

Public Disclosure of Site-Specific Species Information Required Under Recent Court Decision

The National Association of Home Builders, a long-time NESARC member and champion of Endangered Species Act (ESA) improvements, recently achieved a hard fought legal victory for enhanced public participation and increased transparency in agency decision-making in ESA actions. On November 5, 2002, the D.C. Circuit held that the Freedom of Information Act does not shield site-specific information about the location of an endangered species. This case, National Association of Home Builders v. Norton, D.C. Cir. No. 01-5283, creates the important legal precedent whereby Federal agencies will be compelled to make public disclosures of site-specific location information for species listed under the ESA. The U.S. Fish and Wildlife Service historically has refused to make public disclosure of such information, arguing that such disclosure would lead to intentional human disturbances of threatened and endangered species and their habitat.

Case Background and Ruling

In 1997, the Secretary of the Interior (Secretary) designated the pygmy owl as an endangered species under the Endangered Species Act (ESA) and designated critical habitat for the species in Arizona. The National Association of Home Builders (NAHB) filed a Freedom of Information Act (FOIA) request, seeking “previously documented, site-specific locations, with appropriate addresses, identified landmarks, parcel or subdivision maps, polygons, or other points of reference sufficient to allow an average person to locate the property where members of the species are known or believed to exist,” which the Secretary used in designating critical habitat for the owl.

The Secretary, through the U.S. Fish and Wildlife Service (FWS), responded to the FOIA request by producing documents related to the location of pygmy owls, but concealing the site specific information related to where the pygmy owls and their nests were located. NAHB filed suit to compel disclosure. The Secretary defended the withholding of information, primarily relying upon FOIA Exemption 6, which provides that disclosure does not apply to “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

In support of Exemption 6, the Secretary relied on an affidavit by former FWS Director Jamie Clarke who attested to a previous incident in Arizona where bird enthusiasts traveled to pygmy owl habitat and adversely affected both the pygmy owls and the private property owners. NAHB argued that there is a public interest in examining “FWS’ use of the owl data in the 1999 critical habitat designation and on a day-to-day basis . . . in a broad array of other contexts.”

The district court agreed with the Secretary that the information requested by NAHB fell within Exemption 6 of FOIA. On appeal, the D.C. Circuit, *inter alia*, held that Exemption 6 did not apply and that the requested disclosure should be made. (The D.C. Circuit did not, however, order the disclosure of individual property owners' names, which NAHB no longer requested.)

The D.C. Circuit stated that the threshold inquiry under Exemption 6 is whether the requested information is contained in a personnel, medical, or similar file. If so, then the court must determine whether disclosure of the information would constitute a clearly unwarranted privacy invasion. The second inquiry requires the court to balance the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny. The D.C. Circuit stated that "unless a FOIA request advances the citizens' right to be informed about what their government is up to, no relevant public interest is at issue."

In balancing the interests, the D.C. Circuit found that the Secretary's evidentiary support concerning privacy interests was weak, and that because disclosure of site-specific information could contribute to public understanding of the operations or activities of the government, it constitutes a cognizable public interest under FOIA.