Legal Backgrounder

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COURTS COMPEL CLOSER REVIEW OF SPECIES' HABITAT DESIGNATIONS

by

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The Endangered Species Act of 1973 (the "ESA") is arguably the most potent of the nation's environmental laws. Given its goal of protecting species on the brink of extinction, the ESA has been interpreted by the federal agencies and several courts as leaving very little room for compromise. In fact, there are few other situations where a half-inch fly is powerful enough to stop a bulldozer dead in its tracks. Yet, that is exactly the impact that the presence of an endangered species or its habitat may have on a project. The history of the ESA is replete with stories of projects that have undergone years of planning only to be halted at the eleventh hour due to concerns of the potential impact on a species. Unfortunately, however, the United States Fish and Wildlife Service ("FWS" or "the Service") has yet to recognize the true impact of the ESA's regulatory regime.

The idea of protecting the interests of the species no matter what the cost is obviously very controversial with landowners, especially given that over 90 percent of all listed species have habitat on private land. The designation of public and private land as "critical habitat" for listed species is especially contentious. Over the past several years in particular, FWS has set aside incredibly large land areas for species protection, often as a result of litigation. For example, the critical habitat for the red-legged frog is proposed at more than four million acres and the designated wintering habitat for piping plover spans over 1,600 linear miles of coastline. Often there is a paucity of data and analysis to support the "red-lining" of such vast areas.

In response to concerns that setting aside such large swaths of land goes well beyond that which is "critical" to the survival of the species, FWS has consistently taken the position that the designation of critical habitat has "no incremental" impact on landowners above the impact of listing the species. This appears to be driven heavily by litigation. The Service is often forced to designate critical habitat under tight court-ordered schedules and simply has neither the time nor the resources to carefully analyze the impacts of such designation. FWS's longstanding position, however, ignores a basic fact — that *all* activities affecting the land surface of areas within those designated as critical habitat are immediately

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and significantly affected. Recently, several successful challenges to critical habitat designations have borne this out. As a result, FWS must change the way it designates critical habitat by conducting detailed, site-specific economic analysis of all areas proposed for designation. More importantly, on the basis of this analysis, FWS must exclude any area from critical habitat if the benefits of such exclusion outweighs the benefits of specifying such area as critical habitat. If it does not, FWS runs the risk of courts setting aside future designations.

Impacts of the ESA. Under the ESA, the Service may designate specific geographical areas as "critical habitat," concurrently with the listing of a species. Critical habitat is defined as those "specific areas within the geographical areas occupied by the species, at the time it is listed . . . on which are found those physical or biological features [that are] (I) essential to the conservation of the species and (II) which may require special management considerations or protection. . . ." 16 U.S.C. § 1532(5)(A)(i). In addition, FWS may designate, "specific areas outside of the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id*. at § 1532(5)(A)(ii). However, unlike the decision to list a species, FWS must consider economics in the critical habitat designation process. Pursuant to section 4, the Service has a statutory obligation to designate critical habitat on the basis of the "best scientific data available . . . after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." *Id*. at § 1533(b)(2). The Secretary may exclude any area from critical habitat "if he determines that the benefits of such exclusion outweighs the benefits of specifying such area as critical habitat." *Id*.

To understand the significance of critical habitat designation, it is necessary to look at other provisions of the ESA. Section 9 prohibits "take" of endangered species without specific authorization from the Service. "Take" is broadly defined to include to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a listed species. 16 U.S.C. § 1532(19). In turn, FWS defines the term "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. Illegal takes may be subject to civil or criminal penalties.

If a project requires a federal permit, receives federal funding, or has any other federal nexus, section 7 of the ESA requires the sponsoring federal agency (e.g. the Corps for wetlands permits) to consult with FWS to ensure that the project is not likely to jeopardize the continued existence of an endangered species or result in the destruction or modification of its critical habitat. *See* 16 U.S.C. § 1536(a). FWS regulations define "adverse modification" as an alteration that "*appreciably diminishes* the value of critical habitat for both the survival and recovery of a listed species." This includes "alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." 50 C.F.R. § 402.02.

If FWS determines that the project poses such a threat, it will issue a biological opinion that will suggest "reasonable and prudent alternatives" to the project. Although the Service has asserted that a biological opinion theoretically serves as an "advisory function," 51 Fed. Reg. 19,928 (1986), "in reality it has a powerful coercive effect on the action agency." *Bennett v. Spear* , 520 U.S. 154, 169, 117 S. Ct. 1154 (1997). Thus, through the section 7 consultation process, the Service may exert substantial pressure on the lead federal agency, such as the Corps, to adopt its suggested alternatives. In extreme circumstances, it is possible that the project will not be able to go forward. As a practical matter section 7 consultation often leads to permitting delays ranging between eighteen and twenty-four months, or more, together with greatly increased costs associated with operational modifications, timing uncertainties, and costs associated with analyzing and responding to environmental studies such as

Environmental Impact Statements.

The Service Must Carefully Address the Economic Impact of the Proposed Critical Habitat Units. To date, FWS has virtually ignored its duty to take into account the economic impacts of the designation of critical habitat. FWS in effect has rendered this aspect of the ESA meaningless by adopting the theory that designation will not result in any greater economic impacts than under the "baseline" of the listing of the species. For example, in the economic analysis for the designation of wintering habitat for piping plovers, FWS describes the "baseline" of "without critical habitat" designation as, "the take restrictions as well as other Federal, state and local requirements that may limit economic activities in regions containing the proposed critical habitat units." Draft Economic Analysis, at ES- 2. FWS asserts that "critical habitat designation is not expected to require any further project modifications beyond those required by the listing of the piping plover." *Id*., at ES- 3. This assumption is faulty because most designations essentially "red-line" large tracts of land that may or may not have the species present. This ignores the Supreme Court's admonition that FWS must "ensure that the ESA is not implemented haphazardly, on the basis of speculation or surmise. . . [and] avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

FWS's theory also allows it to ignore its National Environmental Policy Act (NEPA) responsibilities. The Service has historically relied on a 1983 notice that is not required to comply with NEPA for all actions under section 4(a) including listing and critical habitat designations citing biological factors under the ESA. Yet, as noted by the Tenth Circuit in *Catron County Board of Commissioners v. Fish and Wildlife Service*, 75 F. 3d 1429, 1436 (10th Cir. 1996), "merely because the Service says (NEPA does not apply) does not make it so."

Recently, FWS's reliance on its theory in order to avoid detailed economic analysis has been soundly rejected by several courts. In *Middle Rio Grande Conservancy District v. Babbitt*, No. 99-870, 99-872, 99-1445 (D.N.M. 2001), the court reviewed the designation of critical habitat for the Rio Grande silvery minnow. The Service had been given a total of 120 days to designate critical habitat for the species by the U.S. Court of Appeals for the Tenth Circuit following a challenge to its failure to designate. *See Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999). The Middle Rio Grande Conservancy District (MRGCD) challenged the proposed designation of a 163-mile stretch of the Rio Grande due to the fact that it would cause a substantial curtailment of irrigated agriculture in the Middle Rio Grande Valley and would result in significant negative ecological, economic, aesthetic, cultural, and social changes. Specifically, the plaintiffs alleged that in designating the entirety of the silvery minnow's present habitat, FWS failed to adequately quantify the impact of the designation.

In *MRGCD* the Service alleged that the designation of critical habitat provides little or no additional benefit beyond the listing of the species. Rejecting the Service's position, the court reached the common-sense conclusion that designation has significant consequences apart from the listing. *See MRGCD*, Slip Op. at 23-(citing *e.g. NWF v. Coleman*, 529 F.2d 359 (5th Cir. 1976)). The *MRGCD* court's critique of the Service's economic analysis of the designation's economic impact on the Middle Rio Grande Valley is especially telling. The court held that the Service may not summarily dismiss legitimate concerns of the designation's economic consequences simply because they conflict with the Service's misapprehension, "that the identified activities would have no impact which would not also jeopardize the continued existence of the species; and therefore, no impact of legitimate concern." *MRGCD*, Slip Op. at 39. Further, the court relied on *Catron County* in rejecting FWS argument that NEPA does not apply as a matter of law. The court directed FWS to issue an EIS on the designation.

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Since *MRGCD*, three other courts have held that the Service's assumption that the designation of critical habitat does not lead to impacts above those of the listing is faulty. In *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), the court rejected the Service's conclusion that designation of critical habitat would provide no additional benefit to a species beyond the protections currently available through jeopardy consultation. The court held that the "adverse modification" standard of 50 C.F.R. § 402.02 is inconsistent with the ESA and that this led the Service to erroneous conclusions regarding the benefit of designation for threatened species.

The Tenth Circuit further expanded upon the opinions of *Sierra Club* and *MRGCD*. In *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*, No. 00-2050 (May 11, 2001), the Tenth Circuit set aside a critical habitat designation that was based on the same faulty theory that designation causes little to no economic impact beyond what is caused by listing species because the "jeopardy standard" (applied in the context of listing) and the "adverse modification standard" (applied in the context of designated critical habitat) are essentially the same. Citing both *Sierra Club* and *MRGCD*, the court noted that, "Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes." *Cattle Growers*, Slip Op. at 3. Realizing that the required economic analysis might lead to exclusion of certain areas, the court stated that this will not undermine protection of the species, as the significant protections afforded by the listing will remain in place. *See id.*

Finally, the critical habitat designation for the cactus ferruginous pygmy-owl was recently thrown out by a federal judge in Arizona in *National Ass'n of Home Builders v. Norton*, 00-903-PHX-SRB (D. Ariz.). The court held that "broader reconsideration" of the designation is necessary in order to fully consider economic impacts, after finding that the plaintiffs "presented evidence which suggests that [FWS] did not fully evaluate the 'economic and other impacts' " of the 731,000-acre designation in four counties in Arizona. Moreover, FWS had "not presented … any evidence suggesting that significant harm to the species is likely to occur if the [CH] designation is vacated pending remand." What made this case particularly interesting is that FWS had requested the court to stay the litigation in order to allow it to complete a new economic analysis, while keeping the designation in effect. Rejecting this request, the court held that "FWS's failure to comply with the statutory requirements regarding critical habitat designation is more than a minor procedural error. Its failure to follow the mandates of the statute calls the very substance of the critical habitat designation into question."

Conclusion. Given these strong precedents, the Service may no longer rely on the misperception that designation does not have an "incremental" effect above that of the "baseline" of the listing and the "jeopardy" standards when it designates critical habitat. Simply put, the Service must take a hard look at the impacts attributed to the designation, and may no longer shirk its NEPA responsibilities. FWS must conduct an economic analysis of the true impacts of the designation and consider the exclusion of certain areas where benefits of such exclusion outweigh the benefits of specifying such areas as critical habitat.

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