**Earth Day's 50th Anniversary: The Law of Sustainability: Past & Future**

**Sustaining Biodiversity: The Endangered Species Act**
**History and Current Cases and Issues**

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## LEGAL CHALLENGES TO NEW ESA REGULATIONS

Three cases have been filed challenging various aspects of the new ESA regulations: one by the Center for Biological Diversity ("Center") and six other conservation/animal protection organizations, *see Center for Biological Diversity et al. v. Bernhardt*, No. 19-cv-05206-JST (N.D. Cal.); one by the State of California along with sixteen other states, the District of Columbia, and the City of New York, *see State of California et al v. Bernhardt, et al.*, No. 19-cv-6013 (N.D. Cal.); and one by the Animal Legal Defense Fund. *Animal Legal Defense Fund v. Bernhardt*, No. 19-cv-6812 (N.D. Cal.). All are pending as related cases before Judge Jonathan Tigar. There are pending motions to intervene as defendants in the various cases, including a motion by thirteen states (led by Alabama); a motion to intervene by the American Farm Bureau, American Petroleum Institute and other business interests; and a motion to intervene by the Pacific Legal Foundation. The government has filed motions to dismiss all three cases on justiciability grounds.

The Principal Claims: The complaints challenge numerous aspects of the new regulations.

With respect to the changes made to the listing, critical habitat, and recovery planning regulations (50 C.F.R. § 424), the Center et al.'s Complaint challenges as violative of the ESA and as otherwise arbitrary and capricious:

- the elimination of the phrase "without reference to possible economic or other impacts of such determination" in 50 C.F.R. § 424.11(b), thereby opening the door to the Services providing information in listing documents regarding the economic costs associated with listing species as endangered or threatened notwithstanding Congress' intent that listing decisions be based solely on non-economic considerations;
- the revised definition of "foreseeable future" in determining whether a species is a threatened species because it is likely to become an endangered species within the foreseeable future. The Center et al. Complaint contends that the Service's new test for foreseeability—i.e., that the "term foreseeable future extends only so far into the future as the Services can reasonably determine that *both* the future threats *and* the species' response to those threats are likely"—constitutes a more stringent test than the Services have previously applied (including in a 2009 Solicitor's Opinion) and that the "consequence of imposing this increased certainty requirement is that species facing extinction from the impacts of climate change or other future events involving prediction and uncertainty will improperly be deprived of protection until after it is too late to prevent their extinction, violating the ESA's command to use the best available science.";
- the elimination of recovery criteria from the factors to be considered in delisting or downlisting determinations. The Center et al. Complaint challenges the Services' determination that species can be delisted in the absence of any finding that established recovery criteria in formal Recovery Plans have been satisfied;
- the expansion of exemptions for critical habitat designation. The Center et al. Complaint challenges the expansion of circumstances where critical habitat

designation may be avoided for newly listed species. In addition to exempting species from critical habitat designation where it would be harmful to the species, the regulations allow designation to be avoided on much broader grounds (such as where the threatened destruction, modification, or curtailment of a species' habitat or range is not deemed to be a threat to the species);

- the adoption of a heightened "reasonable certainty" standard for designation of unoccupied critical habitat. The Center et al. Complaint challenges, as contrary to the ESA's best available science standard, the Service's adoption of a regulation that limits the designation of unoccupied critical habitat only to those situations where it can be determined with "reasonable certainty" both that the area will contribute to the conservation of the species and that the area contains at least one "physical or biological feature" essential to the conservation of the species.

With respect to the changes made to the section 7 regulations (50 C.F.R. § 402), the Center et al.'s Complaint challenges as violative of the ESA and as otherwise arbitrary and capricious:

- the new regulations' reliance on mitigation promises made by action agencies. The Center et al. Complaint contends that, whereas courts construing section 7 have held that mitigation measures relied on to reach a no-jeopardy finding in section 7 consultation must be "specific and binding plans" with a "clear definite commitment of resources for future improvements," *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935-36 (9th Cir. 2008), the new regulations unlawfully allow the Services to rely on promised mitigation measures with no supporting showing as to

the measures' specificity or binding nature, or any demonstration that resources can and will be devoted to carrying out the measures;

- the new regulations' redefinition of ongoing harms as part of the environmental baseline. The Center et al.'s Complaint contends that by redefining the "environmental baseline" for purposes of section 7 consultation to include "ongoing agency actions or existing agency facilities that are not within the agency's discretion to modify"—as distinct from "new" actions that must be analyzed for their impact on the survival and recovery of affected species—the Services are impermissibly attempting to diminish the adverse impacts of ongoing agency actions, including such actions that may be marginally modified to be slightly less harmful but nonetheless pose grave risks to listed species;
- the new definition of "destruction or adverse modification" of critical habitat, which requires that adverse impacts to any particular habitat must analyzed by considering the effects on the value of the critical habitat designation "as a whole." The Center's et al.'s Complaint contends that this change conflicts with the plain language of the ESA, allows habitat previously deemed "critical" to the survival and recovery of a species to be destroyed in piecemeal fashion, and eviscerates the distinct recovery function of critical habitat designation;
- the new regulations' limitation on the consideration of potential adverse effects in section 7 consultation. The Center et al.'s Complaint contends that by limiting the consideration of adverse effects associated with an action to those impacts that are "reasonably certain to occur" and would not occur "but for" the action under

consideration, the Services have significantly and impermissibly restricted the consideration of indirect effects that are likely to flow from an action;

- the regulations' exemption of programmatic land management plans from the requirement to reinitiate consultation upon listing of a new species or designation of new or additional critical habitat. The Center et al.'s Complaint contends that limiting consultation to site-specific actions impacting newly listed species or designated critical habitat fails to adequately address the overall impacts of a land management plan, and that it is only at the programmatic level that the Services and land management agencies can adequately assess the "aggregate impacts of all the proposed activities, together with other activities taking place in the same area."

With respect to the changes made to the FWS's section 4(d) regulation (50 C.F.R. § 17.31 and 17.71), the Center et al.'s Complaint contends that the Service's repeal of the longstanding "Blanket 4(d) Rule"—pursuant to which threatened species received all the protections from take afforded endangered species *unless* the Service adopted a species-specific 4(d) rule—is unsupported by any rational justification and will inevitably result in threatened species being deprived of essential protections, particularly in light of the fact that the new regulations impose no requirement on the FWS to adopt species-specific regulations at the time of listing and in view of the extensive backlog of other listing-related activities the Service faces.

In addition to these challenges to specific regulations, the Center et al.'s Complaint claims that the Services violated the National Environmental Policy Act (NEPA) by failing to prepare an Environmental Impact Statement regarding the rule changes (and instead invoking a Categorical Exclusion); failing to provide for adequate public notice and comment in violation of

the Administrative Procedure Act (APA); and failing to subject the rule changes to intra-agency ESA section 7 consultation.

Government's Motion to Dismiss: In a motion to dismiss filed in all three cases on December 6, 2019, the government contends that Plaintiffs lack standing because the regulatory changes have not yet been applied in a manner that causes harm to any of the plaintiffs. Similarly, Defendants argue that the claims are not ripe because deferring review until the regulations are applied in a specific context would not inflict any harm on the plaintiffs; judicial review at this time would interfere with the Services' ability to flesh out the meaning of the regulations and apply them in concrete factual settings; and courts would benefit from further factual development before reviewing the rule changes. Judge Tigar heard oral argument on the motions to dismiss on February 26 and took them under advisement.