



Ninth Circuit Holds Critical Habitat Designations Not Subject to Cost-Benefit Analysis

07.09.2015 | By [David J. Miller](#), [Benjamin Z. Rubin](#)

In *Building Industry Association of the Bay Area v. U.S. Department of Commerce*, a decision with significant implications for property owners, the building industry, and the development community at large, the U.S. Court of Appeals for the Ninth Circuit rejected various challenges to the National Marine Fisheries Service's (NMFS) critical habitat designation for the southern distinct population segment of North American green sturgeon (*Acipenser medirostris*), holding that (1) while NMFS must "consider" the economic impacts of designating areas as critical habitat, NMFS is not required to do a cost-benefit analysis, and (2) if NMFS decides not to exclude land from a critical habitat designation, that decision cannot be challenged in court. 2015 U.S. App. LEXIS 11645 (9th Cir. July 7, 2015).

Shortly after NMFS issued a final rule designating critical habitat for the green sturgeon, plaintiffs filed a lawsuit alleging that NMFS failed to comply with Section 4(b)(2) of the Endangered Species Act.

Section 4(b)(2) provides:

The Secretary shall designate critical habitat, and make revisions thereto, . . . on the basis of the best scientific data available and after taking into the consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Plaintiffs argued that the use of "shall" in the first sentence of Section 4(b)(2) created a nondiscretionary duty to "consider" the economic impacts of designating an area as critical habitat, and that the second sentence established a specific "balancing-of-the benefits" methodology that NMFS was required to employ when

considering the economic impact of designating critical habitat.

The Ninth Circuit rejected this argument, concluding that after NFMS considered the economic impact of the designation, the entire exclusionary process is discretionary and there is no particular methodology that NMFS is required to follow. The Ninth Circuit found that the use of "outweigh" in the second sentence of Section 4(b)(2) limited the agency's discretion to exclude areas from designation, but did not require the agency to weigh the economic benefits of exclusion against the conservation benefits of inclusion. In support of this finding the court cited agency interpretations, legislative history, and prior case law.

The Ninth Circuit also rejected Plaintiffs' claim that NMFS failed to take into consideration the economic impacts of designating "high conservation value" (HCV) areas, finding that the record demonstrated economic impacts in HCV areas were considered. And, it was after considering those impacts that NMFS determined that the HCV areas were critical to recovery of the green sturgeon and could not be excluded from designation.

Finally, the Ninth Circuit found that NFMS's decision not to exclude areas from critical habitat is not reviewable. Citing its recent decision in *Bear Valley Mutual Water Co. v. Jewell*, 2015 WL 3894308 (9th Cir. Jun. 25, 2015), the court explained that the decision is unreviewable because section 701(a)(2) of the Administrative Procedure Act excludes agency action from judicial review if the agency action is committed to agency discretion by law. And, Section 4(b)(2) established a discretionary process by which NMFS *may* exclude areas from designation, but does not set standards for when areas *must* be excluded from designation.

As a result of the Ninth Circuit's interpretation of Section 4(b)(2), the ability to challenge critical habitat designations, at least in the western states, has been significantly curtailed. Given the significant impact that the decision has on property rights and potential future developments, we anticipate that plaintiffs will be either seeking en banc review or filing a petition for writ of certiorari with the U.S. Supreme Court.