ENDANGERED SPECIES LITIGATION & THE IMPORTANCE OF DATA

ABSTRACT FOR PANEL DISCUSSION

By Keith W. Rizzardi[1]

Litigation substantially influences implementation Endangered Species Act (ESA), and data plays an especially important role in the lawsuits. This document provides an elementary introduction to the problem, from a legal perspective.

A PLAINTIFF'S MOTIVES: AGENCY DISTRUST.

While ideals, money, and personalities certainly factor into the reasons for the abundance of Endangered Species Act litigation, perhaps the most significant factor is agency distrust. Public administration theory refers to the problem as "regulatory capture" – the notion that the regulatory agency, created to act in the public interest, instead advances the commercial or special interests that dominate the industry or sector it is charged with regulating. The source of the distrust could be directed at an individual agency leader, a presidential administration, or an entire agency.

A LAWYER'S TOOL: THE CITIZEN SUIT.

Section 11 of the ESA, the citizen suit provision, empowers private persons and organizations to sue the United States for certain types of alleged violations. It is beloved by the environmental advocacy groups, as Earthjustice has explained:

> The citizen suit provision may be the most democratic section of the law, as it allows citizen participation in the protections for our country's natural resources. With it, concerned citizens, scientists, religious groups and conservation organizations can help oversee and enforce the listing of endangered species and protection of the habitat they need to survive and recover.

Earthjustice, "Citizen's Guide to the Endangered Species Act" (page 42) available at http://earthjustice.org/sites/default/files/library/reports/Citizens_Guide_ESA.pdf. Also, in some instances, the ESA and another federal statute, the Equal Access to Justice Act, enable these groups to recover their attorneys fees.[2]

---

[1] Keith W. Rizzardi is a law professor at St. Thomas University near Miami. Board certified by The Florida Bar in State & Federal Administrative Practice, he serves as Chair of the Marine Fisheries Advisory Committee and publishes a law blog (ESAblawg.com) and a Twitter feed (@ESAlawyer) discussing the Endangered Species Act.

[2] The ESA and the Equal Access to Justice Act include "fee shifting" provisions that allow the courts to award attorney's fees to the litigators who prevail in cases against the government or who otherwise succeed in influencing the governmental decisions. While intended to achieve fairness, and to reward individual's and groups who helped enforce the ESA and to serve as "Citizen Attorney Generals," the notion of fee shifting (and its expenses) has become a hot topic for the current Congress and has recently been the subject of Congressional hearings. See, ESAblawg.com, "House Oversight Hearings:

A JUDGE'S STANDARDS: ADMINISTRATIVE LAW.

The environmental advocacy organizations and other interested groups who challenge the government decisions implementing the ESA have their own (albeit controversial) reasons for their actions. Ultimately, once the lawsuits are filed, the choice between viewpoints rests with the judiciary. That decision will be reached in accordance with the substantive mandates of the ESA, and the procedures and standards in the Federal Administrative Procedure Act (APA).

Agency deference. When reviewing agency actions, some decisions are given judicial "deference." But deference comes in varying degrees, and usually relates to the agency interpretations of statutes or rules. Interpretations that have gone through formal procedures, such as documents allowing for public notice and comment, are usually given very high degrees of deference and are closely followed by the courts. Other documents, however, may be considered merely persuasive, and may then be rejected. The decision on which degree of deference applies becomes crucial in Endangered Species Act litigation, because governmental officials and the environmental advocacy litigants will often have very different interpretations of the relevant rules and statutes.

The hard look. In addition to deciding upon the degree of deference, courts must ultimately decide whether an agency action is "arbitrary or capricious." This standard of review means that the court must apply a "hard look" at the agency decision, based upon the full administrative record that was before the agency decision maker at the time of the agency decision. As the U.S. Supreme Court has explained, this hard look review means that the judge must conduct a "substantial inquiry" and a "thorough, probing, in-depth review" that explores "whether the decision was based on a consideration of the relevant factors."

The judiciary's occasional lack of deference for the agency's policy judgments and interpretations, and the analysis by the federal agency's experts – especially in cases involving complex science – can defy explanation. One recent law review article's title says it all: "The Role of Science in Environmental Litigation: "Courts give deference to agency experts except when they don't." Aaron Gershonowitz, 39 Sw. L. Rev. 233 (2009) at http://www.swlaw.edu:8080/site01/pdfs/lr/39_2gershonowitz.pdf

A STATUTE'S COMPLEXITY: THE ENDANGERED SPECIES ACT.

The Endangered Species Act often provides frustrating examples of the limits of judicial deference towards the agencies, and a tendency to give "much too hard a look" at the agency record. The concepts of "incidental take" and the "environmental baseline" provide excellent examples of the problem.

---

merely theater, or a preview of Endangered Species Act reform?" (Mar. 8, 2012) available at http://www.esablawg.com/esalaw/ESBlawg.nsf/d6plinks/KRII-8S77JP

Incidental take. The ESA §9 prohibits "take" of endangered or threatened species. "Take" means "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." To prevent take, the ESA §7 requires agencies to "consult" with the Fish & Wildlife Service or National Marine Fisheries Service. Ultimately, consultation produces a "biological opinion" that considers "incidental take" of a species. The term "incidental take" is not defined in the ESA, although FWS and NMFS defined it as "takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant." 50 C.F.R. §402.02. They further developed a guidance document, the "Final ESA Section 7 Consultation Handbook," which discussed how impact on a species may be measured, and allowed the agency to use, without specific justification, habitat impact measurements (also called "habitat markers") to express take instead of using actual head counts of members of the species. The courts, however, citing legislative history, have imposed a judicial interpretation of the term. Except in rare instances, incidental take must be expressed as a precise number.[3] A highly non-deferential appellate court opinion from an Everglades water management dispute (relying in turn upon a series of forestry cases) plainly demonstrated the problem:

> We apply instead the rule that specific population data is required unless it is impractical. The rule makes sense. The goal of the Endangered Species Act is to protect populations of species, and using habitat markers when population data is available is like turning on the weather channel to see if it is raining instead of looking out a window… the Service's assertion in its incidental take statement that the birds are "difficult to detect" leaves us unpersuaded that counting them is impractical enough to justify the use of habitat markers instead.

Miccosukee Tribe v. U.S.A., 557 F.3d 1262, 1279 (11th Cir.2009), citing Or. Natural Res. Council v. Allen, 476 F.3d 1031,1037 (9th Cir. 2007)

Jeopardy determinations. Another important aspect of the ESA §7 consultation process requires consideration of whether a proposed federal agency action will jeopardize the continued existence of the entire species. The analysis of jeopardy, like the analysis of incidental take, is by definition, data specific, because the ESA regulations define the term as follows:

> *Jeopardize the continued existence of* means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

50 C.F.R. §402.02.

---

[3] Or. Natural Res. Council v. Allen, 476 F.3d 1031,1037 (9th Cir. 2007) ("Congress has clearly declared a preference for expressing take in numerical form, and an Incidental Take Statement that utilizes a surrogate [measure] instead of a numerical cap on take must explain why it was impracticable to express a numerical measure of take.").

Thus, as with incidental take, raw data and the numeric expression of the reproductive rates and population sizes becomes especially important in the judicial review of an agency's jeopardy decision. Indeed, the concepts of jeopardy and incidental take are closely tied together, because if too much incidental take occurs, and the anticipated amount of take is exceed, then the ESA §7 process is supposed to start again. As a result, even when courts have allowed the use of alternative ways for calculating incidental take, they have continued to demand very specific data and numeric calculations of incidental take to enable a proper jeopardy analysis.[4]

A FISHERY MANAGER'S CHALLENGE: SURVIVING THE SCRUTINY.

Data collection in fisheries management remains an ever-evolving and improving science.[5] But it has a long history, too. For example, for more than 15 years, the National Marine Fisheries Service has been calculating, with great precision, exactly how many sea turtles can, or cannot, be incidentally taken within a fishery.[6] Still, counting undersea fish (and turtles) has been likened to "counting with blindfolds," and the plaintiffs and lawyers who seek to challenge an agency's Endangered Species Act implementation decisions fully understand, and exploit, this reality. If the data can be undermined, then the judge can be convinced that the agency reasoning is flawed, deference will be denied, and the agency decision will be rejected. In other words, the agency's work is like a knit sweater: pull on the right thread, and the whole thing may unravel.

---

[4] Arizona Cattle Growers' Association v. U.S. Fish and Wildlife, 273 F.3d 1229 (9th Cir. 2001)("When preparing an incidental take statement, a specific number (for some species, expressed as an amount or extent, e.g., all turtle nests not found and moved by the approved relocation technique) or level of disturbance to habitat must be described. Take can be expressed also as a change in habitat characteristics affecting the species (e.g., for an aquatic species, changes in water temperature or chemistry, flows, or sediment loads) where data or information exists which links such changes to the take of the listed species. In some situations, the species itself or the effect on the species may be difficult to detect. However, some detectable measure of effect should be provided . . . [I]f a sufficient causal link is demonstrated (i.e., the number of burrows affected or a quantitative loss of cover, food, water quality, or symbionts), then this can establish a measure of the impact on the species or its habitat and provide the yardstick for reinitiation.")

[5] *See, e.g.* the Marine Recreational Information Program's statistical revisions to calculations of recreational catch estimates. http://www.countmyfish.noaa.gov/

[6] *See, e.g.* Ctr. for Marine Conservation v. Brown, 917 F. Supp. 1128 (S.D. Tex. 1996) (shrimping operation may take four hawksbill turtles, four leatherback turtles, ten Kemp's ridley turtles, ten green turtles, or 370 loggerhead turtles).