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Clear the Air

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CLEAR THE AIR

Dear Editorial Staff:

Having had an opportunity to observe much of the spotted owl hearing held recently in Portland, Oregon, I offer the following reflections on the Endangered Species Committee.

I. THE ENDANGERED SPECIES COMMITTEE: THE WIZARD OR THE MAN BEHIND THE CURTAIN?

The way to test people's environmental ethics is to put an endangered species in the way of their supper table; the way to test how many sides a politician's face can have is to put environmentalists and a troubled economy in the way of his getting re-elected. In a time when the conflicting goals of saving the earth and saving the economy vie for priority in the political marketplace, tough problems call for creative solutions.

In a solution that may have been too creative, Secretary of the Interior Manuel Lujan convened the Endangered Species Committee (ESC),¹ nicknamed the "God Squad," to decide whether to grant an exemption under the Endangered Species Act (ESA) to allow forty-four timber sales in southeastern Oregon by the U.S. Bureau of Land Management (BLM). The U.S. Fish and Wildlife Service (FWS) determined that these sales would jeopardize the threatened spotted owl by destroying critical habitat. The ensuing bureaucratic turf war had two divisions of the Department of the Interior, the FWS and the BLM, attacking each other's science, policies, and strategies to create a record for a committee whose chair is the Secretary of the Interior. Joining

1. For an analysis of how and why the ESC works, see Jared des Rosiers, Note, *The Exemption Process under the Endangered Species Act: How the "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825 (1991).

in the fray were environmental groups (intervening as opponents to the sales), as well as the timber industry, timber workers, and Oregon counties that garner much of their revenue from federal timber sales (intervening as proponents).² The State of Oregon intervened on a limited basis.

II. THE ENDANGERED SPECIES COMMITTEE: HISTORICAL AND CURRENT PERSPECTIVES

Perhaps the combination of an election year and a slumping economy has left me more cynical than usual, but invoking the ESC seems entirely inappropriate in this case. In the two prior ESC decisions, the Committee was asked to make single definitive judgments: 1) whether the Tellico dam should be completed at the expense of the endangered snail darter, and 2) whether the Grayrocks dam should be completed at the expense of endangered whooping crane.³ Even in the few remaining cases in which petitions to the ESC were withdrawn or dismissed prior to a Committee decision, the exemption sought was for a single action, such as the construction of an oil refinery or the establishment of a barge fleeting area.⁴

In the case of the spotted owl, however, the BLM timber program, with its annual offering of sales, presents a recurring problem that will continue as long as tension exists between the timber industry and owl preservation. Each year the BLM offers timber sales in Oregon, some of which are bound to jeopardize the spotted owl. If Secretary Lujan and his successors remain amenable to convening the ESC, the BLM could apply for an exemption on an annual basis. Using the ESC in this situation would give it control of long-term timber policy in the Northwest. It seems un-

2. Named parties were the BLM, Oregon Lands Coalition, Northwest Forestry Resource Council, and the O & C Counties as proponents, and the FWS and Portland Audubon Society as opponents. The O & C Counties encompass revested Oregon and California railroad grant lands, which are managed pursuant to 43 U.S.C. §§ 1181a-1181j (1988).

3. Des Rosiers, *supra* note 1, at 845-47.

4. See 44 Fed. Reg. 33,721 (1979) (notice of Pittston Company's exemption applications for construction of oil refinery and marine terminal in Maine that would jeopardize bald eagles and whales); 50 Fed. Reg. 46,157 (1985) (notice of Consolidated Grain and Barge Company's exemption application for the establishment of a barge fleeting area in Illinois that would jeopardize the orange-footed pearly mussel).

likely that Congress intended for this executive committee, comprised of Cabinet-level officials, to provide a long-term bypass around the ESA; rather, Congress developed the exemption process to weigh the effects of single actions.

III. PROCEDURES AND STRATEGY IN THE HEARING

Political cynicism aside, the ESC hearing did provide a fascinating study in administrative law and strategic lawyering.⁵ The time constraints imposed on the exemption process by the ESA demanded compromise and creativity to ensure full development of the record. In some instances, procedure definitely became substance. The parties agreed to simultaneously submit all direct testimony in written form, reserving oral presentations for cross-examination. This unique format created problems that the proponents believed to be quite prejudicial. Because of the simultaneous filing of direct testimony, proponents felt that they had been constrained in the presentation of their case, because they could not amend direct testimony to incorporate and discredit cross-examination. Consequently, proponents felt that this gave opponents an unfair advantage; opponents could narrowly tailor individual cross-examinations and make objections to redirect as beyond the scope of cross-examination, leaving the proponents powerless to alter subsequent witnesses' direct examination to address issues raised. Although the opportunity for rebuttal may have lessened resulting prejudice, the opponents effectively used the structure and procedure to remove several key points from the proponents' case-in-chief.

Strategically, opponents also chose not to cross-examine most of the proponent intervenors' witnesses, particularly those that represented the "common man" elements of the hearing, preferring instead to focus their attack on the economic and biological experts and county officials. Opponents seemed to effectively remove the personal elements from the live portion of the proponents' case, and focused on the more impersonal numbers and statistics.

Furthermore, Administrative Law Judge (ALJ) Harvey Sweitzer allowed the opponents to remove potentially detracting

5. For a summary of the prehearing conference, see 56 Fed. Reg. 65,890 (1991).

paragraphs from their prefiled direct testimony after cross-examination of proponent witnesses. For example, the ALJ permitted opponents to delete portions of prefiled testimony (of U.S. Forest Service employee Jack Ward Thomas) that questioned the credibility of subsequently excluded proponent testimony. On the other hand, proponents successfully blocked the admission of a video on ancient forest ecosystems offered by the opponents.

The most interesting strategic aspect of the case was the focus of the proponents' attack. The exemption process takes the jeopardy finding as a given, and the ALJ instructed the parties not to dispute the jeopardy finding. Nevertheless, the major portion of proponents' cross-examination questioned the biology behind the jeopardy decision—the accuracy of the Thomas Inter-agency Scientific Committee Report on the Northern Spotted Owl and the jeopardy findings of FWS biologists. ALJ Sweitzer permitted the proponents to address these underpinnings of the jeopardy finding as they affected the need for “reasonable mitigation measures.” The proponents' “illogic” was that there was no need to mitigate if the jeopardy finding was unwarranted. But if proponents had wished to challenge the jeopardy opinion without developing mitigation measures, why did they avail themselves of the exemption process?⁶ In perhaps the most memorable quote of the hearing, FWS counsel Patrick Parenteau displayed his frustration with the proponents' line of attack, “It's as if the opponents are playing football and the proponents are playing hockey.” Although the proponents did address some of their case to exemption criteria, the focus remained on jeopardy, an issue that was not at issue.

However, one of the foundations of the ESA is its reliance on the “best scientific and commercial data available.”⁷ Even if the they did point out gaps and inconsistencies in FWS and ISC data, proponents failed to produce data that surpassed FWS data in completeness. Furthermore, because the FWS is the lead agency

6. “[O]nce an agency has had meaningful consultation with the [FWS] concerning actions which may affect an endangered species the final decision of whether or not to proceed with the action lies with the agency itself.” *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 371 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976). Thus, if the BLM disagreed with the jeopardy finding it should have proceeded with the action, subjecting itself to review under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1988).

7. *See* 16 U.S.C. § 1533(b)(1),(2) (1988).

under the ESA, its determination of best available data is entitled to deference. Although the hearing furnished little new scientific evidence, several of the opponents' scientists who had served on the ISC voiced the opinion that even the ISC recommendations were inadequate and that conservation and recovery measures need to be strengthened.

IV. EVIDENTIARY CONSIDERATIONS

The most interesting evidentiary debate centered on the admissibility of testimony from prior proceedings. Most of the parties had faced each other in prior litigation concerning the spotted owl. Both sides attempted to introduce transcripts of depositions or live testimony from prior cases. The ALJ admitted prior testimony offered by the opponents that was tied to a "sponsoring" witness available for cross-examination. However, the ALJ excluded proponent exhibits that were free-standing testimony with no similar nexus to the current proceeding; the ALJ found unconvincing proponents' arguments that the offer and acceptance of similar exhibits by the opponents constituted an admission that such evidence was relevant and admissible.

Another evidentiary quirk of the complex hearing arose when opponent Portland Audubon Society (PAS) offered as an exhibit the discovery responses it had solicited from another opponent, the FWS. Proponents argued that the lack of a concrete adversarial relationship between the two parties made the exhibit an unreliable way to introduce facts. However, the ALJ found more compelling the PAS's arguments that the two parties had separate and independent objectives and that the PAS wished to introduce the discovery responses to address the separation of functions of the various Department of the Interior agencies in its concern for the integrity of the hearing. Directing parties to make any arguments as to its weight in their briefs, the ALJ admitted the exhibit.

V. CONCERNS RAISED BY THE HEARING PROCESS

Although an interesting legal study, the convening of the ESC in this case is troubling. The spotted owl controversy has long been portrayed as an "owl vs. jobs" battle. The blame for current problems in the timber industry, whose fortunes, like

those of the mining industry, have been cyclical, has been laid at the talons of the spotted owl. Admittedly, spotted owl protection does cost jobs, but so does mill automation and the exportation of raw logs. Blaming the ESA for a faltering economy is a politically convenient solution. Although politicians have billed the exemption process as "the way to put people back into the endangered species equation," this convening of the ESC is an attempt to appease voters whose livelihoods are threatened. Extension of the hearing to include a two-day public "gripe session" was yet another attempt to give those members of the (voting) public who felt disenfranchised a supposed say in the process.⁸

The ESA itself is up for review, and the convening of the ESC in this instance appears to be the precursor of attempts to vastly amend the Act. With the closing briefs from the ESC hearing still cooling from the printing press, Secretary Lujan announced the formation of a new Department of the Interior committee to develop a plan for timber management for introduction as federal legislation this spring. Purporting to save timber jobs, Secretary Lujan further proposed an exception to the ESA that would maintain the owl's population at current levels, thereby circumventing the recovery and conservation aspects of the ESA.

VI. VIABILITY OF THE ENDANGERED SPECIES COMMITTEE'S DECISION

In fact, proposed legislation and other external factors make the actual effect of the ESC's decision tenuous. Not only does the ESA expressly authorize judicial review of Committee decisions,⁹ but other available pathways can entangle the resolution of the spotted owl problem for years. Even while Secretary Lujan was preparing his report for the Committee, U.S. District Judge Helen Frye issued a preliminary injunction to stop logging of old-growth timber on BLM lands in Oregon pending the outcome of yet another spotted owl case. The effect of such parallel litigation on an ESC grant of an exemption is unclear; it appears that even with the grant of an exemption the BLM would have to await the outcome of the federal case before it could make its sales. As a side

8. Any Committee member can "take such testimony, and receive such evidence" as he deems advisable. 16 U.S.C. § 1536(e)(7)(A), (B) (1988).

9. 16 U.S.C. § 1536(n).

note, this injunction raises the interesting separation of powers question of whether the courts can rightfully prevent the BLM from attaining the timber production goals that Congress has set for it without addressing the litigation itself. Additionally, testimony at the hearing by EPA employee Ann Miller seemed to provide a basis for another National Environmental Policy Act suit; Miller testified that the BLM might have failed to meet documentation requirements or to file a supplemental environmental impact statement for the sales when it was presented with significant new data.

VII. CONCLUSION

In the spotted owl controversy, the ESC does not appear to have the same divine powers it had in its earlier decisions. Instead of playing God and deciding whether a dam completion should outweigh the extinction of a fish species, this "God Squad" seems to be playing the role of political pawn. In other words this ESC may have ulterior motives. Torn between its promises to protect the environment and to rejuvenate the economy, the Bush Administration appears to be using the ESC to test the political waters, determining receptivity to changes to the ESA, and finding how much of the environment economically pressured people are willing to sacrifice. The tight security, the media blitz, and the legion of lawyers served as a smokescreen for deeper political motives—in this convening of the ESC, not only are the timberworkers and environmentalists whose interests are at stake told to "pay no attention to the man behind the curtain,"¹⁰ they are not supposed to ask who is *really* running the show.

Sincerely,
Kathleen Trever
Law Clerk
U.S. Attorney's Office for the District of Oregon

This letter was written by Ms. Trever in her private capacity, and no official support or endorsement by the U.S. Attorney's Office, or any person within the office, is intended or should be inferred.

10. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

Dear Editorial Staff:

I come to praise the EPA and not to bury it. In my article, published in the last issue,¹ I urged the Agency to use its authorities more assertively to protect biological diversity. The article's overall critical tone reflects my belief that the EPA can do better. The purpose of this letter is to inform readers of a recent, encouraging development in which the EPA adopted one of the tools I suggested.

Under the National Environmental Policy Act² and the Clean Air Act,³ the EPA reviews environmental impact statements (EISs). I discussed the U.S. Forest Service's Grider salvage timber sale EIS as an example of the EPA's failure to exercise its authority to protect biological diversity. In the Grider case, the Ninth Circuit found that the Forest Service's EIS was inadequate because it did not address issues related to the importance of the sale area as a biological corridor in a fragmented landscape.⁴ The EPA, in its review of the Forest Service's EIS, failed to flag this serious problem with the timber sales impact analysis. I recommended that the EPA evaluate how well agencies have considered the effects of their proposed actions on biological diversity as part of the EPA's routine EIS reviews.

On December 27, 1991, the EPA insisted on more serious analysis of biological diversity in the Bureau of Land Management's (BLM's) EISs for forty-four timber sales petitioned for exemption from the Endangered Species Act (ESA).⁵ In its review of the EISs,⁶ the EPA discussed a number of impacts relating to biological diversity that the BLM EISs had failed to consider:

- 1) the requirements for suitable habitat for the threatened northern spotted owl;

1. Robert L. Fischman, *Biological Diversity and Environmental Protection: Authorities to Reduce Risk*, 22 ENVTL. L. 435 (1992).

2. 42 U.S.C. §§ 4321-4370c (1988).

3. 42 U.S.C.A. § 7609(a) (West Supp. 1991).

4. *Marble Mountain Audubon Soc'y v. Rice*, 914 F.2d 179 (9th Cir. 1990).

5. 16 U.S.C. §§ 1531-1544 (1988).

6. U.S. EPA, Detailed Comments on the NEPA Documents Prepared for BLM's Proposed Timber Sales, Letter from Richard E. Sanderson, Director, Office of Federal Activities, EPA, to D. Dean Bibbes, Oregon State Director, Bureau of Land Management (Dec. 27, 1991) (on file with *Environmental Law*).

- 2) the maintenance of ecosystem functions of late successional-old growth forests and the species they support;
- 3) the connection between the impacts of the BLM timber sales and the effects of private and Forest Service logging on corridors, dispersal, and other habitat functions;
- 4) the importance of the northern spotted owl as a species that indicates the overall health of old growth ecosystems and other species that are dependent on that habitat;
- 5) the modification of habitat for the marbled murrelet, a proposed threatened species; and
- 6) the effect of water quality and riparian area degradation on a number of depleted anadromous fish stocks at moderate to high risk of extinction.

The EPA's comments are important not just because they criticize the BLM for failing to consider new information that pertains to the effects of timber harvests on biological diversity. The comments are also significant because they respond to an extraordinarily controversial proposed action. The petition for exemption of the forty-four timber sales is the first in the history of the ESA to work its way through the process designed by Congress in 1978⁷ and elaborated by regulation in 1985.⁸ The decision by the Endangered Species Committee whether to allow the sales will be a signal of the fate of the old growth forests of the Pacific Northwest and the northern spotted owl. Moreover, the EPA's criticism of the EISs may be used by environmental groups to challenge the timber sales if the Committee votes for exemption.

The EPA's aggressively critical letter reviewing the BLM EISs is a boisterous entrance onto the stage of ecological protection. I can scarcely imagine a more dramatic affirmative response to the Science Advisory Board's call for the EPA to "attach as

7. Pub. L. No. 95-632, sec. 3, § 7, 92 Stat. 3751, 3752 (codified as amended at 16 U.S.C. § 1537(e) (1988)); see generally Kathleen E. Trever, *The Endangered Species Committee: The Wizard or the Man behind the Curtain?*, 22 ENVTL. L. 1097 (1992).

8. Rules for Applying for Endangered Species Act Exemptions for Endangered Species Committee Consideration of Such Applications, 50 Fed. Reg. 8122 (1985) (codified as amended at 50 C.F.R. pts. 450-453 (1991)).

much importance to reducing risk as it does to reducing human health risk.”⁹

Sincerely,
Robert L. Fischman
Visiting Assistant Professor, University of Wyoming

9. SCIENCE ADVISORY Bd., U.S. EPA, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION 6 (1990).

**1991 NINTH CIRCUIT
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