

August 1, 2013

Hearing on *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People*

House Committee on Natural Resources

Statement

By

Damien M. Schiff

Principal Attorney

Pacific Legal Foundation

930 G Street

Sacramento, California 95814

Tel: 916-419-7111

Fax: 916-419-7747

I. Introduction

The topic of this hearing is the negative effects of close-door settlements arising out of Endangered Species Act litigation during the Obama Administration. My fellow panelists will ably discuss this particular subject. I, however, would like to address the subject of transparency and the Endangered Species Act a little more broadly, because some of the issues that have arisen during the current Administration are perennial, and reflect persistent failings in the manner in which the United States Fish and Wildlife Service and National Marine Fisheries Service administer the Act.

II. Failing to delist expeditiously

The goal of the Endangered Species Act is to bring species from the brink of extinction to recovery, so that the species no longer need the Act's protections. See 16 U.S.C. § 1531(b). One would think that the Services would be eager to delist species or "downlist" them from endangered to threatened status, to prove the Act's effectiveness. Remarkably, the opposite is true: the Services rarely act to delist or downlist a species, even when they acknowledge that the species merits delisting or downlisting. To make matters worse, the agencies have essentially adopted the policy that no delisting or downlisting will occur unless and until a court orders it to happen. Below, I discuss two examples that demonstrate this troubling practice.

A. The bald eagle

In 1999, the Fish and Wildlife Service announced the recovery of the bald eagle and formally proposed to delist it from the Act. *See* 64 Fed. Reg. 36,454 (July 6, 1999). Yet the Service did not act on that proposal until 2007, *see* 72 Fed. Reg. 37,346 (July 9, 2007), only after having been forced to by court order as a result of a lawsuit brought by Pacific Legal Foundation attorneys on behalf of Edmund Contoski, a Minnesota landowner. *See Contoski v. Scarlett*, 2006 WL 2331180 (D. Minn. Aug. 10, 2006). Mr. Contoski owned several acres of lakefront property in northern Minnesota. He wanted to subdivide the property and ultimately construct a vacation cabin on it. Unfortunately, the property contained an active bald eagle's nest. Under the Service's Endangered Species Act eagle management guidelines, Mr. Contoski was unable to construct anything within several hundred feet of the eagle nest. And yet, the Service had acknowledged that the eagle had recovered and no longer needed these protections. Mr. Contoski's development plans, and his property rights, were put on hold for eight years for no reason whatsoever.

The Service says at one time that the eagle is recovered, yet at another that private property owners must suffer devaluation of their property for no valid reason. Where is the transparency?

B. The Valley elderberry longhorn beetle

A similar sad story of lack of transparency can be found in the controversy over the Valley elderberry longhorn beetle. The beetle, native to California's Central Valley, was listed as a threatened species with designated critical habitat in 1980. *See* 45 Fed. Reg. 52,803 (Aug. 8, 1980). As a result of the beetle's listing and habitat protections, property owners, farmers, and levee districts have been significantly injured. If one has an occupied elderberry bush on one's property, it is nearly impossible to develop the property, or to farm it, or to maintain the flood control levees on which the bush sits. Mitigation for elderberry bushes can run into the hundreds of thousands of dollars. For example, the Sutter Butte Flood Control Agency is a joint powers agency with jurisdiction over flood control facilities in the northern part of California's Sacramento Valley. The Agency is trying to fund a project to remedy geotechnical deficiencies in 41 miles of levee along the Feather River. The total cost of the project is about \$30,000,000, of which **\$4,250,000** is for elderberry bush mitigation. That mitigation price amounts to 15% of the first-year construction cost, or almost one mile of additional levee that could be repaired.¹

The safety threats from the beetle's listing do not end with higher costs. As Levee District 1 of Sutter County—one of California's oldest flood control agencies—explained in a recent

¹ See <http://www.regulations.gov/#!documentDetail;D=FWS-R8-ES-2011-0063-0037> (last visited July 24, 2013).

comment letter to the Service, the beetle's regulation prevents needed flood safety practices, *e.g.*, elderberry bushes can greatly interfere with the visual inspections that flood control agencies must conduct for levee maintenance.²

One would think that the Service would ensure an expeditious delisting of the beetle once it has been demonstrated to have recovered. To the contrary, the Service has dawdled, much to the detriment of property owners and public safety. In 2006, the Service determined that the beetle had recovered.³ Yet the agency did not begin the delisting process until Pacific Legal Foundation attorneys filed a lawsuit on behalf of affected property owners, farmers, levee districts, and other organizations to force the Service to act on its own conclusions. *See N. Sacramento Land Co. v. U.S. Fish & Wildlife Serv.*, 2:12-cv-00618JAM-CKD (filed Mar. 12, 2012). In 2012, the Service finally proposed to delist the beetle, some six years after determining that it had recovered. *See* 77 Fed. Reg. 60,238 (Oct. 2, 2012).

The Service's conduct in the beetle case is part of a larger problem. The Act requires that the Service conduct a status review every five years for each listed species, to determine whether listing is still appropriate. *See* 16 U.S.C. § 1533(c)(2). The Service, however, has taken the position that it is not required to do anything as a result of such status reviews, unless and until an interested party petitions for action and then follows up with a lawsuit. *See Coos County Bd. of County Comm'rs v. Kempthorne*, 531 F.3d 792 (9th Cir. 2008). Most members of the regulated public, however, are not in a position to file lawsuits so easily. Thus, many species continue to receive the protections of the Act even when they are not necessary, and innocent property owners must continue to suffer needlessly.

The Service says that a species is recovered, yet resists delisting to allow affected property owners and local agencies the freedom to act as they need to. Where is the transparency?

III. Critical habitat

The Act authorizes the Services to designate "critical habitat" for listed species. 16 U.S.C. § 1533(a)(3)(A)(i). In practice, critical habitat can have a significant negative economic impact on the value of private property. As just one particularly glaring proof: the Fish and Wildlife

² See <http://www.regulations.gov/#!documentDetail;D=FWS-R8-ES-2011-0063-0029> (last visited July 24, 2013).

³ See http://ecos.fws.gov/docs/five_year_review/doc779.pdf (last visited July 24, 2013).

Service itself estimated that the annual economic impact of critical habitat designation for the California gnatcatcher is over **\$100,000,000**.⁴

Commencing in the 1990s, the Services regularly designated critical habitat in conjunction with the listing of species. These designations tended to be very broad, oftentimes including habitat that was marginal at best. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197 (E.D. Cal. 2003), *overruled in part, Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983 (9th Cir. 2010).

During the Bush Administration, under the leadership of Deputy Assistant Secretary for Fish and Wildlife and Parks, the Service changed its approach. Secretary MacDonald demanded that Service employees demonstrate that their actions, such as designating critical habitat, be supported by adequate data. In particular, Secretary MacDonald was skeptical of the designation of “unoccupied” critical habitat. But in the wake of a critical inspector general report⁵ and a change in administration, the Service resumed its prior, more relaxed, and legally deficient approach. The case of the Western snowy plover nicely exemplifies this retrenchment.

The plover is a shore bird, listed in 1993, whose habitat extends from Central California up to the Canadian border. 58 Fed. Reg. 12,864 (Mar. 5, 1993). The Service originally designated critical habitat for the bird in 1999, but that designation was successfully challenged in 2003 for the Service’s failure to conduct an adequate economic impact assessment. *See id.* at 36,729-30. In 2005, the Service published a revised, less expansive, critical habitat designation. 70 Fed. Reg. 56,970 (Sept. 29, 2005). In 2008, the Center for Biological Diversity sued the Service, contending that many areas were improperly excluded from the designation. *Ctr. for Biological Diversity v. Kempthorne*, No. 3:08-cv-4594-PJH (N.D. Cal. filed Oct. 2, 2008). Pacific Legal Foundation attorneys intervened in the lawsuit on behalf of landowners and off-road vehicle enthusiasts whose property and dune-buggy grounds the Center wanted included in critical habitat. Sadly, rather than defend the designation, the Fish and Wildlife Service chose to settle. *See* Notice of Filing Settlement Agreement, Doc. No. 55 (filed May 11, 2009). The Foundation’s clients were given no opportunity to participate in these settlement discussions. In 2012, the Service issued a new critical habitat designation that nearly doubled the size of the 2005

⁴ *See*

http://www.fws.gov/economics/Critical%20Habitat/Final%20Draft%20Reports/CA%20coastal%20gnatcatcher/CAG_N_DEA_Feb2004.pdf (last visited July 24, 2013).

⁵ *See*

http://voices.washingtonpost.com/washingtonpostinvestigations/2008/12/report_interior_office_meddled.html (last visited July 24, 2013).

designation, *see* 77 Fed. Reg. 36,728 (June 19, 2012), and included our clients' formerly excluded properties, *see id.* 36,742.

The United States Chamber of Commerce has recently reported on similar sue-and-settle critical habitat cases.⁶ In 2007, the Fish and Wildlife Service issued critical habitat for the Hine's emerald dragonfly. *See* 72 Fed. Reg. 51,102 (Sept. 5, 2007). Environmental groups then sued, claiming that the Service wrongfully excluded about 13,000 acres of habitat in two (already protected) national forests in Michigan and Missouri. *See Northwoods Wilderness Recovery v. Kempthorne*, No. 08-01407 (N.D. Ill.). The Administration changed and, not surprisingly, the environmental groups and the Service settled, with the agency agreeing to reanalyze the designation. Then, the Service issued a new designation more than double the size of the previous designation. *See* 75 Fed. Reg. 21,394 (Apr. 23, 2010).

Similarly, WildEarth Guardians, an environmentalist organization, sued the Service in 2008 over the agency's failure to designate critical habitat for the Chiricahua leopard frog. *WildEarth Guardians v. Kempthorne*, 08-cv-00689-NVW (D. Ariz. filed Apr. 9, 2008). The Service listed the frog in 2002, but determined at that time that critical habitat designation would not be prudent. *See* 67 Fed. Reg. 40,790 (June 13, 2002). WildEarth Guardians' suit sought to overturn the Service's determination, and after substantive briefing had commenced (as well as a change in Administration), the Service decided to settle the case. *See* Doc. No. 32. In the settlement, the Service agreed to revisit its determination, and ultimately the Service designated over 10,000 acres of critical habitat. *See* 77 Fed. Reg. 16,324 (Mar. 20, 2012).

The Service at Time 1 produces a reasonable designation that deserves a vigorous defense in court. Yet, at Time 2, once the administration has become "greener" and environmental groups sue, the Service gives up. Where is the transparency?

IV. The salmon wars: counting all the fish

For over two decades, a near-incessant conflict has raged in the Pacific Northwest between the environmental community, on the one hand, and water users and others who rely on the benefits to the human community that various hydroelectric and reclamation projects provide, on the other hand. The environmental community contends that these projects harm various populations of protected salmonids—in ESA parlance, "evolutionarily significant units" of salmon and steelhead. *See* 56 Fed. Reg. 58,612 (Nov. 20, 1991). Generally speaking, the federal courts have endorsed the environmentalists' views. *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 481 F.3d 1224 (9th Cir. 2007) (overturning the management plan for

⁶ *See* <http://www.uschamber.com/reports/sue-and-settle-regulating-behind-closed-doors> (last visited July 25, 2013).

the Federal Columbia River Power System because it was insufficiently protective of ESA-listed salmonid populations). But on one crucial point, which I discuss below, the courts originally sided with property owners and their allies. Yet the National Marine Fisheries Service has succeeded in taking a less-than-transparent path to avoid even this one judicial limitation on its policy preferences.

The issue concerns how the Service defines what constitutes an evolutionarily significant unit. Until the early 2000s, the Service followed a Hatchery Listing Policy whereby it entirely ignored the existence of hatchery-raised salmon when determining whether a given population of salmon merited listing. See 58 Fed. Reg. 17,573 (Apr. 5, 1993). This was a crucial move on the Service's part, because by refusing to count these hatchery-raised individuals, the Service was able to give the (false) impression that the salmon population at issue was closer to extinction than actually was the case.

To right this wrong, Pacific Legal Foundation attorneys filed suit on behalf of property owners and their allies in federal court in Oregon, challenging the Service's policy of not counting all the fish. The district court ultimately agreed with the Foundation's position, ruling that it was arbitrary and capricious for the Service to acknowledge that (1) hatchery-raised fish are genetically indistinguishable from naturally spawning fish, and (2) offspring of hatchery fish are deemed naturally spawning, *but* (3) hatchery-raised fish must be excluded by definition from the population unit proposed for listing. See *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001). The court therefore ordered the Service to redo its policy.

But the Service, rather than agreeing to faithfully implement the court's order, opted for an end-run. The agency's strategy succeeded in two ways.

First, it issued a new Hatchery Listing Policy (ultimately upheld by the Ninth Circuit on principles of judicial deference to agency decision making, see *Trout Unlimited v. Lohn*, 559 F.3d 946 (9th Cir. 2009)) under which hatchery-raised fish are considered part of the protected population, but their presence is deemed *a negative impact* on the naturally-raised component, therefore making it more likely that the population *as a whole* will be listed. See 70 Fed. Reg. 37,204. An admittedly clever approach: not only does the revised policy undercut the *Alsea* decision, it potentially makes things worse for the regulated public. Before *Alsea*, hatchery-raised fish were not regulated under the Act. Now, such fish are included within the protected population, yet, per the policy, cannot help the population as a whole to recover.

Second, the Service has begun to use a rationale for listing salmonid species that is different from the evolutionarily significant unit rationale but better serves the agency's preferred policy ends. Specifically, the Service has begun to use its Distinct Population Segment Policy, see 61 Fed. Reg. 4,722 (Feb. 7, 1996), to list salmonid populations that otherwise would be subject to

its evolutionarily significant unit policy, *see Modesto Irrig. Dist. v. Gutierrez*, 619 F.3d 1024 (9th Cir. 2010). The reason for the Service's shift is that the Distinct Population Segment Policy allows the Service to divide populations based on behavior rather than "reproductive isolation." Although hatchery-raised fish are genetically indistinguishable from their wild-spawning cousins, they can exhibit behavioral differences. Thus, using the distinct population segment rationale also allows the agency to effect a perfect end-run around *A/sea*.

Hatcheries have been used to sustain salmonid populations in the Pacific Northwest for over a century.⁷ Indeed, without such hatcheries, many runs of salmon might be far worse than they are today (or even extinct). Does it serve transparency to first ignore this fact and then systematically to characterize it as a bad thing?

V. Convenient taxonomy

The Act does not authorize the Services to list any population they wish. Rather, the Act carefully circumscribes the Services' authority to list only species, subspecies, and distinct population segments of species. *See* 16 U.S.C. § 1532(16). Nevertheless, recent history reveals the Services' desire to use less-than-transparent processes to ensure that they can find a listable unit. I give two examples below.

A. California gnatcatcher

The California gnatcatcher is a small songbird that ranges from Mexico to southern California. The gnatcatcher species as a whole is not endangered with extinction, but in 1993 the Service decided to list as threatened the California segment of the gnatcatcher as a separate subspecies. *See* 58 Fed. Reg. 16,742 (Mar. 30, 1993). The Service justified its determination largely on the work of one scientist, Jonathan Atwood. *See id.* at 16,742. Since then, several published studies have concluded that the Atwood subspecies classification is invalid. In fact, Atwood was a co-author of a subsequent study that substantially undercut his earlier work. Accordingly, in 2010, Pacific Legal Foundation attorneys, representing various interested industry and property rights groups, petitioned the Service to delist the gnatcatcher. Remarkably, the Service rejected the petition, reasoning that, although the new science undercut the old science, the agency was not prepared to move forward with delisting until more science was done. *See* 76 Fed. Reg. 66,255, 66,259 (Oct. 26, 2011).

B. Orca whale

⁷ *See, e.g.*, http://www.hatcheryreform.us/hrp/summary/welcome_show.action (last visited July 25, 2013) (Congressionally established Hatchery Scientific Review Group noting that "hatcheries play an important role in the management of salmon and steelhead populations in the Pacific Northwest").

Similarly fishy is the National Marine Fisheries Service's listing of the Puget Sound population of orca whale. The Service listed the population in 2005 as the result of an environmentalist lawsuit. *See* 70 Fed. Reg. 69,903 (Nov. 18, 2005). At the time, the Service acknowledged that the worldwide species of orca is not in danger of extinction, and that the Puget Sound population of orca whale does not qualify as a distinct population segment of the species as a whole. *See id.* at 69,903. So, what did the Service elect to do? Invent a new *subspecies* of orca whale, and list the Puget Sound orcas as a distinct population segment of that never-before-and-never-since-recognized subspecies of whale. *See id.* at 69,907. When protections for this whale population were used as part of the justification for imposing draconian water cutbacks to farms and towns in California's San Joaquin Valley, Pacific Legal Foundation attorneys submitted a delisting petition on behalf of affected farmers. The petition argued that new science has definitively established that the unnamed subspecies of orca whale is bogus, and that the listing is illegal. The Service is currently reviewing the petition. *See* 77 Fed. Reg. 70,733 (Nov. 27, 2012).

These examples of the gnatcatcher and orca whale support the conclusion that the Services view taxonomy as just one obstacle, or convenient excuse, relating to the ultimate goal of listing species, whether endangered or not. Where is the transparency?

VI. Economic impact analysis

The Act does not allow the Services to take into account economic impacts when determining whether to list a species. *Cf.* 16 U.S.C. § 1533(a)(1). However, the Act requires such considerations to be taken into account when designating critical habitat. *See id.* § 1533(b)(2). Nevertheless, the Services have tried to minimize their responsibility to assess critical habitat's economic impact by using a so-called "baseline" approach. According to this baseline theory, the agencies must estimate what the world would look like without the designation, and compare it to what the world would look like with the designation. This interpretation appears at first blush to be reasonable, but in reality it makes a mockery of the economic impact analysis. The reason why derives from the Services' position that many of the economic impacts attributable to critical habitat designation are also attributable to a species' listing. But, because the Services are not allowed to take into account economic impacts when considering whether to list a species, the Services assert that they must ignore these impacts *for all purposes*, including for critical habitat designation.

Hence, the Services produce economic impact analyses concluding that there are no or very few negative economic impacts from critical habitat designation, which is of course demonstrably false. As one prominent economist has explained, "[d]esignation of critical habitat can impose significant costs by raising the cost of development, reducing the amount of

usable land and delaying completion of projects.”⁸ Moreover, he notes that the Service’s baseline approach has serious flaws, because it ignores regional market impacts, as well as impacts to consumers, not just developers and landowners.⁹

A much more reasonable approach—known as the “coextensive” theory—would take account of *all* impacts from designation, even if those impacts are “coextensive” with listing impacts. The Service’s baseline position has been adopted by one circuit court of appeals, *Az. Cattle Growers Ass’n v. Salazar*, 606 F.3d 1160, 1173 (9th Cir. 2010), but rejected in favor of the coextensive approach by another, *see N.M. Cattlegrowers Ass’n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001). The Service has now pending a proposal to make the baseline approach part of the agencies’ regulations. *See* 77 Fed. Reg. 51,503, 51,506-07 (Aug. 24, 2012).

How is transparency served when the agencies convert their obligation to assess the economic impacts of critical habitat designation into a paper exercise?

VII. Amending a forest plan through settlement

Conservation Northwest v. Sherman, 715 F.3d 1181 (9th Cir. 2013), is the latest in a long tradition of litigation over the Northwest Forest Plan, which governs logging and other activities for over 24 million acres of federal land between San Francisco and the Canadian border. In 2007, environmental groups challenged, under a variety of laws including the Endangered Species Act, the Bureau of Land Management’s and Forest Service’s decision, approved by the Fish and Wildlife Service, to excise the “Survey and Manage” Standard from the Plan. This Standard, which the agencies found difficult to administer, required them to take a close look at the impacts of logging on some 400 species of concern. *Id.* at 1184. The D.R. Johnson Lumber Co. intervened to defend the agencies’ abandonment of the Standard. The environmental groups, however, prevailed in the district court on their claims under the National Environmental Policy Act, and then proceeded to negotiate a settlement with the agencies. The settlement ultimately approved, over the lumber company’s objections, effectively amended the Plan by imposing new management standards for various species.

Happily, the lumber company successfully appealed the settlement’s approval to the Ninth Circuit, which held that the district court abused its discretion in okaying the settlement. The appellate court reasoned that, although judicial decrees normally are not subject to notice and comment, this agreement was illegal because it imposed new, substantive, changes to the

⁸ David Sunding, *The Economic Impacts of Critical Habitat Designation*, 6 Agricultural & Resource Economics Update 7 (July/Aug. 2003), available at <http://giannini.ucop.edu/are-update/6/6/the-economic-impacts-of-c/> (last visited July 25, 2013).

⁹ *Id.* at 10.

existing Plan, and because these changes were potentially of indefinite duration. *See id.* at 1187-88.

Nevertheless, had it not been for judicial correction, the agencies would have managed, through “sue and settle” tactics, to amend their regulations without adhering to the required notice-and-comment procedures. Where was the transparency?

VIII. Conclusion

Reasonable people can disagree about the utility and morality of the Endangered Species Act, but no one can legitimately approve of a less-than-transparent administration of the Act. Unfortunately, over the last several decades, the United States Fish and Wildlife Service and National Marine Fisheries Service have implemented the Act in a way that puts agency policy ahead of the law and the best interests of the regulated public. Moreover, the agencies’ administration of the Act oftentimes bears no relationship to the best interests of protected species, but serves only to aggrandize government power or satisfy particularly litigious environmental groups. The last five years have simply exacerbated these odious practices. Groups like Pacific Legal Foundation can help prevent individual injustices, but systematic improvement to the Act and its administration is this Committee’s and Congress’ prerogative and duty.