Endangered Species Act and Grassroots Activism

NEIL LEVINE

1400 Glenarm Place, Suite 300, Denver, CO 80202
nlevine@earthjustice.org

ABSTRACT. The Endangered Species Act includes a two-year review for petitioned species contrasted with an indefinite timeline, the designation of critical habitat concurrent with the listing of species (or done when there is a lawsuit), recovery plans are required (without deadlines). The regulatory protections of Section 7 require consultations on any federal action. Section 9 contains prohibition against "take" and considers habitat conservation plans. There is a misconception that Section 9 is voluntary. Almost half of the endangered species reside on private lands. This papers illustrates vernal pool species and the Endangered Species Act. This study will consider the involvement of conservation groups and a 1993 listing case, a 1995 listing challenge, and critical habitat cases. Implications of this paper involve biological opinions on Army Corps Clean Water Act 404 Permits and citizen enforcement. Despite the mandate to use best available scientific and commercial information, federal agencies have difficulty completing their jobs.

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I'm a lawyer from Colorado, and I feel a little out of place, with your prior statement of collaboration; it's not really what I do. Sometimes it leads that way, but it's not my focus. As a public interest lawyer, which means I don't get paid unless we win. I'm very motivated when I litigate. My cases involve a wide smattering of issues. I'm working right now on the San Pedro River in Arizona, coal bed methane development in Wyoming, Rocky Mountain forests, logging, grazing, it runs the gamut when it comes to environmental issues. But I've been working on vernal pools since I became a lawyer in 1993; it's been part of my whole career.

One recommendation when doing your research and when you're working on species and such, it's really hard to get up in court and talk to a judge about fairy shrimp. You can't make them sexy. Once, I tried to call them "fresh water crustaceans," instead of "vernal pool fairy shrimp." I've tried to say, "seasonal wetlands," instead of "vernal pools," but it just doesn't work. So next time you name species, which I know you do, try to come up with something sexy like "grizzly bear." Everybody likes the grizzly bear and it's really easy to get behind it. So I'll just throw that out as a recommendation.

I'm supposed to talk about the Endangered Species Act (ESA). I'm going to try to give a summary of my litigation involving the Endangered Species Act starting in 1993, and I don't see my involvement with this ending during my career. One thing you all probably already know is both the Endangered Species Act and the Clean Water Act are under attack, and frankly the Endangered Species Act has been under attack since the Contract with America in 1994. Nobody really talked too much about proposed changes to the Endangered Species Act as much as they are right now because so many changes or modifications to the Act have been done administratively—through rule making or changes to the regulations, or simply not listing species. As you know, the Supreme Court is now considering isolated wetland issues in two cases before it, and I think that will obviously be a big issue. It will be an even bigger issue in the Midwest prairie, and in the Great Basin where they don't have listed species and they do have isolated wetlands. I do see this as a really big issue coming up.

Right now I'll just talk about the Endangered Species Act as it exists and will not bore you with too much of an overview. Instead, I'll give you general sense of where a lot of the litigation is, and then I'll get to the vernal pool species.

The Endangered Species Act is great in part for the public involvement process. For example: citizens' petitions, public comments, or the great citizen supervision of administering the Act. And that's the thing that's given me the power to bring lawsuits, to hopefully better the Central Valley. The petition

process was started for many of the vernal pool species by a one-paragraph letter submitted by a Fish and Game person that only said "We think you ought to list these species." That triggered the Section Four deadline process that is supposed to take two years. And that was a very effective tool, by an individual to get the four fairy shrimp listed in 1994.

The framework of the act is: listing, critical habitat and recovery plans. And a lot of our litigation over the years has been to get those regulatory mechanisms in place. Let me tell you, the fight over those three issues, not only for the vernal pool species, but for so many species, is a battle that has been going on for 20 years. The Service does not necessarily represent the people here. The Service in DC has taken a very administrative approach, and used very creative arguments as to why they don't have to list species, why they don't have to designate critical habitat, and why they don't have to do recovery plans.

What you have here with the vernal pool species is unique, in that you actually have listed species with critical habitat and now have a recovery plan. Where I live there are hardly any listed species. In the prairie there are no listed species. So in many ways, from a regulatory conservation perspective, you have it made.

One of the most important trends in Endangered Species Act litigation occurred about two summers ago when the 9th Circuit Court of Appeals issued a decision called Gifford-Pinchot. That case involved Section 7 consultations on a series of timber sales in Washington. What came out of that case, which is so important, is the question "What does critical habitat do for a species?" What that court said is that it requires the Service to consider Recovery when looking at federal agency actions. Previously all the agency was doing was making sure the action would not jeopardize the species and now it has to look at the impacts on recovery. And while it's true that technically recovery plans are not mandatory. These recovery plans have, in and of themselves, little enforcement power. Through this decision, we are now able to use the recovery plans to argue that, no project will impact recovery. They should not go forward, or more realistically the project needs to be modified, as a result of litigation.

The whole critical habitat issue has been a sort of sleeping giant for years. This has been on the books since the Act was first enacted and I've always wondered why people were not using this. For years it was not used, and not enforced by citizens; it was not used in the regulatory process. Only over the last decade or so folks have been arguing for it and advocating for it, and it's been a huge boon. The reason I think people were not using it within the agencies and perhaps not enforcing it, is because it's so powerful. The plain language of the statute says you can't adversely modify critical habitat—you can't destroy critical habitat. Just listening to those words, whenever I think about it, means you can't do anything. You can't put a road through a vernal pool. That'd be adversely modifying it. So, my impression was that people were always scared of this provision and therefore kind of "swept it away."

Now, with the recent discussion from the Ninth Circuit, this provision has considerably more substance, and that's probably why people in Congress want to try to get rid of the protections it could provide.

I want to give you an illustration of how the Endangered Species Act worked for the vernal pool species. Many of you probably know this story, but it's fascinating because there's just so much that has happened since 1993. It shows how hard it is to get protections under the statute for all species and in particular these species. It all started for me, as a first year lawyer, when I got a postcard in my office one day, down in Santa Barbara. It was an anonymous postcard. It had no return address. It was simple. A type-written note saying, "If you don't sue, the shrimp won't be listed." I had no clue what this note was talking about. I wanted to be an environmental lawyer, not to protect shrimp. I just tossed it away. About a month or two later, I got another anonymous type-written post card. It had a Federal Register citation, and that was very helpful because now I knew where to look. So, I looked it up and figured out what was going on, and I convinced our board and our staff that we should bring this lawsuit because there are vernal pools in Ventura and Santa Barbara Counties. These pools are sort of on the outskirts of their range, but I was able to sell this idea and we brought the case and we ended up with a settlement requiring a listing decision by September 1994. About a week before the deadline, we got a call from a water lawyer in Sacramento saying, can you delay listing for a year? And after looking into who this guy was, I realized I was getting into this hornet's nest with vernal pools and fairy shrimp.

Immediately after the species were listed, the Building Industry Association sued in Washington, DC to take them off the ESA list. And so we, on behalf of Butte Environmental Council, intervened in that case. We had a really good judge in that case that worked out really well because two years later, the judge ruled in our favor and he kept the species on the list.

The statute says that critical habitat must be designated concurrently with listing of the species and in 1997 the Service had not yet designated critical habitat. Therefore, we filed a new suit in Sacramento to get critical habitat designated for the four fairy shrimp. Starting in 1997, this case went on for four years. First, we got an order saying the Service must designate critical habitat in six months and that was very good; six months seems like a reasonable period of time. But as soon as we got that order, I got a call from the government attorney saying, "No, that's just not going to happen." And I said, "Let me talk to the clients and see if we can get an extension." What came out of that, was that we negotiated critical habitat, not just for the four shrimp, but also for another eleven plants, also dependent on vernal pools. In exchange, we gave them another year. A month before that deadline for critical habitat, I got a call saying we need to talk because they could not make that deadline. I said, "Well you know we've given you eighteen months total; now what more do you want?" We ended up with a lot of court proceedings as a result, and we had to move for contempt of court. In the end, the result was the Recovery Plan. We negotiated another period of time in exchange for the Recovery Plan. That was significant because we can't really enforce getting recovery plans. Unlike listings and critical habitat, the recovery plan obligations, while mandatory, have no deadline. And without a deadline we have little in the way of a good argument for getting a Recovery Plan, so we negotiated.

And that's how we got the Endangered Species Act framework in place. Once we have all those things in place, we are starting to use the Act to protect places. An illustration of this action occurred about a year and a half ago with a development project in Placer County near Roseville. The biological opinion for the project from the Service was inadequate. It did not require any on-site avoidance, and it didn't require any good mitigation off-site, but the entire property was designated critical habitat. We sued, based on the Gifford-Pinchot decision. As a result, the developer and the Service immediately came to the table. By all counts, we were able to negotiate an extremely good resolution of that case, where all the mitigation off-site is going to be in critical habitat and we're getting much more acreage as a result of that case. Frankly, the only reason we got that, is because of the 4th Circuit decision that says critical habitat means recovery. I believe more of these cases are going to be available, using the same or similar theories.