PACIFIC LEGAL FOUNDATION

July 17, 2017

The Honorable Ryan Zinke
Secretary
U.S. Department of Interior
1849 "C" Street NW
Washington, DC 20240

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Honorable Greg Sheehan
Acting Director
U.S. Fish & Wildlife Service
1849 "C" Street NW, Room 3331
Washington, DC 20240

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: 60-Day Notice of Intent to Bring a Citizen Suit Pursuant to 16 U.S.C. § 1540(g)

Dear Secretary Zinke and Director Sheehan:

This letter provides notice of intent to commence civil litigation for violation of the Endangered Species Act, 16 U.S.C. §§ 1531-1544, as well as for violation of the Federal Advisory Committee Act, 5 U.S.C. App. 1, §§ 1-16. This notice is submitted on behalf of the Center for Environmental Science, Accuracy & Reliability, the Coalition of Labor, Agriculture & Business of Santa Barbara County, the Property Owners Association of Riverside County, the California Building Industry Association, the National Association of Home Builders, and the Building Industry Legal Defense Foundation (collectively "Advocates for Agency Accountability" or "Advocates").

INTRODUCTION

The Endangered Species Act authorizes the Secretary and the Service (collectively "Service") to protect endangered and threatened species. *See* 16 U.S.C. § 1533(a). The Act also provides a process whereby interested persons may petition the Service to add or remove populations from the Act's lists of protected populations.

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See id. § 1533(b). The Service is required to delist an already protected population when the best available data indicate that, among other reasons, the population was originally listed in error. *See id.* § 1533(b)(3)(B)(ii); 50 C.F.R. § 424.11(d)(3). Last year, the Service rejected a petition, signed on to by many of the Advocates, to delist the coastal California gnatcatcher on the ground of faulty taxonomy. 81 Fed. Reg. 59,952 (Aug. 31, 2016). The Service determined that the gnatcatcher is properly considered its own subspecies and should remain listed. *See id.* at 59,962. That determination is illegal, for two reasons.

First, the Service's affirmance of the gnatcatcher's dubious subspecies taxonomy violates the basic administrative law principle of reasoned decision-making. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A corollary of that fundamental tenet is that an agency may not "move the goalposts" in the course of ruling on a matter, much less decide an issue without articulating a standard or measure to explain the agency's decision. *See Qwest Corp. v. FCC*, 689 F.3d 1214, 1228 (10th Cir. 2012). In rejecting the Advocates' delisting petition, the Service conceded that there is no scientific consensus on the definition of "subspecies" generally, or as applied to birds in particular. 81 Fed. Reg. at 59,958. Yet the Service provided no definition for what constitutes a gnatcatcher "subspecies," and thus no criterion to measure the soundness of its own action or to alert the public to the relevant taxonomic standard. Consequently, the Service's standardless rejection of the Advocates' delisting petition is necessarily arbitrary and capricious.

Second, the Service violated the Federal Advisory Committee Act by relying on a privately convened, privately conducted "workshop" of experts to critique the data submitted by the Advocates to support the gnatcatcher's delisting. *See* 81 Fed. Reg. at 59,956. The workshop report played a critical role in the Service's decision to maintain the gnatcatcher's listing. *See id.* at 59,956-62. Yet the public was given no opportunity to attend the workshop, much less to participate therein, all in violation of the Act's mandates, 5 U.S.C. App. 1, § 10(a)(1)-(3).

If the foregoing legal errors, more fully described below, are not corrected within the next 60 days, the Advocates for Agency Accountability will seek recourse through the courts.

Parties

The Center for Environmental Science, Accuracy & Reliability ("CESAR") is a California nonprofit corporation the primary purpose of which is to bring scientific rigor to regulatory decisions undertaken pursuant to environmental statutes, and to ensure consistent application of these statutes throughout all industries and sectors. CESAR believes that these activities will generate additional support for environmental statutes, because the results of and bases for regulatory actions will be transparent and supported by good science. CESAR believes that these goals will be furthered by delisting the gnatcatcher. Delisting will demonstrate that Endangered Species Act decision-making should not be based on politicized science.

The Coalition of Labor, Agriculture & Business of Santa Barbara County ("COLAB") is a nonprofit organization comprised of 1,000 members including all the leading farming and ranching families in the central coast region of California. Founded in 1991, COLAB seeks to preserve Santa Barbara County's heritage and economy, which are primarily dependent on family-owned businesses with a heavy emphasis on farming and ranching operations. COLAB cares about the Endangered Species Act's frequent maladministration, including the continued erroneous listing of the gnatcatcher, because Santa Barbara County has more species listed than any other county in the continental United States.

The Property Owners Association of Riverside County ("POARC") is a nonprofit, public policy research, educational, and advocacy organization. Founded in 1983, POARC seeks to promote free enterprise and economic growth, as well as to serve as an advocate for property owners to ensure that the interests and private property rights of landowners are protected in the formation and implementation of public policies. POARC represents a membership consisting of property owners, farmers, ranchers, developers, homebuilders, architects, engineers, contractors, attorneys, brokers, real estate agents, property managers, businesses, and others whose interests are affected by land-use regulation. POARC's membership includes landowners in Riverside County whose properties are located within the gnatcatcher's critical habitat and subject to its regulatory restrictions.

The California Building Industry Association ("CBIA") represents approximately 3,000 members—including homebuilders, trade contractors, architects, engineers, designers, suppliers, and other industry professionals. CBIA members design and construct California's housing. CBIA's purpose is to advocate on behalf of its members' interests, including representation in regulatory matters and litigation affecting the ability of its members to provide housing, office,

industrial, and commercial facilities for California residents. Since 1990, CBIA members have been actively involved in all regulatory and planning issues concerning the gnatcatcher. They have committed hundreds of millions of dollars and tens of thousands of acres of land to the bird's conservation in the various habitat conservation plans and natural community conservation plans in Southern California. The gnatcatcher's delisting would be a fitting culmination of these efforts.

Petitioner National Association of Home Builders ("NAHB") is a national trade association consisting of more than 140,000 builder and associate members organized into more than 700 affiliated state and local associations in all 50 states, the District of Columbia, and Puerto Rico. Its members include individuals and firms that construct single-family homes, apartments, condominiums, and commercial and industrial projects, as well as land developers and remodelers. NAHB's members employ between six million and eight million workers. More than 80% of members are classified as "small businesses" and meet the federal definition of a "small entity," as defined by the federal Small Business Administration. Although the ultimate goal of the Endangered Species Act is species recovery, this goal in practice too often takes a backseat to an impermissible aim—land-use regulation. Homebuilders and other private property owners seeking to comply with the Act frequently have encountered regulations that do not contain sufficient scientific criteria for determining whether species are truly endangered, as well as improper and unreasonable habitat conservation and recovery plans to deal with listed species. Interagency jurisdictional disagreements and differing interpretations are further sources of unnecessary delay, which makes housing expensive and community building more difficult in many areas of the country where listed species are found. Some of these ills would be moderated through the gnatcatcher's delisting.

The Building Industry Legal Defense Foundation ("BILD") is a nonprofit mutual benefit corporation and a wholly-controlled affiliate of the Building Industry Association of Southern California, Inc. ("BIASC"). BIASC represents approximately 1,200 member companies across Southern California that are active in all aspects of the building industry, including: land development; builders of housing, commercial, and infrastructure product; and related entities including architects, engineers, planners, contractors, suppliers, and property owners. The purposes of BILD are, in part, to initiate or support litigation or agency action designed to improve the business climate for the building industry and to monitor and involve itself in government regulation critical to the industry. BILD's interest in seeking delisting of the gnatcatcher stem from its interest in promoting the building industry, especially in areas of Southern California, where the bird species can be found.

Regulatory restrictions related to the gnatcatcher, including large swaths of land marked as critical habitat, have long hampered the building industry. BILD Foundation seeks to ensure that unnecessary regulation will be lifted so that economic progress can be made and the building industry can thrive.

BACKGROUND

In 1993, the Service listed the gnatcatcher as a threatened subspecies. 58 Fed. Reg. 16,742 (Mar. 30, 1993). Shortly thereafter, a coalition of homebuilders successfully challenged the listing on the ground that the Service had failed to make publicly available the data underlying the key study supporting the agency's determination that the gnatcatcher is a valid subspecies. *Endangered Species Comm. v. Babbitt*, 852 F. Supp. 32 (D.D.C. 1994). Nevertheless, on remand the Service reaffirmed its view that the gnatcatcher is its own subspecies. 60 Fed. Reg. 15,693 (Mar. 27, 1995).

In 2010, several of the Advocates submitted a petition to delist the gnatcatcher, relying in part on a mitochondrial DNA study produced by a team of researchers headed by Dr. Robert Zink. In 2011, the Service denied the petition. 76 Fed. Reg. 66,255 (Oct. 26, 2011). Although the Service acknowledged that new evidence—including the Zink study—tended to show that the gnatcatcher is not a separate subspecies, the Service believed that further research was needed before delisting could happen. *See id.* at 66,258. Specifically, the Service concluded that subspecies status could not be disproved simply on the basis of mitochondrial DNA analysis, and strongly suggested that a nuclear DNA analysis would be required to disprove the gnatcatcher's subspecies status. *See id.* In 2013, Dr. Zink's research team published a new nuclear DNA analysis confirming that the gnatcatcher should not be considered a separate subspecies. Robert M. Zink, *et al.*, *Phylogeography of the California Gnatcatcher (*Polioptila californica*) Using Multilocus DNA Sequences and Ecological Niche Modeling: Implications for Conservation*, 130 The Auk 449, 454 (2013). In this study, Dr. Zink and his colleagues also concluded that the gnatcatcher does not exhibit ecological distinctiveness. *Id.* at 456. At most, the data reveal that the gnatcatcher has recently (in geologic time) expanded its range into Southern California. *See id.* at 455.

In 2014, relying on Dr. Zink's nuclear DNA study, the Advocates submitted a renewed delisting petition, contending that the study now constitutes the best available data on the gnatcatcher's taxonomy. *Cf.* 16 U.S.C. § 1533(b)(1)(A). Shortly thereafter, the Service made a positive initial determination. 79 Fed. Reg. 78,775 (Dec. 31, 2014). But in August of last year, the Service denied the petition. In this

second petition denial, the agency relied on input from a privately convened peer review panel of avian experts to reject Dr. Zink's work on three grounds. First, the standard for differentiation in genetic analysis that the study used is supposedly too strict to distinguish subspecies. 81 Fed. Reg. at 59,959. Second, the genetic markers chosen for analysis are allegedly not broad enough. *Id.* at 59,960-61. And third, the study purportedly relies excessively on genetic data and fails to give sufficient attention to morphological and ecological data. *Id.* at 59,959. Yet, in denying the delisting petition, the Service conceded that "there are no universally agreed-upon criteria for delineating, defining, or diagnosing subspecies boundaries," and that "there is no consensus in the literature for defining subspecies criteria for avian taxa." *Id.* at 59,958. The Service could affirm only that "[e]ach possible subspecies has been subject to unique evolutionary forces," and therefore that "the methods for detecting each [subspecies] will be different." *Id.* at 59,959.

Violation of the Endangered Species Act

The Endangered Species Act authorizes the Service to list "subspecies." *See* 16 U.S.C. § 1532(16). The Act, however, does not define "subspecies," Anna L. George & Richard L. Mayden, *Species Concepts and the Endangered Species Act: How a Valid Biological Definition of Species Enhances the Legal Protection of Biodiversity*, 45 Nat. Resources J. 369, 374 (2005) (observing that the Act's "definition" for species "does not define a species at all" but "merely provides for protection of groups below the species level"), and the Service has never promulgated a regulation or policy fleshing out the term. Although existing regulation directs the Service to consult with its own experts and the outside scientific community when making taxonomic decisions, 50 C.F.R. § 424.11(a), that instruction is unhelpful, because there is no universally accepted definition among taxonomists for subspecies. Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 Wash. U. L.Q. 1029, 1100-01 (1997) ("Although many biologists use the word subspecies, it carries no similar, generally recognized biological meaning."). The Service's delisting denial itself acknowledges the absence of any authoritative subspecies definition. *See* 81 Fed. Reg. 59,958. *Cf.* U.S. Fish & Wildlife Serv., California Gnatcatcher Facilitated Science Panel Workshop, App. C, Panelist 5 Mem., at 3 (2015) (Gnatcatcher Workshop) ("[I]n a recent review of 1,313 avian taxonomic studies, no single taxonomic criterion . . . was considered necessary or sufficient by any taxonomist to designate taxa.").

The Service could not identify a standard of its own. Nevertheless, it felt competent to reject what it perceived to be the Advocates' proposed subspecies definition—reciprocal monophyly[1]—and thus to deny the delisting petition. *See* 81 Fed. Reg. at 59,959. That denial is arbitrary and capricious. It is illogical, as well as unfair to the regulated public, for the Service to refuse to adopt a standard for subspecies classification unless it articulates what does in fact constitute a valid subspecies. *See Trafalgar Cap. Assocs., Inc. v. Cuomo*, 159 F.3d 21, 34 n.11 (1st Cir. 1998) (an "ad-hoc standardless determination . . . is likely to be arbitrary and capricious"). *Cf. Kunkel v. Comm'r*, 821 F.3d 908, 910 (7th Cir. 2016) ("[Y]ou can't beat something with nothing."). Here, the Service rejected the Advocates' delisting petition without providing any standard for what would have to be shown in order to disprove the gnatcatcher's subspecies status. If the Service can deny a delisting petition without setting forth a standard, the agency will always be able to insulate its decision-making by keeping the public in the dark as to the relevant goalposts.

Such unfettered discretion violates basic principles of agency decision-making. As noted above, all agencies—including the Service—must articulate a satisfactory *explanation* for their actions. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Consequently, the Service may not inexplicably move the goalposts of its decision-making during the course of rule-making, much less fail altogether to set up the goalposts. *See Qwest Corp.*, 689 F.3d at 1228 (citing various authorities). In denying the delisting petition, the Service asserted what it considers to be the relevant *types of data* for making a taxonomic determination, 81 Fed. Reg. at 59,959-61 ("[W]e consider multi-evidence criteria involving multiple lines of genetic, morphological, and ecological scientific data to provide the best approach to determining the taxonomic status of the coastal California gnatcatcher."), and alluded to appropriate *methods* for collecting those data, *see id.* at 59,959 ("[T]he methods for detecting each [subspecies] will be different."). But merely identifying the pertinent evidence and suggesting appropriate methods for collecting that evidence does not define the thing—here, the statutory term "subspecies"—which is to be established by the

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[1] *See* Ernst Mayr, *Principles of Systematic Zoology* 407 (1969) (defining monophyly as "[t]he derivation of a taxon through one or more lineages, from one immediately ancestral taxon of the same or lower rank"). The modifier "reciprocal" means that, among related populations, each is more closely related to the common ancestral species than to one another. The delisting petition does not assert that reciprocal monophyly standing alone is always appropriate to diagnose subspecies. Rather, the petition contends that such a standard is appropriate when, as here, no other set of data (be it morphological or otherwise) supports a subspecies classification.

evidence and methods. The Service's petition denial gives no explanation for why any of the perceived differences—be they morphological, genetic, or ecological—between the coastal California gnatcatcher and other putative gnatcatcher subspecies are significant enough to make the former "a distinguishable subspecies," *id.* at 59,962.

That failure is critical. Even scientists who would support a subspecies designation for the gnatcatcher acknowledge that the differences on which the classification would be based are slight. *See, e.g.*, Gnatcatcher Workshop, App. C, Panelist 1 Mem., at 3 (asserting "a subtle . . . difference"); *id.*, Panelist 4 Mem., at 3 (acknowledging that gnatcatcher genetic "divergence is modest"); *id.*, Panelist 6 Mem., at 17 ("[D]ifferences among [gnatcatcher] subspecies appear to be relatively subtle and no amount of additional data collection and analysis will change that basic result."). Mere distinctions among populations, standing alone, are not enough to merit separate classifications for those populations—the perceived differences must be biologically significant. *See id.*, Panelist 4 Mem., at 1 ("[N]ot all morphological traits have a genetic basis and geographic variation in avian morphology has also been attributed to phenotypic plasticity and differences in gene expression."); *id.*, Panelist 5 Mem., at 1 (noting the importance of "guard[ing] against recognizing populations that are discrete due to environmentally induced traits"). In other words, distinctions must be qualified. Yet, "there is a broad range of possible scenarios in which investigators looking at the same data and results . . . will reach different conclusions" about whether a population qualifies as a subspecies. *Id.*, Panelist 6 Mem., at 6. The data do not explain themselves; rather, the Service must explain the subspecies criterion which those data purportedly satisfy. The failure to do so purports to reserve to the Service the power to list or delist the gnatcatcher according to whim and fancy.[2] The agency has no such power. *See Pennsylvania v. Surface Transp. Bd.*, 290 F.3d 522, 535 (3d Cir. 2002) ("[A]gencies must apply consistent standards and principles to insure the fairness of the administrative process.").

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[2] For example, there is no way to determine whether the Service's unexplained criteria for diagnosing the coastal California gnatcatcher would support any number of overlapping and ultimately arbitrary divisions among gnatcatcher populations. *Cf.* Gnatcatcher Workshop, App. C, Panelist 6 Mem., at 8 (recognizing the importance of diagnosing an "abrupt transition in phenotype" in order to "avoid the need to arbitrarily divide continuous clines into an uncertain number of named subspecies").

Violation of the Federal Advisory Committee Act

The Federal Advisory Committee Act imposes important limitations on the ability of administrative agencies to use outside panels and taskforces to inform agency decision-making. The Act's purpose is "to enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures" that result only in "worthless committee meetings and biased proposals." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 453, 459 (1989). Among its mandates, the Act requires that advisory committees provide notice of their meetings in the Federal Register, and give the public the opportunity to attend meetings and to submit testimony. 5 U.S.C. App. 1, § 10(a)(1)-(3).

The Service's reliance on the advice of a privately convened peer review committee to deny the delisting petition violates these requirements. A group is an "advisory committee" subject to the Act when it is asked to render advice or recommendations as a group with some established structure and defined purpose, 5 U.S.C. App. 1, § 3(2). *See Ass'n of Am. Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993); *Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975). The gnatcatcher science panel comprised several avian experts who had been selected by an outside contractor at the Service's request. *See* Gnatcatcher Workshop at 2-3. The committee convened privately in late summer of 2015, *id.* at 5, and subsequently produced a report critical of Dr. Zink's analysis, *see id.* at 9-10. The public was not given notice of the committee's formation, or an opportunity to observe and to participate in the committee's deliberations, or the chance to comment on the committee's final report.[3] Yet the committee played a significant role in the Service's delisting denial. In the Service's own view, the committee was convened in response

[3] In response to a Freedom of Information Act request for "all documents pertaining to the Service's compliance with the Federal Advisory Committee Act" in denying the gnatcatcher delisting petition, the Service disclosed several email communications demonstrating the extent to which members of the public were notified of the convening of the scientific review panel. It appears that by early July, 2015, the Service had adopted a "script" for agency personnel to provide in response to inquiries from the public about the status of the Service's review of the delisting petition. The "script" relates that the agency was "working with an outside contractor to bring together a number of independent scientists" who, in "August 2015, . . . will participate in a workshop led by an independent facilitator." Email of Jane Hendron, Public Affairs Division Chief, Carlsbad Fish & Wildlife Office, "Re: gnatcatcher verbiage" (July 7, 2015). The Advocates have found no evidence that this "script" was ever published.

to "the diverse and conflicting information submitted by the public and members of the scientific community in response to" the agency's initial determination that the gnatcatcher's delisting may be warranted. 81 Fed. Reg. at 59,956. Indeed, the Service's delisting denial cites the committee's report two dozen times. *Id.* at 59,958-61. Thus, the Service's failure to comply with the Federal Advisory Committee Act means that the agency's denial of the delisting petition must be reconsidered.[4]

CONCLUSION

"Given that the coastal California Gnatcatcher lacks morphological, genetic, and ecological significance, it becomes difficult to justify its listing." Zink, *supra*, at 456. The Service's denial of the delisting petition, which adopts a contrary position, cannot be reconciled with basic norms of administrative and Endangered Species Act decision-making. Moreover, the Service's failure to provide the public formal notice of the panel's convening or an opportunity to observe and participate in the panel's work, in light of the agency's heavy reliance on the science panel's findings, violates the Federal Advisory Committee Act and independently vitiates the petition denial.

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[4] Typically, courts have declined to invalidate a completed agency action if the only ground for the invalidation would be noncompliance with the Federal Advisory Committee Act. *See Idaho Farm Bureau Fed'n v. Babbitt*, 900 F. Supp. 1349 (D. Idaho 1995); *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1309 (W.D. Wash. 1994), *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996). These decisions presuppose that the public had adequate opportunity to comment on the advisory committee report and thereby mitigate the informational harm deriving from the agency's noncompliance. Here, however, the public had no meaningful opportunity to comment on, and to rebut, the committee's work or the Service's reliance thereon. For that reason, invalidation of the Service's delisting denial is warranted. *See Public Citizen v. Nat'l Econ. Comm'n*, 703 F. Supp. 113, 129 (D.D.C. 1989) ("Congress expressly protected [the] right to view the advisory committee's discussion of policy matters in public and the right to confront, through observation, the decision-making process as it occurs . . . ."); *Alabama-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103, 1106 (11th Cir. 1994) ("If public commentary is limited to retrospective scrutiny, the Act is rendered meaningless."). *Cf. Tucson Rod & Gun Club v. McGee*, 25 F. Supp. 2d 1025, 1030 (D. Ariz. 1998) (declining to enjoin the use of a report where plaintiff had, and would continue to have, an opportunity to present further information prior to a final agency decision).

If the Service does not promptly correct these legal errors, the Advocates for Agency Accountability will commence a civil action to require their correction following expiration of the statutory 60-day notice period.

Respectfully submitted,

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