# Testimony of David Bernhardt

## Before the U.S. House Committee on Natural Resources

## Hearing Entitled, "Oversight Hearing On Recent Changes to Endangered Species Habitat Designation and Implementation"

## April 19, 2016

Mr. Chairman and Members of the Committee on Natural Resources, I appreciate the invitation to testify today, and I appreciate the opportunity to share my own views with you. These views are informed by my experience of working 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, and the number of panelists, I have four points to make:

- The U.S. Fish and Wildlife Service ("Service") and NOAA Fisheries (Collectively "Services") should be commended for making the effort to provide greater clarity to its employees and to the public by working to improve the implementation of the ESA. Efforts to modify longstanding regulations regarding the implementation of the ESA are never without criticism;

- The executive branch is entitled to place its gloss on how the ESA will be executed, provided it operates within the scope of the statute and complies with the Administrative Procedure Act;

- The Obama Administration's promulgation of two regulations, one related to the designation of critical habitat, the other redefining the term "destruction or adverse modification," and the finalization of one policy describing how the Services intend to utilize their authority to exclude areas from critical habitat designations are, together, likely to exacerbate, not minimize, the conflict and controversy associated with the implementation of the ESA; and

- To achieve the Obama Administration's policy objectives the Services' regulations have been untethered from both their statutory text and Congress's clear direction.

### Understanding a Federal Agency's Duty to Ensure that Their Actions are Not Likely to Result in the "Destruction of Adverse Modification" of Designated Critical Habitat

Under the ESA, the primary consequence of a critical habitat designation is found in Section 7(a)(2) which states,

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in

> this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.[1]

Therefore, Section 7(a)(2) essentially, absent an exemption from the Endangered Species Committee, precludes actions by federal agencies that are "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of its critical habitat. [2] To effect that preclusion, an agency contemplating action[3] that it believes may implicate Section 7(a)(2) is required to consult with the respective Service to determine whether the action is likely to have the precluded effect, and, if so, what reasonably prudent alternatives can be implemented to modify its action so that it comports with the statutory stricture.[4] Formal consultation is initiated by a federal action agency's submission of a Biological Assessment, although the Services will engage in informal discussion and exchanges of information before a Biological Assessment is completed. The duty to consult applies to "ongoing agency action[s]" as well as future actions.[5] In general, the consultation process is occurs each time a federal agency is contemplating funding, carrying out, or authorizing someone else to carry out a discretionary activity that may effect a listed species or its designated critical habitat.

It is here, as part of this consultation analysis, where the question of what physical and biological features are encompassed by the designation of critical habitat and the application of the meaning of the term "destruction or adverse modification" of critical habitat is most important. Here, the Services' must determine if the agency's proposed action destroys or adversely modifies designated critical habitat. Depending upon the Service's conclusion, the action agency will choose to proceed, accept a modification to its proposal, seek an exemption from the Endangered Species Committee, or simply decide not to proceed forward with its action.

## Imposing a New Duty on Federal Agencies to Ensure Their Actions are Unlikely to Destroy or Adversely Modify Features that Do Not and May Never Exist Before Proceeding with Their Actions

Since 1986, the Services' regulations defined the term "destruction and adverse modification" as

> a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features

[1] 16 U.S.C. § 1536(a)(2).
[2] Id.
[3] The federal agency seeking to consult is commonly referred to as the "action agency," whereas the Services are commonly referred to as "consulting agencies."
[4] Id.; see also, e.g., Wild Fish Conservancy v. Salazar, 628 F.3d 513, 518 -519 (9th Cir. 2010).
[5] Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1053 (9th Cir. 1994); Wild Fish Conservancy, 628 F.3d at 518.

> that were the basis for determining the habitat to be critical.[6]

The term "destruction and adverse modification" now means:

> a direct or indirect alteration that appreciably diminishes the value of critical habitat **for the conservation** of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species **or that preclude or significantly delay development of such features**.[7]

(Emphasis added). When the Obama Administration finalized this new definition, they explained that in their view, the

> revised definition codifies our practices and provide Service biologists a clear and consistent benchmark within the regulations to use when making their determination of "destruction or adverse modification". While this revised definition replaces one that the courts found improper, we do not expect that its application will alter the number of "destruction or adverse modification" findings compared to recent years. In other words, we do not expect it to be substantially more or less protective of critical habitat than the internal guidance we have used in recent years.[8]

I wish they were right, but from my vantage point they are almost certainly wrong. They have chosen to impose a new duty on action agencies. This duty is unprecedented and will over the course of time prove to be very significant.

The ESA granted the Services the authority "to designate any habitat of [a species that has just been listed] which is then considered to be critical habitat."[9] It did 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. Instead, 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."[10] 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, even though that habitat may (or may not) be needed at some indefinite point in the future.

By seeking to protect presently unneeded and non-existent features from "destruction or adverse modification," the Services have imposed an unprecedented new affirmative duty on federal

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[6] 51 FR 19926, June 3, 1986; codified at 50 CFR 402.02.
[7] 81 FR 7226, February 11, 2016, codified at 50 C.F.R. 402.02.
[8] Revision of the Definition of "Destruction or Adverse Modification" of Designated Critical Habitat Questions and Answers available at: http://www.fws.gov/endangered/improving_ESA/AM.html.
[9] 16 U.S.C. § 1533(a)(3)(A).
[10] Id.

agencies to recover listed species by forcing them to refrain from actions that would adversely modify, not the present capacity of the habitat to aid in the recovery of a species, but the potential of the habitat to develop new features in the future that might provide additional aid in the recovery of the species. In doing so, they require federal agencies not just to refrain from making the present condition of the habitat worse, but to also refrain from doing anything that would prevent the condition of the habitat from getting better, or developing conservation features in the future. While this may be a desirable goal, it is not what the ESA requires of action agencies under Section 7(a)(2).[11]

Also troubling, from my perspective, is that the Services have not placed any boundaries on their expected evaluation of the impacts to presently unneeded potential features that may (or may not) develop for their employees, for other agencies or for the public. Instead they have explained, that they "consider [designated critical habitats] future capabilities only so far as we are able to make reliable projections with reasonable confidence."[12] The lack of clear parameters places tremendous discretion in the hands of field staff. It will almost certainly foster speculation on whether any area might eventually develop the physical and biological features that do not presently exist.

## A Big Change Regarding the Designation of Unoccupied Areas as Critical Habitat

Magnifying the future conflict that I anticipate arising from the new definition of "destruction or adverse modification," is the novel approach to designating critical habitat in areas not occupied by listed species finalized by the Services. Primarily to deal with the anticipated effects from climate change, the Services have fundamentally altered 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 changes to 50 CFR § 424.12 to deal with those effects almost certainly exceed their authority under the ESA.

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."[13] Clearly, an unoccupied area cannot be "essential for the conservation of [a] species" if the occupied area is adequate to insure its conservation. Thus, 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.

Under the Services' new reading of the definition of "critical habitat," they assert that Congress, by defining "critical habitat'' in the way it did-i.e., by defining unoccupied areas as critical habitat if they were deemed "essential" to the conservation of the species by the Services-

[11] 16 U.S.C. § 1536(a)(2).
[12] 81 FR 7220, February 11, 2016.
[13] Id. at § 1532(5).

intended to grant them a larger authority to designate unoccupied areas as critical habitat. This interpretation is far broader than they have previously recognized. Indeed, it is actually far broader than the authority Congress granted them for the designation of occupied areas.

This newfound assertion of authority 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 Service's original 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 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 that broadly cannot be squared with the rest of the language in the definition of critical habitat. 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."[14] 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.[15] 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."[16]

The Services' changes to their regulations based on their new reading of the definition of "critical habitat," legitimately reflect a policy goal that the Administration feels is important, but if they wanted such authority they should have sought the legislation to garner such authority

[14] 16 U.S.C. §1533(5).
[15] Id.
[16] Id.

rather than trying to shoehorn it into a regulatory change which will be litigated for years to come.

## Conclusion

Mr. Chairman and Members of the Committee, the actions taken by the Administration are significant. The Administration should be complemented on its effort to try to address these important issues. However, they should be called on to reconsider their potential to cause unnecessary conflict by creating a new mandate thereby misapplying the requirements that federal agencies have under Section 7(a)(2) of the ESA and by taking an expansive view of their power to designate critical habitat where the listed species do not exist and that habitat is not presently needed.

I welcome any questions, you may have.