TESTIMONY OF ALAN GLEN

Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Wildlife and Water
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Good morning Mr. Chairman and Members. My name is Alan Glen, and I am a lawyer from Austin, Texas. I am particularly interested in the topic of interagency consultations under the Endangered Species Act ("ESA") and am hopeful that the interest and efforts of this Subcommittee will help to enhance the consultation process and make it a more efficient tool for species conservation.

I. Introduction

My testifying for increased efficiency in the ESA consultation program is a little bit like a tax lawyer testifying for streamlining the tax code. A significant proportion of my work involves assisting clients in navigating the complex and acronym-rich ESA consultation process. Our firm represents clients, ranging from developers, to utility companies and state and local governments, across the nation in ESA matters. My experience with consultations under the ESA is firsthand, having handled dozens of consultations involving a wide variety of activities and species. Through this experience, I have seen significant conservation and economic benefits derived from resolution of endangered species conflicts through the consultation process. Unfortunately, I have also recognized maddening inefficiencies and uncertainties, many created by the very agency they afflict. I do see the Fish and Wildlife Service ("Service") making positive strides to improve the efficiency and effectiveness of the consultation process, but some problems remain.

Statistics regarding the ESA consultation process are often cited in an effort to demonstrate that the program is working, and with little impact on government and economic

activity. We are told that thousands of consultations are processed each year, with only a handful resulting in a "jeopardy" conclusion. These statistics, however, do not reveal the enormous cost in terms of time, money, project changes, and mitigation property or payments associated with completing these thousands of consultations. Perhaps the pending GAO report will shed some light into the trenches of the process, where most of my labor is performed.

Today, I will focus briefly on some of what I refer to as the self-inflicted wounds of ESA consultations: areas in which the Service may be making life harder on itself than necessary or appropriate. First, I will mention the trend towards lowering the thresholds or "triggers" of the consultation process, resulting in many more consultations with perhaps little conservation benefit. Next, I will discuss the use of delay beyond the legally required timeframe for the completion of consultations, and how illegal delays are sometimes used as a tool for extracting concessions that are not otherwise required by law. Last, I will mention the use and impact of "draft" jeopardy conclusions which can be a tool to extract costly mitigation far beyond what the law requires. The Service has been making progress in addressing some of these concerns on a policy level. In practice, though, they still arise with some degree of frequency.

II. Lowering Consultation Thresholds

The Service conducts thousands of ESA consultations every year. Many of these, however, involve activities with little, or purely speculative, biological impacts. Because the thresholds required for a consultation to actually modify a project or activity (the project must be found to jeopardize or at least "take" a listed species), are so much higher than the threshold required to merely initiate consultation (that a species might be affected, even if purely beneficially), these marginal to no impact consultations end up amounting to delay and cost for little conservation benefit. Moreover, the trend towards lowering the thresholds to initiate consultation is severely impacting the ability of other federal agencies, perhaps most notably the

Corps of Engineers and the EPA, to have efficient general or nationwide permitting programs. The lower thresholds mean that many projects with little or no impact, that might otherwise have only the briefest of interchanges with the federal government, are instead kicked into an ESA consultation that can cause delays of over a year.

A very recent example of this trend towards lowering of consultation thresholds are the cactus ferruginous pygmy owl consultation guidelines (Attachment "A") worked out between the Corps and the Service for the Corps' nationwide permitting program in southern Arizona. These guidelines define a development project's potential impacts on the owl so broadly that consultation would be required on dozens, if not hundreds, of projects not located in critical habitat for the species and in fact miles and miles from any known owls. Moreover, because the guidelines state that, where consultation is triggered, the Corps will require applicants to obtain an individual permit from the Corps, a time-consuming and expensive process, even though the project would otherwise qualify for a much more efficient nationwide permit authorization. These guidelines have the effect, therefore, of increasing the work load of two federal agencies and increasing the time and cost associated with projects' federal environmental approvals, all in exchange for little if any real species conservation. To its credit, the Service is beginning to recognize the inefficiencies of these guidelines and has expressed an interest in working with appropriate stakeholders to improve the process.

A similar example of lowering the consultation threshold occurred with the Service's Edwards Aquifer Water Quality Recommendations (Attachment "B") in central Texas These guidelines have since been withdrawn as a result of a settlement in a lawsuit we filed on behalf of the National Association of Homebuilders. However, prior to the withdrawal of these guidelines, they operated in a manner very similar to the cactus owl guidelines. Under the

aquifer guidelines, the position of the Service was that every development project in a 350-square-mile area should consult with the Service regarding potential impacts on the endangered Barton Springs salamander, a small amphibian that lives in the Barton Springs swimming pool in Austin's Zilker Park. The federal trigger for these consultations was the otherwise very efficient EPA general permit for construction-related stormwater discharges applicable to every development project over five acres. The Service's position requiring consultation was contrary to its often-stated view that no single project would result in harm to the salamander. In this case, the lowered consultation threshold resulted in more than mere delay for a number of projects. Applicants were entitled under the EPA general permit to conduct "informal" consultations with the Service, but if differences could not be resolved in informal consultation, the general permit did not authorize resolution through formal consultation. In other words, applicants were stuck in a Catch-22; they were required to initiate informal consultation with the Service, but could not require the Service to finally "put it in writing" in formal consultation. The Service was overtly telling developers, "if you agree to these project modifications, we will let you out of the consultation; if not, you're stuck." With no practical way for applicants ultimately to hold the Service accountable for its extractions, most applicants simply gave up and made concessions that in most instances could not have been required of them if consultation were properly concluded.

III. Delay as a Tool of Extraction

One of the frequently-cited benefits of the ESA Section 7 consultation process is that, unlike the process for approving habitat conservation plans under Section 10(a), it is subject to specific and generally reasonable statutory timeframes. For example, formal consultation is required to be concluded within 135 days. Unfortunately, at least in my experience, these timeframes are observed much more often in the breaches than in compliance. While this fact

may largely be due to the heavy workload and limited budget of the Service, it can and does give rise to an implicit trading of processing time for conservation benefits that would not otherwise be the obligation of the applicant to provide. For the private sector, particularly on larger activities or projects such as pipelines and large-scale developments, time is very, very expensive, and the time it takes to process environmental approvals may directly affect a project's competitive position. The Service sometimes takes advantage of this fact by, either implicitly or expressly, offering an applicant a quicker turnaround if they make concessions. This practice would not be particularly disturbing if the concessions were those that could lawfully be required by the Service at the end of a normal process. But, it has been the case repeatedly in my experience that the concessions are purely a trade for quicker processing.

A good example of this circumstance is the so-called "alternative consultation process" informally adopted by the Service for the Navasota ladies tresses ("NLT") (a species of orchid). (*See* Attachment "C," correspondence and draft Notice of Intent to Sue). Under this alternative process, projects, principally pipelines and some real estate developments, which may affect NLTs or their habitat, can simply offer to pay a per-acre conservation fee and receive an expedited approval through consultation. Because the fee, even at tens of thousands of dollars, often pales in comparison to the project cost of unspecified delay, many applicants happily pay it. Indeed, this would be a beneficial arrangement for all involved, *if* at the end of the day the fee was legal. However, because plants are not protected under the ESA Section 9 "take" prohibition, there is no lawful basis for this fee. The Service is simply selling time.

Another problem that arises with respect to consultation timeframes is the Service's understandable, though not lawful, desire to delay the initiation of consultation or extend the period of consultation beyond the statutorily required timeframe in order to allow the applicant to

gather more data concerning the species in question. Many species can be observed only seasonally and for short durations. In these circumstances, the Service is too often tempted to seek to require delays in order to allow for more complete survey data. The Service's own regulations and the courts, however, reject that approach. Information is never perfect, and the Service is required to make its judgments based on the data available within the statutorily prescribed timeframe. Recently, I was involved in a large, regionally important infrastructure project which, although it had received all of its major federal environmental approvals, faced the potential of significant delay to allow time to perform some additional surveys for a plant.

IV. Draft Jeopardy Opinions

With the much-publicized statistic of how few final jeopardy opinions the Service renders per year in ESA consultations, it is surprising that I have personally been involved in at least four written *draft* jeopardy opinions and several more specifically promised if my client refused to relent. Again, this is an area in which the Service is making progress, but, at least up until the recent past, in my experience the Service's issuance, or overt threat of issuance, of draft jeopardy opinions, can be another unwarranted tool of extraction. Attachment "D" includes two attorney letters responding to draft jeopardy opinions issued on projects in Pima County, Arizona. In both instances, the draft opinions were based on clearly erroneous understandings of the applicable regulations and facts. Also, in both instances, the draft opinions were accompanied by demands for the applicant's provision of costly mitigation which, at least in my view, far exceeded the Service's authority to require. In the instance involving the Pima pineapple cactus, the mitigation was ultimately reduced from an initial demand that the applicant purchase and permanently protect 400 acres of cactus habitat, to a payment of less than $20,000 to a research program. In the instance involving the cactus owl, due to severe economic pressure to avoid further delay, the applicant largely relented to the mitigation demand, even though there were no

owls on the project site and the applicant proposed of its own accord to leave approximately half of the property in its natural condition.

V. Conclusion

Recently, I have observed the Service making significant strides to improve the ESA consultation process. Difficulties nonetheless remain, and I consider it appropriate and beneficial that this Subcommittee is directing its attention to these issues.