

Introduction

We have examined petitions to list species under the Endangered Species Act (“ESA”) and lawsuits challenging listing decision filed since WildEarth Guardians (“WEG”) and Center for Biological Diversity (“CBD”) reached their separate settlements with the U.S. Fish and Wildlife Service (“Service”) in May 2011 and July 2011, respectively. Please carefully read the section titled “Methodology,” which describes the methods and criteria we used to compile this information as well as the extent and limitations of the information.

Please note that we did not analyze and do not take any position on whether or not the parties to the settlements have complied with the terms thereto. We simply reviewed petitions filed since the 2011 settlements and searched the Public Access to Court Electronic Records (“PACER”) database for lawsuits fitting the criteria listed below.

Findings Related to Listing Petitions Filed Since May 2011

- Since May 2011, at least 46 petitions have been filed with the Service requesting listing or uplisting action on at least 122 species. On average, the Service is requested to list more than 3 species per month and more than 38 species per year since May 2011.
- Of the 46 petitions submitted since May 2011, CBD and WEG have submitted 34 of the petitions, or nearly 3/4 of all petitions submitted.
- CBD and WEG together have petitioned to list or uplist 109 species, nearly 90 percent of the total species petitioned since the settlements.
- It is useful to compare the number of petitions the Service has received since the settlements to the numbers of petitions it received annually prior to the settlements. Until 2007, the Service only received petitions to list an average of 20 species per year. In 2007, this number rose—sometimes dramatically. The Service received petitions to list 695 species in 2007, 56 species in 2008, and 63 species in 2009. In 2010 the Service received petitions for a substantial number of species, including a single petition from CBD to list 404 species. U.S. Dep’t of the Interior-Fish and Wildlife Service, Budget Justifications and Performance Information Fiscal Year 2012, RM-1 (pdf page 45).¹ Although the current average of petitions to list 38 species annually certainly does not reach the number of petitioned species in 2007 or 2010, the Service is receiving petitions to list nearly twice as many species annually as were annually petitioned for listing prior to 2007.

Findings Related to Listing Litigation Filed Since May 2011

- Since May 2011, 29 lawsuits have been filed by 35 different plaintiffs challenging Service decisions on petitions to list or uplist a total of 97 different species.
- CBD and WEG together have been plaintiffs in 14 different lawsuits,² or nearly 40 percent of the lawsuits filed since May 2011.

¹ Available at http://www.doi.gov/budget/appropriations/2012/upload/FY2012_FWS_Greenbook.pdf.

² 11 for CBD, 4 for WEG, with one of those involving both CBD and WEG but only counting once towards the total number of different lawsuits in which CBD and WEG have been plaintiffs.

- CBD's and WEG's lawsuits have challenged listing decisions for 35 different species.
- Of the species for which decisions on petitions to list or uplist were challenged, 26 were subject to the 2011 settlements. CBD and WEG were plaintiffs in lawsuits challenging listing or uplisting decisions on 19 of those species subject to the 2011 settlements.

Methodology

I. PETITIONS

Our search encompassed petitions to list, or to uplist from threatened to endangered, one or more species received by the Service between the May 10, 2011 settlement and June 30, 2014. Although the CBD settlement was approved in July 2011, we started with May 10, 2011 because that was when the earlier of the two settlements, WEG's, was approved. We did not include petitions to delist or downlist from endangered to threatened one or more species, petitions to designate or revise critical habitat, or petitions for rulemakings other than listings under the Administrative Procedure Act.

In telephone conversations with Service employees, we were told that the Service does not maintain a publicly available internal list of currently active petitions. However, the Service maintains a publicly available database, the Environmental Conservation Online System ("ECOS"), of species that are candidates, species that are currently listed, or species that the Service is currently reviewing for other reasons, such as species that have been petitioned for listing and foreign species petitioned in the past that the Service continues to review in its Annual Notices of Review ("ANOR").³

We used ECOS as our starting point. On June 19, 2014, from the search page, we chose "Petitioned for Listing, Under Review" under the heading "Federal Listing Status," and then selected the following "Fields to Display": "Common name," "scientific name," and "regions of occurrence." This search identified 241 species that are currently under petition or being considered for another reason, such as: The species is a candidate species, which the Service reviews annually; the species was once a candidate species but has been removed from the candidate list, which the Service continues to monitor to ensure the species does not later warrant protection or candidate status; the species was a foreign species petitioned for listing prior to May 10, 2011, which the Service reviews annually in its ANORs; the species had been petitioned for downlisting; the species had been a Candidate Level 2 species under the Service's prior candidate priority system, which the Service removed from the candidate list in 1996 but continued to monitor like other species removed from the candidate list.

We narrowed this list as follows:

- We removed all species for which a petition for listing was filed before May 10, 2011. Because the ECOS search did not identify the dates of the petitions, we determined the dates of petitions through several different methods:
- For many of the species identified in our ECOS search, we determined the date of petitions by searching the Federal Register for 90-day findings on those species,

³ Available at http://ecos.fws.gov/tess_public/pub/adHocSpeciesForm.jsp.

searching by scientific name. These 90-day findings identified the applicable petition dates.

- Many of the 241 species our ECOS search identified had appeared in petitions filed by the Center for Biological Diversity (CBD) or WildEarth Guardians (WEG) prior to the 2011 settlements.
- Other species were foreign species for which petitions were filed in the 1980s or 1990s and which the Service has listed in its Annual Notice of Review for foreign species as recently as 2013. 78 Fed. Reg. 24,604 (April 25, 2013).

We also removed certain other species identified in our ECOS search, for which we found no evidence of petitions having been filed since the 2011 settlements, for the following reasons:

- The Camp Shelby burrowing crayfish, the Painted clubshell, the Alabama clubshell, and the Holsinger's Cave Beetle had been candidates at one point but were removed in recent years. The Service generally continues to monitor species removed from the candidate list, which explains the continued inclusion of these species in the ECOS database. *See, e.g.*, 78 Fed. Reg. 70,104, 70,107 (Nov. 22, 2013) (“We will continue to monitor the status of these species [removed from the candidate list] and to accept additional information and comments concerning this finding. We will reconsider our determination in the event that new information indicates that the threats to the species are of a considerably greater magnitude or imminence than identified through assessments of information contained in our files, as summarized here.”).
- Also, certain species (notably three separate populations of the grizzly bear) had been listed in the 1970s and thereafter subject to multiple downlisting petitions.
- A large number of these species had been Candidate Level 2 species under the Service's old candidate priority system (in use until 1996), last appeared in the Federal Register in 1994, and were subsequently removed from the candidate list in 1996 when the Service changed its candidate procedures.

We added a number of petitions to our list found through sources other than ECOS:

- To find species that the Service had since May 10, 2011 disposed of with negative 90-day findings, and which would not appear in the list we downloaded because they were no longer “under review,” we searched for 90-day findings made from May 10, 2011 through June 27, 2014. We added any species we found for which petitions had been submitted from May 10, 2011 through the present.
- We added a number of petitions from a list received from another industry member. That list included species petitions received through June 30, 2014.

II. LITIGATION

Our summary includes the number of lawsuits filed since the 2011 settlements entered into between WEG and the Service and CBD and the Service, respectively. Thus, our search is limited to lawsuits filed from May 10, 2011 through July 28, 2014.

Further, our summary is limited to lawsuits that challenge decisions by the Service to list or uplist one or more species, or decisions by the Service not to list such species through a negative 90-day finding, a not warranted 12-month finding, a warranted but precluded finding, or a decision not to list a species following a 12-month warranted finding (e.g., the Service issued a 12-month finding on the dunes sagebrush lizard of warranted, but later decided not to list due to conservation efforts).

We also limited our search to the following defendant search terms:

- “U.S. Fish”
- “United States Fish and”
- “United States Fish &”
- “Fish and Wildlife”
- “Fish & Wildlife”
- “Salazar, Ken”
- “Jewell, Sally”
- “Ashe, Dan”
- “Gould, Rowan”
- “Davis, Laura”
- “Jacobson, Rachel”⁴

We excluded the following categories of lawsuits:

- Lawsuits against the Service but not challenging ESA listing decisions;
- Lawsuits challenging the Service’s negative findings on petitions to delist species or downlist species from endangered to threatened (e.g., delisting of gray wolf in certain states); note that we did include lawsuits challenging actual decisions to delist or downlist (e.g., gray wolf). If you desire, we can create a list adding in the lawsuits challenging the Service’s negative findings on petitions to delist or downlist.
- Lawsuits challenging or requesting decisions to designate (or not designate) or revise critical habitat;
- Lawsuits challenging listing decisions for marine species under the jurisdiction of the Department of Commerce;

⁴ Our initial searches revealed a significant lack of consistency in the defendants named in suits challenging Endangered Species Act (ESA) listing decisions. Thus, we broadened our list of search terms to include not only variations on “U.S. Fish and Wildlife Service” (see list in text, above), but also the Secretaries of the Interior (Salazar and Jewell), Directors of Fish and Wildlife (Rowan Gould and Dan Ashe), and other relevant Interior and Service officials active during the time frames searched.

- Pending Notices of Intent to Sue (NOI). We have no way of reliably locating and tallying pending NOIs until actual lawsuits are filed.

III. MARINE SPECIES

We excluded from our summary information on marine species petitions submitted to the National Oceanic and Atmospheric Administration (“NOAA”)–National Marine Fisheries Service (“NOAA Fisheries”) because neither NOAA nor NOAA Fisheries were parties to the 2011 settlements. In our research, however, we found that since May 10, 2011, NOAA Fisheries received 21 petitions to list or uplist 155 species. Thus, on average, NOAA Fisheries receives petitions to list around 4 species per month and nearly 49 species per year.

Of these NOAA Fisheries petitions, CBD and WEG were responsible for over 71 percent of petitions submitted and over 95 percent of the species petitioned.