# ENDANGERED SPECIES & WETLANDS REPORT

*Politics, regulation, and law on ESA, wetlands and takings*

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# Corps requests comments on new NWPs, conditions

## Prohibition on filling in 100-year floodplain dropped

The Army Corps of Engineers has proposed a new batch of nationwide permits and general conditions, kicking off a comment period that will run until Nov. 27.

The 42-page Federal Register document was published with little fanfare — a brief press release from the Corps was the only announcement — and it garnered nary a mention in the national press, despite the permits' importance to home builders, sewage districts, mining companies, farmers and many others.

The Corps said it had revised the text of the NWPs, general conditions and definitions to make them "clearer [and] more concise, and can be more easily understood by the regulated public, government personnel, and interested parties, while retaining terms and conditions that protect the aquatic environment."

Most of the NWPs are the same, the Corps said. But the Corps also made important changes to some of the most widely used permits and general conditions, and proposed six new

*(Continued on page 2)*

# Kessler upholds fire plan counterpart regs, remands lynx threatened listing

A federal judge has upheld alternative ESA consultation procedures that allow the Forest Service and BLM to determine themselves whether National Fire Plan (NFP) projects are likely to adversely affect listed species or their critical habitat (*Defenders of Wildlife v. Kempthorne*, 04-1230 GK, D.D.C.).

The plaintiffs had argued that the procedures, contained in regulations issued in December 2003, violate the ESA, APA and NEPA. Under the regs, the resource agencies can avoid engaging in consultation with FWS or NMFS on the impact of NFP projects.

But U.S. District Judge Gladys Kessler in Washington, D.C., concluded that given the ambiguous language in the ESA, the regulations were not illegal.

"The ESA language at issue requires 'consultation' on projects that might affect a listed species, but leaves room for the Secretary [of Interior or Commerce] to determine how, precisely, that consultation should occur," Kessler said in a Sept. 29 opinion.

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# New NWPs proposed

*(Continued from page 1)*

permits: NWP A: Emergency Repair Activities (for structures or fills damaged by storms, floods, fires or other discrete events); B: Discharges into Ditches and Canals; C: Pipeline inspections and repairs designated time-sensitive by DOT; D: Commercial Shellfish Aquaculture Activities; E: Coal Remining Activities; and F: Underground Coal Mining Activities.

Perhaps the most prominent change was the Corps' decision to allow above-grade fills in the 100-year floodplain. General Condition 10, adopted in 2002, prohibits the use of NWPs 39, 40, 42, 43, and 44 for discharges of dredged or fill material in waters of the U.S. that result in "permanent above-grade fills within mapped 100-year floodplains located below headwaters." With the exception of NWP 43, the condition also prohibited the same use of the NWPs in floodways above headwaters.

The Corps said it was proposing to abandon that condition "to harmonize the NWP program with FEMA's floodplain management programs." Management of floodplain development "is more appropriately achieved through state and local government land use planning, which can address impacts to both the aquatic and terrestrial components of 100-year floodplains," the Corps said in the *Federal Register*.

Besides, the Corps said "adverse effects to public interest review factors, especially floodplain values and flood hazards" would be evaluated during the Preconstruction Notification review process for those five NWPs, which authorize residential and commercial development (39), farming (40), recreation (42), stormwater management (43) and mining (44).

The National Wildlife Federation was sharply critical. "Permitting more destruction of wetlands in floodplains will only invite more flooding and damage to property while putting more people and property in harm's way," said Julie Sibbing, NWF Senior Program Manager for Wetlands Policy.

NWF also didn't like proposed language removing the requirement in NWPs 39, 43 and 44 that permit applicants submit "a written avoidance and minimization statement and a compensatory mitigation proposal with [their] PCN." Instead, district engineers will review PCNs "to ensure that all practicable on-site avoidance and minimization has been accomplished." They then have the option of requiring compensatory mitigation "to ensure that the authorized activity results in minimal adverse environmental effects," the Corps said.

The Corps also is asking for comments on whether to establish an acreage limit for NWP 21, which authorizes surface coal mining operations such as contour mining, mountaintop mining and area mining. The controversial and oft-litigated permit has been a target of environmental groups and property owners in Appalachian states, especially West Virginia, where the mountains are lopped off to expose rich seams of coal. Much of the excess material from the projects ends up in waterways below.

"These types of mining frequently result in excess spoil material being created that may not safely be placed back on the mine site," the Corps said. "Other permanent impacts may include permanent stream diversions and/or relocations, fill for coal processing plants, and coal processing waste areas. Temporary impacts to waters of the United States frequently include temporary stream relocations, road crossings, and sediment ponds. Surface coal mining activities may also involve disturbances to stream channels. Coal deposits underlie many streams at shallow depths and mining activities routinely divert and relocate watercourses to remove the coal."

The Corps also is proposing to "remove the prohibition against permanent sidecasting of excavated material into waters of the United States, where the excavated material results from the ditch reshaping activity. In cases where there are jurisdictional wetlands or other waters next to the ditch to be reshaped, this prohibition is likely to cause many landowners to maintain the ditch at its originally designed configuration to qualify for the exemption."

One change that appears more protective of the aquatic environment is the Corps' proposal to modify the definition of "loss of waters of the United States" to include the "filling or excavating of ephemeral stream beds." A 300 linear foot limit now exists on the loss of perennial or intermittent streams.

"By applying the same thresholds and limits to impacts resulting in the loss of intermittent and ephemeral streams, it will not be necessary to identify which stream reaches are intermittent and which are ephemeral," the Corps said.

District engineers, however, can waive the limits for ephemeral and intermittent stream beds, but must put the waivers in writing. No such waiver can be granted for perennial streams.

**Note to subscribers:**

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# Judge tosses lawsuit challenging nationwide permits

The Army Corps of Engineers acted well within its authority under the Clean Water Act when it issued and then reissued nationwide permits and general conditions that allow the filling of wetlands (*Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 00-379 RJL, D.D.C.).

That was the conclusion of U.S. District Judge Richard Leon in a Sept. 29 opinion that appeared to bring to an end a six-year-old lawsuit challenging myriad aspects of the Corps' NWPs.

It's not clear what would have happened if Leon had ruled otherwise, since the Corps just proposed a new batch of NWPs and general conditions, which will be valid for five years when finalized.

At the least, however, it may make industry groups think twice before filing yet another legal challenge to the latest nationwides, which were proposed by the Corps just days before Leon's decision (*see page 1*).

"A review of the record makes it clear that the Corps has adequately explained its reasoning behind the issuance [in 2000] and re-issuance [in 2002] of the NWPs and GCs," Leon said in rejecting the plaintiffs' Administrative Procedure Act claim. "While the Corps' reasoning may be unnecessarily lengthy, it is reasonable, supported by the facts, and its explanation clearly and adequately lays out the 'path' of the Corps' logic, and that logic has been adequately explained." Therefore, he concluded, the Corps did not act "arbitrarily and capriciously."

The plaintiffs also claimed that the Corps needed to define "minimal adverse environmental effects" and abused its discretion by not analyzing the effects of the NWPs on a regional basis.

The CWA's Section 404(e) says the Corps "may" issue general permits covering activities that are "similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment."

The Corps argued in response that it did not have to define the term, and that a definition would be impossible to craft given the diversity of the nation's aquatic environments.

Leon agreed.

"What is a minimal environmental impact in Arizona, for example, will not be the same as the effect as the bayous of Louisiana. Thus, the Corps has reasonably articulated its reasoning behind the promulgation of the NWPs and the GCs and that reasoning is supported by the record."

### Notice-and-comment requirements followed

Leon also ruled that the complainants were not blindsided by the final NWPs that were issued. They claimed that some changes in the final NWPs were so drastic that they were not given a fair chance to comment.

"While the NWPs that were modified, issued, and re-issued are not *exactly* the same as the proposed NWPs eventually issued and re-issued, they do not have to be identical in order to be a logical outgrowth of the proposals," Leon said.

Examples he cited were lower acreage limits for construction of new stormwater management facilities for "single and complete" mining projects.

"All interested parties were aware that the final NWPs and GCs would be more protective of the environment and the waters of the United States; hence, a more protective NWP or GCs [sic] is a logical endpoint, especially considering the fact that the objective of the CWA is 'to restore and maintain the chemical, physical, and biological integrity of the nation's waters.' "

Leon also threw out the plaintiffs' attempt to bring back nationwide permit 26, a catch-all permit that authorized filling of up to 10 acres of isolated or nontidal waters. The Corps reduced that threshold to three acres in 1996 before eliminating NWP 26 in favor of activity-specific permits with a half-acre limit.

NWP 26 "has already expired and an expired permit is 'null and void,' " Leon said.

### Leon finds for government on remaining claims

The judge quickly dispensed with a bevy of other claims. He said the Corps had reasonably explained its decisions to lower the limit on fill to a half-acre and the preconstruction notification threshold to 1/10th of an acre. He found that the Corps had adequately explained why NWP 29 should apply only to single-family homes. (The Corps combined NWP 29 with NWP 39 in its latest proposal; the new NWP would cover all residential construction.)

Leon agreed with the Corps that hard rock/mineral mining and aggregate mining activities are similar enough to justify their coverage under one NWP (NWP 44). He also concluded that the Corps is authorized by the CWA to require mitigation of the loss of wetlands with the creation of vegetated buffers.

Leon said the Corps' decision to prohibit the use of certain NWPs in the 100-year floodplain was reasonable, given its concerns about flood damages. He also noted that the Corps had eliminated the PCN requirement for NWPs 12 and 14 below headwaters "and for the use of NWPs 12, 13, 29, 39, 40, 42, 43, and 44 in the flood fringe above headwaters."

The plaintiffs also argued that the NWPs did not comply with the Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

"[W]hile plaintiffs are correct that the Supreme Court's decision in *SWANCC* makes clear that the Corps' regulatory jurisdiction is limited to 'waters of the United States,' this holding is irrelevant to the instant issue," the judge said. "As defendant rightly notes, a body of water does not become a 'water of the U.S.' and come within its regulatory jurisdiction because of an NWP; rather, the NWP simply specifies the permit criteria for bodies of water that are already within the Corps' regulatory jurisdiction."

The plaintiffs also contended that the Corps' issuance of the NWPs was contrary to the intent of Congress to create a "streamlined" system of general permits. But nowhere in the law does it say that the Secretary of the Army "must enact NWPs that 'streamline' the "authorization of minimal effects projects," Leon said.

"While efficiency in the granting of permits for projects is a corollary of the issuance of NWPs, efficiency does not drive the creation of the NWPs — protecting the environment does," he said.

# Counterpart fire regs OK'd

*(Continued from page 1)*

"Given the involvement of the services in the creation of an [Alternative Consultation Agreement (ACA)] and the oversight they retain over action agencies [subject] to one, as well as their power to suspend or terminate a poorly administered ACA, the services retain an important and ongoing role in evaluating the environmental consequences of National Fire Plan projects. As a result, the court cannot find that the counterpart regulations are inconsistent with the ESA's 'consultation' requirement."

Kessler also upheld the validity of the regulations under the Administrative Procedure Act and the National Environmental Policy Act.

The decision was significant not only for its holding but because of who issued it. As a federal judge, Kessler has never been reluctant to rule against the federal government.

Three years ago, she ordered the Army Corps of Engineers to lower water levels on the Missouri River to protect endangered species, and threatened to impose hefty fines if they did not. The Corps refused to follow her order, however, citing what it claimed was a conflicting ruling in Nebraska. Ultimately, the matter was settled in the Corps' and barge interests' favor by a Minnesota judge appointed by a multi-district judicial council.

In the present case, the environmental plaintiffs were able to get Kessler as the jurist by amending a complaint already in her court that sought review of FWS's decision to list the Canada lynx as threatened, not endangered.

The groups argued that the legal issues were related because fire projects in lynx habitat would be allowed to go forward more easily with the counterpart regulations in place.

As she has in previous rulings, Kessler found for the plaintiffs on their lynx claim. The judge said FWS did not comply with her 2002 order requiring the service to reconsider its 2000 rule listing the lynx as threatened.

In that rule, FWS said the Northeast, Great Lakes and Southern Rockies regions did not constitute a "significant portion" of the lynx's range, so therefore the lynx was not endangered.

Two years later, Kessler found that conclusion was "arbitrary and capricious" and ordered FWS "[a]t a minimum, [to] explain such an interpretation that appears to conflict with the plain meaning of the phrase 'significant portion.' " *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d at 19 (D.D.C. 2002) (Lynx III).

FWS came back with a new rule in July 2003 that retained the threatened designation but still did not address the specific question posed by Kessler.

"There can be no question that the agency's primary duty on remand was to explain its earlier finding that the court held to be inconsistent with the ESA: that the Northeast, Great Lakes, and Southern Rockies, three of the four regions that the lynx has historically populated, do not 'collectively' constitute a 'significant portion' of the animal's total range within the contiguous United States. Nevertheless, in the course of a twenty-five page Remanded Determination, FWS presents no coherent explanation for that finding. Instead, FWS addresses an issue that is both conceptually and semantically distinct from the one remanded: whether the lynx is in danger of extinction throughout a significant portion of its range within the Northeast, Great Lakes, and Southern Rockies."

The judge quoted FWS biologists who who were worried that the service was not following her instructions.

"I am still concerned that this new direction on the lynx remand is not what the judge ordered," FWS biologist Lori Nordstrom said in a June 19, 2003, email.

Said Kessler: "Where, as here, an agency has utterly failed to abide by the terms of a remand order, a second remand is the only appropriate remedy."

She did not set a deadline for when FWS must return with a new explanation.

### Counterpart regs comply with ESA, judge says

But on the bigger question, Kessler found no basis to conclude that the counterpart regs violate the ESA's consultation requirements.

The plaintiffs had argued that the regulations "allow action agencies to 'bypass' the services entirely on any project within the National Fire Plan," she noted. "This simply is not the case. Pursuant to the regulations, an action agency must develop and implement an Alternative Consultation Agreement together with one or both of the services before that agency can be authorized to make [Not Likely to Adversely Affect] determinations on [NFP] projects."

**"A definition of 'consultation' is not provided in [Section 7(a)(2)], nor elsewhere in the ESA. Furthermore, Section 7 is completely silent on both the mechanics and details of the 'consultation' it requires. Here, Congress has not 'spoken to the precise question at issue,' *Natural Resources Defense Council v. Browner*, 57 F.3d at 1125 (D.C. Cir 1995), but has instead 'left a gap for the agency to fill.' *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. at 843 (1984)."**

—U.S. District Judge Gladys Kessler

The services also retain the authority to terminate ACAs if they determine they're not working well enough, she said.

Kessler said that if the plaintiffs' position were "taken to its logical conclusion, [it] would require the court not only to overturn the counterpart regulations, but also to invalidate the very default Section 7 consultation procedures that have been in effect since 1978 on which plaintiffs rely."

The plaintiffs argued that Section 7 requires consultation between the action agencies and the services "on 'any project' to 'insure' that listed species are not jeopardized or critical habitat is not impaired," Kessler noted.

But under that "default consultation regime," the action agencies have the sole responsibility for determining whether a proposed action "may affect listed species or critical habitat."

*(Continued on next page)*

## Downlisting, delisting recommended for Calif. species

The Center for Biological Diversity and the Fish and Wildlife Service agree.

Yes, you read that right. CBD, which usually has nothing good to say about the service's listing decisions, agrees with FWS that three California species are doing better and deserve to have their listing status downgraded.

Just to show that the world's not spinning off its axis, however, CBD and FWS are still at odds about the service's plans for 10 other species in the Golden State.

CBD is supporting the delisting of the island night lizard and the downlisting to threatened of least Bell's vireo and the California least tern.

"Today's proposal shows how well the Endangered Species Act is working," said CBD Policy Director Kieran Suckling. "Critics of the [ESA] are dead wrong when they say species aren't recovering. The lizard, vireo and tern are just a few of the hundreds of endangered species with soaring population numbers."

FWS issued results of five-year status reviews for 12 species in California. The reviews recommended delisting the lizard and the valley elderberry longhorn beetle, and downlisting Smith's blue butterfly and Morro shoulderband snail, in addition to the two mentioned above.

FWS recommended no change in status for western snowy plover, Kneeland prairie pennycress, Hidden Lake bluecurls, Santa Cruz Island rockcress, San Francisco garter snake and giant garter snake.

CBD said it "strongly opposes" delisting of the beetle and Chorro shoulderband snail and the downlisting of the Morro shoulderband snail and Smith's blue butterfly.

FWS's reviews show that it "does not know what [the species'] population size is; does not know what the population trend is, and has not established scientific recovery criteria or goals," CBD said. "In the case of Smith's blue butterfly, the five-year review states the habitat is known to be declining and the species probably is as well."

## Garter snake won't be listed

### U.S. range not "significant" enough

The northern Mexican gartersnake has likely disappeared from 85-90 percent of its historical range in the United States, due to myriad factors, FWS said Sept. 26.

The snake's population has declined due to the loss and degradation of habitat caused by poorly managed livestock grazing, residential and commercial construction, roads, the introduction of non-native species, and the "substantial decline of primary native prey species, such as leopard frogs and native fish," FWS said.

But the service said it was not proposing to list the species, because it doesn't know enough about the snake's status in Mexico, and the U.S. portion of its range is not significant enough to warrant protection.

"[B]ased on the information available concerning the threats in Mexico we cannot conclude that the subspecies is likely to become endangered throughout its range in Mexico. Although we acknowledge that several threats are affecting the subpecies in the United States, we have determined that the portion of the subspecies' range in the [U.S.] does not constitute a significant portion of the range of the subspecies or a DPS."

The Center for Biological Diversity, however, noted that the service acknowledged severe threats to the species in Mexico. "Many species of wildlife have been protected in the U.S. despite their occurrence in other countries, including the gray wolf, grizzly bear, orca, and Canada lynx," CBD said. Thus, the snake could have been listed in the U.S., "where it is undisputed that the species is headed for extinction. What is particularly disturbing ... is that FWS recognized that the [snake] is also severely threatened by multiple factors in Mexico."

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"The services play no role whatsoever in that threshold determination; if an action agency concludes that a proposed action will have no effect on a listed species, it is under no obligation to consult with the services."

If the plaintiffs' interpretation is correct, "this procedure would be invalid because it does not mandate consultation on each and every federal project," Kessler said. "However, because Congress reviewed the default consultation procedures in 1978, and passed ESA amendments codifying them, the court must conclude that Congress intended to allow action agencies to initially evaluate the potential environmental consequences of federal actions and to move forward on many of them without first consulting the services if they concluded that they had 'no effect' on listed species and their critical habitat."

"Plaintiffs' broad interpretation of the term 'consultation' does not comport either with the plain meaning of the ESA or the legislative intent underlying it," the judge concluded.

In a footnote, she "note[d] that in response to the government's argument on this point, plaintiffs merely state that the validity of the default procedures 'are not under review in this case' and that they 'have not challenged those longstanding procedures.' … They offer no substantive rebuttal."

Kessler also distinguished the litigation before her from a case in the Western District of Washington, which resulted in an injunction prohibiting EPA from avoiding consultation on pesticide use (*Wash. Toxics Coal. v. U.S. Dep't of the Interior,* 04-1998, W.D. Wa.; *ESWR* Sept. 22, page 1).

"While *Washington Toxics Coalition* and this case present similar issues, the court finds it distinguishable for at least two reasons. First, the plaintiffs in [that case] challenged a completely different set of counterpart regulations, based on a very different administrative record, than the regulations and record under review here. Second, and more importantly, the court was compelled to reach its conclusion … by Ninth Circuit precedent that is substantively different from the case law interpreting *Chevron* in this jurisdiction. The prevailing law in the D.C. Circuit overwhelmingly supports the proposition that the secretary's construction of ambiguous statutory language must stand so long as it is reasonable and permissible."

# Data on wolverines sufficient to require full-blown status review

## Federal judge in Montana says FWS set bar too high for 90-day finding

The Fish and Wildlife Service had enough information three years ago to make a positive 90-day finding on a petition to list the wolverine, Chief U.S. District Judge Donald Molloy said in an opinion and order issued Sept. 29 (*Defenders of Wildlife v. Kempthorne,* 05-99-M-DWM, D. Mont.).

The plaintiff environmental groups "presented substantial information" about three specific threats to the continued existence of *Gulo gulo luscus,* "the largest terrestrial member of the weasel family," the judge said: "1) the loss of almost all of its historic range; 2) increasing human encroachment into the wilderness where wolverines den and reproduce; and 3) the genetic isolation of wolverine subpopulations."

"The petitioner does not have to present conclusive evidence; the petition need only present substantial scientific information that would lead a reasonable person to believe listing may be warranted," Molloy said, citing a district court decision out of Oregon that concluded FWS should have issued a positive finding on a petition to delist the Lost River and shortnose suckers (*Moden v. USFWS*, 281 F. Supp. 2d 1193, D. Or. 2003; see *ESWR* Sept 03, page 9).

That doesn't mean the wolverine should be listed, Molloy said. But "it does mean a closer look is required."

FWS had "disparaged" a published article by wildlife biologist Howard Hash for "assert[ing] that anecdotal information must be corroborated in order for the information to be considered substantial," the judge said.

FWS relied on an internal memorandum that defined the standard for "substantiality," but Molloy said, "the controlling law is set forth in federal regulations and statutes, not in internal FWS memos. Moreover, FWS overlooks portions of the memo that contradict its position. The memo states that 'information provided by individuals with demonstrated expertise in the relevant subject area can also generally be considered reliable.' "

The memo "further states there should be countervailing information to cast doubt on a peer-reviewed publication," the judge said. FWS, he noted, "does not question Hash's qualifications, [] nor does it present countervailing information from other experts in the field. Rather, FWS selectively cites from an internal memo to conclude that the historic range information is inadequate and not substantial."

The service also had contended that the plaintiffs had been unable to provide reliable data on the wolverine's historic range "in accordance with FWS standards," Molloy said.

"Notably, the [service's] published finding acknowledges that the wolverine no longer inhabits Colorado, Maine, Michigan, Minnesota, New Hampshire, New York, North Dakota, Wisconsin, and Utah. Yet, the finding rationalizes that the extent of the historic range is unknown. To follow FWS's reasoning to its logical conclusion means that the loss of historical range can never be a factor in an ESA wolverine determination because there will never be conclusive data that delineates the historic range of the wolverine."

Molloy also criticized the service for subjecting another study to a too-stringent standard. A 2001 study by Kimberly Heinemeyer and two co-authors relied on aerial surveys to conclude that "winter recreational use, particularly snowmobile and heli-skiing, may be having potentially severe localized habitat impacts on wolverines."

"FWS faults the Heinemeyer study because it is focused on a 'limited area'—the Greater Yellowstone region. However, a review of the study shows the scientists conducted aerial surveys in nine sampling areas in southern Montana, eastern Idaho, and western Wyoming," Molloy said. "The only significant remaining populations of wolverines left in the contiguous United States are in Montana, Idaho, and Wyoming."

The judge did not set a date certain by which the service must complete the 12-month finding and decide whether to propose listing of the wolverine. But unless FWS appeals—unlikely, since it would not want the Ninth Circuit to affirm Molloy's standard—it looks like it will have to get cracking on a status review.

"Everything we know about the wolverine tells us that this species is under siege from trapping in Montana and habitat disruption throughout its entire range," said Earthjustice attorney Tim Preso, who represented the plaintiffs. "This court ruling gives the wolverine a fighting chance."

In addition to Defenders, plaintiffs include Friends of the Clearwater, Conservation Northwest, and the Klamath-Siskiyou Wildlands Center.

### Congress works to pass... anything

In the category of legislation that has little chance of becoming law, or which has become law but will have no discernible real-world impact, two examples from Congress deserve mention.

The House of Representatives voted 231-181 Sept. 29 to pass H.R. 4772, which would allow builders and other landowners to file suit in federal court when their plans are frustrated by local government.

The biggest supporter of the legislation, which has a slim chance of passage in the Senate during the impending lame-duck session, is the National Association of Home Builders. The bill is opposed by dozens of environmental groups, the National League of Cities, 36 attorneys general, the U.S. Conference of Mayors, National Association of Counties, National Conference of State Legislatures, Council of State Governments, and the International City Management Association.

NAHB said that nothing in the bill prevents local governments from protecting local health, safety, and environment, "within the bounds of the Constitution."

**Meanwhile, the House joined the Senate in passing a bill, which was signed by President Bush Oct. 3, giving FWS's Partners for Fish and Wildlife program a statutory imprimatur.** PfW will continue to operate as it has since it started in 1987, except that now it has the benefit of a law named for it. Sen. James Inhofe (R-Okla.) and Rep. Richard Pombo

*(Continued on next page)*

# As House Clerk, NFWF director confronted Foley about behavior

## Trandahl left House around same time as 2005 meeting with Shimkus, Fla. rep

The executive director of the National Fish and Wildlife Foundation is at the center of the scandal involving former Rep. Mark Foley (R-Fla.) and congressional pages.

Jeff Trandahl, who left the House in November 2005 after eight years as clerk, confronted Foley last fall with Rep. John Shimkus (R-Mich.) after coming into possession of e-mails that Foley sent to a former page from Louisiana. Foley had inquired how the boy was doing after Hurricane Katrina, asked for his photograph, and told him he had just gone for a bike ride and was going to the gym. Shortly after that email was leaked to ABC News, sexually graphic instant messages were publicized that caused Foley to resign.

Shimkus, chairman of the page board, said he and Trandahl were assured by Foley that he would cease contact with the pages. But he apparently did not.

As House Clerk, Trandahl had oversight of the page program.

A spokesman for Shimkus said no one else on the page board was told about the matter because the former page's parents did not want their son in the middle of a media circus.

That, however, is what the Foley story has become. And one of the key figures is Trandahl, who may know more than anyone about Foley's behavior — when it occurred, and who was aware of it.

As coverage of the scandal progressed and more and more pages and congressional aides revealed what they knew (and in some cases had their accounts disputed by staff for House Speaker Dennis Hastert, R-Ill.), Trandahl largely avoided the media spotlight, partly because he has not spoken publicly about the matter.

That has changed as investigations by the House Ethics Committee and FBI have gotten off the ground. On Oct. 5, the Ethics Committee approved nearly four dozen subpoenas, including one for Trandahl, as part of its investigation. Trandahl's attorney, Cono Namorato, issued a statement saying Trandahl will cooperate with investigators.

Trandahl was apparently aware of inappropriate contacts as far back as 2001, when Rep. Jim Kolbe (R-Ariz.) was told by a former page that he was "uncomfortable" with where an email correspondence with Foley was heading.

"It was my recommendation that this complaint be passed along to Rep. Foley's office and the Clerk [Trandahl] who supervised the page program. This was done promptly," Kolbe said.

Kolbe, the only openly gay Republican in the House of Representatives and a former page himself, is retiring.

On Oct. 7, *The Washington Post* reported that "sources close to [former Foley aide Kirk] Fordham say Trandahl repeatedly urged the longtime aide [Fordham] and close family friend to confront Foley about his inappropriate advances on pages. Each time, Foley pledged to no longer socialize with the teenagers, but, weeks later, Trandahl would again alert Fordham about more contacts. Out of frustration, the sources said, Fordham contacted [Hastert chief of staff Scott] Palmer, hoping that an intervention from such a powerful figure in the House would persuade Foley to stop."

Palmer has denied he met with Fordham about Foley.

Rep. Deborah Pryce (R-Ohio) sent a letter Oct. 3 to the current House Clerk, Peggy Sampson, asking her to investigate a claim "that the director of the Republican pages brought specific concerns about then-Congressman Foley's behavior to the attention of the then-Clerk of the House [Trandahl]," Pryce wrote.

Trandahl's executive assistant, Mary Keelin, told *ESWR* that NFWF's board of directors would not comment. Asked whether the board planned to discuss the matter or talk with Trandahl, she said, "It's completely separate." Calls to two board members about the matter were not returned.

NFWF distributed about $50 million in grants for restoration, preservation, education and other purposes in fiscal 2005, the organization said. About $34 million of that was in federal funds, and $16 million in "philanthropic" donations. "Those funds were matched by $90 million pledged by grant recipients for a total investment of $140 million," NFWF said.

Last year, the foundation announced a program with Wal-Mart Stores called "Acres for America," which commits the retail giant to conserving "at least one acre of priority wildlife habitat for every developed acre of Wal-Mart Stores' current footprint, as well as the company's future development throughout the 10-year commitment." The company has promised to spend $35 million on the program.

In late September, NFWF gave Wal-Mart its Chairman's Award, "honoring Wal-Mart's sustainability programs and groundbreaking environmental initiatives such as the Acres for America program," NFWF said.

In its 2004 IRS Form 990 (used by 501(c)(3) organizations), NFWF reported that previous Executive Director John Berry was paid $220,000 in salary and $25,500 in benefits. The board of directors includes FWS Director Dale Hall, NMFS Administrator Conrad Lautenbacher, Thurgood Marshall Jr., Sue Anschutz-Rodgers, and Wayne LaPierre (see web site for details).

Trandahl appeared at an Interior Department press conference in March to tout the most recent FWS wetlands status report. The theme was that the lower 48 states are now gaining wetlands, not losing them.

"Not long ago, the crisis surrounding wetlands was only realized, a national plan was created, and the critical loss was first slowed, stopped, and now the trend has been reversed," Trandahl said. "The leadership provided by the White House, Department of the Interior, Department of Agriculture, Congress and the other federal agencies should be applauded," he said. "As well, I need to recognize my fellow conservation organizations and all other partners to this effort. All of us are contributors."

(*Continued from previous page)*

(R-Calif.) were the leaders in the effort, which resulted in a photo of Pombo standing behind President Bush as he signed the bill into law. S. 206 passed the Senate by unanimous consent last year and the House by a voice vote on Sept. 20.

Asked how it would change the way the program operates, a PfW official laughed and said it wouldn't.

# Ivorybill redux: U.S./Canadian team claims to have seen and recorded bird in Florida

## FWS reacts with "cautious optimism" as skeptics take aim at report

The ivory-billed woodpecker has been seen and heard again. Or has it?

That's the question on the minds, lips and blogs of birders, following the publication of a paper by an Auburn University ornithologist.

Professor Geoffrey Hill, the search coordinator, and Prof. Daniel J. Mennill, a biologist and bioacoustics expert from the University of Windsor in Toronto, are the lead authors.

Their paper was published in Avian Conservation & Ecology, an online journal founded in December 2005 that posted recordings of double-knocks and "kent" calls said to be made by the near-mythical ivorybill.

In 2004, the woodpecker's rediscovery on a national wildlife refuge in Arkansas was announced with great fanfare at the Interior Department by then-Secretary Gale Norton, the Cornell Lab of Ornithology and a passel of other IBW enthusiasts. DOI and the U.S. Department of Agriculture pledged millions to find proof of the bird's existence.

That hasn't happened, but the Florida news gave believers reason to hope, even if the Fish and Wildlife Service's response this time around was muted.

"The evidence Dr. Hill and his team presented is worth more than a passing glance and we have been working with him in this area given what it suggests about the bird's potential presence," said FWS Southeast Regional Director Sam Hamilton, who chairs the recovery team's executive committee. "We should keep looking there. That said, at this time there's not enough here we believe to definitively confirm the Ivory-bill's presence in these woods."

That was a far cry from the hoopla that attended the 2005 announcement, when the Interior Department hailed the "dramatic rediscovery" of the woodpecker. "I will appoint the best talent in the U.S. Fish and Wildlife Service and local citizens to develop a Corridor of Hope Cooperative Conservation Plan to save the Ivory-billed woodpecker," Norton said April 28, 2005.

DOI Science Adviser Jim Tate, an ornithologist and member of the recovery team, called the Hill/Mennill paper "another verifiable report on the ivorybill."

"I've been a true believer in the Arkansas case ever since the beginning," Tate said. As for unimpeachable proof, he said he was confident that "sooner or later," a clear image of one of the birds would be collected..

Skeptics abound. Many of them are online, picking apart the evidence.

The doubters said the intervals between knocks were too long, the kent calls could have come from other birds, such as blue-jays, and the roost holes, said by the search team to be too large for more common pileated woodpeckers, are not necessarily the work of ivorybills.

Hill and the others on the team, while confident in their findings, nonetheless voiced their own skepticism. Hill emphasized that "the only evidence that would constitute irrefutable proof is a clear photograph or video of an ivory-billed woodpecker, and such an image has to date eluded us."

Said Tate: "This is a matter of using good science to make your conclusions. I know some of the naysayers are just as hopeful as I am."

"Here though is the question," he said. "This bird is apparently hanging on by the skin of its egg tooth, as it were; the Fish and Wildlife Service has responded with a recovery plan, and we need to take a hard look at [it]. We need to look at a Population Viability Analysis and see what's possible and what's not possible."

"Doing the recovery plan makes sense," Tate said. "It brings people who know about the bird together. It doesn't mean that we're going to be able to recover [it]."

**Birder's dream on Choctawhatchee**

On May 21, 2005, just a month after the Arkansas ivorybill announcement, Hill and two research assistants were kayaking in mature swamp forest along the Choctawhatchee River in the Florida panhandle when Brian Rolek, one of the grad students, saw what appeared to be an ivorybill, and fellow grad student Tyler Hicks heard a distinctive double-knock, the sound associated with the ivorybill.

"On the weekend after their initial discovery, Hicks, an expert in bird identification, got a clear view of a female ivory-billed woodpecker, which has distinct plumage, including a white trailing edge on the upper wing, white stripes down the back and an all black crest," according to an Auburn U. press release.

"During a subsequent year of research, members of our small search team observed birds that we identified as ivory-billed woodpeckers on 14 occasions," the online paper said. "We heard sounds that matched descriptions of ivory-billed woodpecker acoustic signals on 41 occasions. We recorded 99 putative double knocks and 210 putative kent calls."

The results were presented at the fourth North American Ornithological Conference, held in Veracruz, Mexico, Oct. 3-7.

## Fish passage costs not government's responsibility, judge finds

A Claims Court judge has dismissed part of a lawsuit brought by Casitas Water District over the cost of the Robles Fish Passage facility on the Ventura River (*Casitas Municipal Water District v. U.S.,* 05-168L, USCFC).

Judge John Wiese said the government had not breached its contract with Casitas by requiring the district to spend $9 million to aid passage of Southern California steelhead.

The costs associated with construction "constitute operation and maintenance expenses," the judge said.

He also said the government could employ the sovereign acts doctrine because the ESA was enacted after the contract between the Bureau of Reclamation and Casitas was entered into.

The takings portion of the lawsuit has yet to be litigated.

# Enforcement briefs

### South Carolina wetlands case ends in guilty plea

The owner of a Columbia, S.C., construction company will pay a $60,000 fine, $60,000 in restitution, and serve 12 months' probation for filling about 45 acres of wetlands without a permit.

U.S. District Judge Cameron McGowan Currie imposed the criminal fine Sept. 26 after Robert M. Richardson pled guilty to a misdemeanor violation of the Clean Water Act.

He "acknowledged significantly altering or destroying wetlands in northeastern Richland County," the U.S. Attorney's Office in Columbia said in a news release.

"Richardson's unauthorized activities in these wetland areas included (1) land clearing with mechanized equipment, (2) grading and filling low-lying areas, (3) ditching and side casting excavated soil, and (4) installing culvert piping," the release said. "These wetlands are part of a larger tract of 429.4 acres located at the intersection of I-77 and Killian Road (Highway 52)."

The restitution will go to the National Park Foundation for the benefit of the Congaree Swamp National Monument.

Last year, Crossings Development, the property owner, acknowledged its role in the illegal filling, pleading guilty to a felony Clean Water Act violation.

The company paid a criminal fine and restitution in the amount of $1.1 million, about half of which will be used to preserve land in Congaree National Park. Restoration of the damaged wetlands has been completed, the U.S. Attorney's office said.

### DuPont, Ciba to pay $1.6 M for restoration as part of settlement with U.S., Delaware

Chemical companies DuPont and Ciba have agreed to pay more than $1.6 million to FWS, NOAA and the state of Delaware for restoration projects along the Delaware Bay.

The settlement resolves claims for cleanup costs and natural resource damages related to the DuPont Newport Superfund Site. The agencies said contaminated wetlands had already been substantially restored as part of a cleanup that was completed in 2002.

"I'm pleased that in addition to the work already completed at the Newport site and wetlands, this settlement will protect and restore wetland habitat in the Mispillion [River] and improve biodiversity in the entire ecosystem of the river," Delaware Department of Natural Resources and Environmental Control Secretary John A. Hughes said.

Per the agreement, filed Sept. 29 in federal court in Delaware, the companies will buy an "environmental covenant," which allows them to set aside 56 acres of private land (the "Pike Property") along the Delaware Bay for restoration projects identified in the federal and state agencies' Damage Assessment and Restoration Plan

For the past century, the site has been used for various chemical manufacturing operations. It currently is the location of a paint pigment factory that DuPont sold to Ciba in 1984.

There also are two inactive industrial landfills on the property.

"As a result of its history of manufacturing operations, the site became heavily contaminated with various hazardous substances, including heavy metals (particularly arsenic, barium, cadmium, lead and zinc) and volatile organic compounds," the Justice Department, NOAA and FWS said in a news release.

### California firm hit with penalty, cleanup costs for damage to Santa Barbara County river

A mining company will pay a $38,750 fine and restore portions of a river in Santa Barbara County to settle an EPA complaint that documented illegal dumping.

"GPS River Rock Products has agreed to spend up to $130,000 to enhance and restore portions of the Cuyama River on BLM-owned land that have historically been used as illegal dump sites," EPA said. "Once these dump sites have been restored, GPS will discourage further illegal dumping by removing access to the sites by fencing or removing access roads."

GPS will transfer 22 acres of land in the Cuyama River watershed to BLM for protection of habitat and the endangered California jewelflower.

"During an inspection in January 2005, EPA inspectors found storage areas for materials and waste were not covered, facility entry and exits lacked controls to minimize the tracking of mud and dirt into public roads by vehicles. In addition, EPA inspectors found that stockpiles of earthen material, berms and roads had been discharged into 22 acres of the Cuyama River without a permit."

### Colorado companies will pay fines, restore areas damaged by illegal filling

Pietraszek Enterprises and Munson Excavating of El Paso County, Colo., have agreed to pay a $105,000 fine for filling about 1 acre of a creek and adjacent wetlands without first obtaining a Section 404 permit.

Pietraszek also must restore the creek and wetlands to their "pre-damaged condition," said EPA Region 8, which announced the settlement.

The properties where the activity occurred are owned by Pietraszek, the city of Colorado Springs, and Tudor Land Company. They are the site of a planned hotel.

From late 2001 to April 2002, Munson did work to stabilize the river bank and build temporary road crossings and other structures, EPA said. In addition to damaging the wetlands, "the unauthorized activities impacted habitat of the [ESA-listed] Preble's meadow jumping mouse."

Pietraszek's Restoration and Mitigation Plan provides approximately one acre of mitigation for the wetland impacts and 12 acres of habitat restoration and mitigation.

**In another enforcement matter, #10 Enterprises, LLC has entered into an agreement** with EPA to correct damage caused by releasing dredged or fill material into the North Dry Fork and the Dry Fork of Roan Creek and adjacent wetlands at the High Lonesome Ranch near De Beque, Garfield County, Colo. "The discharges were made without a permit in conjunction with the construction of approximately 100 ponds to be used for fly-fishing by guests at the High Lonesome Ranch, a recreational hunting and fishing property owned by #10," EPA said.

# Redden requires new Upper Snake River Biological Opinion

## Judge urges NMFS to take a comprehensive look at Columbia/Snake projects' effects on species

The National Marine Fisheries Service has been given a short timeline to come up with a new Biological Opinion examining Bureau of Reclamation projects on the Upper Snake River.

In a typically blunt remand order Sept. 27, Senior U.S. District Judge James Redden in Oregon ordered NMFS to complete a new BiOp four months from the day it completes work on another BiOp he ordered rewritten, governing operations of the Federal Columbia River Power System. The service is supposed to finish that one this fall.

The two cases are *American Rivers v. NOAA Fisheries* (04-61-RE, D. Ore.; Upper Snake) and *Nat'l Wildlife Fed'n v. NMFS*, 04-640-RE, D. Ore.; FCRPS). The judge said he may give the feds more time on the Upper Snake BiOp "provided that significant progress is being made and will continue to be made."

Redden's order may presage a clash between the legislative and judicial branches, as he said he did not believe he was bound by the terms of the congressionally approved Snake River Basin Agreement (SRBA), which guarantees a certain amount of water for irrigators in Idaho but allows BuRec to provide 487,000 acre feet of water for migrating salmon and steelhead.

The government appears "more concerned with ensuring that the upper Snake River consultation does not interfere with the terms of SRBA than ensuring that the [Reclamation] projects do not jeopardize ESA-listed salmon and steelhead in the upper Snake River," Redden said.

"Stated somewhat differently, '[i]nstead of looking for what *can* be done to protect the species from jeopardy, [NOAA] and the action agencies [appear to be] narrowly focus[ing] their attention on what the establishment is capable of handling with minimal disruption.' " (*IDFG v. NMFS*, 850 F. Supp. at 900, D. Or. 1994) (emphasis in original).

The government's position "appears to be inconsistent with the Supreme Court's admonition that the ESA reflects Congress' explicit 'decision to require agencies to afford *first priority* to the declared national policy of saving endangered species.' *TVA v. Hill*, 437 U.S. at 185 (emphasis added)."

That raised the ire of Idaho's congressional delegation.

"Yesterday's decision has more to do with establishing a personal judicial legacy than saving a species," Sen. Larry Craig (R-Idaho) said. "We have said it before and we will say it again; let there be no mistake: We will protect Idaho's water and the Snake River Basin Agreement at all costs."

His fellow senator, Mike Crapo, added, "I will aggressively defend the SRBA, which remains the only durable agreement that deals with anadromous fish recovery flow augmentation and of course, reasonable electricity rates."

The order focused new attention on the future of four dams on the lower Snake, the removal of which has long been called for environmentalists.

"Today's instructions from the court, coupled with the fact that the benefits of the those four dams can be affordably replaced, ought to spur our regional leaders and the federal government to take a fresh look at restoring a free-flowing lower Snake River," Michael Garrity of American Rivers said.

Although Redden did not require that a combined FCRPS/Snake BiOp be prepared — as had been requested by the environmental groups but rejected by the judge in July — he did say that in their first status report, the agencies needed to "detail specific steps they plan to take to ensure the kind of comprehensive analysis required by the ESA—i.e., a comprehensive analysis consistent with my May 23, 2006 Opinion and Order, which considers the combined effects of the BOR Projects and the FCRPS operations on ESA-listed salmon and steelhead."

In addition, although Redden did not specifically state that the amount of water available to listed Snake stocks under the SRBA is insufficient to guard against jeopardy, he signalled that BuRec and NMFS would have to work hard to convince him otherwise.

SRBA, which was reached with Idaho, the Nez Perce Tribe, and Snake River Irrigators, is "designed to guarantee water to specific users in the upper Snake River despite evidence that ESA-listed Snake River salmon and steelhead populations were declining due, in part, to already insufficient water flows from the upper Snake River," Redden said.

The federal defendants "seem unwilling to consider flow mitigation measures beyond the 487 kaf flow augmentation available under the agreement," Redden said.

But he added that he would not order the government agencies "to examine and describe potential sources of additional flow, the costs and sources of funding for additional flow, or any possible additional mitigation measures the agencies must include in the proposed action."

"While I am concerned by federal defendants' present position regarding the SRBA agreement, I am also confident that these experienced action agencies can produce the two separate comprehensive biological opinions we all seek. The past, however, tells me that none of us—especially the threatened and endangered Snake River salmon and steelhead—can afford the dire consequences that will follow from another failure."

### PacifiCorp's Klamath dams hurt fish, ALJ says

A U.S. Coast Guard Administrative Law Judge has agreed that changes recommended by FWS and NMFS to the operations of four Klamath River dams would benefit threatened coho salmon and other native fish.

In the first proceeding of its kind, ALJ Parlen L. McKenna found that PacifiCorp's operation of the dams adversely affects the resident trout fishery. He also said that the prescriptions put forth by FWS and NMFS would benefit coho.

The agencies made recommendations to FERC as part of the relicensing process. PacifiCorp is seeking a 30- to 50-year license.

"If the company wants to operate the dams, it must change its practices to help restore the Klamath," Brian Johnson of Trout Unlimited said in a press release issued by environmental groups.

"With that question decided, we hope now to be able to work out a comprehensive agreement with PacifiCorp," Johnson said.