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Before the U.S. Senate Committee on Environment and Public Works

Hearing Entitled, "Fish and Wildlife Service: The President's FY2016 Budget Request for the Fish and Wildlife Service and Legislative Hearing on Endangered Species bills."

May 6, 2015

Mr. Chairman and Members of the Committee, I appreciate the invitation to testify before the Committee today. By way of background, I have worked on Endangered Species Act ("ESA" or "Act") issues for over twenty years, including while serving as the Solicitor of the Department of the Interior, as an attorney in private law practice, and as a congressional aide.

Given the breadth of today's hearing, I have four points to make:

First, regarding oversight, many of the decisions made by U.S. Fish and Wildlife Service ("Service") employees when implementing the ESA are decisions of great public consequence, and as such, they should be made with as much care and as much foresight as our government can muster.

Some examples of important decisions that have potential to greatly impact species, people, states and communities include:

- The determination that a particular species merits the protection of the ESA,
- The identification and designation of the critical habitat for that listed species,
- The decision whether certain areas should be excluded from such a critical designation, and,
- The issuance of a biological opinion to another federal agency along with a reasonable and prudent alternative to the agency's proposal

Unfortunately, at times, each of these decisions are driven by deadlines (some imposed by statute, some established by courts, and some imposed by the Service's own agreement with opposing litigants). The consequence of these deadlines mean less care and thought in crafting the underlying decision, less review of the legal sufficiency of the decision, and less credibility on the merits of the decision with the public.

You do not need to take my word for it. Recently, the Ninth Circuit of Appeals provided its view of a biological opinion prepared under a court ordered deadline. The Court explained:

> The BiOp is a jumble of disjointed facts and analyses. It appears to be the result of exactly what we would imagine happens when an agency is ordered to produce an important opinion on an extremely complicated and technical subject matter covering

multiple federal and state agencies and affecting millions of acres of land and tens of millions of people. We expect that the document was patched together from prior documents, assembled quickly by individuals working independent of each other, and not edited for readability, redundancies and flow. It is a ponderous, chaotic document, overwhelming in size, and without the kinds of signposts and roadmaps that even trained, intelligent readers need in order to follow the agency's reasoning. We wonder whether anyone was ultimately well-served by the imposition of tight deadlines in a matter of such consequence. Deadlines become a substantive constraint on what an agency can reasonably do… Although we ultimately conclude that we can discern the agency's reasoning and that the FWS's 2008 BiOp is adequately supported by the record and not arbitrary and capricious, we also recognize that Reclamation has continuing responsibilities under CVP and SWP and that this is likely not the last BiOp that the FWS will issue with respect to the delta smelt, nor is this the last legal challenge that we will hear. Future analyses should be given the time and attention that these serious issues deserve.

San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F .3d 581, 605-06 (9th Cir.2014)

Sadly, this is not an isolated example, prior Inspector General Reports paint a similar portrait over and over. These decisions should be made with care and not under arbitrary deadlines, which can serve to facilitate poorly made decisions. The Committee should consider the benefit of the imposition of deadlines compared to their cost to people and species.

Second, despite the significant conflict and acrimony that exists in the implementation of the Act, things might have been much worse. We must recognize that over the last twenty years, those charged with implementing the Act have developed and significantly expanded initiatives primarily related to sections 7 and 10 of the Act such as Safe Harbor Agreements, multi-species Habitat Conservation Plans, Candidate Conservation Agreements, No Surprises Policy and Private Stewardship Grants. These tools are not without criticism. Unquestionably, much more can and should be done to incentivize private landowners and states to be encouraged to engage in conservation measures without the specter of ESA penalties hovering above their heads. In addition, the administrators of the ESA could choose to do more to maintain the protection of species, while also reducing conflict under sections 4, 6, and 7of the ESA. That said, these administrative changes have been very meaningful to the individuals, entities and entire communities, who have been able to use these tools to successfully resolve their particular challenges while providing the protection to listed species that the law requires.

Third, the conflict and controversy associated with the implementation of the Act may actually become far worse than it is today if the Obama Administration finalizes two regulations and a draft policy. The regulations relate to the designation of critical habitat and the interpretation of the term "adverse modification." The policy describes how the Service intends to utilize its authority to exclude areas from critical habitat designations it has initiated. While the Service

and NOAA Fisheries should be commended for making the effort to provide greater clarity to its employees and to the public on these three issues, they have missed the mark and developed proposals that are untethered from the text of the statute itself. Though all three have issues of concern, for my testimony today, I will focus on only one of these changes, the proposed regulatory changes related to the designation of unoccupied critical habitat.

Unoccupied habitat is habitat that is not currently occupied by a listed species. To deal with the anticipated effects from climate change, the Service and NOAA Fisheries are proposing changes to their regulations that would vastly expand their authority to designate unoccupied areas as critical habitat. By changing a few words in a regulation, the Services would fundamentally alter the role that the designation of unoccupied areas has historically played in the ESA regulatory scheme.

Whatever one may think of the Services' concern for the effects that climate change may have on critical habitat, their proposed changes to 50 CFR § 424.12 to deal with those effects exceed their authority under the ESA for the following reasons:

The ESA only grants the Services the authority "to designate any habitat of [a species that has just been listed] which is then considered to be critical habitat" (emphasis added).[1] It does not grant them the authority to designate habitat which "is [not] then considered to be critical habitat," but that may become critical habitat at some point in the future, depending on the effects of climate change or other factors. The ESA provides the Services with the authority to deal with changes that may occur in the critical habitat of a species in the future by authorizing them to make changes in their designations as it becomes clear what those changes are. The ESA states that the Services "may, from time-to-time thereafter [i.e., after the designation of habitat that is critical habitat at the time of listing] as appropriate, revise such designation."[2] The ESA does not grant them the authority to predict what changes may be necessary in the future and to designate habitat as critical now that is not presently needed but that may (or may not) be needed in the future.

The ESA grants the Services the authority to designate unoccupied areas as critical habitat only if those areas are "essential for the conservation of the species."[3] Clearly, an unoccupied area cannot be "essential for the conservation of [a] species" if the occupied area is adequate to insure its conservation. Thus, contrary to the Services' claim, they must necessarily first determine whether the occupied areas are adequate to insure the conservation of a species before they can determine whether unoccupied areas are "essential" to the achievement of that purpose. It is impossible to claim that an unoccupied area is "essential for the conservation of [a] species" without knowing how the species would fare if the unoccupied area were not designated.

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[1] 16 U.S.C. § 1533(a)(3)(A).
[2] Id.
[3] Id. at § 1532(5).

Under the Services' new reading of the definition of "critical habitat," they assert that Congress, by defining "critical habitat'' in the way it did-- by defining unoccupied areas as critical habitat if they were deemed "essential" to the conservation of the species--intended to grant them a larger authority to designate unoccupied areas as critical habitat. This definition is far broader than they have previously asserted, while also far broader than the authority Congress granted them for the designation of occupied areas.

This assertion is contradicted by the legislative history of the definition of critical habitat. The ESA as originally passed in 1973 did not contain a definition of "critical habitat." Concerned about the issues raised by the snail darter case, Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), Congress adopted its own definition of "critical habitat" in 1978, which remains the definition today. Congress provided a statutory definition of critical habitat that was narrower than the FWS's regulatory definition; it changed the definition from a focus on "constituents," the loss of which would ''appreciably decrease the likelihood of the survival and recovery of a listed species,'' to a focus on "physical and biological features" that are "essential to the conservation of a species." The Services now claim to read "essential"; however, in a way that would broaden the definition of "critical habitat" far beyond that contained in the Services' original definition that was rejected by Congress. They read "essential" as encompassing potential features, the loss of which (if the features actually develop) may (or may not) at some unspecified point in the future reduce the likelihood of the survival and recovery of the species by some unspecified degree, depending on the accuracy of their predictions about the effects of climate change.

In addition to being in conflict with the legislative history, the Services' claim that "essential" may be read so broadly cannot be squared with the rest of the language in the definition. Congress, in defining "critical habitat" in the way it did in 1978, was deeply concerned about the amount of habitat, even in occupied areas, that would be deemed critical and sought to carefully limit it, not grant a broad new authority to designate it.

In the definition, Congress placed three limitations on the amount of occupied areas that could be designated. First, it limited critical habitat to those occupied areas that presently have "those physical and biological features...essential to the conservation of the species."[4] But even that was not limited enough, so it added a second limitation. It defined critical habitat in such a way that only those areas with the requisite features that also required "special management considerations or protection" could be designated.[5] Finally, to make sure that its intent to limit the amount of occupied habitat that could be designated was clear, it stated that "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species."[6]

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[4] 16 U.S.C. § 1533(5).
[5] Id.
[6] Id.

The Services' proposed changes to their regulations based on their new reading of the definition of "critical habitat," may legitimately reflect a policy goal that the Administration feels is important, and if so, they should propose legislation to garner such authority rather than trying to shoehorn it into a regulatory change.

Fourth, the legislative proposals before you today highlight several important ideas regarding changes to the Act. Some reflect longstanding policy debates, others raise new ones, but they each merit a serious and meaningful debate framed by whether the Act of today can or should be improved, after decades of experience we have living under it. While I have not included detailed testimony on each individual bill, I would be happy to respond to questions regarding these legislative proposals.

Conclusion

Mr. Chairman and Members of the Committee, as you begin to consider the Administration's proposed budget and proposed changes to the Act, please ask yourself whether you believe the Act is being implemented with as much care and as much foresight as our government can muster. Consider greater opportunities for incentivizing stewardship and public confidence in the decisions and carefully examine whether the Administration's regulatory and policy changes are within the parameters Congress intended when it enacted the Endangered Species Act. I look forward to addressing any questions you have.