

November 8, 2010

Sent Via Certified Mail Return Receipt Requested

Kathy George, Chair
Yamhill County Commission
535 NE Fifth Street
McMinnville, OR 97128

Mary Stern, Vice Chair
Yamhill County Commission
535 NE Fifth Street
McMinnville, OR 97128

Leslie Lewis, Commissioner
Yamhill County Commission
535 NE Fifth Street
McMinnville, OR 97128

RE: Notice of violations of the Endangered Species Act

Dear Commissioners George, Stern and Lewis,

On behalf of the Xerces Society, Yamhill Watershed Stewardship Fund, Center for Biological Diversity, Laura McMasters, Bill Fender, and Dorothy McKey-Fender (“coalition”), I hereby provide notice, pursuant to section 11(g) of the Endangered Species Act (ESA or Act), 16 U.S.C. § 1540(g), that Yamhill County is violating the ESA by “taking” a federally listed species under section 9 of the Act.

In particular, as discussed below, the County’s road, roadside, and park maintenance activities are violating federal law. These activities crush, harm, and otherwise “take” Fender’s blue butterflies and the plants upon which the butterflies rely: Kincaid’s lupine as a primary larval host plant and the Willamette daisy as one of the plants that the adults use for nectar.

The County decided to refuse a grant from the FWS in the amount of \$391,000 for preparation of an Habitat Conservation Plan (HCP). With an HCP, the County could have developed measures to avoid and mitigate further take of the butterfly and obtained an incidental take permit for its road, roadside, and park maintenance activities. In the absence of such a permit and the concurrent conservation efforts under an HCP, the County’s activities are unlawful. Unless the County agrees to take corrective action in the next sixty days, the coalition intends to file suit to enforce the ESA.

A. ESA Statutory Background.

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA v. Hill*, 437 U.S. 180 (1978). Its fundamental purposes are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species” 16 U.S.C. § 1531(b).

To achieve these objectives, the ESA directs the FWS to determine which species of plants and animals are “threatened” and “endangered” and place them on the endangered species list. 16 U.S.C. § 1533. An “endangered” species is one “in danger of extinction throughout all or a significant portion of its range,” and a “threatened” species is “likely to become endangered in the near future throughout all or a significant portion of its range.” *Id.* § 1532(6) & (20). Concurrent with listing a species, the FWS must designate critical habitat for the imperiled species. *Id.* § 1533(a)(3). Critical habitat is those areas “essential to the conservation” of the listed species. *Id.* § 1532(5)(A)(i) & (ii). These essential habitat areas provide the space needed for growth and normal behavior; food, water, air, light, other nutritional or physiological requirements; cover, or shelter, and sites for breeding, reproduction, rearing of offspring, germination or seed dispersal. 50 C.F.R. § 424.12(b).

Once a species is listed, the ESA provides a variety of procedural and substantive protections to ensure not only that species’ continued survival, but its ultimate recovery. One central protection is the prohibition against the “take” of a listed species. 16 U.S.C. § 1538. The definition of “take” includes “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1533(19). It was Congress’s intent that the term “take” be defined “in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish and wildlife.” S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2995; H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973), *reprinted in* 1973 U.S.C.A.A.N. 2989 (“‘Take’ is defined broadly. It includes harassment, whether intentional or not. This would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.”).

The FWS has further defined “harm” to mean “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3. Additionally, the FWS has defined “harass” to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.*

Anyone who “takes” a species in violation of the statute is subject to substantial civil and criminal penalties. 16 U.S.C. § 1540. Citizens are empowered to enforce the ESA by filing a citizen suit in federal court to enjoin violations of the Act. *Id.* § 1540(g). Federal courts have

readily found that the death or injury of ESA listed species is a take under the ESA. *See Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (finding that state fishing licenses “took” Atlantic Right whales when the whales were injured from being entangled in fishing gear); *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989) (EPA took listed species by allowing the registration of pesticides under FIFRA with strychnine in them); *Loggerhead Turtle v. County Council of Volusia County Florida*, 896 F. Supp. 1170 (N.D. Fla. 1995) (beach driving authorized by the County during sea turtle nesting season was reasonably likely to take the turtles); *United States v. Town of Plymouth, Mass.*, 6 F. Supp.2d 81 (D. Mass. 1998) (off-road vehicles were taking plovers where “25 piping plover chicks and two adults were found dead in ORV tire ruts”).

The destruction of habitat relied upon by ESA listed species also constitutes a take. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1069 (9th Cir. 1996) (activity could be enjoined before take occurs and “a habitat modification which significantly impairs the breeding and sheltering of a protected species amounts to ‘harm’ under the ESA”); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (Forest Service’s failure to carry out all the protective measures in its handbook for the red-cockaded woodpecker was a take of the species); *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1367 (N.D. Cal. 1995) (timber harvesting during breeding season could “harass” marbled murrelets by “annoying the to such an extent that it will significantly disrupt their normal behavior patterns”); *House v. U.S. Forest Service*, 974 F. Supp. 1022, 1031-32 (E.D. Ky. 1997) (“the Court concludes that the Indiana bat’s foraging habitat may be adversely affected by the Leatherwood Fork timber sale and thus may constitute a ‘taking’ of the Indiana bat, as the timber sale may harass and/or harm the Indiana bat in violation of the ESA”). The citizen suit provision also provides for the “award” of the “costs of litigation (including reasonable attorney and expert witness fees).” 16 U.S.C. § 1540(g)(4).

Section 10 and section 7 of the ESA provide the only means for ensuring compliance with the prohibitions in section 9 of the Act. Section 10 is applicable to the activities of non-federal entities such as Yamhill County. The primary mechanism for avoiding liability under section 9 is to apply for and receive an incidental take permit (ITP). 16 U.S.C. § 1539(a)(1)(B). In exchange for permission to “take” a listed species pursuant to an ITP, the permit applicant must commit to implement a plan that “conserv[es]” – *i.e.*, facilitates the recovery of – the species. *Id.* §§ 1539(a)(1)(B), (a)(2)(A); *see also Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001) (“‘[c]onservation’ is a much broader concept than mere survival” because the “ESA’s definition of ‘conservation’ *speaks to the recovery of a threatened or endangered species*” (emphasis added)). This plan is called a Habitat Conservation Plan (HCP) and it must delineate “the impact which will likely result from such taking” and the “steps the applicant will take to minimize and mitigate such impacts” 16 U.S.C. § 1539(a)(2)(A).¹

¹ Section 7 applies to the activities of federal agencies and requires them to consult with the FWS to ensure listed species will not be jeopardized by the activity and their critical habitat will not be adversely modified. 16 U.S.C. § 1536(a)(2).

B. The ESA Listed Prairie Species That Are Endemic To The Willamette Valley And Present In Yamhill County.

Fender's blue butterfly (*Icaricia icarioides fenderi*), Kincaid's lupine (*Lupinus sulphureus* spp. *kincaidii*), and Willamette daisy (*Erigeron decumbens* var. *decumbens*) are all listed under the ESA. The butterfly and daisy are listed as endangered and Kincaid's lupine is threatened. 65 Fed. Reg. 3875 (Jan. 25, 2000). All three of these species are found in Yamhill County.

Fender's blue butterflies have a wingspan of approximately 2.5 centimeters. 65 Fed. Reg. at 3877. Males have brilliant blue upper wings with black borders and basal areas, while the females have brown upper wings. *Id.* Both males and females have cream colored under wings with "black spots surrounded with a fine white border or halo." *Id.* The butterflies are closely tied to their larval food plants (primarily Kincaid's lupine) and rarely travel more than 2 kilometers during their life cycles. Region 1 FWS, Recovery Plan for the Prairie Species of Western Oregon and Southwestern Washington at II-2 (May 2010) (hereafter Recovery Plan). Adult Fender's blue butterflies live for about 10 to 15 days (their entire life cycle is usually a year) and during this time females lay about 350 eggs on perennial lupine plants. *Id.* As the FWS explains in the Recovery Plan for the butterfly:

Newly hatched larvae feed for a short time, reaching their second instar in the early summer, at which point they enter an extended diapause. When the lupine plant senesces, diapausing larvae remain in the leaf litter at or near the base of the host plant through the fall and winter. Larvae become active again in March or April of the following year, although some larvae may be able to extend diapause for more than one season depending upon the individual and environmental conditions. Once diapause is broken, the larvae feed and grow through three to four additional instars, enter their pupal stage, and, after about two weeks, emerge as adult butterflies in May and June (Schultz et al. 2003).

Id.

Fender's blue butterfly, Kincaid's lupine, and Willamette daisy "occupy native grassland habitats within the Willamette Valley" including Yamhill County. *Id.* at 3875. The butterfly's association with "upland prairie is mostly a result of its dependence on [Kincaid's lupine], although Fender's blue butterfly often uses wet prairies for nectaring and dispersal habitat," which is where the Willamette daisy is most frequently located. Recovery Plan at II-2. The habitat necessary for the butterfly, lupine, and daisy to thrive has declined and currently only "remnant prairie habitat" remains. 65 Fed. Reg. at 3876. Agricultural development and fire suppression in the Willamette valley have "decimated" native prairie vegetation. *Id.* at 3876. Agricultural and grazing practices "hastened the decline of native prairie species" and fire suppression "allows shrub and tree species to overtake grasslands." *Id.*

Habitat loss is the primary factor threatening these three species with extinction. This includes loss of habitat due to "agriculture practices, development activities, forestry practices, grazing, roadside maintenance, and commercial Christmas tree farming." 65 Fed. Reg. at 3880. The spraying of herbicides and mowing associated with roadside maintenance threaten the butterfly and Kincaid's lupine, and have resulted in the extirpation of these species from certain roadside sites. *Id.* at 3882. Likewise, mowing and the application of herbicides to county park lands where Kincaid's lupine and the butterfly are present also cause harm. In addition, grading, leveling, and the addition of gravel to county roads can bury Kincaid's lupine and associated butterflies.

In listing Fender's blue butterfly as endangered, the FWS explained that activities that "would likely" violate section 9 include: "[r]elease of chemical or biological control agents that attack, damage, or kill any stage of this taxon;" the "removal or destruction of the food plants being utilized by Fender's blue butterfly" where the butterfly occurs; "[d]estruction or alteration of Fender's blue butterfly habitat by . . . mowing, burning, herbicide or pesticide spraying . . . that result in death or injury of adult Fender's blue butterflies and/or their larvae or eggs" *Id.* at 3889.

C. Yamhill County's Violations Of Section 9 Of The ESA.

Yamhill County is currently violating section 9 while engaging in county road, roadside, and park maintenance because "Fender's blue butterfly is known to occur in prairie habitat in Yamhill County, Oregon and specifically, within County-owned and managed lands." Letter from FWS State Supervisor, Kemper McMaster to Yamhill County Commissioner Chair, Kathy George (July 5, 2007) (Attachment A). The butterfly is taken during road, roadside, and park maintenance in several ways. First, the wheels and blades of the mower, road grader, and brush cutter can directly take butterflies by crushing and killing them or injuring them irrespective of the butterfly's life stage. 65 Fed. Reg. at 3882; Programmatic Biological Opinion at 98. Second, the mower can blow butterflies in diapause away from their host Kincaid lupine plants resulting in death of the blown individuals. *Id.* Third, treatment of sites with herbicides or other chemicals can result in take of the butterflies with long-term consequences for the site. 65 Fed. Reg. at 3882; Hammond, P.C. The 2007 Study of Fender's Blue Butterflies in Benton, Polk, and Yamhill Counties, Oregon at 6 (2005) (noting loss of lupine from herbicide application several years earlier); Hammond, P.C. The 2007 Study of Fender's Blue Butterflies in Benton, Polk, and Yamhill Counties, Oregon at 5-6 (2008) (noting continued absence of lupine at the same site). Fourth, the butterfly can be taken as a result of the loss of its host plant Kincaid's lupine including during grading and leveling activities. Fifth, the butterfly is also harmed and harassed by the loss of Willamette daisy for nectaring, since non-native nectaring plants are not as apt at providing sufficient nectar for Fender's blue butterflies. 65 Fed. Reg. at 3877-78.

Take from road and roadside maintenance is on-going where butterflies are located and where designated critical habitat exists. *See* Recovery Plan at III-3 ("Routine roadside maintenance generally involves herbicide application or mowing, which reduces or even eliminates populations"). Starting in 2001, Dr. Paul Hammond has expressed concern about roadside maintenance activities and documented the take of butterflies, including take in Yamhill

County as a result of roadside maintenance, during annual surveys of the butterflies and work to improve their habitat. This includes, but is not limited to, the sites where butterflies have been documented in Yamhill County, including the Oak Ridge and Gopher Valley areas, Recovery Plan at IV-14, and roadside areas along Hacker Road, Old Moores Valley Road, and Gopher Valley. Hammond, P.C. The 2008 Study of Fender's Blue Butterflies in Benton, Polk, and Yamhill Counties, Oregon at 6-8 (2008); *see also* Hammond, P.C. The 2007 Study of Fender's Blue Butterflies in Benton, Polk, and Yamhill Counties, Oregon at 6-7 (2007) (discussing the discovery of additional butterfly populations in the Oak Ridge area in Yamhill County). The FWS itself has recognized that "when Fender's is in diapause, some take of Fender's eggs and larvae during [mowing and other] procedures is unavoidable. Take in the form of harm, egg and larval mortality, is most likely to result from mowing and prescribed burns, as these activities affect continuous swaths of habitat" Programmatic Biological Opinion for the Oregon Restoration Programs 2004-2009 at 98. The take of Fender's blue butterflies in Yamhill County during roadside maintenance was most recently documented on March 30, 2010. Letter from FWS State Supervisor, Paul Henson to Yamhill Co. Road Director, John Phelan at 1 (April 29, 2010) (Attachment B); Photographs (Attachment C). As the photographs illustrate, the county's roadside maintenance work buried lupine plants with gravel with consequences for any larvae on the plants.

Similarly, the County's maintenance of Deer Creek park where butterflies and their host plant (Kincaid's lupine) are known to occur is also resulting in take. These maintenance activities include mowing and herbicide treatment.

Starting in 2007, the FWS reached out to Yamhill County to notify them of the ESA listings in the County, and to discuss conservation opportunities. The federal agency informed the County "of the potential liability that government entities have when implementing governmental activities such as management actions, regulation, and permitting" that impact ESA listed species. Letter from FWS State Supervisor, Kemper McMaster to Yamhill County Commissioner Chair, Kathy George (July 5, 2007) (Attachment A). Additionally, the FWS has explained that it has "several programs and agreements that can facilitate agencies' ability to carry out the management actions and permitting activities necessary for a healthy local economy." *Id.*

The FWS met with County staff on five occasions to discuss "concerns related to County road maintenance activities' effects on the Fender's blue butterfly and its host plant, the Kincaid's lupine . . ." *Id.* at 2. In April, 2010, the FWS noted that it "has identified that the road maintenance program [in Yamhill County] results in adverse impacts to listed species, particularly endangered Fender's blue butterfly . . . and its habitat." Letter from FWS State Supervisor, Paul Henson to Yamhill Co. Road Director, John Phelan at 1 (April 29, 2010) (Attachment B). The federal agency is "very concerned about the implications of these continuing impacts not only with respect to the conservation of the species in question, but also with respect to the County's vulnerability to legal action associated with unauthorized incidental take." *Id.* Unless the County is willing to commit to preparing a Habitat Conservation Plan and obtaining an Incidental Take Permit from the FWS, our clients stand ready to enforce the prohibition on take in the Endangered Species Act.

D. The Need For An HCP And ITP For Yamhill County's Activities.

One way in which the County can protect itself from ESA liability and the expense of ESA take lawsuits, is to prepare an HCP and obtain an incidental take permit. Indeed, since 2007 the FWS has informed Yamhill County's commissioners that the agency has "several program and agreements that can facilitate [the county's] ability to carry out the management actions and permitting activities necessary for a healthy local economy." Letter from FWS State Supervisor, Kemper McMaster to Yamhill County Commissioner Chair, Kathy George (July 5, 2007) (Attachment A).

The FWS has "strongly recommended to County staff and Commissioners" that they "obtain[] an incidental take permit through development of a Habitat Conservation Plan (HCP) under section 10 of the Act." Letter from FWS State Supervisor, Paul Henson to Yamhill Co. Road Director, John Phelan at 1 (April 29, 2010) (Attachment B). In 2008, Yamhill County Commissioners approved submission of a grant application to obtain a grant from the FWS to prepare the recommended HCP. Yamhill County Commissioners Meeting Minutes (Aug. 25, 2008) (Attachment D). The FWS awarded "\$391,000 to the County in response to the Commission's August 25, 2008 decision to pursue grant funds for HCP planning and development." Letter from FWS State Supervisor, Paul Henson to Yamhill Co. Road Director, John Phelan at 1 (April 29, 2010) (Attachment B). The agency even "met with local conservation organizations to try to obtain additional resources, expertise, and assistance" for developing an HCP and committed "to exercise its discretion related to compliance and enforcement actions" during the HCP process. *Id.*

Nevertheless, on May 26, 2010, the Commissioners decided not to go forward with the HCP process. Letter from FWS State Supervisor, Paul Henson to Yamhill County Commissioners at 2 (June 22, 2010) (Attachment E). In making this decision, the Commissioners said nothing about the expense associated with take liability under the ESA and the threat the County now faces at having to defend its actions in federal court. Yamhill County Commissioners Meeting Minutes (May 26, 2010) (Attachment F).

E. Conclusions

For the above reasons, the coalition hereby provides notice pursuant to section 11(g) of the Endangered Species Act, 16 U.S.C. § 1540(g), that they intend to file suit seeking to enjoin Yamhill County's take of Fender's blue butterfly and recover its associated attorneys' fees and expenses. During the next sixty days, the coalition is willing to meet to discuss how the County can comply with federal law and thereby avoid the imminent citizen enforcement action. I encourage the County to contact me at its earliest possible convenience to begin those discussions.

Yamhill County Commissioners
Fender's blue butterfly letter
November, 2010

Sincerely,

Scott Black
Executive Director
Xerces Society
On behalf of the Coalition

CC'd:

Ken Salazar, Secretary of the Interior
Paul Henson, State Director FWS Oregon Office
Mikki Collins, FWS Oregon Office
Eric Holder, U.S. Attorney General