Case No. 11-11915-A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CONSERVANCY OF SOUTHWEST FLORIDA; SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY; PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY; and COUNCIL OF CIVIL ASSOCIATIONS, INC.,

Plaintiffs-Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE, in his official capacity as Director of the U.S. Fish and Wildlife Service; UNITED STATES DEPARTMENT OF INTERIOR; and KENNETH SALAZAR, in his official capacity as Secretary of the Department of Interior,

Federal Defendants-Appellees,

and

EASTERN COLLIER PROPERTY OWNERS; and SEMINOLE TRIBE OF FLORIDA,

Defendant Intervenors-Appellees.

On Appeal From The U.S. District Court For The Middle District Of Florida
No. 10-CV-00106-JES-SPC (Hon. John E. Steele)

AMICUS BRIEF OF CONSERVATION LAW CENTER IN SUPPORT OF APPELLANT SIERRA CLUB AND PETITION FOR REHEARING EN BANC

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CONSERVANCY OF SOUTHWEST FLORIDA, et al. v. UNITED STATES FISH AND WILDLIFE SERVICE, et al.

Case No. 11-11915-A

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus curiae Conservation Law Center, pursuant to 11th Cir. R. 26.1-1, 26.1-2(c) and 26.1-3, file this certificate of interested persons and corporate disclosure statement.

Amicus curiae states that it is a nonprofit corporation that has no parent corporation or publicly held stock and give notice that the following persons and entities have an interest in the outcome of this review:

1. Albrecht, Virginia S., Attorney for Eastern Collier Property Owners (ECPO)
2. Albritton, A. Brian, Attorney for Federal Defendants
3. Alico Land Development, Inc.
4. Baker, Keri-Ann C., Attorney for the Seminole Tribe of Florida
5. Barron Collier Companies
6. Barsky, Seth M., Attorney for Federal Defendants
7. Baumann, Andrew J., Attorney for the Seminole Tribe of Florida
8. Center for Biological Diversity, Plaintiff-Appellant
9. Chandler-Clements, E. Carter, Attorney for ECPO
10. Chappell, Sheri Polster, United States Magistrate Judge

CONSERVANCY OF SOUTHWEST FLORIDA, et al. v. UNITED STATES FISH AND WILDLIFE SERVICE, et al.

Case No. 11-11915-A

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)

11. Charles, James E., Attorney for the Seminole Tribe of Florida

12. Cohen, Kyle S., Attorney for Federal Defendants

13. Collier Enterprises Management, Inc.

14. Conservancy of Southwest Florida, Plaintiff-Appellant

15. Consolidated Citrus, LP

16. Council of Civic Associations, Inc., Plaintiff-Appellant

17. Department of the Interior-Office of the Regional Solicitor

18. Davis, Gary A., Attorney for Plaintiffs-Appellants

19. Durkee, Ellen Attorney for Federal Defendants

20. Eastern Collier Property Owners, Defendant-Appellee

21. English Brothers

22. Floom, Kristen Byrnes, Attorney for Federal Defendants

23. Flowers, Wayne E., Attorney for the Seminole Tribe of Florida

24. Gary A. Davis & Associates

25. Half Circle L Ranch LLP

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)

26. Hansen-Young, Thekla, Attorney for Federal Defendants

27. Huber, Eric E., Sierra Club Attorney, Attorney for Plaintiffs-Appellants

28. Hunton & Williams LLP

29. Kenneth Salazar, Defendant-Appellee

30. LaHart, Marcy I., Attorney for Plaintiffs-Appellants

31. Lewis, Longman & Walker, P.A.

32. Lima, Paulo R., Attorney for ECPO

33. Mergen, Andrew, Attorney for Federal Defendants

34. Moreno, Ignacia S., Attorney for Federal Defendants

35. Pacific Tomato Growers, Ltd.

36. Public Employees for Environmental Responsibility, Plaintiff-Appellant

37. Rowan Gould, Defendant-Appellee

38. Segall, Craig, Attorney for Plaintiffs-Appellants

39. Seminole Tribe of Florida, Defendant-Appellee

40. Sierra Club, Plaintiff-Appellant

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)

41. Steele, John E., United States District Court Judge

42. Steinmeyer, Edwin A., Attorney for the Seminole Tribe of Florida

43. Stevens, Michael, Of Counsel for Federal Defendants

44. Sunniland Family Limited Partnership

45. Turner, Andrew J., Attorney for ECPO

46. United States Department of Interior, Defendant-Appellee

47. United States Department of Justice-Environment and Natural Resources Division

48. United States Fish and Wildlife Service, Defendant-Appellee

Respectfully submitted this 8th day of June, 2012,

_____

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W. William Weeks
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CONSERVANCY OF SOUTHWEST FLORIDA, et al. v. UNITED STATES FISH AND WILDLIFE SERVICE, et al.
Case No. 11-11915-A

STATEMENT OF COUNSEL

We express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Are agency explanations of their denials of rulemaking petitions, as required by 5 U.S.C. § 555(e), unreviewable under the Administrative Procedure Act unless the substantive statute or regulations governing the requested rule explicitly provides additional review standards?

2. Does the Endangered Species Act sections 2(c) (16 U.S.C. § 1531(c)) and 7(a)(1) (16 U.S.C. § 1536(a)(1)) provide substantive standards for judicial review under 5 U.S.C. § 706 of the U.S. Fish & Wildlife Service's decision to deny Plaintiffs' petitions to designate critical habitat for the Florida panther?

_____

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Attorneys of Record for Amicus Curiae

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae Conservation Law Center ("CLC") is a non-profit organization that works on behalf of conservation organizations to improve conservation law and policy. CLC has a fundamental interest in the issues of administrative and conservation law involved in this case. The outcome of this case may critically affect the ability of CLC's clients to obtain judicial review of agency actions, including actions under the Endangered Species Act. This amicus brief is filed pursuant to the Federal Rules of Appellate Procedure 29 and 35 and Eleventh Circuit Rules 35-5 and 35-6.

STATEMENT OF AUTHORSHIP AND FINANCIAL INTEREST

Conservation Law Center attorneys are the sole authors of this amicus brief. No party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person, other than the Conservation Law Center, contributed money intended to fund preparation or submission of this brief.

STATEMENT OF THE ISSUES MERITING EN BANC CONSIDERATION

En banc review is warranted because the Panel's decision involves a question of exceptional importance with regard to the application of Administrative Procedure Act ("APA") § 701(a)(2) and § 706(2) to agency denials

of rulemaking petitions. APA § 555(e) requires that an agency explain its denial of a petition. The Panel improperly concluded that the response of an agency to a rulemaking petition – including the APA § 555(e) explanation – is *entirely* unreviewable if the law underlying the proposed rule contains no substantive standard against which to test the response. The Supreme Court's decision in *Heckler v. Cheney*, 470 U.S. 821 (1985), does not require such a conclusion, and *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007), counsels the opposite. Moreover, this Circuit reviewed the sufficiency of an APA § 555(e) explanation in *Washington v. Office of the Comptroller of the Currency*, 856 F.2d 1507 (11th Cir. 1988). *Heckler v. Cheney* should not be extended to govern review of an agency's APA § 555(e) explanation of its denial of a rulemaking petition. If the Panel opinion stands, an important and potentially expanding subset of agency actions will improperly escape judicial review in the Eleventh Circuit.

Moreover, the Panel opinion involves a question of exceptional importance with regard to whether Endangered Species Act ("ESA" or "Act") § 7(a)(1) (16 U.S.C. § 1536(a)(1)) and § 2(c) (16 U.S.C. § 1531(c)) provide substantive standards for review of agency responses to petitions for critical habitat designation for species listed before 1978. The Panel erred in concluding that the ESA does not contain such a substantive standard. If the Panel opinion stands, an

important subset of agency decisions under the ESA will improperly be immune from judicial review in the Eleventh Circuit.

ARGUMENT

Plaintiff environmental groups petitioned the U.S. Fish & Wildlife Service ("Service"), pursuant to 5 U.S.C. § 553(e) and 50 C.F.R. § 424.14(d), to initiate rulemaking to designate critical habitat for the endangered Florida panther. The agency denied the petitions. The Eleventh Circuit Panel that decided the case on appeal concluded that the denial of Plaintiffs' petitions is unreviewable under the APA because it is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *see Conservancy of Southwest Florida v. USFWS*, __F.3d__, 2012 WL 1319857, *1 (11th Cir. April 18, 2012). The Panel's conclusion is in error for two reasons argued below. First, even if the *substantive* decision not to designate critical habitat were unreviewable, the Panel erred in concluding that the agency's decision was unreviewable *in its entirety* – that is, both substantively and procedurally. Second, the Panel erred in concluding that the ESA does not contain a substantive standard by which to guide judicial review of the agency's response to Plaintiffs' petitions.

I. EVEN IF THE ENDANGERED SPECIES ACT IS DEEMED TO CONTAIN NO STANDARD FOR JUDICIAL REVIEW OF THE SERVICE'S SUBSTANTIVE DECISION NOT TO DESIGNATE CRITICAL HABITAT FOR THE PANTHER, THE AGENCY'S EXPLANATION FOR DENYING THE RULEMAKING PETITIONS IS STILL REVIEWABLE FOR COMPLIANCE WITH APA § 555(E).

Irrespective of the standard for judging the decision not to designate critical habitat for the Florida panther, the Panel erred in concluding that the agency's denial of Plaintiffs' rulemaking petitions is unreviewable *in its entirety*. *See Conservancy*, 2012 WL 1319857 at **1, 4, 10. The APA § 701(a)(2) limitation does not apply to the APA § 555(e) procedural requirement that the agency publically explain its denial of Plaintiffs' petitions. APA § 555(e) limits the agency's discretion over whether and how to explanation the agency's decision. Under the established concept of partial unreviewability, the agency's explanation of its decision is still reviewable to determine whether the agency complied with the procedures required by law, regardless of the reviewability of the substantive part of the agency's denial.

Our arguments target petitions for rulemaking specifically, the type of petition at issue here. Agency decisions regarding rulemaking petitions are special cases compared to other agency decisions that may also be subject to APA § 555(e) requirements. *See Massachusetts v. EPA*, 549 U.S. at 527; Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 766 (April 1990). The need for judicial oversight of the rulemaking process is

more pressing than the need for oversight of agency adjudications of individual complaints. When an agency refuses to commence a rulemaking proceeding the stakes for the public are relatively high. Moreover, the agency's rationale for refusing to make a rule is generally more likely to expound legal theories than is the rationale for failing to bring, say, an enforcement action. Judicial review of the Service's subsection 555(e) explanation for denying Plaintiffs' rulemaking petitions should be viewed as a uniquely important judicial function.

A. An Agency's Decision Can Be Partially Reviewable For Procedural Infirmity Yet At The Same Time Be Partially Unreviewable For Substantive Challenges.

The APA provisions subjecting agency action to judicial review under APA § 706 are inapplicable "*to the extent that* . . . agency action is committed to agency discretion by law." APA § 701(a)(2) (emphasis added). Professor Levin, in *Understanding Unreviewability in Administrative Law*, examined the concept of partial unreviewability. Levin points out that the "to the extent that" language in APA § 701(a) establishes that an agency action can be partially rather than entirely unreviewable, and he notes that this point, although sometimes overlooked, is a crucial one. 74 Minn. L. Rev. at 701–02. An agency decision is partially unreviewable if only some of its premises or issues are not properly subject to judicial examination. *Id.* at 694, 746–50. Professor Charles Koch explained the

conceptual basis of partial unreviewability as follows:

> In discussing the scope of unreviewability, it is necessary to emphasize the point made throughout this treatise that each administrative decision may involve the resolution of a bundle of issues. . . . [U]sually only some of the controverted issues are unreviewable and a court must review other controverted issues in the bundle.

Charles H. Koch, Jr., 4 Administrative Law and Practice § 12:14 (West, 3d ed., Feb. 2012). One example Koch provides is the propriety of review of procedural issues in cases in which the substantive decision is unreviewable. *Id*.

In this case, the Service's decision to deny Plaintiffs' petitions comprises two bundled issues: the substantive issue of the agency's evaluation of critical habitat designation and the procedural issue of the agency's APA § 555(e) explanation of its decision. Because the procedural issue can be reviewed separately from the substantive issue, the reviewability or lack thereof of the substantive issue does not affect the reviewability of the procedural issue: the latter is reviewable.

B. Judicial Review For Compliance With The APA § 555(e) Requirement Is Both Desirable And Feasible.

Judicial review of the agency's denial of a rulemaking petition for compliance with APA § 555(e) is desirable even in circumstances where the substantive decision is deemed unreviewable under APA § 701(a)(2). If the agency's subsection 555(e) explanation were held to no standard at all in those

circumstances, as the Panel's opinion allows, the agency could, without repercussion, decide to issue no explanation or to issue an explanation that is a bare conclusion or that sets forth irrational or biased reasons.

More generally, the APA embodies the notion that the administrative decisionmaking process should be subject to a broad appraisal of its reliability; this notion is codified at APA § 555(e). *Roelofs v. Secretary of the Air Force*, 628 F.2d 594, 599–600 (D.C. Cir. 1980). Such an appraisal entails the "fundamental requirement" that an agency explain its reasons for a decision, which is "essential to the integrity of the administrative process" by focusing the agency on the values served by the decision and thus "releasing the clutch of unconscious preference and irrelevant prejudice." *Id*. These concerns apply irrespective of whether the substantive issue is deemed committed to agency discretion by law.

A limited review of agency compliance with APA § 555(e) is feasible. The district court's decision in this case demonstrates that *some* review of an agency's explanation is feasible even where the agency's substantive decision is deemed unreviewable. The district court, after concluding that the Service's substantive decision is unreviewable, nonetheless proceeded to review whether the agency's letters of denial complied with 43 C.F.R. § 14.3. *Conservancy of Southwest Florida v. USFWS*, 2011 WL 1326805, **10–11 (M.D. Fla. April 6, 2011) (43 C.F.R. § 14.3 provides that petitions for rulemaking to the Department of Interior

"will be given prompt consideration and the petitioner will be notified promptly of action taken").

The district court's review of the Service's denial letters did not go far enough, however. The district court failed to review the denial letters for compliance with APA § 555(e), which involves an inquiry into whether the agency's explanation is sufficient, reasoned, and rational. For example, in *Washington v. Office of the Comptroller*, the Eleventh Circuit reviewed the sufficiency of an agency's APA § 555(e) explanation and found it lacking:

> There remains the further question, however, of whether OCC fully complied with the requirements of the Administrative Procedure Act, 5 U.S.C. § 555(e). . . . In effect, the OCC response to the request for a hearing was simply that "no hearing is needed." The statement that "the substantial expense and inconvenience ... is not warranted," obviously added nothing to the statement. This was not "a brief statement of the grounds for denial" as required under Section 555(e).

856 F.2d at 1512–13. Congress's mandate for "a brief statement of the grounds for denial" in APA § 555(e) rules out conclusory, unreasoned, or irrational explanations – the agency's explanation must be meaningful or else it is useless.

A fuller example of the feasible scope of review for compliance with APA § 555(e) is provided by *Int'l Union v. Chao*, 361 F.3d 249 (3d Cir. 2004). The *Chao* Court reviewed OSHA's letter denying the union's petition for rulemaking, which had requested that OSHA regulate metalworking fluids. *Id*. at 252, 255. The Court concluded that the agency's decision to direct resources to higher priority actions

was "reasoned." *Id*. at 256. Importantly, the Court arrived at this determination by considering only the petition for rulemaking and the agency's denial letter, without reference to the substantive statute. *See also Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919–21 (D.C. Cir. 2008) (reviewing NOAA's denial of an emergency rulemaking petition, and without reference to any standards in the applicable substantive laws, concluding that the agency's explanation reflected "reasoned decisionmaking" and that the facts in the denial letters supported this explanation). These cases show that review of an agency's subsection 555(e) explanation for sufficiency and reasoned decisionmaking is entirely feasible and does not depend on the presence of standards in the substantive statutes.

In the instant case, even if the Service possesses unfettered discretion over whether or not to designate critical habitat for the Florida panther, the agency does not have unfettered discretion over the form and substance of the APA § 555(e) explanation of its decision. The proper scope of review is whether the agency's explanation is sufficient, reasoned, and rational, and thus in accordance with APA § 555(e). Plaintiffs' complaint alleged, among other things, that the Service "failed to provide a rational explanation for its decision" to deny the rulemaking petitions. *Conservancy*, 2012 WL 1319857 at *3. That allegation challenges the sufficiency and rationality of the agency's subsection 555(e) explanation. The Court can, without reference to a standard based in the substantive statute or regulations,

determine whether the agency has offered an explanation that runs counter to the facts in the rulemaking petition and denial letters, that fails to articulate a sufficient explanation for the decision, or that is internally inconsistent or irrational. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Panel's opinion should have allowed, but does not allow, for proper review of the Service's APA § 555(e) explanation. The Court is well equipped to supervise that aspect of the agency's decision.

II. THE ENDANGERED SPECIES ACT PROVIDES A STANDARD TO APPLY IN REVIEWING THE SERVICE'S REFUSAL TO CONSIDER PROMULGATING CRITICAL HABITAT RULES.

In addition to the Service's duty under APA § 555(e) to provide "a brief statement of the grounds for denial," the Service also has substantive duties under ESA §§ 7(a)(1) and 2(c). These duties provide a substantive standard for review of the Service's evaluation of whether to designate critical habitat for the Florida panther in response to Plaintiffs' petitions. Moreover, these duties require more of the Service in this matter than the agency provided in its denial letters: the denial letters must provide an explanation sufficiently detailed to allow judicial review using the substantive standards in ESA §§ 7(a)(1) and 2(c). Because the Service did not demonstrate that it conducted the evaluation required by §§ 7(a)(1) and

2(c), the record in this case is insufficient to assess the credibility of the Service's statement that it carefully considered Plaintiffs' petitions.

ESA § 7(a)(1) sets forth requirements for the Department of Interior as well as for other federal agencies. With regard to all federal agencies *other than* Interior, § 7(a)(1) requires that their authorities be used "in furtherance of the purposes of the Act *by* carrying out programs for the conservation of listed species." (Emphasis added.) Congress recognized that conservation was not the principal mandate of other agencies (and prior versions of the ESA had included specific language to that effect). Thus, in the ESA of 1973, Congress limited the affirmative responsibilities of all agencies other than Interior. Even so, the Eleventh Circuit has determined that the conservation programs mandated by ESA § 7 must be real and substantial, and "to hold otherwise would turn the modest command of section 7(a)(1) into no command at all[.]" *Florida Key Deer v Paulison*, 522 F.3d 1133, 1147 (11th Cir. 2008).

Interior, however, is treated differently in ESA § 7(a)(1) (a difference improperly ignored in the regulations, *see* 50 C.F.R. § 402.01). The "modest command" issued to other federal agencies is a prime directive for Interior. There is no qualifier or limitation with regard to Interior's responsibility to use its programs in furtherance of the ESA's purposes. Congress meant to and did make the conservation of listed species the first priority with respect to the

administration of every Interior program. "Congress intended endangered species to be afforded the highest of priorities." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978). Congress in § 7(a)(1) directed that the Secretary "shall" see that all other programs are utilized "in furtherance of the purposes of" the ESA.

The purposes of the ESA are "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species[.]" 16 U.S.C. § 1531(b). Thus, Interior's programs are to be managed to conserve critical habitat – the ecosystems upon which listed species depend – and for the purpose of conserving listed species. The ESA defines conservation as bringing species "to the point at which the measures provided pursuant to this Act are no longer necessary." 16 U.S.C. 1532(3). This is an active and not a passive duty: "Under the Endangered Species Act of 1973, the agency has an affirmative duty to increase the population of protected species." *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167, 170 (D.D.C. 1977).

In considering Plaintiff's complaint in this matter, the district court made short work of the claim for relief based on the § 2 and § 7(a)(1) standards. The court cited this Circuit's reading of a Housing and Urban Development statute in *National Wildlife Federation v Marsh*, 721 F.2d 767 (11th Cir. 1983), for the proposition that statutory preambles create no duties. *See Conservancy*, 2011 WL

1326805 at *6. This reliance on *Marsh* is inappropriate. First, ESA § 7(a)(1) is not a preamble; it is among the core provisions of the Act. By its terms, it incorporates the purposes language of ESA § 2(b) into the main body of the statute. Second, the Eleventh Circuit has specifically acknowledged (in *Florida Key Deer*) that ESA § 7(a)(1) does create specific duties, even for agencies not principally charged with conserving endangered species.

Furthermore, other federal courts have held that both ESA §§ 2(c) and 7(a)(1) together create affirmative conservation duties, and that these duties apply to the Service as well as to other federal agencies. In *Defenders of Wildlife v. U.S. Dep't of Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005), the Service argued that § 7(a)(1) did not apply to its administration of the ESA, because the reference to "other programs" and "other federal agencies" in that section excluded the Service. In rejecting this argument, the court held that such a reading of § 7(a)(1) would be inconsistent with the conservation duties imposed on all federal agencies in ESA § 2(c)(1). Instead, the court insisted that the duties of § 7(a)(1) and § 2(c)(1) "be read consistently and without conflict." *Defenders of Wildlife*, 354 F. Supp. 2d at 1173.

Defenders of Wildlife clearly indicates that the Service's administration of ESA programs, including the program for establishing critical habitat, is subject to the mandate of § 7(a)(1). Also, an unavoidable conclusion from *Defenders* is that ESA § 2(c) is not merely a preamble, but rather is a substantive provision of the

ESA creating an affirmative conservation duty applicable to the Service whether the Service's ESA programs are "other programs" or not.[1] *See also Mausolf v. Babbitt*, 125 F.3d 661 (8th Cir. 1997) (citing ESA § 2(c) for the proposition that "[t]he ESA represents a *congressional directive* that all federal agencies . . . shall utilize their authorities" in service of the purposes of the Act (emphasis added)).

The complaint in this matter is not only that that the Service refused to promulgate regulations establishing critical habitat, but that the Service provided no evidence that it affirmatively considered the facts presented in the petitions for rulemaking. This latter failing is fundamental. ESA §§ 7(a)(1) and 2(c) provide a clear statutory standard against which to consider the APA § 706(2)(A) requirement that agency action be consistent with law and not arbitrary or capricious. The ESA creates in Interior the authority to protect critical habitat of species listed prior to 1978, and thus the authority to consider petitions for designation of critical habitat. When presented with a petition that purports to demonstrate that critical habitat exists and needs to be designated, the agency must

[1] Even if this Court rejects *Defenders of Wildlife's* treatment of the "other programs" language in ESA § 7(a)(1), programs for designating critical habitat are subject to the mandate that they be used to further the Act's purposes because when § 7(a)(1) was written there were no formal responsibilities under the Act to designate critical habitat. Thus, they are "other" Interior programs referred to in § 7(a)(1), and as such, specifically subject to review for administration in accordance with the purposes of the Act.

actively review the facts developed therein. And given a proper record, the Court can review the actions the Service has taken and information gathering the agency has done to see whether, under the standards established in §§ 7(a)(1) and 2(c), the agency's response to the petition demonstrates, first, that Interior's programs have been utilized to conserve the ecosystems upon which the Florida panther depends, and second, whether the Secretary has utilized all Interior programs so as to bring about the recovery of the panther. *Cf. Center for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115 (N.D. Cal. 2006), a § 7(a)(2) case relevant to the matters at issue here. The record in this matter improperly fails to support such a review, and thus fails to meet the requirements of law. The dismissal of the complaint was therefore an error.

The Panel's opinion would create two classes of listed species under the ESA, with the earliest listed species a less-protected class. Reviewability is a fundamental and necessary balance to the enormous pressure under which the Service and all federal agencies operate, and here Congress has given no indication that it intended to create the exceptional case in which review is unavailable.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing AMICUS BRIEF OF CONSERVATION LAW CENTER IN SUPPORT OF APPELLANT SIERRA CLUB AND PETITION FOR REHEARING EN BANC was served by United States First Class mail, postage prepaid, on this 8th day of June, 2012 to the following:

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The foregoing amicus brief was mailed to the Clerk of the Court of Appeals for the Eleventh Circuit via U.S. Postal Service, Certified Mail Return Receipt Requested, on June 08, 2012.

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