



ENDANGERED SPECIES ACT ALERT

An Environmental Alert From Stoel Rives Natural Resources Attorneys

MAJOR COURT DECISION AFFECTING CRITICAL HABITAT IN THE GIFFORD PINCHOT CASE

The purpose of this alert is to bring to your attention significant recent developments regarding the Endangered Species Act ("ESA"). Recommendations regarding these developments are included.

Recently the Ninth Circuit held in the *Gifford Pinchot Task Force v. United States Fish and Wildlife Service* ("Gifford Pinchot") that the Endangered Species Act ("ESA") requires the U.S. Fish and Wildlife Service¹ to address the twin goals of recovery and survival in the context of a section 7 consultation on a proposed action that may affect designated critical habitat. As a practical matter, this case underscores the importance of demonstrating on the administrative record for section 7 consultations that the proposed action would not appreciably diminish the value of critical habitat for either survival or recovery of listed species. Developing this administrative record will be all the more important for section 7 consultations where the relevant Service has not adopted an ESA section 4(f) recovery plan.

I. Gifford Pinchot Task Force v. United States Fish and Wildlife Service

ESA section 7(a)(2) requires federal agencies to insure that their actions (1) are not likely to "jeopardize the continued existence" of listed species or (2) to result in the "destruction or adverse modification" of designated critical habitat. *Gifford Pinchot* focused on the "destruction or adverse modification" standard. Regulations adopted by the Services in 1986 define the destruction/adverse modification standard to mean a "direct or indirect alteration that appreciably diminishes the value of critical habitat for *both* the survival *and* recovery of a listed species." 50 CFR § 402.02 (emphasis added). The Ninth Circuit read the conjunctive "and" to mean that the standard would not be violated by an action that appreciably diminishes the value of critical habitat for recovery but not survival.

The Ninth Circuit held that the Services' "adverse modification" regulation violates the ESA because Congress intended that conservation (*i.e.*, recovery) and survival be two different (though complementary) goals of the ESA. Significantly, the court interpreted the "adverse modification" standard to include a recovery component, and held that an action agency and the Services must ensure that a proposed action's impacts to critical habitat do not preclude the species from recovering, in addition to ensuring that the species continues to survive.

To overcome the effect of the regulation the court found unlawful, the Ninth Circuit imposed on the U.S. Fish and Wildlife Service the burden of demonstrating on the administrative record that its regulation had "no bearing on the procedure or the substance of the decision reached," that is, no effect "on the process" or "the result" of the consultation. Although some of the challenged biological opinions mentioned "recovery," the court held that these references were "descriptive," not evidencing analysis of recovery different than the regulation the court faulted. As a result, the court held the biological opinions "irredeemably flawed." Had the challenged biological opinions demonstrated that the proposed actions would not appreciably diminish the biological features that were the basis for designating critical habitat, the result might have been different.

For many species, including the Northern Spotted Owl at issue in *Gifford Pinchot*, the Services have not yet adopted section 4(f) recovery plans. *Gifford Pinchot* did not address how the Services would analyze whether a proposed action's effects on critical habitat preclude recovery absent a recovery plan.

¹ The regulation at issue in this case was issued jointly by the U.S. Fish and Wildlife Service and NOAA Fisheries (collectively the "Services") in 1986. Therefore, this case applies equally to NOAA Fisheries.

Major Court Decision Affecting Critical Habitat In the *Gifford Pinchot* case (cont'd)

II. Implications of *Gifford Pinchot* for Project Proponents

In the aftermath of *Gifford Pinchot*, the Services are working on issuance of national guidance which will deal prospectively with how completed consultations will be reopened and how new biological opinions will be prepared. Until the Services come out with their guidance, the situation remains fluid and is hard to provide definitive advice on how the Services will address the recovery issue in the future.

With that substantial uncertainty in mind, project proponents should consider assisting action agencies in preparing biological assessments for submission to the Services which include analysis of whether proposed actions appreciably diminish the value of critical habitat for recovery as well as survival. Additionally, project proponents should be prepared to work closely both with action agencies and the Services to ensure that the Services' biological opinions contain the analysis and findings to address recovery. If a section 4(f) recovery plan has been adopted, the analysis in the consultation documents should take the recovery plan into account.

If no recovery plan has been adopted for species of concern, the analysis will be much more difficult but we believe it can be done. No recovery plan exists for Northern Spotted Owl involved in the *Gifford Pinchot*. The Ninth Circuit never suggested that the a recovery plan was needed to perform the required recovery analysis.

The strategic course that clients may decide upon to address the uncertainties from *Gifford Pinchot* will vary depending upon both the procedural posture and facts of specific consultations, including: the nature and length of the proposed action, the species at issue, the effects of the action, the conservation benefits, and whether or not there is a 4(f) recovery plan. We will work closely with clients to analyze the particular risks and concerns related to their consultations and will advise clients on the implementation of the pending agency guidance.

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