

**TESTIMONY OF DAN ASHE, DIRECTOR,
U.S. FISH AND WILDLIFE SERVICE WITHIN THE DEPARTMENT OF THE INTERIOR
ON
"THE ENDANGERED SPECIES ACT:
HOW LITIGATION IS COSTING JOBS AND IMPEDING TRUE RECOVERY EFFORTS"
BEFORE THE HOUSE NATURAL RESOURCES COMMITTEE**

December 6, 2011

Good morning Chairman Hastings, Ranking Member Markey and members of the Committee. I am Dan Ashe, Director of the U.S. Fish and Wildlife Service (Service).

Mr. Chairman, I appreciate this opportunity to discuss how the Service carries out its duties related to the Endangered Species Act (ESA), the challenges associated with carrying out those duties, and the benefits associated with the Service's conservation mission. Our procedures, some prescribed by statute and others by agency regulations or policies, are all focused upon ensuring that our decisions are objective and based on the best available science. In addition, our listing and recovery plan decisions are made in the open with peer review and public participation throughout. The Service is committed to making the ESA work in the eyes of the public, the Congress, and the courts so as to accomplish its purpose of conserving threatened and endangered species and protecting the ecosystems upon which they depend.

This job has never been easy, and it grows more difficult and complex every day. We are facing an extinction crisis. With the pace and extent of environmental change threatening the continued existence of more and more of our Nation's biological wealth, we must manage limited resources to carry out our mission. The unprecedented challenge of climate change and its broad, complex impacts on species and habitat make it even more imperative to have an effective, collaborative approach to conserving imperiled species. The nature of this work often results in strongly held views on all sides and frequent challenges to our decisions through the administrative, judicial, and political process. In the face of all these factors, we are confident our agency does an excellent job of making decisions that are scientifically sound, legally correct, transparent, and capable of withstanding challenge.

Benefits of Conservation

The health of threatened and endangered species is strongly linked to our own well-being. Millions of Americans depend on habitat that sustains these species – for clean air and water, recreational opportunities and for their livelihoods. By taking action to protect imperiled native fish, wildlife and plants, we can ensure a healthy future for our community. Our Nation's history is deeply rooted in the conservation of our landscapes, and their value to the American people and our economy is clear. For example, the *2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation*, a Department of the Interior and Department of Commerce document, found that 87.5 million U.S. residents participated in wildlife-related recreation.

During the survey's period of review, 30 million people fished, 12.5 million hunted, and 71.1 million participated in at least one type of wildlife-watching activity such as wildlife observation and photography in the United States. These 87.5 million people spent \$122.3 billion on their activities. Of that, \$37.4 billion was trip-related, \$64.1 billion was spent on equipment, and \$20.7 billion was spent on other items such as licenses and land leasing and ownership. Maintaining biological diversity, by protecting our nation's threatened and endangered species, provides ecological, scientific, aesthetic, recreational, commercial, subsistence, social, cultural, and economic benefits to society.

Success in the Endangered Species Act

The ESA provides a critical safety net for America's native fish, wildlife, and plants. And we know it can deliver remarkable successes. Since Congress passed this landmark conservation law in 1973, the ESA has prevented the extinction of hundreds of imperiled species across the nation and has promoted the recovery of many others – like the bald eagle, the very symbol of our Nation's strength. Well-known examples include the recovery of the American alligator and brown pelican. Likewise, in August of this year, the Service delisted the Tennessee purple coneflower. This was the culmination of another Service-facilitated alliance of multiple diverse partners coming together to achieve the unified goal of recovery for an endangered plant species.

Success under the ESA is not only defined by removal of species from the list of endangered and threatened species. The fact that relatively few observed extinctions have occurred in the United States during the last four decades represents a significant benchmark of success of the ESA. The law has been successful in stabilizing endangered and threatened species by promoting conservation programs that are designed for their recovery. For instance, the Service and Eglin Air Force Base have worked together to address threats to a small native stream fish on the base, the Okaloosa darter, and this year the Service was able to downlist the fish from endangered to threatened. Partnerships with the States, Tribes, and the agricultural community are supporting the ongoing recovery of the black-footed ferret, once believed to be extinct but re-discovered 30 years ago and now reestablished in 10 experimental populations. A less familiar but equally impressive example is that of the Kemp's ridley sea turtle, increasing from fewer than 300 females nesting in 1985 to more than 6,000 females nesting in recent years.

Our Nation's rich diversity of fish, wildlife, and plant resources symbolizes America's richness and promise. The ESA represents a firm commitment to safeguard our natural heritage for future generations out of a deeply held understanding of the direct link between the health of our ecosystems, the services they provide and our own well-being.

ESA Consultation and Habitat Conservation Planning

Science is the foundation of our consultation and recovery activities under the ESA. One of the most important and effective tools available to recover endangered and threatened species is the consultation process prescribed by section 7 of the ESA. We engage in consultation with other Federal agencies to assist them in meeting their obligation to avoid taking any action that would

be likely to jeopardize the continued existence of a listed species or that would destroy or adversely modify their critical habitat.

Habitat Conservation Plans (HCPs) under section 10(a)(1)(B) of the ESA provide for partnerships with non-Federal parties to conserve the ecosystems upon which listed species depend, ultimately contributing to their recovery. HCPs are planning documents required as part of an application for an incidental take permit. HCPs provide the conservation benefits of proactive landscape planning, combining private land development planning with species ecosystem conservation planning. Working in partnership is foundational for the Endangered Species program, because the conservation of the Nation's biological heritage cannot be achieved by any single agency or organization. Essential partners include other Federal agencies, States, Tribes, non-governmental organizations, industry, academia, private landowners, and other Service programs and partners. Our collaboration with these partners foster solutions providing a balance between wildlife, energy, and other economic development.

In recent years we have worked closely with energy developers to site pipelines, solar projects, and wind projects that will reduce our reliance on foreign energy sources and create jobs, while avoiding or minimizing impacts to threatened and endangered species. For example the NiSource pipeline HCP in the eastern U.S. is a partnership with 17 States and other stakeholders to develop a landscape level, multi-species HCP to avoid and minimize impacts to endangered and threatened species associated with construction, operation, and maintenance of its natural gas transmission lines and ancillary facilities running from Louisiana to Indiana, and Ohio throughout the northeast to Maine. This 15,500-mile planning area and associated one-mile corridor covers 6.4 million acres of land and has the potential to affect 74 federally listed species.

Another example is the Ruby Pipeline Natural Gas Project in Wyoming, Utah, Nevada, and Oregon. In the case of the Ruby Pipeline Project, the Service worked with the project proponent (Ruby Pipeline LLC), the Bureau of Land Management, the Forest Service, and State wildlife agencies to develop an ESA Conservation Action Plan, a Migratory Bird Conservation Plan, and various State mitigation plans to avoid, minimize, and mitigate adverse project impacts to listed and candidate species, species of concern, migratory birds, and other State species and habitats of concern. Ruby Pipeline LLC has committed about \$1.7M, \$2.8M, and \$17M, respectively, to implement these plans. About \$11M of that funding commitment is intended to address the conservation needs of the greater sage grouse to ensure the project does not contribute to the need to list this candidate species.

Using the ESA consultation process, we also worked with the Bureau of Land Management on 12 approved high-priority renewable energy projects (solar and wind) in 2010, and we have assisted in the approval of 11 high-priority renewable energy projects to date in 2011 (4 others are close to being approved). The Service is also implementing an action plan for supporting ESA compliance for renewable energy projects on private lands. This plan takes a 3-pronged approach to developing additional staff capacity so that the Service can provide support to private developers for renewable energy projects with HCP permit decisions completed in a timely manner.

An integral component of this partnership is the increases in base-funding in FY 2010 and FY 2011 that we obtained and the President's 2012 budget requested an additional \$2 million to support renewable energy projects. These resources provided the Service with much needed capacity to help guide energy projects through the permitting process, clearly showing that wildlife conservation, economic development, and job creation can occur simultaneously. For example, the California Habitat Conservation Planning Coalition estimated that regional HCPs in California alone will conserve almost 1.5 million acres of land, while permitting projects with a cumulative value of \$1.6 trillion.

Multi-District Litigation Settlements for the Listing Program

The nature of ESA work often results in challenges to our decisions through the administrative, judicial, and political process. Overall, we believe the Service does an excellent job of making decisions that are scientifically sound, legally correct, transparent, and capable of withstanding challenge. Recently, questions have been raised about the costs of litigation.

In an effort to reduce litigation and shift litigation-related resources to improving implementation of the ESA, the Service recently developed a 6-year work plan for the Listing Program through mediated settlement agreements of cases in Multi-District Litigation (MDL) with two of the Service's most frequent plaintiffs, the Center for Biological Diversity and WildEarth Guardians. These cases are discussed in further detail below. As a result of those settlements, we now expect to be able to address the backlog of species awaiting final determinations for protection under the Act, and for the first time in years, the wildlife professionals at the Service will have the opportunity to use our objective listing priority system to extend the safety net to those species most in need of protection, rather than having our work priorities driven by the courts.

The Service will systematically, over a period of 6 years, review and address the needs of more than 250 species now on the list of candidates for protection under the ESA, to determine if they should be added to the Federal Lists of Endangered and Threatened Wildlife and Plants. All of these species were previously determined by the Service to warrant being proposed for listing, but action was deferred because of the need to allocate resources for other higher priority listing actions. The Service will make listing determinations for each species, carefully reviewing scientific information and public comments before determining whether listing is still warranted and, if so, whether to designate the species as threatened or endangered. Each and every listing proposal will be subject to public review and comment.

The listing work plan will also provide predictability and certainty to landowners and State, Tribal and local governments, providing time for States and landowners to engage in conservation programs and for agencies to develop management plans. The Service has developed a variety of tools and programs to encourage conservation efforts for listed and candidate species that are compatible with the objectives and needs of landowners with listed and candidate species on their lands. These tools include Habitat Conservation Plans, Safe Harbor Agreements, and Candidate Conservation Agreements that provide regulatory assurance;

technical assistance; and a grants program that funds conservation projects by private landowners, States, and territories. In five of the states represented on this committee, Florida, Georgia, Louisiana, South Carolina, and Texas, roughly 240 private landowners have enrolled nearly 2.5 million acres of private forest lands in Safe Harbor agreements to aid the recovery of the endangered red-cockaded woodpecker.

Litigation Costs

We fully agree with the concern that our resources are better spent on implementing the ESA than on litigation. This was our intent in settling the Multi-District Litigation. With the work plan in place, WildEarth Guardians and the Center for Biological Diversity agreed to dismiss their pending lawsuits and agreed to provisions that should have the effect of limiting the number of new petitions and/or deadline lawsuits they would file during the same time period. The work plan allows the Service to reclaim a greater measure of control over our listing activities, to resolve our backlog of listing actions in a timely and cost-effective manner, and to focus our limited resources on the species most in need of ESA protection.

The two settlement agreements resolved 13 separate lawsuits that were consolidated in these MDL proceedings, and the parties are currently attempting to settle the fees-related claims for all of these lawsuits. Because the parties' fees-related negotiations are complex and ongoing, it is not possible to estimate the amount of any fee award at this time. If the parties are unable to agree on the amount of fee awards, the court will determine the appropriate amount.

Nationwide, in FY 2011, the Service spent approximately \$1.24 million to manage, coordinate, track, and support ESA litigation. This does not include staff time and resources to prepare administrative records and other administrative expenses, nor does it include salaries and expenses related to litigation for the Department of the Interior's Office of the Solicitor. Although we do not generally track this information, we identified approximately \$134,156 paid out of Service funds for attorneys' fees in FY 2010 and \$15,833 in FY 2011. Our FY 2011 resource management allocation for listing and critical habitat was \$20.9 million, of which we spent at least \$15.8 million taking substantive actions required by court orders or settlement agreements resulting from litigation. For recovery and habitat conservation, which includes section 7 consultation, our resource management allocation was \$143.1 million.

Improving Implementation of the ESA

We are committed to continually improving the ESA's implementation in close collaboration with our partners. In addition to the 6-year work plan for the Listing Program, the Service and the NOAA Fisheries are working to improve implementation of the ESA by considering appropriate changes to our practices, guidance, policies, or regulations to enhance conservation of listed species. Our priority is to make implementation of the ESA less complex, less contentious and more effective by ensuring that key operational aspects of the ESA are current, transparent, and results oriented.

We seek to accelerate recovery of threatened and endangered species across the nation while making it easier for people to coexist with these species. To improve the efficiency and effectiveness of the ESA in conserving endangered and threatened species, the Service and NOAA Fisheries have begun a renewed effort to identify areas where changes in ESA implementing regulations and policies may reduce burdens, redundancy, and conflict, and at the same time promote predictability, certainty, and innovation. This effort is guided by the following objectives, which conform with the principles espoused in President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review" and the Service's vision for the Endangered and Threatened Species Program:

- Improving the effectiveness of the ESA to conserve imperiled species;
- Making administrative procedures as efficient as possible;
- Improving the clarity and consistency of our regulations through, among other things, the use of plain language and by providing more precise definitions of many of our key terms;
- Encouraging more effective conservation partnerships with other Federal agencies, the States, Tribes, conservation organizations, and private landowners;
- Encouraging innovation and cooperation in the implementation of the ESA; and
- Reducing the frequency and intensity of conflicts when possible.

The Service and NOAA Fisheries seek to be open and transparent in our efforts to improve ESA implementation through ESA regulatory reform and meet the goals of promoting public participation, promoting innovation, increasing flexibility where possible, ensuring scientific integrity, and continuing our analysis of existing rules as set forth in Executive Order 13563.

Conclusion

In closing, Mr. Chairman, America's fish, wildlife, and plant resources belong to all of us, and ensuring the health of imperiled species is a shared responsibility. We are working to actively engage conservation partners and the public in the search for improved and innovative ways to conserve and recover imperiled species. I would like to emphasize the importance the Service places upon having a science-driven, transparent decision-making process in which the affected public can meaningfully participate.

The Service remains committed to conserving America's fish and wildlife by relying upon the best available science and working in partnership to achieve recovery. Thank you for your interest in endangered species conservation and ESA implementation, and for the opportunity to testify.