



FWS Sued Over 16-Year Permit Delay, Proposes to Expand Locations for “Experimental Populations”

Two recent developments depict the frustration with regulatory roadblocks and concern with future costs that project developers often cite in working through Endangered Species Act (ESA) issues with the U.S. Fish & Wildlife Service (FWS). One illustrates the extraordinary delays that ESA permitting can create. The other is indicative of the ever-broadening scope of FWS authority.

On June 1, 2022, West Virginia-based Allegheny Wood Products, Inc. (AWP) filed a federal lawsuit against FWS and its Director, as well as the Secretary of the Interior, seeking a court order directing FWS to take action in an ESA permitting process that began 16 years ago and still remains pending. *Allegheny Wood Products, Inc. v. U.S. Fish and Wildlife Service*, Civil Action No. 2:22-cv-007 (N.D. W.Va.) (assigned to Judge Thomas Kleeh). According to the Complaint, AWP (one of the largest producers of Eastern U.S. hardwoods) began the process to obtain an Incidental Take Permit from the FWS in 2006 for a proposed project in Tucker County, West Virginia. Consistent with guidelines published by FWS, AWP started the process by submitting a draft Habitat Conservation Plan (“HCP”; a prerequisite to submission of a permit application) to FWS for review. Largely in response to comments from the agency, AWP had to revise the HCP many times, including at least 10 revisions in just the last three years. AWP contends that most of those revisions were in response to FWS comments that sought changes “to sections [of the HCP] that were previously agreed upon” or “foundational changes that should have been raised earlier.” Complaint, ¶28. As an example of the kinds of delays it has experienced, AWP notes that the FWS offered no response to its March 2013 draft HCP until March 2016.

Concerned that the FWS was intentionally refusing to advance the review process to the next stage, in December 2017 AWP unilaterally decided it was time to submit an Incidental Take Permit application, including the most recent version of its HCP. AWP also paid the required application fee and supplied an administrative “Environmental Assessment,” as required by the National Environmental Policy Act (NEPA). Four years later, AWP’s application remains pending with no end in sight. FWS has reportedly failed to comply with the deadlines set forth in its own timeline provided to AWP on August 4, 2020 to govern the completion of its review. Alleging violations of the federal Administrative Procedures Act, the Council on Environmental Quality’s NEPA regulations, and the FWS Planning and Incidental Take Permit Processing Handbook, AWP has asked the court to issue an order

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requiring that FWS complete its review of the AWP application by a date certain, retain jurisdiction over the case to oversee compliance with that order, and award AWP its costs and attorney's fees in bringing the action.

AWP is not alone in its frustration over lack of action by FWS. On May 18, 2022, West Virginia Senator Shelley Moore Capito questioned FWS Director Martha Williams during a Senate hearing on the agency's proposed 2023 budget (click [here](#) to access). Senator Capito inquired about significant delays in ESA permitting actions associated with highway development in West Virginia that have been pending before FWS since 2014. Rather than expand the agency's budget to hire additional staff, FWS proposed that the State of West Virginia should pay FWS nearly \$800,000 per year to fund additional staff to handle the State's projects. Private businesses have also entered into similar agreements with FWS to pay the agency money in exchange for the assignment of staff dedicated to certain projects. In essence, both the states and private industry have to fund FWS to do its job in a timely fashion or else be stuck in perpetual regulatory limbo.

While FWS apparently lacks sufficient funding to handle its current workload, the agency recently proposed to expand its regulatory reach ever further. On June 7, 2022, [FWS published](#) a proposal to revise its regulations to authorize the agency to create populations of threatened or endangered species in areas where those species have never been known to exist. Historically, FWS has authority to re-introduce listed species into geographic areas within the species' probable historical range, which are known as "experimental populations." In other words, if the agency has evidence that a listed species once existed in an area, FWS can release the species to that area in an attempt to re-establish a population. FWS now seeks to expand the scope of eligible geographic areas to include locations outside of the species' known historical range. FWS cites the impact of climate change on species and their habitats as justification for the proposed rule change. Under the proposed revised regulation, property owners and developers could face significant delays, or even outright cancellation, of projects in areas where FWS has chosen to attempt to establish a population of listed species. Comments on the proposed rule are due by August 8, 2022.

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