own accord and noted the history of flooding in the area involved. In reviewing all the evidence, the County concluded that the developer’s expert and the engineering plan were not credible. The subdivision denial was upheld on appeal because the record contained “substantial evidence that the proposed subdivision would adversely affect public health, safety, and welfare.”⁵⁶ Thus, the layperson testimony of neighbors and an informal County investigation constituted substantial evidence, even in the face of the developer’s formal engineering plans and expert testimony.

In contrast, the recent Montana district court case of *Simmons et al. v. Helena City Commission*⁵⁷ highlights how a governing body acts arbitrarily and capriciously by

approving a subdivision based on insufficient evidence. Montana subdivision law required the developer in *Simmons* to submit an environmental assessment that, among other things, described the probable impacts the proposed subdivision would have on water quality. The 325-lot subdivision would have been situated over a shallow groundwater area “adjacent to Prickly Pear Creek, which flows through the Helena Valley into Lake Helena and then into the Missouri River.” The developer’s environmental assessment did not include available reports and groundwater test data relevant to the affected area. Additionally, the assessment did not address the interconnection between the “shallow aquifer and nearby Prickly Pear Creek.” Instead, the assessment concluded that the subdivision’s sewage plans made it unnecessary to do a risk analysis concerning potential sewage leaks into the aquifer.⁵⁸

The district court concluded that the environmental assessment lacked the information necessary for the City to review effects to water quality. The court stated:

An agency must take a hard look at the environmental impacts of a given project or proposal. Implicit in the requirement . . . is the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data. . . . [W]hile a court is not to substitute its judgment for that of the agency, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. In other words, the Court looks closely at whether the agency has taken a hard look at the question presented.

Further, courts have held that general statements about possible effects and the existence of some risk do not equal the hard look that is provided by the provision of more definitive information. Courts have also held that if an agency relies only on expert opinion without supplying the underlying data supporting that opinion, such an activity vitiates the public’s ability to challenge government action. In other words, the public is entitled to receive the underlying environmental data from which an expert may derive his opinion.⁵⁹

Although experts for the developer and the City opined that there was no risk of sewage leaks, the court held that the environmental assessment “should have discussed the issue of a leaking sewer pipe in shallow groundwater that is potentially connected to Prickly Pear Creek. That is an impact with which the Commission should have been made familiar.” The court then voided the subdivision approval.⁶⁰ While this decision focused on water quality, it is relevant to fish and wildlife because environmental assessments for subdivision must also address effects to wildlife and wildlife habitat.⁶¹

Montana Fish & Wildlife Cases

Montana's subdivision statutes require that a local government review a subdivision proposal for its effects on "wildlife and wildlife habitat."⁶² Montana case law contains two recent decisions considering this criterion. Notably, in both decisions the local government made a sufficient record to survive arbitrary and capricious review. The record in these cases can be contrasted with the arbitrary and capricious conduct that the City of Red Lodge demonstrated in *Kiely Construction*, discussed above.

In the first case, *Vergin v. Flathead Co.*⁶³ (an unpublished decision), Flathead County cited impacts to wildlife as one factor in denying a development proposal in the Smith Valley of Flathead County. The County also concluded that the proposed density was higher than the surrounding areas and the air quality and agricultural lands would be negatively affected. Regarding wildlife, the County made a factual finding that the development was "anticipated to result in incremental effects on area wildlife due to pets, increased human activity, automobile traffic, noise, and outdoor lighting."⁶⁴ While the *Vergin* opinion does not detail the underlying evidence, the parties' briefs reference evidence that the proposed development was adjacent to the Batavia Waterfowl Production Area, a large wetland area and wildlife refuge. The area provided habitat for birds and deer, as well as mountain lions preying on deer. In addition to the effects on wildlife, the County had concerns about the dangers of increased mountain lion and human interaction.⁶⁵ The developer complained that the findings lacked sufficient detail and cited Washington case law requiring evidence of "specific, proven, significant" effects before denying a proposal based on environmental impacts. The Montana Supreme Court rejected the Washington standard and concluded that the County's factual findings were adequate under arbitrary and capricious review.⁶⁶

A year later, in *Madison R.V., Ltd. v. Town of Ennis*,⁶⁷ an RV park subdivision was denied, again in part based on wildlife impacts. Other concerns related to the safety of children using the park and the aesthetic effects on the Town of Ennis. The principal concern, however, was that sewer and waste disposal at the proposed park (73 RV spots on less than 10 acres) would affect the water quality of the Madison River, and in turn harm the fishery. The record in this case is more fully discussed:

The Town's engineer described his waste water flow monitoring in the Town's sewer system. He collected data showing total water flows greater than the capacity of the sewer system, leading him to conclude that the Town's sewage treatment lagoon was already hydraulically overloaded. He informed the Town Council that the type of discharge permit possessed by the Town was under review by the Department of Health and Environmental Sciences and the Department of Environmental

Quality. He stated that a strong possibility existed that additional restrictions would soon be placed on the amount of nutrients that could be discharged into state waters such as the Madison River under such permits.

The Town's engineer further stated that holding tanks for recreational vehicles are more biologically loaded than residential sewer discharge. The engineer for R.V. admitted that the waste water from recreational vehicles is stronger than household waste and that care must be taken to avoid "shock loading" of sewage treatment systems by such waste. An environmental engineer specialist submitted a letter discussing the potential effect of septage (waste that has no dissolved oxygen in the waste water) from recreational vehicle tanks on the Town's waste water lagoon. The environmental engineer specialist stated that one load of septage from a recreational vehicle is equivalent to the organic load from about 456 people in a very short time. Ennis's lagoon was not designed for this type of shock load. Septage can contribute to organic overload, odors, and permit violations. . . .

In his letter, [Patrick Byorth, fisheries biologist for the Montana Department of Fish, Wildlife & Parks] stated that his Department had received information indicating that sewage from the proposed recreational vehicle park may overwhelm the Town of Ennis's sewage treatment system and enter the Madison River. He stated that formaldehyde from recreational vehicle holding tanks could further exacerbate such problems, degrade water quality, and harm the fishery.

The developer in *Madison R.V.* argued "there was no definitive professional testimony" that its proposed development would overload the Town's sewage system. The Montana Supreme Court rejected the need for "definitive" evidence. Observing that there was "considerable testimony raising serious questions about the effect of adding a recreational vehicle park's waste to the Town's sewage treatment system," the court concluded the denial was not arbitrary or capricious.⁶⁸ Thus, the Town of Ennis did not need definitive professional testimony to deny the subdivision based on environmental and wildlife concerns.

While Montana's zoning statutes do not expressly mention wildlife as a review criterion, the statutes do expressly mention "public health and general welfare," "overcrowding of land," "undue concentration of population," and "the most appropriate use of land" as criteria to be considered in zoning decisions.⁶⁹ In keeping

with national trends, Montana's case law treats these broad categories as including effects on wildlife.⁷⁰

*Greater Yellowstone Coalition, Inc. (GYC) v. Board of County Commissioners*⁷¹ is the principal Montana case concerning zoning and wildlife. There, Gallatin County considered the rezoning of 323 acres of undeveloped land near Duck Creek, Hebgen Lake, and Forest Service lands. The rezoning changed the allowable density from 32 single family residences to as many as 1,615 multiple family residences. The GYC decision describes the surrounding habitat as follows:

The area around the Duck Creek parcel contains important wildlife habitat. The northern portion of the parcel along Fir Ridge serves as a corridor for grizzly bears traveling between Yellowstone National Park and the Madison Range. Evidence in the record estimates that 16 grizzly bears use the Duck Creek parcel as part of their habitat and another 17 grizzly bears have been found in adjacent habitat. These bears represent approximately 10% of the entire grizzly population in the Greater Yellowstone area. Elk, moose, and bison from Yellowstone National Park use the area in and around Duck Creek for winter range. Duck Creek itself is important trout habitat. Testimony indicated that increased density in development on the Duck Creek parcel will displace wildlife, affect habitat, lead to an increase in human-wildlife conflict, and degrade the water quality in Duck Creek.⁷²

Despite this evidence, Gallatin County approved the rezone based on a general finding that the new zoning "met the general welfare, public necessity and convenience" of the area. The district court, however, voided the rezone after concluding that there was "nothing in the record" and "scant evidence in the record" to support such a finding.⁷³ The district court held that the evidence showed just the opposite - that the "extremely sensitive nature of the Duck Creek parcel and its importance to wildlife habitat . . . is a significant factor to be weighed in evaluating the public welfare" Affirming the district court, the Montana Supreme Court cited to substantial evidence in the record from neighbors, agency officials, a wildlife biologist, and the general public that showed the rezone would negatively affect "some of the most significant wildlife habitat in the country," harming both the general public and people living in the area.⁷⁴ Because wildlife evidence played such a significant role in this zoning case, questions exist about whether *Sager* (discussed in Section I), which treated wildlife evidence as unnecessary in zoning, may be limited in its effect.

Fish & Wildlife Cases from Other Jurisdictions

Other states also apply the substantial evidence standard to land use decisions. In Minnesota, for example, the reviewing court in *Application of Central Baptist Theological Seminary*,⁷⁵ upheld a state agency's denial of a radio tower based on substantial evidence of harmful effects to wildlife. While the case involves a state agency, rather than a local government, its description of wildlife evidence is instructive.

Central Baptist Theological Seminary operated a non-profit radio station and sought to build a tower in the center of Jones Lake, a wetland in New Brighton. The tower would be mounted on a 48-foot base and would involve three sets of guy wires, 6 anchors, and a 700-foot power line 15 feet above the lake, running to the transmission building. The administrative record reflected that Jones Lake provided good waterfowl habitat and nesting cover, and it was home to many significant bird species. The lake also provided habitat for muskrats, pheasants, and rabbits. There were surveys quantifying the types and amount of wildlife occurring on Jones Lake on particular observation dates. Further, the record showed that Jones Lake comprised 30% of the total wetland acreage in the county. The Department of Natural Resources denied the tower permit based on the record and the results of a wildlife impact review.⁷⁶ The Minnesota Court of Appeals affirmed, finding substantial evidence that the tower would be detrimental to significant wildlife habitat. In particular, the court cited evidence that quality waterfowl habitat is scarce in the area, that waterfowl would avoid the lake because of the tower, that there was little alternative habitat for displaced waterfowl, and that bird mortality occurs when birds collide with guy wires in taking off, landing, and courtship behavior.⁷⁷

Vermont also applies the substantial evidence standard. Under Vermont law, a permit for a subdivision or development "will not be granted if it is demonstrated by any party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species."⁷⁸ In the case *In re Southview Associates*,⁷⁹ the developer proposed a vacation home development on 88 acres of land that was situated in a deeryard. Although the area had once contained 600 acres of deeryard, the 280-320 remaining acres comprised the only deeryard in a 10.7 square mile area, and it supported 20 deer over the winter. Expert testimony in the record reflected conflicting opinions about the severity of the development's effect on the deeryard. Some experts concluded that the proposed development would have impaired the mature softwood cover that provides critical deer wintering habitat, and that the development also would have stressed the deer by creating winter time noise and activity from people, vehicles, and pets. The developer

submitted a Wildlife Management Plan to mitigate the loss of the mature softwood area by increasing deer food and encouraging growth of immature softwood.⁸⁰

The Vermont Environmental Board, a state board that reviews certain types of land use proposals that affect the environment, denied the vacation home development. Despite conflicting expert testimony of the issue, the Board concluded that the Wildlife Management Plan would not adequately mitigate the adverse effects. The Vermont Supreme Court affirmed that substantial evidence supported the Board's decision: "[W]e must defer to the Board when its findings are supported-even if the record contains contradictory evidence-and when its conclusions are rationally derived from its findings and based on a correct interpretation of the law." The court also rejected the argument that the Board could deny a proposal only upon proof that wildlife deaths will occur.⁸¹

In the land use case *In re Killington, Ltd.*,⁸² the Vermont Supreme Court again upheld the denial of a land use proposal because of its wildlife effects. The case involved a pond construction request to create snow at a skiing area. The Vermont Environmental Board denied the request because necessary wildlife habitat for black bear would be destroyed or significantly imperiled.⁸³ The court affirmed that the "findings are ample to support the Board's conclusion on necessary wildlife habitat" based on evidence that the pond would block access to and destroy important wetlands and beech trees that are a source of food for the bears, that the bears depend on those food sources, and that there are no other wetlands and food sources available.⁸⁴ As in *Southview Associates*, the court again declined to require proof of wildlife mortality.⁸⁵

Federal Cases

Agencies protecting wildlife under the Endangered Species Act have a different statutory burden than local governments in Montana. Nonetheless, a comparison to the federal standard is helpful. Critical habitat designation and biological opinions under the ESA must be based on the "best scientific and commercial data available,"⁸⁶ commonly referred to as the "best available science mandate."⁸⁷

Using best available science does not require an agency to prepare new studies if sufficient data exists to make a determination for a particular species. The Eighth Circuit in *Heartwood, Inc. v. U.S. Forest Service* held "All that is required of the agencies is to seek out and consider all existing scientific evidence relevant to the decision at hand They cannot ignore existing data."⁸⁸ *Heartwood* involved a challenge to the U.S. Forest Service's decision to log a national forest in Missouri without conducting new surveys for the endangered Indiana bat. The U.S. Fish & Wildlife Service had used

existing data from mist-netting and surveys in the area before issuing “no jeopardy” opinions. The circuit court upheld this decision on summary judgment.⁸⁹

In the recent case of *Cabinet Resource Group v. U.S. Fish & Wildlife Service*⁹⁰ the U.S. District Court in Montana held that the Fish & Wildlife Service did not need to prepare new studies just because the available scientific and commercial data had flaws. Several advocacy groups sued the Fish & Wildlife Service and Forest Service, claiming road management decisions in two grizzly bear ecosystems violated the best available evidence standard. The Fish & Wildlife Service relied on statistical information that did not predict the number of grizzlies that could die before the population failed to recover. However, such predictive data did not exist, and the court upheld the road decisions, stating that while the data “is not the best conceivable scientific information upon which to make access management decisions affecting grizzly habitat The issue is whether [the data] is the best *available* information, and the Plaintiffs have not carried their burden to show that it is not.”⁹¹ It seems that so long as the agency has considered the relevant factors and articulated a rational connection between the facts and the decision, that decision will be upheld.⁹²

On the other hand, an agency “cannot ignore available biological information . . . which may indicate potential conflicts between the proposed action and the preservation of endangered species.” In *Natural Resources Defense Council v. Kempthorne* the Fish & Wildlife Service issued a biological opinion concluding that the diversion and storage of large volumes of water from the California Bay (Sacramento-San Joaquin) Delta would not jeopardize the endangered Delta smelt.⁹³ The agency’s opinion considered several years of Delta smelt trawl surveys, but did not consider the most recent survey showing record low levels of Delta smelt. In overturning the agency’s opinion, the federal district court stated that “A biological opinion is arbitrary and capricious and will be set aside when it has failed to articulate a satisfactory explanation for its conclusions or when it has entirely failed to consider an important aspect of the problem.” By ignoring the latest trawling survey the agency did not consider best available science and acted arbitrarily and capriciously. The district court observed that if the agency did not wish to consider the new survey, it should have specifically explained in its findings why the new survey did not carry weight.⁹⁴ The *Kempthorne* decision closely parallels that of *Ferry County* (discussed in Section I), in that the governments in both cases disregarded certain evidence and relied on inferior evidence in reaching their decisions.

Conclusion

The cases collectively illustrate that a local government need not spend significant sums to create “definitive,” “proven,” or “flawless” studies concerning a

development's wildlife effects. *Madison River R.V.* indicates that evidence "raising serious questions" about wildlife effects is sufficient to support the government's decision. By the same token, the local government cannot speculate, and thus should rely on a combination of opinions from professionals, information about the affected area, and available studies and data. In reaching the substantial evidence standard, some best practices are worth considering:

(1) *Use the Phrase "Substantial Evidence."* If the findings of a local government expressly state that there is "substantial evidence" to support a decision, the local government will be reminded of the evidentiary standard it must meet and will be more likely to review the record to ensure the standard is met. As *Simmons* illustrates, the mere conclusion that a criterion is met will not be sufficient to support a decision.

(2) *Have Substantial Evidence for Every Criterion.* In many instances, a local government will cite multiple reasons for denying or conditioning a land use proposal. If there truly are multiple reasons, then the government should look at each reason independently and ensure that *each* reason is supported by substantial evidence. Both the *Madison River R.V.* and *Vergin* cases exemplify this approach, which creates multiple reasons for winning on appeal, even if one individual reason is disregarded by the reviewing court.

(3) *Address Conflicting Evidence.* The local government should squarely address evidence that does not support its decision and explain why that evidence did not carry weight. To ignore evidence, particularly uncontroverted evidence, is to violate the substantial evidence rule.

III. The Level of Specificity Required When Using Fish & Wildlife Evidence

Question Presented

Must scientific evidence include site-specific data, or can a local government rely on outside studies or the general judgments of professional fish and wildlife biologists?

Short Answer

Although site-specific data is preferable, outside studies or general judgments of professionals may satisfy the substantial evidence standard if the studies or judgments are shown to be relevant to the affected area. The local government should not speculate or presume that an outside study or the general judgment of a professional applies to the affected area.

General Rules

Depending on the review criteria that apply to a development proposal, the developer may have a threshold obligation to provide site data to the local government. If such data is necessary to determine whether the review criteria are met, the local government may require the developer to provide the data and may deny the development when sufficient data is not provided.

For example, in the unpublished decision *Quality Rock Products, Inc. v. Thurston County*, a mining company sought a special use permit to expand a gravel mining operation in Washington.⁹⁵ The mine was adjacent to a national wildlife refuge and near the Black River. The geology of the area caused the groundwater under the mine site to flow into the Black River, which had an impaired water quality classification. The Black River is “one of the last large, intact riparian systems in the Puget Sound area” and provides important habitat for migratory birds, fish, and other species.⁹⁶ One of the County’s permit criteria required a showing that the proposed use would not have “substantial or undue adverse effects on . . . [the] natural environment.” Although the mining company did a hydrogeologic study of the mine operation, it did not study effects on the Black River and its habitat. The County denied the permit because the company’s evidence did not address the adverse effect on surrounding areas. The reviewing court upheld the County’s decision because the company failed to provide sufficient evidence that the permit criterion was met.⁹⁷ This holding is consistent with the *Simmons* case (discussed in Section II), which held that a developer’s environmental assessment did not contain sufficient evidence about potential effects on water quality in a shallow groundwater area.

In other cases, however, the developer has provided sufficient information to review a development proposal, and the local government is faced with the question of what evidence it needs to deny or conditionally approve the proposal due to effects on wildlife. No bright line rule exists as to whether site-specific data is needed in this situation. The facts and complexity of each case, along with the applicable review criteria, will suggest the specificity of the evidence needed and whether layperson testimony or professional expertise is necessary. To the extent a general rule exists, it is that a local government should have enough information in the record that it is not speculating when it finds that the development proposal will affect wildlife.

While local government cannot speculate, its lay decision makers can “rely upon personal knowledge concerning matters readily within their knowledge”⁹⁸ Local government may also draw “reasonable inferences from the factual evidence.”⁹⁹ The *Gasvoda* decision (discussed in Section II) illustrates these principles, where the lay county commission members relied on personal investigation of the property’s

topography, past flooding history of the property, and community testimony to draw the reasonable inference that the proposed development would likely experience drainage and flooding problems.¹⁰⁰ Thus, a general wildlife study or general professional judgment may be adequate if the effects of the proposed land use are self evident or if reasonable inferences can be drawn concerning the affected area.

Many wildlife-land use issues, however, will turn on a “technically sophisticated and complex question,” that is “outside the knowledge and experience of the lay commission,” necessitating that the government obtain enough site-related evidence to avoid acting arbitrarily and capriciously.¹⁰¹ As the *Ferry County* case (discussed in Section II) shows, even a well-credentialed expert will not carry weight if he relies on general studies and does not visit the affected area or consult with a local biologist to confirm the relevance of the studies. Similarly, in *Toll Bros., Inc. v. Inland Wetlands Commn.*,¹⁰² a local wetland commission could not rely on general studies or the general judgment of a soil scientist concluding that excessive development has an impact on wetlands. In that case, a developer proposed a 129-unit townhouse complex on property containing wetlands. The commission relied solely on the general studies and opinions in denying the development, without showing how the general evidence was relevant to the specific wetlands at issue. The decision was reversed for lack of substantial evidence and remanded for additional fact finding.¹⁰³

The need for technical information also increases when the local government wants to dispute or disregard the expert testimony presented by a party. The Connecticut appellate opinion *Tanner v. Conservation Commission* typifies judicial sentiment on this issue:

[T]he commission, in dealing with complex issues, ignored the testimony of the expert witnesses and relied solely on their own insight. While we recognize that an administrative agency is not required to believe any of the witnesses, including expert witnesses, it must not disregard the only expert evidence available on the issue when the commission members lack their own expertise or knowledge. We find there was no substantial evidence since there was an absolute disregard of the unanimous contrary expert opinion.¹⁰⁴

In *Tanner*, a landowner in a designated wetland area sought permission to construct a home and driveway. The City of Norwalk’s conservation commission found, without explanation, that the proposal would adversely affect the wetland area, despite the landowner’s three expert witnesses concluding otherwise. The record contained no evidence supporting the commission’s finding, and the reviewing court set aside the commission’s decision for lack of substantial evidence.¹⁰⁵ These facts

contrast with those in *Gasvoda*, where Cascade County explained why it was disregarding the developer's expert testimony and also cited facts that disputed the expert's conclusions.

Montana Fish & Wildlife Cases

Madison River R.V. (discussed in Section II) again provides a useful Montana example. In denying an R.V. park subdivision, the local government relied on general studies concerning sewage release from recreational vehicles. The local government coupled the general sanitation studies with testimony from a town sanitarian and engineer who identified a serious risk of the development overloading the town's sewage lagoon and causing violations of the town's water quality discharge permit. A state fisheries biologist then provided testimony about how such sewage, if released, would degrade the water quality and harm the Madison River fishery. Thus, general studies and data were made relevant to the affected area through the testimony of local and state professionals. Although the developer argued for more definitive data regarding the development's risks, the reviewing courts found sufficient evidence to uphold denial of the subdivision.¹⁰⁶

Fish & Wildlife Cases from Other Jurisdictions

Although not arising in the local government context, the case of *California Sportfishing Protection Alliance v. State Water Resources Control Board* addressed a related question of the quality of site data relied upon by a decision-making body.¹⁰⁷ In that case, the California Water Resources Control Board adopted a temperature amendment to the water quality control plan for Deer Creek in the Sierra Nevada foothills. In setting the new temperature objective, the Board used a two-step approach that included a "compilation of scientific literature pertaining to all fish and aquatic species documented to occur in the creek," and "existing site-specific biological data" that included surveys of aquatic wildlife documented from 1993 to 2000.¹⁰⁸ (Such extensive site-specific data would appear necessary to resolve the complex question of water temperature control on a creek). The Board found that the surveys indicated an absence of rainbow trout populations during summer months, which conflicted with anecdotal evidence from fishermen that had observed the presence of rainbow trout. Interest groups questioned the validity and methodology of the surveys, but the reviewing court declined to reweigh the evidence, stating that "We are not entitled to discount evidence 'unless it is physically impossible or inherently improbable and such inherent improbability plainly appears.' . . . We do not consider the evidence of data compiled from multiple fish surveys and other studies so implausible or subject to dispute that we may discount it in this appeal."¹⁰⁹

As the preceding discussion of *Quality Rock Products* reveals, the proximity between an impaired habitat and a proposed development can increase the need for site-specific evidence. The case of *Minnesota Center for Environmental Advocacy v. City of St. Paul Park* considered the related question of how to define the “affected area” of a proposed development – whether the area is limited to the developed property or includes other areas beyond the development.¹¹⁰ There, the City of St. Paul Park studied the environmental effects of a proposed 667-acre development partially located in the Mississippi River Critical Area Corridor and the Mississippi National River and Recreation Area. The development contained bluffs that were unusual to Minnesota, as well as bald eagle nests, two endangered and one threatened species of mussel, and native plants, animals and birds. An interest group opposed the City’s designation of the study area, which included only the proposed development, arguing that the study area failed to encompass other affected lands and resources.¹¹¹ The statutes requiring the study, however, gave the City discretion in designating the study area.¹¹² Concluding that the City had substantial evidence to support its designation, the reviewing court ruled that site-specific evidence outside the study area could not be used to invalidate the conclusions of the City’s environmental study.¹¹³

Federal Cases

Though *Ohio Valley Trail Riders v. Worthington*¹¹⁴ involves the National Environmental Policy Act, it nonetheless provides a useful discussion concerning the use of outside studies to support a government decision. The case involved the setting of forest management policy in the Daniel Boone National Forest to deal with off-highway vehicle (OHV) use on trails in the forest. In determining OHV impacts, the U.S. Forest Service consulted outside studies on erosion and sediment release on roads because many of the OHV trails were once roadways. The Service also looked at past studies on OHV use as well as data from other national forests. The Service then did site visits and interviews within the forest’s districts. By “using evidence collected by the Team as well as external studies, the Service concluded that OHV use adversely affected the Forest’s resources.” An interest group challenged the Service’s methodology, but the reviewing court concluded that use of outside materials was “reasonable and understandable,” and that “the agency fulfilled its obligation by looking at appropriate evidence”¹¹⁵

Conclusion

Of all the questions presented in this report, the question about site-specific evidence is the most difficult to answer because there is no clear rule. The facts of each case will dictate the level of evidence needed for the local government to avoid

speculation in reaching its decision. To the extent the cases suggest best practices, they are as follows:

(1) *Make the Burden of Proof Clear.* If the developer has the initial burden to provide site-specific data, the government's land use ordinance should clearly articulate the burden and describe what information is necessary to meet the burden.

(2) *Make General Evidence Relevant to the Site.* A local government relying on general studies or professional judgments should couple the general evidence with evidence that applies to the affected area. In most cases, site-specific evidence need not take the form of a definitive, commissioned study, but could take the form of testimony or observations about the site that show how the general evidence is relevant.

(3) *Consult Experts on Complex Questions.* Where the complexity of the issue is beyond that of a layperson, and the drawing of inferences requires expertise, then a professional should lay the foundation for the general evidence and connect that evidence to the affected area.

(4) *Expressly Weigh All Evidence.* As mentioned previously, the government should explain why it is disregarding certain site-specific evidence, and it should identify other countervailing evidence in the record to support its decision. If that countervailing evidence does not exist in the record, the government may need to consult outside professionals and obtain further evidence to avoid issuing a decision based on speculation.

IV. Resolving Conflicting Fish & Wildlife Evidence

Question Presented

What is a local government's obligation when there is conflicting evidence about fish and wildlife issues?

Short Answer

When conflicting evidence is presented, a local government has the discretion to weigh the evidence and determine which evidence it finds most credible. In weighing the evidence, the local government should explain why it placed more weight on some evidence and less weight on other evidence. The local government's decision will not be overturned if substantial evidence supports the decision.

General Rules

The general rule for conflicting evidence hinges on the substantial evidence standard (discussed in Section II). Because the local government is the finder of fact, a reviewing court generally does not substitute its judgment so long as substantial evidence supports the decision. This is true even if there is conflicting evidence that the court would have weighed differently.¹¹⁶ This deference to the fact finder is in keeping with the definition of substantial evidence, which requires “more than a mere scintilla of evidence” but “somewhat less than a preponderance,” and which can be based on “conflicting evidence.”¹¹⁷

In *Gasvoda* (discussed in Section II), the Montana Supreme Court described the County Commissioners as “fact finders . . . in the best position to weigh conflicting testimony and determine the credibility of witnesses.” The County did not give weight to the developer’s expert because he had changed his opinion on the drainage issues, and his opinion conflicted with other evidence of flooding problems at the development site. The County placed greater weight on its own knowledge of the area and layperson testimony from people living in the area. The County’s resolution of the conflicting testimony was upheld as meeting the substantial evidence standard.¹¹⁸

In *Englin v. Board of County Commissioners of Yellowstone County*, the County denied an application to rezone a property from residential to highway commercial use. In applying the zoning review criteria, the zoning commission (which advises the County Commission) first recommended approval and subsequently recommended denial. The zoning commission made mixed findings of fact, with some findings favoring, and other findings disfavoring, the rezone. While the property was near other commercial uses, it was also near residential uses and the rezone presented noise and traffic concerns. The County denied the rezone but adopted the zoning commission’s mixed findings of fact. The landowner argued that the County acted arbitrarily by denying the rezone while adopting some findings that favored the rezone. The reviewing courts found substantial evidence to support denial of the rezone based on effects to surrounding landowners. The Montana Supreme Court observed that a reviewing court “will not substitute [its] judgment for that of the trier of fact” and will not “sit as a super-legislature or super-zoning board.”¹¹⁹ Thus, the record can contain conflicting evidence so long as a substantial amount of evidence supports the decision.

Montana Fish & Wildlife Cases

Although Montana case law has not set forth a conflicting evidence rule specific to local government decisions affecting wildlife, a practitioner can reasonably assume that the rule will extend to wildlife evidence as well.¹²⁰ Thus, the local government

should weigh conflicting wildlife testimony, explain through findings why it found particular wildlife evidence more credible, and provide substantial evidence to support its decision.

While not dealing directly with wildlife, *Pennaco Energy v. Montana Board of Environmental Review* is instructive. There, the Montana Board of Environmental Review adopted numeric standards for water-sodium adsorption ratio (SAR) and electrical conductivity (EC) of coal bed methane produced water. Pennaco argued that the Board's standards lacked "specific findings or [a] sound scientific basis."¹²¹ The standard of review differs in the case because it involves an agency setting scientific standards based on its area of expertise. Nonetheless, the district court's discussion of conflicting evidence reflects a deference similar to that given local government.

The parties in *Pennaco Energy* stipulated that in general "EC is damaging to plants and SAR is damaging to soils." Beyond this general agreement, the Board received "extensive information and comment from soil scientists, DEQ technical staff, the Federal Environmental Protection Agency, industry, environmental groups, and irrigators." This evidence was sometimes in conflict and suggested varying possibilities for how stringent the numeric standards should be. The district court concluded that the BER, "in the exercise of its discretion, was entitled to weigh the science, compare the veracity of the experts, and make a final determination based on the evidence presented." The court further stated that the law "does not require the BER to set the standard at the least protective level . . ." and that "[t]he fact that data in the administrative record is subject to scientific debate does not render the agency's conclusions unfounded, nor should the Court participate in that debate and substitute its judgment for that of the rulemaking agency."¹²² The reviewing courts upheld the sufficiency of the Board's evidence.¹²³

Fish & Wildlife Cases from Other Jurisdictions

In *Ponderosa Neighborhood Association v. Spokane County*, an unpublished opinion, a Washington appellate court upheld the County's approval of a preliminary plat, despite conflicting evidence over the subdivision's impact on wildlife.¹²⁴ The area provided habitat for elk, deer, and birds, and neighbors argued that the County had not required the developer to adequately protect critical habitat and wildlife areas on the property. The developer's Habitat Management Plan (HMP) provided a 100-foot corridor to accommodate a seasonal stream and to connect travel corridors and wildlife habitat. The developer's wildlife biologist prepared the HMP using a site-specific study evaluating the wildlife and habitat present in the area. The County's hearing examiner heard conflicting testimony from biologists and the Washington Department of Fish & Wildlife regarding the detrimental effect the subdivision would have on wildlife. Eight

different wildlife experts and organizations visited the site and found the 100-foot wildlife corridor inadequate.¹²⁵

The hearing examiner ultimately found the developer's wildlife biologist to be credible, found the 100-foot corridor adequate, and concluded that the proposed subdivision "would not significantly impact priority habitat or species." The appellate court deferred to the hearing examiner because he was "the local authority with expertise in land use regulation."¹²⁶ The court further stated that "Under the substantial evidence test, if there is conflicting evidence, then the reviewing court need only determine whether the evidence most favorable to the responding party supports the challenged decision." The court thus concluded that substantial evidence supported the hearing examiner's decision, despite a significant amount of evidence to the contrary.¹²⁷ This ruling reflects the reality that the substantial evidence standard does not require that a preponderance of the evidence support the local government's decision.

*In re Wildlife Wonderland*¹²⁸ involved a Vermont Environmental Board decision to deny the construction of a commercial game farm in Mount Holly, Vermont. The proposed game farm would have housed 300 wild and domestic animals, with an anticipated 100,000 paying visitors per season. The game farm would also have involved the construction of a public building with restaurant facilities, a ticket booth, pathways, a miniature railroad amusement ride, and parking facilities for approximately 910 cars. The surrounding area was "essentially forest land and commercially undeveloped" and "[t]wo main streams, pristine and essentially free from any visible or measurable pollutants, run through this parcel and are headwaters of the West River. The Board heard extensive expert testimony from both proponents and opponents. Although the developer's experts provided evidence that the game farm would not result in undue water pollution, the Board found that the fecal matter and bacteria from the animal wastes in the game farm would "degrade the water quality of the existing streams and proposed ponds."¹²⁹

The Vermont Supreme Court deferred to the Board's findings: "The trier of fact has the right to believe all of the testimony of any witness, or to believe it in part and disbelieve it in part, or to reject it altogether Thus, it is not for this Court to reweigh conflicting evidence, reassess the credibility or weight to be given certain testimony, or determine on its own whether the factual decision is mistaken." The Court found substantial evidence supported the Environmental Board's decision, and upheld the denial of the permit for the game farm.¹³⁰

Federal Cases

In federal cases, the well-established standard for technical, expert, or scientific evidence is that when specialists express conflicting views, an agency has the discretion to rely on the reasonable opinions of its own qualified experts, even if the court might find contrary views more persuasive.¹³¹ Under the Administrative Procedure Act, the reviewing court will only set aside agency decisions if they are not supported by substantial evidence¹³² or if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹³³ This deference to agency decisions is termed “*Chevron* deference,” named for the court decision establishing the standard.¹³⁴

*Central South Dakota Cooperative Grazing District v. Secretary of U.S. Dept. of Agriculture*¹³⁵ involved a National Environmental Policy Act challenge over the reduction of grazing levels due, in part, to destruction of suitable habitat for sharp-tailed grouse. The grazing district argued that conflicting data concerning grouse nesting rendered the agency’s decision invalid. The Eight Circuit applied *Chevron* deference, stating “If the administrative record contains evidence that supports the positions of both the agency and the party seeking relief, the agency is entitled to rely on its experts’ tests and observations, and decisions made in such reliance are not arbitrary and capricious Even if the agency’s data is flawed, if the agency has relied on a number of findings and only some are erroneous, we must reverse and remand, only if ‘there is a significant chance that but for the errors the agency might have reached a different result.’”¹³⁶

Conclusion

The cases demonstrate that hearings about land use-wildlife issues will inevitably include conflicting evidence about effects on wildlife. In considering conflicting evidence the local government should consider the following best practices:

(1) *Assess Credibility.* If a local government disregards an expert opinion or study, it should explain why it found that witness or study lacking in credibility. Ignoring expert evidence, without explanation, is a primary cause for reversal.

(2) *Weigh the Evidence.* The local government should identify which evidence among the conflicting evidence has the most weight, and is thus the most influential in reaching its decision. In particular, when two conflicting pieces of evidence are both credible, the government should explain why one piece of evidence outweighs the other. This explanation becomes particularly important when the government decision disregards the testimony of what may appear to be a numerical “majority” of expert witnesses on an issue.

OVERALL CONCLUSION

Wildlife impacts are emerging as an important factor in Montana land use regulation and decision making. For this reason, Montana case law is just beginning to address questions about the use of wildlife evidence at the local government level. By looking to general land use cases in Montana, as well as trends in other jurisdictions, a practitioner can predict the likely standards that Montana courts will apply and develop best practices for local government.

The background cases indicate that a local government should rely on basic science when adopting ordinances, and create a record based on substantial evidence when making a decision on a specific development proposal. The existence of conflicting evidence is inevitable, and a local government's weighing of that evidence will be upheld as long as its decision meets the substantial evidence standard. Definitive evidence is not required, and courts appreciate the heavy costs of developing scientific evidence. Courts thus permit governments to use outside data and studies, but expect the government to make a connection between the outside data and the area affected by the government's action. Ultimately, a local government should show that it is appropriately exercising its delegated powers by avoiding speculation and reasonably educating itself about the effects of land use on wildlife in its community. In this regard, the cases suggest that state wildlife agencies play a vital role in providing local governments with the evidence and expertise they need to make legally defensible land use decisions.

APPENDIX A -- SELECTED STATUTES FROM OTHER STATES

California

Though the Cortese-Knox Local Government Reorganization Act of 2000 does not specifically address wildlife, it does recognize the importance of managing growth by charging the local government where the land is located to create a “sphere of influence” over management of that land. Additionally, this Act is cross-referenced with Cal. Gov’t Code § 50060.5, which establishes Habitat Maintenance Assessment Districts. This statute allows a local agency to establish a district, “to provide for the improvement or maintenance of natural habitat.”

The California Environmental Quality Act (CEQA) requires all levels of government to protect the environment by developing standards and procedures necessary to protect environmental quality. Cal. Pub. Res. Code § 21001(g),(h) (2007). To accomplish these goals, the Legislature requires the local government to consider an environmental impact report (EIR) before approving a land use development that “may have a significant effect on the environment.” Cal. Pub. Res. Code § 21002.1 (2007); § 21151(a) (2003).

Florida

Florida’s Local Government Comprehensive Planning and Land Development Regulation Act requires local governments to plan and develop regulations that:

12. Assure protection of key natural areas and agricultural lands that are identified using state and local inventories of natural areas. Key natural areas include, but are not limited to:
 - a. Wildlife corridors.
 - b. Lands with high native biological diversity, important areas for threatened and endangered species, species of special concern, migratory bird habitat, and intact natural communities.
 - c. Significant surface waters and springs, aquatic preserves, wetlands, and outstanding Florida waters.
 - d. Water resources suitable for preservation of natural systems and for water resource development.
 - e. Representative and rare native Florida natural systems.

Fl. Stat. Ann. § 163.3246 (2006). Local governments are subject to state and regional oversight, but may obtain more local control of certain areas through a certification process.

Hawaii

Hawaii has enacted priority guidelines for regional growth distribution and land resource utilization as part of the Hawaii State Planning Act. These priority guidelines provide aspirational direction for balancing development and conservation of land resources, which include wildlife habitat and endangered species. For an overall look at population growth and land use guidelines, see Haw. Stat. Ann. §§ 226-104(b)(1) to (13). These statutes attempt to preserve greenbelts and critical habitats while encouraging growth in existing urban areas.

For example, Haw. Stat. Ann. § 226-104(10) states that a priority is to “Identify critical environmental areas in Hawaii to include but not be limited to the following: watershed and recharge areas; wildlife habitats (on land and in the ocean); areas with endangered species of plants and wildlife; natural streams and water bodies; scenic and recreational shoreline resources; open space and natural areas; historic and cultural sites; areas particularly sensitive to reduction in water and air quality; and scenic resources.”

Minnesota

Generally, the Policy section of the Minnesota Critical Areas Act of 1973 does not specifically mention wildlife, but states:

The legislature finds that the development of certain areas of the state possessing important historic, cultural, or esthetic values, or natural systems which perform functions of greater than local significance, could result in irreversible damage to these resources, decrease their value and utility for public purposes, or unreasonably endanger life and property. The legislature therefore determines that the state should identify these areas of critical concern and assist and cooperate with local units of government in the preparation of plans and regulations for the wise use of these areas.

Minn. St. § 116G.02. The Minnesota Rules do mention wildlife impacts specifically. For instance, the rules on structures in public waters prohibit certain structures detrimental to significant fish and wildlife habitat:

Minn. R. § 6115.0210, subpart 3: Prohibited placement of structures. Placement of structures, temporary structures, and floating structures is prohibited when the structure, temporary structure, or floating structure:

- A. will obstruct navigation or create a water safety hazard;
- B. will be detrimental to significant fish and wildlife habitat. Construction is

- prohibited in posted fish spawning areas;
- C. is designed or intended to be used for human habitation or as a boat storage structure;
- D. is designed or intended to include walls, a roof, or sewage facilities; or
- E. will take threatened or endangered species listed in chapter 6134 without authorization by the commissioner according to parts 6212.1800 to 6212.2300.

Minnesota Environmental Protection Act, Minn. Stat. § 116D.04 also provides that:

Subd. 6. Prohibitions. No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

North Carolina

North Carolina's Land Policy Act discusses the need for environmentally-sound land management to preserve and enhance environmental quality and requires the consideration of natural habitat in present and future land use planning. N.C. Gen. Stat. §§ 113A-150 to 113A-159.

Oregon

The Oregon Land Use Planning Act, Or. Rev. Stat. § 197.230, requires that when adopting or amending goals for development, the responsible agency will consider, "(B) Estuarine areas; (C) Tide, marsh and wetland areas; (D) Lakes and lakeshore areas; (E) Wilderness, recreational and outstanding scenic areas; (F) Beaches, dunes, coastal headlands and related areas; (G) Wild and scenic rivers and related lands; (H) Floodplains and areas of geologic hazard; (I) Unique wildlife habitats" Additionally, certain land with significant wildlife habitat can be designated with a wildlife habitat special assessment by the State Fish and Wildlife Commission. Or. Rev. Stat. § 308A.415.

Rhode Island

The Comprehensive Planning and Land Use Regulation Act, R.I. Gen. Laws §§ 45-22.2-1 to 4, acknowledges that land, water and air are finite and comprehensive planning must provide for the protection of these resources. The goals of the Act include:

(4) To promote the protection of the natural, historic and cultural resources of each municipality and the state.

(5) To promote the preservation of the open space and recreational resources of each municipality and the state.

(6) To provide for the use of performance-based standards for development and to encourage the use of innovative development regulations and techniques that promote the development of land suitable for development while protecting our natural, cultural, historical, and recreational resources, and achieving a balanced pattern of land uses.

Vermont

Vermont's Land Use and Development Act ("Act 250") is unique in providing that a permit for development shall be denied if the proposed development or subdivision would destroy or significantly imperil necessary wildlife habitat or any endangered species.

Vt. Stat. Ann. tit. 10 § 6086(a):

(8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

(A) Necessary wildlife habitat and endangered species. A permit will not be granted if it is demonstrated by any party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species; and

(i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species; or

(ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied; or

(iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

Washington

The Washington Growth Management Act, Wash. Rev. Code Ann. §§ 36.70A.010 et seq., requires designation of critical habitat and open space corridors in the comprehensive plans of a county with a population exceeding 50,000 or a 17% population increase over 10 years (10% increase if 10 year period was before 1995). Wash. St. § 36.70A.040.

This Act also provides goals for local counties and cities required or opting to create comprehensive land use plans and development regulations. These goals include the preservation of fish and wildlife habitat as part of open space. Wash. St. § 36.70A.020(9). “Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.”

The required designation of critical areas includes fish and wildlife habitat. Wash. St. § 36.70A.030(5). “Critical areas” include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

In addition, the required identification of open space corridors includes wildlife habitat. Wash. St. § 36.70A.160. “Each county and city that is required or chooses to prepare a comprehensive land use plan under RCW 36.70A.040 shall identify open space corridors within and between urban growth areas. They shall include lands useful for recreation, wildlife habitat, trails, and connection of critical areas as defined in RCW 36.70A.030”

Best available science is to be used by counties and cities in designating and protecting critical areas when developing policies and development regulations. Additionally, when a petition involves a critical area, the growth management hearings board can have a scientist or other expert review the petition if they feel assistance would be necessary or helpful in reaching a conclusion. Wash. Rev. Code § 36.70A.172 (1995). The criteria for best available science are defined within the Growth Management Act at Wash. Admin. Code 365-195-900 through -925 (2008).

APPENDIX B -- RELATED ARTICLES OF INTEREST

Jeffrey L. Amestoy & Mark J. Di Stefano, *Wildlife Habitat Protection Through State-Wide Land Use Regulation*, 14 Harv. Envtl. L. Rev. 45 (1990).

Linda Breggin & Susan George, *Planning for Biodiversity: Sources of Authority in State Land Use Law*, 22 Va. Envtl. L. J. 81 (2003-2004).

Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science Mandate*, 34 Envtl. L. 397 (2004).

Christopher J. Duerksen, R. Matthew Goebel, Donald L. Elliot, & Heidi Anderson, Limitations on Wildlife Protection: State Takings Legislation § 21:52 (4th ed., 2008).

Joseph R. Perella, *Act 250's "Necessary Wildlife Habitat" Definition: How Much Wildlife Does It Embrace?*, 12 Vt. L. Rev. 531 (1987).

APPENDIX C -- ENDNOTES

¹ In Montana, *Greater Yellowstone Coalition v. Bd. of Co. Commrs.*, considered effects to wildlife and wildlife habitat in evaluating how a rezoning affected the public's welfare. 2001 MT 99, ¶ 31, 305 Mont. 232, ¶ 31, 25 P.3d 168, ¶ 31. Prominent nationwide examples include *Moviematic Industries Corp. v. Bd. of Co. Commrs.*, 349 So.2d 667, 669-70 (Fla. 3d DCA 1997); *Department of Community Affairs v. Moorman*, 664 So.2d 930, 933 (Fla. 1995); *Gardner v. N.J. Pinelands Commn.*, 593 A.2d 251, 257 (N.J. 1991). The *Moorman* case is noteworthy because the Florida Constitution has a section on environmental protection that states, "[I]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty." *Moorman*, 664 So.2d at 933. The court goes on to say that there is an obvious public interest in this policy, as environmental degradation impacts the economy, health, safety, and welfare of the people. *Id.* Given Montana's similar Constitutional provisions on the clean and healthful environment, it would seem that the exercise of police power in regulating land uses to protect wildlife and their habitats would be a legitimate use of a local government's power. Mont. Const. art. IX, sect. 1 and art. II, sect. 3.

² Mont. Code Ann. § 76-1-601(3) (2007).

³ § 76-1-601(4).

⁴ §§ 76-1-605 and -606 (2007); *North 93 Neighbors, Inc. v. Bd. of Co. Commrs.*, 2006 MT 12, ¶¶ 22-23, 332 Mont. 327, ¶¶ 22-23, 137 P.3d 557, ¶¶ 22-23.

⁵ See endnote 1.

⁶ Mont. Code Ann. §§ 76-2-201 to -203 (2007) (counties); §§ 76-2-301 to -303 (2007) (municipalities).

⁷ Mont. Code Ann. § 76-3-608(3) (2007).

⁸ § 76-3-603 (2007).

⁹ § 76-3-608(4) (2007).

¹⁰ *Schanz v. City of Billings*, 182 Mont. 328, 335, 597 P.2d 67, 71 (1979); *Boland v. City of Great Falls*, 275 Mont. 128, 910 P.2d 890 (1996). This rule is consistent with nationwide practices. See Rathkopf et al., 1 *The Law of Zoning and Planning* § 3:13 (4th ed., West 2008).

¹¹ *Schanz*, 182 Mont. at 335, 597 P.2d at 71.

¹² *Id.*

¹³ 1 *The Law of Zoning and Planning* § 3:15.

¹⁴ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002).

¹⁵ *Id.*

¹⁶ *Yurczyk v. Yellowstone County*, 319 Mont. 169, 178-79, 83 P.3d 266, 272-73 (2004).

¹⁷ 165 Mont. 38, 525 P.2d 551 (1974), overruled on other grounds in *Greens at Fort Missoula, LLC v. City of Missoula*, 271 Mont. 398, 897 P.2d 1078 (1995) (holding that zoning and rezoning are both "legislative" acts).

¹⁸ The criteria now appear at Mont. Code Ann. § 76-2-304 (2007).

¹⁹ 165 Mont. at 43, 525 P.2d at 553.

²⁰ *North 93 Neighbors, Inc.*, 2006 MT 132, ¶ 35, 332 Mont 327, ¶ 35, 137 P.3d 557, ¶ 35 ("[T]he Board must equip reviewing courts with a record of the facts it relied upon in making its decision to avoid judicial intrusion into matters committed to the Board's discretion.").

²¹ Mont. Const. art. II, § 9.

²² *North 93 Neighbors, Inc.*, ¶ 26.

²³ *Id.* at ¶ 35.

²⁴ *Id.* at ¶ 31.

²⁵ 190 Mont. 247, 620 P.2d 1189 (1980).

²⁶ *Id.* at 261, 620 P.2d at 1197-98.

²⁷ *But compare Greater Yellowstone Coalition, Inc. v. Bd. of Co. Commrs.*, 2001 MT 99, 305 Mont. 232, 25 P.3d 168, discussed in Section II, which treats wildlife effects as relevant to zoning.

²⁸ *Id.*, 620 P.2d at 1198. This observation assumes that future subdivisions would not be divisions of land exempt from subdivision review. If the divisions were exempt, the local government likely would not have occasion to review effects on wildlife or wildlife habitat.

²⁹ These statutes are summarized in App. A.

³⁰ 664 So.2d 930 (Fla. 1995).

³¹ *Id.* at 933.

³² *Id.* at 931.

³³ 558 So.2d 1030 (Fl. Ct. App. 1990).

³⁴ *Id.* at 1032-33.

³⁵ *Id.* at 1033.

³⁶ *Id.* at 1038.

³⁷ *Ferry Co. v. Concerned Friends of Ferry Co.*, 123 P.3d 102, 107 (Wash. 2005).

³⁸ Wash. Rev. Code § 36.70A.172 (1995); Wash. Admin. Code 365-195-900 (2008). These statutes are summarized in App. A.

³⁹ *Ferry Co.*, 123 P.3d at 104, n.1.

⁴⁰ *Id.*

⁴¹ *Id.* at 105.

⁴² *Id.* at 107.

⁴³ *Id.* at 105.

⁴⁴ *Id.* at 107-08.

⁴⁵ Wash. Admin. Code §§ 365-195-900 through 365-195-925. Noteworthy is the requirement that local governments use a “precautionary or a no risk approach,” in which development and land use activities are strictly limited until the uncertainty is sufficiently resolved” through further study. Wash. Admin. Code § 365-195-920.

⁴⁶ *Madison River R.V. Ltd. v. Town of Ennis*, 2000 MT 15, ¶ 30, 298 Mont. 91, ¶ 30, 994 P.2d 1098, ¶ 30 (holding that the standard applicable to agencies applies to local government as well). The standard is codified for subdivision decisions. Mont. Code Ann. § 76-3-625(2007). Although the wording of *Madison River R.V.* leaves the impression that arbitrary and capricious review may differ from the substantial evidence standard, a review of the briefing below indicates that the two concepts are interrelated, as summarized in this Section. This interrelationship is reflected in the other Montana cases cited, as well as in national treatises. *See e.g.*, 3 *The Law of Zoning and Planning* § 62:34 (“A determination which is not supported by substantial evidence is an arbitrary decision.”).

⁴⁷ *Silva v. City of Columbia Falls*, 258 Mont. 329, 335, 852 P.2d 671, 675 (1993).

⁴⁸ *Kiely Const., L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 33, 312 Mont. 52, 66, ¶ 33, 57 P.3d 836, 845, ¶ 33 (2002).

⁴⁹ 2002 MT 241, 312 Mont. 52, 57 P.3d 836.

⁵⁰ *Id.* at ¶ 12.

⁵¹ *Id.* at ¶¶ 68, 70.

⁵² *Clark Fork Coalition v. Mont. Dept. of Envtl. Quality*, 2008 MT 407, ¶ 21, 347 Mont. 197, ¶ 21, 197 P.3d 482, ¶ 21.

⁵³ *Seven Up Pete Venture v. State*, 2005 MT 146, ¶ 58, 327 Mont. 306, ¶ 58, 114 P.3d 1009, ¶ 58. The court lists three ways that clear error can occur, of which substantial evidence is the first: (1) after review of the record, the findings must be supported by substantial evidence, (2) if there is substantial evidence to support the findings, the Court will determine whether the agency misapprehended the effect of the evidence, and (3) even assuming the first two requirements are met, the Court may conclude that a finding is clearly erroneous when, in spite of evidence supporting it, a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed.

⁵⁴ *Barrett v. Asarco Inc.*, 245 Mont. 196, 200, 799 P.2d 1078, 1080 (1990).

⁵⁵ 242 Mont. 212, 789 P.2d 1234 (1990).

⁵⁶ *Id.* at 213-15, 789 P.2d at 1235-36.

⁵⁷ (Cause No. BDV-2005-883), Findings of Fact, Conclusions of Law, and Order (March 23, 2009).

⁵⁸ *Id.* at 2, 5.

⁵⁹ *Id.* at 3-4 (internal citations omitted).

⁶⁰ *Id.* at 7, 12.

⁶¹ § 76-3-603.

⁶² § 76-3-608(3)(a).

⁶³ *Vergin v. Flathead Co.*, 996 P.2d 882 (Table), 1999 WL 77679 (Mont. 1999).

⁶⁴ *Id.* at ¶¶ 11-13.

⁶⁵ Respt.'s Br. 26-27 (Aug. 13, 1998).

⁶⁶ *Vergin*, ¶¶ 16-20.

⁶⁷ 2000 MT 15, 298 Mont. 91, 994 P.2d 1098.

⁶⁸ *Id.* at ¶¶ 32, 39.

⁶⁹ Mont. Code Ann. §§ 76-2-203 (2007) (counties); §§ 76-2-303 (2007) (municipalities).

⁷⁰ See endnote 1.

⁷¹ 2001 MT 99, 305 Mont. 232, 25 P.3d 168.

⁷² *Id.* at ¶¶ 4-5, 12.

⁷³ *Greater Yellowstone Coalition, Inc. v. Bd. of Co. Commrs.* (Cause No. DV-96-331), Findings of Fact No. 98-100, Conclusions of Law No. 21 (Apr. 19, 2000).

⁷⁴ 2001 MT 99, ¶¶ 31-34, 305 Mont. 232, ¶¶ 31-34, 25 P.3d 168, ¶¶ 31-34.

⁷⁵ *Application of Central Baptist Theological Seminary*, 370 N.W.2d 642 (Minn. App. 1985).

⁷⁶ Minnesota law required the wildlife impact review for this permit. Minn. R. § 6115.0210 and Minnesota Environmental Protection Act, Minn. Stat. § 116D.04, subd. The full text of the statutes appears in App. A.

⁷⁷ 370 N.W.2d at 645, 648.

⁷⁸ Vt. Stat. Ann. tit. 10 § 6086(a)(8)(A). The full text is set forth in App. A.

⁷⁹ *In re Southview Associates*, 569 A.2d 501 (Vt. 1989).

⁸⁰ *Id.* at 502.

⁸¹ *Id.* at 504.

⁸² 616 A.2d 241 (Vt. 1992).

⁸³ *Id.* at 242-43.

⁸⁴ *Id.* at 247-48.

⁸⁵ *Id.*

⁸⁶ 16 U.S.C. § 1533(a)(2), (b)(1)(A) (2000).

⁸⁷ For a discussion of the ESA's best available science mandates see Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science Mandate*, 34 *Envtl. L.* 397 (2004).

⁸⁸ 380 F.3d 428, 436 (8th Cir. 2004).

⁸⁹ *Id.*

⁹⁰ 465 F.Supp.2d 1067 (D. Mont. 2006).

⁹¹ *Id.* at 1081-1082, 1088 (emphasis in original).

⁹² *Id.* at 1083. "This court 'cannot substitute [its] judgment for that of the Forest Service and Fish & Wildlife but instead must uphold the agency decisions so long as the agencies have considered the relevant factors and articulated a rational connection between the facts found and the choice made.' . . . The standard does not require the agency to rely on indisputable or unequivocal evidence. The Court may conclude that '[w]hile another decision maker might have reached a contrary result, the agencies conducted a reasonable evaluation of the relevant information and reached a conclusion that, although disputable, was not arbitrary and capricious.'" (citing *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944 (9th Cir. 2003)).

⁹³ 506 F.Supp.2d 322, 324 (E.D. Cal. 2007).

⁹⁴ *Id.* at 347, 363-67.

⁹⁵ 137 Wash. App. 1006, 2007 WL 404720 (Wash. App. Div. 2 2007). The unpublished case of *Unistar Properties v. Town of Putnam* provides a second example. There, a local ordinance required a developer to provide "[t]he types and extent of plant and animal species on the property and the probable effect of the proposed activity on these species." The town denied the developer's application as incomplete, even though the developer provided expert testimony generally concluding there were no effects on species, because the developer did not provide a list of the plant and animal species on the property. The town's denial was upheld as supported by substantial evidence. 2008 WL 344664 *3-5 (Conn. Super. 2008).

⁹⁶ *Id.* at *2.

⁹⁷ *Id.* at *8 (applying a "clearly erroneous" standard codified at Rev. Code Wash. § 36.70C.130(d)).

⁹⁸ See e.g., *United Jewish Center v. Town of Brookfield*, 827 A.2d 11, 18 (Conn. App. 2003).

⁹⁹ 3 *The Law of Zoning and Planning* § 62:45.

¹⁰⁰ *Christianson v. Gasvoda*, 242 Mont. 212, 214-215, 789 P.2d 1234, 1236 (1990).

¹⁰¹ See e.g., *United Jewish Center*, 827 A.2d at 18.

¹⁰² 922 A.2d 268 (Conn. App. 2007).

¹⁰³ *Id.* at 271.

¹⁰⁴ 544 A.2d 258, 258-60 (Conn. App. 1988) (internal citations omitted).

¹⁰⁵ *Id.*

¹⁰⁶ 2000 MT 15, ¶¶ 7-8, ¶¶ 32-39, 298 Mont. 91, ¶¶ 7-8, ¶¶ 32-39, 994 P.2d 1098, ¶¶ 7-8, ¶¶ 32-39.

¹⁰⁷ 160 Cal. App. 4th 1625, 1633 (2008).

¹⁰⁸ *Id.* at 1634-35.

¹⁰⁹ *Id.* at 1639-40.

¹¹⁰ 711 N.W.2d 526 (Minn. App. 2006).
¹¹¹ *Id.* at 528-30.
¹¹² Minn. R. § 4410.3610, subp. 1-3.
¹¹³ 711 N.W.2d at 532-34.
¹¹⁴ 111 F.Supp.2d 878 (E.D. Ky. 2000).
¹¹⁵ *Id.* at 882-85.
¹¹⁶ *Englin v. Bd. of Co. Commrs.*, 2002 MT 115, ¶ 13, 310 Mont. 1, ¶ 13, 48 P.3d 39, ¶ 13.
¹¹⁷ *Barrett v. Asarco Inc.*, 245 Mont. 196, 200, 799 P.2d 1078, 1080 (1990).
¹¹⁸ *Christianson v. Gasvoda*, 242 Mont. 212, 215, 789 P.2d 1234, 1236 (1990).
¹¹⁹ *Englin*, ¶¶ 16-20, 27.
¹²⁰ Cases such as *Madison River R.V.* support this assumption. In that case, the County heard significant evidence supporting and opposing the proposed R.V. park. Although the conflicting evidence rule is not stated in the case, the presence of differing evidence did not affect the County's discretion to deny the development based on substantial evidence.
¹²¹ 2007 Mont. Dist. LEXIS 513 (Mont. Dist. Oct. 17, 2007).
¹²² *Id.* at *30-31.
¹²³ *Pennaco Energy, Inc. v. Montana Board of Environmental Review*, 2008 MT 425, ¶ 28, 347 Mont. 415, ¶ 28, 199 P.3d 191, ¶ 28.
¹²⁴ *Ponderosa Neighborhood Assn. v. Spokane Co.*, 141 Wash. App. 1031, 2007 WL 3349121 (Wash. App. Div. 3 2007).
¹²⁵ *Id.* at *7-9.
¹²⁶ *Id.* at *7.
¹²⁷ *Id.* at *2, 9.
¹²⁸ 346 A.2d 645 (Vt. 1975).
¹²⁹ *Id.* at 647-49.
¹³⁰ *Id.*
¹³¹ See generally, *Home Builders Assn. of N. Cal. v. U.S. Fish & Wildlife Serv.*, 529 F. Supp.2d 1110 (N.D. Cal. 2007); *Pacific Coast Fedn. of Fishermen's Assns. v. U.S. Bureau of Reclamation*, 426 F. 3d 1082 (9th Cir. 2005); and *Natl. Assn. of Home Builders v. Norton*, 340 F.3d 835 (9th Cir. 2003).
¹³² 5 U.S.C.A. § 706(2)(E)
¹³³ 5 U.S.C.A. § 706(2)(A)
¹³⁴ *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984).
¹³⁵ 266 F.3d 889 (8th Cir. 2001).
¹³⁶ *Id.* at 899-90.