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OF HOME BUILDERS



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June 27, 2003

**VIA HAND DELIVERY**

Correspondence Control Unit

Attention: Information Quality Complaint Processing

U.S. Fish and Wildlife Service

1849 C Street, NW, Mail Stop 3238-MIB

Washington, D.C. 20240

Re: *Complaint for Correction of Information*

Dear Sir or Madam:

The National Association of Home Builders ("NAHB") hereby submits this Complaint for Correction of Information pursuant to the "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" issued by the Office of Management and Budget (67 Fed. Reg. 8452 (February 22, 2002)) ("OMB Guidelines"), as well as the "Information Quality Guidelines" of the U.S. Department of Interior ("Interior Guidelines") and the U.S. Fish and Wildlife Service ("FWS Guidelines").<sup>1</sup> This Complaint is directed toward dissemination of information by FWS regarding the designation of critical habitat for the Cactus Ferruginous Pygmy-owl, pursuant to Section 4 of the Endangered Species Act (ESA).

NAHB submits that certain information disseminated by FWS in the "Proposed Designation" of Pygmy-owl critical habitat, published at 67 Fed. Reg. 71032 (Nov. 27, 2002) (Attachment 1), does not satisfy the requirements of the Federal Information Quality Act, 44 U.S.C. § 3516 note ("FIQA"), or the applicable Information Quality Guidelines. Accordingly, this Complaint asks FWS to correct or supplement information in the Proposed Designation, and also seeks to ensure that information disseminated by FWS in the "Final Designation"<sup>2</sup> of Pygmy-owl critical habitat meets the requirements of FIQA and the Information Quality Guidelines.

<sup>1</sup> Collectively, the OMB, Interior, and FWS Guidelines are referenced herein as the "Information Quality Guidelines."

<sup>2</sup> The Final Designation is currently due by September 29, 2003, pursuant to court order. See *NAHB v. Norton*, No. Civ. 00-0903-PHX-SRB (D. Az.) (Order of Feb 12, 2003, ¶ 2) (Attachment 2.)

## I. SUMMARY OF COMPLAINT

The Proposed Designation is replete with statements regarding the numbers, dispersal and distribution of Pygmy-owls throughout southern Arizona. Many of these statements cite, as their reference source, “unpublished data” and “personal communications” from third parties who have apparently supplied information to FWS. With regard to the Proposed Designation, the statements sourced to “unpublished data” and “personal communications” violate the FIQA and the Information Quality Guidelines for the following reasons:

- FWS’s use of and reliance upon “unpublished data” and “personal communications,” without including this information in the administrative record, violates the general policies concerning agency information practices required by the Information Quality Guidelines. *See* p. 9;
- There is nothing to indicate that FWS subjected this information to “pre-dissemination review” as required by the Guidelines. *See* pp. 9-10;
- The “unpublished information” and “personal communications” at issue are not *presented* in an “accurate, clear, complete, and unbiased” manner so as to satisfy the Information Quality Guidelines’ objectivity requirements. *See* p. 11;
- This information fails the Guidelines’ requirement for *substantive* objectivity to ensure “accurate, reliable and unbiased information.” *See* p. 11-12;
- In addition, as this information is “influential,” it fails the Guidelines’ standards for substantive objectivity, in that (1) it is “scientific” information that fails the tests for “transparency and reproducibility” (*see* pp. 12-13), and (2) it concerns an analysis of “environmental risks” and fails the principles established by the Safe Drinking Water Act (*see* pp. 13-14), which have been adopted by FWS; and
- This information does not satisfy the Guidelines’ requirement for “utility.” *See* p. 15.

NAHB requests that you respond to this Complaint within 45 days. *See* FWS Guidelines, § IV-5, p. 7.

## II. BACKGROUND ON FIQA AND THE INFORMATION QUALITY GUIDELINES

The Federal Information Quality Act (FIQA), Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554, H.R. 5658), required OMB to issue government-wide guidelines to federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by federal agencies. FIQA § 515(a).

Fed. Reg. 37,419 (July 12, 1999)). With regard to the Initial Designation, NAHB argued that FWS violated a number of important requirements imposed by the ESA and its implementing regulations. Among other things, NAHB argued that:

- FWS failed to identify the primary physical and biological features of habitat that are essential to Pygmy-owls;
- FWS failed to distinguish between land that was occupied by Pygmy-owls and land that was unoccupied at the time the Arizona population was listed;
- FWS failed to limit the areas designated as critical habitat to those that actually contain the primary physical and biological features essential to the species; and
- FWS failed to perform a legitimate analysis of the economic and other impacts of designating particular areas as critical habitat, as required by ESA § 4(b)(2).

Based on these fundamental flaws, NAHB asked the court to rescind the Initial Designation.

On September 19, 2001, Judge Susan Bolton of the U.S. District Court of Arizona ruled in NAHB's favor on the Initial Designation. She ordered that the Initial Designation "is invalid, and must be set aside." She recognized that critical habitat must be:

based on "the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C.A. § 1533(b)(2). The "terms of § 1533(b)(2) are plainly those of obligation rather than discretion." *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154 (1997).

*NAHB v. Norton*, No. CIV-00-0903-PHX-SRB, Order of Sept. 19, 2001, Slip op. at p. 4. Because FWS "failed to discharge this statutory obligation" (*id.*), Judge Bolton vacated the Initial Designation and remanded back to FWS to designate another critical habitat for the Pygmy-owl that satisfied the ESA's directives. Judge Bolton further stated that "FWS's failure to comply with the statutory requirements regarding critical habitat designation is more than a minor procedural error. Its failure to follow the mandates of the statute calls the very substance of the critical habitat designation into question." Slip op. at p. 5.

Meanwhile, NAHB pursued separate administrative and judicial avenues under the Freedom of Information Act (FOIA) to obtain data from FWS regarding the site-specific locations of Pygmy-owls in southern Arizona. Data on current locations of Pygmy-owls is essential to ensure that Judge Bolton's September 19, 2001, order culminates in a valid, defensible final designation of critical habitat for the species. As NAHB has explained to FWS, site-specific location data is needed so the public can assess FWS's decisions regarding: occupied vs. unoccupied areas; types of vegetation used by Pygmy-owls; population dynamics

FWS considered three factors in developing the Proposed Designation, namely, the (1) numbers, (2) dispersal, and (3) distribution, of Pygmy-owls throughout Arizona. See generally 67 Fed. Reg. at 71,034 (“Methods” section). In the Proposed Designation, FWS cites “unpublished data” and “personal communications” as the source to buttress its statements on numbers, dispersal, and distribution. Attachment 3 is a table of all statements in the Proposed Designation that reference either “unpublished information” or “personal communications” as their source. A summary follows:

**(1) Numbers:** The Proposed Designation places heavy emphasis on the numbers and locations of “verified Owl sites” found since 1997. See Proposed Designation, 67 Fed. Reg. at 71,032; 71,035. Uniformly, FWS uses “unpublished data” as the basis for its statements regarding “verified” sites. For example:

- “The total number of Pygmy-owls and their distribution in Arizona are unknown. Survey and monitoring work in Arizona resulted in documenting 41 adult Pygmy-owls in 1999, 34 in 2000, 36 in 2001, and, most recently, 18 in 2002. A cumulative total of 85 occupied sites (includes both single or paired birds) were recorded during these 4 years....**(AGFD unpubl. data)**” [67 Fed. Reg. at 71,032/3].
- “The number of known Pygmy-owls in the State remains relatively few, and the information base regarding the needs of this species is still small. This necessitated our reliance on limited information as we developed this critical habitat proposal....**(AGFD unpubl. data)**” [*Id.* at 71,035/1].

**(2) Dispersal:** In the Proposed Designation, FWS relies on an “inter-connectivity” concept that would link occupied Pygmy-owl sites to one another, presumably to facilitate the dispersal among members of the species. See, e.g., 67 Fed. Reg. at 71,035. Again, “unpublished data” is the source for FWS’s dispersal information. For example:

- “Generally, the proposed system of critical habitat was developed based on recent, verified owl sites...the average straight-line dispersal distance (8 km (5 mi)) from nest sites, **(AGFD unpubl. data)** [etc]....” [*Id.* at 71,035/2].
- “The average dispersal distance was used to define the area that is likely to be necessary for the maintenance of existing breeding locations through mate replacement and reoccupation of sites through dispersal....**(AGFD unpubl. data)**” [*Id.* at 71,035/2. See also *Id.* at 71,036/1 (same)].
- “Areas proposed for connectivity that fall outside the average dispersal distance are still essential for Pygmy-owls and could potentially be used for dispersal as all proposed areas of critical habitat also fall within the maximum dispersal distance 34.8 km (21.8 mi.) from recent, verified owl locations, and are considered occupied.” **(AGFD unpubl. data)** [*Id.* at 71,035/3].

- “[U]npaired female dispersers may make additional movements in the...breeding season (AGFD unpubl. data)” [*Id.* at 71,037]
- “Pygmy-owl dispersal patterns are just beginning to be documented....In Arizona, the maximum documented dispersal distance is 34.8 km (21.8 mi)....(AGFD unpubl. data)” [*Id.* at 71,037/2].

**(3) Distribution:** The Proposed Designation is based on information regarding the distribution of Pygmy-owls, both throughout the various proposed critical habitat units and in relation to residential development. The source for all of it is “unpublished data.” For example:

- “Pygmy-owls have rarely been observed using areas of high human density, such as high density (4-5 houses/AC) housing, for normal day-to-day activities within a home range, nor during dispersal (AGFD unpubl. data)” [*Id.* at 71,037/3].
- “Pygmy-owl behavior is not typically affected by low levels of human activity or activities which are predictable (...AGFD unpubl. data). Low density (< 3 houses per acre) residential areas and roads with low traffic volumes are examples of this type of activity. However, high levels of human activities, high-intensity activities or activities which cannot be predicted may affect the areas Pygmy-owls will use for nesting, foraging and dispersal (AGFD unpubl. data)” [*Id.* at 71,039/1].

The following is evident on the face of the Proposed Designation:

- (1) **Numbers:** FWS developed the Proposed Designation based on the number of occupied Pygmy-owl sites in Arizona. That number, FWS admits, is “unknown.” And to the extent Pygmy-owl sites have been verified, the source for that information is “unpublished data.”
- (2) **Dispersal:** FWS developed the Proposed Designation based on the average straight-line dispersal distance, which is itself based on the maximum dispersal distance, from verified Pygmy-owl sites. Working backwards: The source for “verified” Pygmy-owls sites is “unpublished data.” The source for maximum dispersal distance is “unpublished data.” And the source for average straight-line dispersal distance is “unpublished data.”
- (3) **Distribution:** FWS developed the Proposed Designation based on the distribution of Pygmy-owls. Its sole source for distribution information is “unpublished data.”

With respect, NAHB believes that the Proposed Designation lacks sound scientific and biologic support. That defect will continue unless FWS withdraws all references to unpublished data or personal communications in the Proposed Designation, and uses and relies only on documented, verifiable information—available for public review and analysis—in its place.

2, 67 Fed. Reg. at 8459/1. OMB explains that “[a]gencies are directed to develop information resources management procedures for reviewing and substantiating (by documentation or other means selected by the agency) the quality (including the objectivity, utility, and integrity) of information before it is disseminated.”<sup>4</sup> 67 Fed. Reg. 8453/2.

There is no indication in the Proposed Designation’s Federal Register announcement that FWS’s statements based on, or its use of and reliance upon, unpublished data and personal communications have been subject to pre-dissemination review by FWS, and whether FWS determined that the statements have met the relevant criteria. Without such pre-dissemination review, FWS has violated the Information Quality Guidelines.

**B. Information in the Proposed Designation Does Not Meet the Standard for “Objectivity” Under the Guidelines.**

Under OMB’s Guidelines, all information disseminated by federal agencies must meet the standard of objectivity. According to OMB, “objectivity” has two distinct components: *presentation* and *substance*. OMB Guidelines, § V, 3, 67 Fed. Reg. 8459/3.

NAHB believes that FWS’s statements based on, as well as its use of and reliance upon, unpublished data and personal communications, as evidenced through statements regarding Owl numbers, dispersal and distribution in the Proposed Designation, violate both the “presentation” and “substance” components of the objectivity standard.

As an initial matter, NAHB notes that OMB’s Guidelines allow a presumption of objectivity for information that has been subject to formal, independent peer review. OMB’s Guidelines state: “[I]f data and analytic results have been subjected to formal, independent peer review, the information may generally be presumed to be of acceptable objectivity. However, this presumption is rebuttable, based on a persuasive showing by the petitioner in a particular instance.” OMB Guidelines § V, 3, b, I, 67 Fed. Reg. at 8459/3. This presumption does not apply to information in the Proposed Designation, because there is nothing to indicate that FWS has subjected the suspect information to formal, independent peer review.

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<sup>4</sup> Likewise, Interior’s Guidelines state that: “[b]efore disseminating information to members of the public, the originating office...must ensure that the information is consistent with OMB, Departmental, and bureau or office guidelines and must determine that the information is of adequate quality for dissemination and maintain an administrative record of review procedures. If the information is influential, the Department [and component] will provide for more rigorous review of the conclusions...” Interior Guidelines, § II, p. 3.

FWS’s Guidelines state that “[a]ll information disseminated to the public must be approved prior to its dissemination by an authorized representative of the program and/or Regional Office and must satisfy OMB, Departmental, and FWS guidelines. *The approval process will include documentation of the specific information quality standards used in producing the information in a way that substantiates the quality, utility, objectivity, and integrity of the information...*” FWS Guidelines, § II-8, p. 4 (Emphasis added). FWS’ Guidelines also provide that “[t]o the greatest extent practicable and appropriate, information that FWS disseminates is internally reviewed for quality, including objectivity, utility, and integrity, before such information is disseminated.” FWS Guidelines, § III, p. 4.

1. “Presentation” Objectivity.

OMB’s Guidelines state that “objectivity” includes:

[W]hether disseminated information is being presented in an accurate, clear, complete, and unbiased manner. This involves whether the information is presented within the proper context... Also, the agency needs *to identify the sources of the disseminated information* (to the extent possible, consistent with confidentiality protections) and, in a scientific, financial, or statistical context, the supporting data and models *so that the public can assess for itself whether there may be some reason to question the objectivity of the sources. Where appropriate, data should have full, accurate, transparent documentation ...*” OMB Guidelines § V, 3, a, 67 Fed. Reg. at 8459/3 (Emphasis added).

Interior adopts the OMB standard and further adds: “[a]lso, the Department, [and] its bureaus... need to identify the sources of the disseminated information... so that the public can assess for itself whether there may be some reason to question the objectivity of the sources. *Where appropriate, transparent documentation ... should be identified and disclosed to users.*” Interior Guidelines, § Vii, 3 (a), p. 8 (Emphasis added).

With respect, FWS has not satisfied the “presentation objectivity” standard. First, the statements by the agency based on “unpublished data” and “personal communications” in this context mislead the public to believe that the agency is citing definitive, objective, and verifiable scientific fact. Yet, no one has had the opportunity to assess the “unpublished data” and “personal communications” upon which FWS relies here; in fact, NAHB is concerned that such information cited in the Proposed Designation may simply be documented personal observations that were not conducted with any sound practices or methodology. Second, to the extent the Information Quality Guidelines call for the identification of sources, that requirement is subverted by reference to “unpublished information” or “personal communications” which escape OMB’s goals of public review and independent verification.

In short, FWS’s use of and reliance upon the suspect information means the statements in the Proposed Designation concerning Pygmy-owl numbers, dispersal and distribution are not presented in an “accurate, clear, complete, and unbiased” manner. Accordingly, FWS has violated the “objective presentation” component of the Information Quality Guidelines.

2. “Substantive” Objectivity.

OMB’s Guidelines require that the substance of all information disseminated by a federal agency must meet a general standard of objectivity, defined as: “a focus on ensuring accurate, reliable, and unbiased information.” OMB Guidelines § V, 3, b, 67 Fed. Reg. at 8459/3. OMB explains: “[I]n a scientific... context, the original and supporting data shall be generated, and the analytic results shall be developed, using sound statistical and research methods.” *Id.* Interior adopts this language verbatim. Interior Guidelines, § VII, 3(b), p. 8. Similarly, “FWS is

will assist in determining whether analytic results are reproducible.” OMB Guidelines, § V, 3, b, ii, B, 67 Fed. Reg. at 8460/1. *See also* Interior Guidelines, §VII, 3(b) ii, p. 9 (verbatim standard).

Furthermore:

“Reproducibility” means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision. For information judged to have more...important impacts, the degree of imprecision that is tolerated is reduced...If agencies apply the reproducibility test to specific types of original or supporting data, the associated guidelines shall provide relevant definitions of reproducibility (*e.g.*, standards for replication of laboratory data). With respect to analytic results, ‘capable of being substantially reproduced’ means that independent analysis of the original or supporting data using identical methods would generate similar analytic results, subject to an acceptable degree of imprecision or error. (OMB Guidelines, § V, 10, 67 Fed. Reg. at 8460/3.)

This complaint seeks to correct information in the Proposed Designation based on “unpublished data” and “personal communications.” It is impossible for NAHB to conduct an independent analysis of that information or replicate the analysis used by FWS, simply because it is impossible to assess the scientific validity of “unpublished data” and “personal” statements communicated solely to FWS. The public has no way of knowing whether the Agency’s statements are accurate, whether they correctly reflect what the unpublished data actually says, or whether the conclusions reached by the Agency are reasonable in light of that information.

This is the precise problem OMB had in mind when it established its transparency and reproducibility standard for influential scientific information:

“[T]he primary benefit of public transparency is not necessarily that errors in analytic results will be detected, although error correction is clearly valuable. *The more important benefit of transparency is that the public will be able to assess how must an agency’s analytical result hinges on the specific analytic choices made by the agency.* Concreteness about analytic choices allows, for example, the implications of alternative technical choices to be readily assessed. This type of ... analysis is widely regarded as an essential feature of high quality analysis, yet... cannot be undertaken by outside parties unless a high degree of transparency is achieved.” 67 Fed. Reg. at 8456/3 (Emphasis added).

To conclude, information and statements in the Proposed Designation, with a source to “unpublished data” or “personal” communications, violate the transparency and reproducibility standard for substantive objectivity.

**b. “Heightened” Substantive Objectivity: SDWA Requirements for Influential Information Concerning “Environmental Risks.”**



**C. Information in the Proposed Designation Does Not Meet the Standard for “Utility” Under the Guidelines.**

Both FIQA and OMB’s Guidelines require agencies to “ensure and maximize” the quality, objectivity, utility, and integrity” of information disseminated by federal agencies. FIQA §515(a), OMB Guidelines, § II, 2, 67 Fed. Reg. at 8458/3. “Utility” refers to “the usefulness of the information to its intended users, *including the public.*” OMB Guidelines, § V, 2, 67 Fed. Reg. at 8459/2 (Emphasis added). OMB explains that: “[i]n assessing the usefulness of information that the agency disseminates to the public, the agency needs to consider the uses of the information not only from the perspective of the agency *but also from the perspective of the public.* As a result, *when transparency of information is relevant for assessing the information’s usefulness from the public’s perspective, the agency must take care to ensure that transparency has been addressed in its review of the information.*” OMB Guidelines, § V, 2, 67 Fed. Reg. at 8459/3 (Emphasis added). Both the Interior and FWS Guidelines contain identical language. See Interior Guidelines, § VII, 2, p. 8; FWS Guidelines, § VI-2, p. 8.

NAHB believes statements made by the agency concerning numbers, dispersal and distribution of Pygmy-owls that are based on, use, or rely upon unpublished data and personal communications violate the “utility” standard because they are not useful to the public because they are made without giving the public access to the underlying information. This prohibits the public from assessing the value and usefulness of the information, and encourages the regulatory process to operate in the dark. OMB makes clear that in order to meet the utility standard, the agency must “*consider the uses of the information ... [and the] perspective of the public.*” OMB Guidelines, § V, 2, 67 Fed. Reg. at 8459/2 (Emphasis added). The public has reason to be skeptical anytime an agency uses or relies on information it has not made available to the public.

**VII. REQUEST FOR CORRECTION.**

The FIQA states that the agencies must allow “affected persons to seek and obtain correction of information” that does not comply with the OMB Guidelines. FIQA, § 515(2)(B). Thus, the statute requires not only that the public be able to “seek” the correction of nonconforming information, it must also be able to “obtain” its correction. “Correction” may include supplementation of the record and other actions. OMB Guidelines § V, 3, a, 67 Fed. Reg. at 8459/3.

Additionally, both OMB and Interior make clear that the purpose of the administrative mechanism is “[t]o facilitate public review” of agency information practices. OMB Guidelines § III, 3, 67 Fed. Reg. at 8459/1. Moreover, Interior’s Guidelines provide that once the Department or component determines that the complaint has merit, “...*it shall take reasonable steps to withdraw the information from the public domain and from any decision making process from which it is being used.*” Interior Guidelines, § III, p. 4 (Emphasis added). The Interior Guidelines also provide that “[I]f the bureau determines that the information does not comply with the [guidelines]... the bureau will *use existing mechanisms to remedy the situation, such as reproposing a rule...*” Interior Guidelines, § III, p. 6 (Emphasis added).

Accordingly, FWS must refrain from using or relying on “unpublished data” and “personal communications” as cited in the Proposed Designation, or any other similar type of undocumented, unverifiable information that violates the Information Quality Guidelines, as it prepares to finalize critical habitat for the Pygmy-owl. Based on the remedies contemplated by OMB and Interior, NAHB respectfully requests that FWS correct information as follows:

- (1) Any information that FWS uses or relies upon regarding Pygmy-owl critical habitat designation, including information regarding the species’ numbers, dispersal and distribution, should be subject to the “pre-dissemination” review requirements discussed on pp. 9-10;
- (2) Following pre-dissemination review, FWS should supplement the administrative record for the Pygmy-owl’s critical habitat designation to include all original “unpublished data” and “personal communications” regarding the species’ numbers, dispersal and distribution. The public should be given a reasonable opportunity to comment any supplemental information placed in the administrative record;
- (3) If FWS continues to rely on “unpublished data” and “personal communications” regarding Pygmy-owl critical habitat, it must ensure that all such information is transparent, reproducible and otherwise independently verifiable pursuant to all of the requirements set forth in the Information Quality Guidelines; and
- (4) FWS should rescind the current Proposed Designation, and re-propose critical habitat in a Federal Register notice that cites all the information placed in the supplemental record.

\* \* \*

NAHB looks forward to continuing the dialogue with FWS to ensure that its decisions under the Endangered Species Act comply with both the letter and spirit of the FIQA and the Information Quality Guidelines. If you have any additional questions regarding this Complaint, please do not hesitate to contact Bruce Lundegen, Regulatory Counsel (202/266-8305) or Duane Desiderio, Staff Vice President, Legal Services (202/266-8146) at NAHB.

Sincerely,



Gerald M. Howard  
Executive Vice President and  
Chief Executive Officer

Attachments

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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

National Association of Home Builders, et al.,

Plaintiffs,

v.

Gale A. Norton, et al.,

Defendants,

and

Defenders of Wildlife, et al.,

Intervenors-Defendants.

No. CIV 00-0903-PHX-SRB

**ORDER EXTENDING DEADLINES FOR COMPLETION OF REMAND PROCEEDINGS**

The Court having considered the Motion to Stay Comment Period filed by Plaintiffs, Defendants' responses thereto and Plaintiff's' reply, and following oral argument before this Court on February 3, 2003, the Court finds and concludes that the deadlines for the completion of the critical habitat designation should be extended.

THEREFORE, IT IS ORDERED that the Court's Order, filed December 13, 2001, establishing a deadline for the completion of remand proceedings, as subsequently modified by the Court's Order, filed October 3, 2002, is modified as follows:

1. Defendants are directed to submit to the Federal Register a notice

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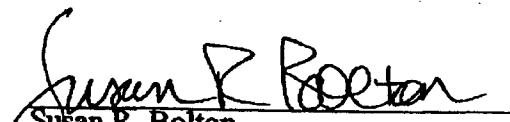
1 extending the deadline for the submission of data and comments from the public on all  
2 aspects of the proposed designation of critical habitat for the cactus ferruginous pygmy-  
3 owl, including data on economic and other impacts of the designation, from February 25,  
4 2003, to April 25, 2003.

5 2. The deadline for the completion of all remand proceedings and for issuing  
6 a final rule designating critical habitat for the pygmy-owl is extended from July 31,  
7 2003, to September 29, 2003.

8 3. Defendant United States Fish and Wildlife Service is directed to respond  
9 to the Southern Arizona Home Builders Association's pending request for the  
10 production of certain data referenced in the proposed rule by February 10, 2003 or as  
11 soon thereafter as may be practicable. Defendants shall provide Defendant-Intervenor  
12 with a copy of the responsive documents at the same time as the documents are provided  
13 to Plaintiffs.

14 4. The Court will consider further extensions of these deadlines to the extent  
15 necessary to ensure that data and other materials supporting the proposed critical habitat  
16 designation are made available to Plaintiffs and other interested members of the public  
17 as may be necessary to ensure a meaningful opportunity to evaluate and comment on the  
18 proposed designation.

19 DATED this 12 day of February, 2003.

20  
21   
22 Susan R. Bolton  
23 United States District Judge

24 COPIES to all counsel of record  
25  
26

# Pygmy Owl Unpublished Data

Statement	No.	Source	Federal Reg Citation (Page/Column)
<p>"The total number of pygmy-owls and their distribution in Arizona are unknown. Survey and monitoring work in Arizona resulted in documenting 41 adult pygmy-owls in 1999, 34 in 2000, 36 in 2001, and, most recently, 18 in 2002. A cumulative total of 85 occupied sites (includes both single or paired birds) were recorded during these 4 years."</p>	1	AGFD unpubl. data	71032/3
<p>"Additional information to identify and define specific habitat needs of pygmy-owls in Arizona has been gathered since our initial critical habitat designation in 1999, including surveys and research by the Arizona Game and Fish Dept (AGFD). Data from project clearance surveys conducted by private consultants were also used to help in our understanding of pygmy-owl distribution. We also considered preliminary habitat assessment work which has been initiated in limited areas of the State, primarily on Bureau of Land Management (BLM) and U.S. Forest Service (FS) lands, and initial micro-habitat research studies have been conducted by the AGFD. Unpublished data gathered by the AGFD with regard to dispersal, numbers and distribution of pygmy-owls were also considered."</p>	2	No source	71034/3 , 71035/1
<p>"The number of known pygmy-owls in the State remains relatively few, and the information base regarding the needs of this species is still small. This necessitated our reliance on limited information as we developed this critical habitat proposal. Recent survey data indicate that the majority of known pygmy-owls in AZ are found in the southern portion of its historical range in the State"</p>	3	AGFD unpubl. data	71035/1
<p>Generally, the proposed system of critical habitat was developed based on recent, verified owl sites, the presence of areas that are below 1,200 m (4,000 ft) and include one or more of the primary constituent elements related to vegetation and the average straight-line dispersal distance (8 km (5 mi)) from nest sites.</p>	4	AGFD unpubl. data	71035/2

Statement	No.	Source	Federal Reg Citation (Page/Column)
<p>The average dispersal distance was used to define the area that is likely to be necessary for the maintenance of existing breeding locations through mate replacement and reoccupation of sites through dispersal. The average dispersal distance is a measure of central tendency which increases the likelihood that the area will actually be used by dispersing juvenile pygmy-owls, unlike the maximum and minimum distances which are extremes and more likely to be chance events.</p>	5	AGFD unpubl. data	71035/2-3
<p>"In addition, most (10 out of 16) measured dispersal distances were below the average, indicating that using the average dispersal distance accounts for the distance documented as typically being used by dispersing pygmy-owls."</p>	6	AGFD unpubl. data	71035/3
<p>Areas proposed for connectivity that fall outside the average dispersal distance are still essential for pygmy-owls and could potentially be used for dispersal as all proposed areas of critical habitat also fall within the maximum dispersal distance 34.8 km (21.8 mi.) from recent, verified owl locations, and are considered occupied...</p>	7	No Source	71035/3
<p>"We have proposed an interconnected system of habitat linkages. [Pygmy-owl nest sites and occupied territories can vary from year to year over the landscape, as well as within a pygmy-owl's home range."</p>	8	AGFD unpubl. data	71035/3
<p>"Habitat linkages within the historical range of the pygmy-owl in Arizona can play a pivotal role in maintaining this potential Arizona metapopulation, especially since the pygmy-owl is capable of dispersal up to 34.8 km (21.8 mi)."</p>	9	AGFD unpubl. data	71035/3
<p>"Some areas proposed for connectivity fall outside of the 5-mile average dispersal distance around known pygmy-owl locations. However, these areas are still likely to be occupied because all areas proposed also fall within the maximum dispersal distance documented for pygmy-owls in AZ (34.8 km (21.8 mi)) ..."</p>	10	AGFD unpubl. Data	71036/1
<p>"Pygmy-owls are considered non-migratory throughout their range. There are winter (November through January) pygmy-owl location records in Organ Pipe Cactus National Monument."</p>	11	R. Johnson unpubl. data 1976, 1980; Tibbitts, pers. comm. 1997	71037/2
<p>"Pygmy-owl dispersal patterns are just beginning to be documented... In Arizona, the maximum documented dispersal distance is 34.8 km (21.8 mi)."</p>	12	AGFD unpubl. data	71037/2

Statement	No.	Source	Federal Reg Citation (Page/Column)
<p>"Once dispersing male pygmy-owls settle in a territory (the area defended by a pygmy-owl), they rarely make additional movements outside of their home range. For example, spring surveys have found male juveniles in the same general location as observed the preceding autumn (Abbate et al. 2000). However, unpaired female dispersers may make additional movements into the subsequent breeding season."</p>	13	AGFD unpubl. data	71037/2-3
<p>"Pygmy-owls typically make short, rapid flights. Observations indicate that pygmy-owls rarely fly longer distances than what is needed to travel from one tree to an adjacent tree."</p>	14	AGFD unpubl. data	71037/3
<p>"Pygmy-owls have rarely been observed using areas of high human activity, such as high-density (4-5 houses/ac) housing, for normal day-to-day activities within a home range, nor during dispersal."</p>	15	AGFD unpubl. data	71037/3
<p>"Free-standing water does not appear to be necessary for the survival of pygmy-owls. During many hours of research monitoring, pygmy-owls have never been observed directly drinking water."</p>	16	AGFD unpubl. data	71038/1
<p>"Recent information from Arizona indicates nests were located in cavities in saguaro cacti for all but two of the known nests documented from 1996 to 2002."</p>	17	AGFD unpubl. data	71038/1
<p>"Pygmy-owls exhibit a high degree of site fidelity once territories (the area defended) and home ranges (the area used throughout the year) have been established."</p>	18	AGFD unpubl. data	71038/2
<p>"Little is known about the rate or causes of mortality in pygmy-owls; however, they are susceptible to predation from a wide variety of species. Documented and suspected pygmy-owl predators include great horned owls (<i>Bubo virginianus</i>), Harris' hawks (<i>Parabuteo unicinctus</i>), Cooper's hawks (<i>Accipiter cooperii</i>), screech-owls (<i>Otus kennicottii</i>), and domestic cats (<i>Felis catus</i>)."</p>	19	AGFD unpubl. data	71038/2
<p>"Arizona Game and Fish Department (AGFD) telemetry monitoring in 2002 indicated at least three of the nine young were killed by predators prior to dispersal during a year when tree species failed to leaf out due to drought conditions."</p>	20	AGFD unpubl. data	71038/2
<p>"The fifth constituent element describes landscape conditions which may affect pygmy-owl behavioral patterns and relates to the need to protect habitats from various disturbances. Pygmy-owl behavior is not typically</p>	21	AGFD unpubl. data	71039/1

Statement	No.	Source	Federal Reg Citation (Page/Column)
<p>affected by low levels of human activity or activities which are predictable."</p>	22	AGFD unpubl. data	71039/1
<p>"Low-density (&lt; 3 houses per acre) residential areas and roads with low traffic volumes are examples of this type of activity. However, high levels of human activities, high-intensity activities, or activities which cannot be predicted may affect the areas pygmy-owls will use for nesting, foraging and dispersal."</p>	23	AGFD unpubl. data	71041/1
<p>"We determine that [Critical Habitat Unit 1] area is essential to pygmy-owl conservation in Arizona because it contains recent documentation of breeding pygmy-owl locations and a number of pygmy-owls with unknown breeding status. Since 1999, this unit has accounted for approximately 43 percent of the known pygmy-owls in Arizona."</p>	24	AGFD unpubl. data	71041/3
<p>"This [Critical Habitat Unit 3] contains a high density of active pygmy-owl nesting territories and dispersal pathways threatened by existing and ongoing land uses, affecting primary constituent element 5. It has one of the highest known densities of pygmy-owls in Arizona, and is one of only four areas in the State with documented breeding pygmy-owls. Since 1999, CHU 3 has accounted for 35 percent of the known pygmy-owls in Arizona and 40 percent of the known nests."</p>	25	AGFD unpubl. data	71042/1
<p>"This [Critical Habitat Unit 4] has documented pygmy-owl occupancy (3 sites since 1999) ..."</p> <p>"This [Critical Habitat Unit 5] contains numerous pygmy-owl locations, including breeding sites. Since 1999, this CHU has accounted for approximately 21 percent of the known pygmy-owls in Arizona."</p>	26	AGFD unpubl. data	71042/2