**TESTIMONY OF CRAIG MANSON**
**BEFORE THE COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY**
**SUB-COMMITTEE ON INVESTIGATIONS & OVERSIGHT**
**UNITED STATES HOUSE OF REPRESENTATIVES**
**OCTOBER 13, 2011**

Chairman Broun, Congresswoman Edwards, and Members of the Subcommittee:

My name is Craig Manson. I am a specialist in law and public policy, currently serving as General Counsel to the Westlands Water District in California's Central Valley. Westlands is the largest agricultural water agency in the United States. Prior to my present appointment in May 2010, I was a professor at the Capital Center for Public Law and Policy at University of the Pacific, McGeorge School of Law in Sacramento, California. I taught administrative law, natural resources law, and public policy development, among other things. I held that position from January 1, 2006 to April 30, 2010.

From February 19, 2002, until December 31, 2005, I served as Assistant Secretary for Fish and Wildlife and Parks in the United States Department of the Interior. I oversaw the National Park Service and the United States Fish and Wildlife Service. I had responsibility for policy oversight of a number statutory programs, including the Endangered Species Act (ESA).

Immediately prior to my service as Assistant Secretary of the Interior, I was a Judge of the Superior Court of California in the County of Sacramento.

From 1993 to 1998, I was the General Counsel of the California Department of Fish and Game. The department implements the California Endangered Species Act and coordinates with the federal government concerning the state's responsibilities under the federal Endangered Species Act.

I have published articles in a number of journals, including Environmental Law (published by Lewis & Clark Law School, Portland, Oregon), the Texas International Law Journal, the Duke University Environmental Law & Policy Forum, the Environmental Law Institute's Environmental Law Forum and others.

As Assistant Secretary of the Interior, I testified before congressional committees on numerous occasions and spoke to professional groups many times about the Endangered Species Act. My writing and testimony has been cited, quoted, or criticized, for better

or for worse, in hundreds of scholarly publications.

Today the committee reviews the nexus between science and policy in the Endangered Species Act. This is an issue of overriding importance for both the conservation of species and for the property rights of individuals across the nation. Unfortunately, it is a question that is neither new nor unique. Since the beginning of the age of federalized environmental activity in the late 1960s and early 1970s, science and policy have seemingly behaved like that rarest of all species, the Pushmi-pullyu, discovered by the multi-lingual fictional naturalist, Dr. Doolittle.[1]

The Pushmi-pullyu science-policy approach to the ESA and other environmental statutes raises fundamental issues for resolution. In the last six months, Members of both political parties in both the House and the Senate have strongly criticized the Fish and Wildlife Service and the National Marine Fisheries Service for using "bad science" in important decisions. Most recently, a federal judge excoriated not just an agency, but two individual scientists by name for misleading the court. The judge said that the scientists were engaged in "an attempt to mislead and to deceive the court into accepting what is not only not the best available since, it's not science." He went on to say that "There can be no acceptance by a court of the United States of the conduct that has been engaged in in this case by these witnesses."

Clearly there is a problem with the manner in which science is being applied in significant matters involving the ESA. I now offer my view of the issues and a scheme for resolution.

1. Some scientists, lawyers, and policymakers misunderstand the relationship between science and policy in ESA decision-making. A good amount of this misunderstanding springs from certain statutory language itself. In describing the process of determining whether a species is "threatened" or "endangered," section 4 of the statute says:

> The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available . . . .

16 U.S.C. § 1533(b)(1)(A).

The use of the term "solely" has led to the belief that there is no room for anything but a

1 "They had no tail, but a head at each end, and sharp horns on each head. They were very shy and terribly hard to catch. The [Africans] get most of their animals by sneaking up behind them while they are not looking. But you could not do this with the pushmi-pullyu—because, no matter which way you came towards him, he was always facing you." H. Lofting, *The Story of Doctor Dolittle--Being the History of His Peculiar Life at Home and Astonishing Adventures in Foreign Parts, Never Before Printed*, p. 81 (New York: Frederick A. Stokes & Co., 1920 [Tenth Printing Nov. 1922])

scientific basis for listing decisions. There is, under this belief, no space to be given over to policy decisions. Indeed, perhaps this interpretation of this part of the statute is correct.

But this interpretation has over time been exaggerated into two other "beliefs" that are demonstrably incorrect. The first fallacy is that all listing decisions are purely the purview of field scientists, the closer to the bottom of the organization, the better. The second fallacy is that ***all*** decisions having to do with the ESA are safeguarded against so-called "political interference."

The wrong-headedness of the first fallacy is apparent in the statute itself. The statute does not commit listing decisions to the primary investigating biologist in the field. The statute commits those decisions to the Secretary. While some degree of delegation is expected, as long as the Secretary or the Secretary's designee has made a listing decision based on the best available science, the decision is valid. The Secretary has the power to determine in the first instance what constitutes the best science available to the Secretary. And in doing so, the Secretary or the Secretary's designee may disagree with scientists in the field. Science managers may direct science staff to go back and "do it over" if those managers believe the "best science" has not been used. They have not only the power, but the obligation to do so.

The second fallacy is also belied by that statute itself. Not all ESA decisions are off-limits to considerations of policy. For example, section 4(b)(2) of the ESA deals with the designation of critical habitat, said by some to be one of the most important features of the act. However, section 4(b)(2) requires that the Secretary in designating critical habitat:

> tak[e] into 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.

16 U.S.C § 1533(b)(2).

Even the listing portion of section 4 requires that the decision-maker:

> tak[e] into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect

> such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.

16 U.S.C. § 1533(b)(1)(A).

So what is the lesson here? It is that the ESA requires science-informed decisions and not merely scientific decisions.

2. Some scientists, lawyers and policy-makers do not understand the different functions of science and policy. As I and Professor Adler and others have said, science is observational and thus seeks to tell us "what is," "what was," and occasionally "what might be." Policy is the determination of the body politic as to how it desires to act, given the observed conditions. The infinite political options in the face of certain conditions are not to be dictated by scientists, but by those given such authority by law.

3. Some scientists, lawyers and policymakers fail to comprehend *Renault's Other Surprise:*[2] *The ESA is a Politicized Statute.*

That the ESA is a politicized statute is no surprise to any but the most naïve. In fact, the ESA did not involve politics, this committee would not be holding this hearing.

The ESA is necessarily politicized because it involves the protection of certain natural resources at the expense of private property, economic activity, and other natural resources. Although not intended by the drafters, implementation of the ESA has become a win-lose adversarial process. The politicization of the ESA began at its inception and has carried on through every Administration and Congress since then.

To say that the ESA is politicized is really to make no more than the point that there are competing policy decisions to be made, whether we recognize that or not. In fact, all sides need to stop pretending that the ESA can be administered in a politically neutral fashion. Later in this testimony, I suggest a solution that will serve to put the political decisions in proper context. There are several types of political influence that are involved in ESA implementation; some are proper and others are improper.

*"Political Interference" Generally*

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2 Rick: How can you close me up? On what grounds?
Captain Renault: I'm shocked, shocked to find that gambling is going on in here.
[ *A croupier hands Renault a pile of money*]
Croupier: Your winnings, sir.
Captain Renault [*sotto voce*]: Oh, thank you very much. [*aloud*] Everybody out, at once!
*Casablanca* (1942)

Shortly after I became Assistant Secretary, a Member of Congress summoned me and the then-director of the Fish and Wildlife Service to his office. In his district was a large military base that had been closed under the BRAC process. Businesses and local governments were interested in seeing the reuse process move quickly. The Congressman (who to my knowledge had no biological training)[3] complained that the Fish and Wildlife Service was "holding up the process" by demanding "too many studies" and "too much mitigation" for potential impacts to threatened and endangered species. The Congressman asked us to get the Service to "cooperate" with the other parties.

We left having promised the Member no more than that we would "look into" the matter.

Such contacts by Members of Congress with the Secretary, the Deputy Secretary, the Assistant Secretary, and the Service Director are quite common. I regard such contacts as "political contacts" since they involve a Member of Congress and appointees of the President. Such contacts generally are not improper. Members of Congress have a legitimate role in seeing that the Executive Branch is doing its job in a general sense and more specifically in not disadvantaging the Member's constituents.[4]

What would make this type of contact improper? In this case, the Member essentially asked that we review the science and the application of the science in the particular case. If the Member had asked us to change the Service's *science* based solely on political considerations, that would be improper. If we in fact ordered the Service to change its science solely on political considerations, that would be improper. Neither occurred in this case.

*Political Interference—the Executive Branch*

An issue that receives much attention in the press is the alleged political interference by Executive Branch political appointees. The story usually alleges that an appointee "with no scientific training" edited a scientific document or changed a scientific conclusion produced by the career staff. These stories are usually wrong on several counts.

First, the appointees in the Executive Branch have the right and the duty to oversee the work of the career staff. This means more than simply rubber-stamping the work product of the career staff.[5] Since the decisions under the ESA have regulatory effect, these

3 I believe he sold automobiles before being elected to public office.

4 Curiously, this particular Member, endorsed by the Sierra Club, and with a 100% rating from the League of Conservation Voters, believed that what he was doing might be improper. As we left his office, he said "You know, if I heard of any other Member having this conversation, I'd be all over them. But, hey, it's my district, you understand?"

5 Within days of becoming Assistant Secretary, I held a staff meeting of both appointees and career staff. I told them, among other things, paraphrasing a well-known Washington lawyer, "I'm the Assistant Secretary here. I'm not a potted

decisions must be supported by substantial evidence. It is important that before any document is given effect by the signature of the Secretary, the Assistant Secretary or the Director, that it be reviewed at all levels to ensure that its conclusions are supported by the evidence. If a conclusion is not supported by the evidence presented, that conclusion cannot and should not be stated. It is completely appropriate for appointees to review documents in this manner. One need not be a biologist to conduct that sort of review. In fact, judges do this all of the time in a variety of fields. This does not constitute political interference.

Furthermore, "many ESA decisions involve questions of biological science for which the available scientific database is either sparse or inconclusive." J.B. Ruhl, *The Battle Over ESA Methodology,* Envt L. (Mar 2004). In such cases, it is not improper for an appointee to challenge the gap-filling by agency scientists. The struggle in this respect between scientists and agency policymakers is nothing improper or nefarious, but rather expected, as Professor Ruhl explains.

In fact, the Constitution of the United States demands protection of private property from arbitrary, capricious, and otherwise unlawful actions by agents of the government. The Executive Branch's officials have an oath-taken duty to ensure that private property and other liberties are preserved.

Second, it is alleged that appointees impose the policy views of the administration. This by itself is not improper.

> [A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices--resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

*Chevron USA Inc. v. Natural Resources Defense Council*, 467 US 837, 865-66 (1984), *per* Stevens, J.

Furthermore, it is not improper for an appointee to inquire whether there exists science which supports the Administration's view of a particular problem or issue. Where competing scientific views exist, it is not improper for an appointee who oversees an agency to select or direct that science be used which more nearly aligns with the

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plant." I didn't expect any member of the staff to be a "potted plant" either.

administration's policy views.

Finally, it is not improper for an appointee to state the Administration's policy view and direct that science which supports that view be found.

It would be improper, having been told that no science exists to support the Administration's policy view, for an appointee to nonetheless implement that view when that statute requires "the best available science" as the basis for the decision.

*Science, Law and Policy*

What about science? What of the complaints of scientists that their work is edited or disregarded? There are several answers to this. First, there has been no scientifically valid study of this issue. The studies that have been done rely on recycled anecdotal data. But assuming that there are valid complaints in this area, the following should be noted.

First, no organization in the world takes as its final position a "first draft" produced at its lowest level. There's a reason that there are levels of review—recall, no potted plants. This may difficult for some to accept.

Second, what passes for science in the ESA context frequently consists of little more than literature search, especially with respect to listing of species. That's because the Fish and Wildlife Service has virtually no research capacity and few Ph.d. scientists in the field. As a result, many "scientific" documents rely on the interpretation and policy leanings of their authors. In that event, policymakers are entitled to use *their* judgment about how the document will be presented.

Third, as Professor Ruhl has noted, ESA decision contexts present a poor fit between science and policy. Ruhl says that the law often requires scientists to answer questions that don't make sense to them. When scientists and policymakers don't understand each other, then chaos and strife will reign in their relationships.

The ESA exists at the confluence of science, law, and policy. It is not a purely scientific decision scheme. Nonetheless, its decision contexts must be science-informed. They also may be policy-informed and this must not be mistaken for improper or unlawful political influence.

4. <u>In the present Administration, political apathy rules.</u> As I have previously explained, there is an obligation for the Executive Branch to supervise the work of its employees. And as I have explained, this can be done within the law. In the present Administration, political apathy, rather than political interference, reigns. This attitude is just as bad as

and perhaps worse than alleged political interference. Leaving the policy decisions to the foot-soldiers with no direction can only lead to catastrophe. That's what has happened in one of the most important and sensitive issues of the day--the San Francisco Bay Estuary. No effective policy oversight led the federal judge to castigate the two government scientists. And time and time again, the accountable officials in Washington have sought to duck their responsibilities, even when taken to task by Members of Congress.

5. The ESA Contains a Structural Flaw Which Exacerbates Hostility Toward Science. The ESA imposes it regulatory scheme immediately upon the listing of a species or the designation of critical habitat. That's why all the major fights are about the science and why scientist-advocates are so strident in their views even if their science is poor. The statute, in an effort to minimize strife over science, has in fact significantly heightened it. The view that neutrally applied science is an effective method to solve political issues is a relic of the nineteenth century which was thoroughly discredited in the twentieth century.

We need to return to the notion that science can tell us what is, while policy determines what ought to be done. To do that, the listing decisions should be de-coupled from the automatic, discretion-less application of regulation. That would require Congressional action. Additionally, the quality of science would be vastly improved and court litigation sharply reduced if the Secretary was required to make listing determinations by formal-rulemaking under the Administrative Procedure Act.

Thank you for inviting me on this important topic. I am available for any questions the committee may have.