

United States Senate
WASHINGTON, DC 20510

April 25, 2007

The Honorable Dirk Kempthorne
Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Dear Secretary Kempthorne:

We are writing to express concern over the changes that you reportedly are considering making to the Fish and Wildlife Service rules that implement the Endangered Species Act.

We have seen reports of a document reflecting extensive, draft revisions to a subchapter of the Wildlife and Fisheries title of the Code of Federal Regulations. Additional documents that have surfaced recently suggest that major rule revisions remain under active consideration.

Together, the documents that have come to light describe regulatory changes that would loosen existing wildlife protection requirements while also narrowing their applicability. We find the draft revisions troubling for at least three reasons.

First, we believe that the changes put into place by the rule revisions would reduce dramatically the current scope and positive impact of the Endangered Species Act. Indeed, if the draft revisions had been in place thirty years ago, it is hard to imagine that we ever could have achieved the successes – with bald eagles, grizzly bears, sea turtles, sea otters, and many other species – of which we now are deservedly proud.

Second, many of the changes under consideration would reverse settled understandings and policies, of which Congress long has been aware, and which Congress has chosen to leave undisturbed. We are concerned about any attempt to overhaul the Endangered Species Act program administratively, without the involvement of Congress.

Finally, the draft revisions create the impression that the Department's leadership is focusing on reducing the scope and weakening the substance of the federal government's wildlife protection laws. We hope that is not the case, because we believe there are, immediately at hand, much less controversial and much more constructive initiatives to which you could devote your attention with broad support in Congress and the American public in order to achieve the Endangered Species Act's overarching goal of recovery. In particular, we believe you could advance wildlife protection, while at the same time alleviating controversies that have arisen in the pursuit of that goal, by requesting

increased funding for recovery-related activities, by expanding (rather than eliminating) incentive programs like the Private Stewardship Grants Program and the Landowner Incentives Program, and by actively supporting the Endangered Species Recovery Act of 2007.


We request that you respond to the enclosed questions and information requests. Please take no longer than one month to respond in full, and please do not move any closer to promulgating any revisions until you have answered our questions.

We look forward to working with you to resolve our concerns, and we thank you in advance for your responses to our questions.

Sincerely,



Joseph Lieberman
Chairman, Subcommittee on Private
Sector and Consumer Solutions to
Global Warming and Wildlife Protection



Barbara Boxer
Chairman, Committee on
Environment and Public Works



Frank R. Lautenberg
United States Senator



Bernard Sanders
United States Senator



Benjamin Cardin
United States Senator

Cc: Mr. Dale Hall, Director, U.S. Fish and Wildlife Service

Enclosure

Questions

1. How would these rule revisions, and any other new rulemakings or policies you are considering, specifically promote species conservation and recovery?
2. The draft rule revisions would remove the term “recovery” from many places in the regulations and re-define the term “conservation” so that it no longer would be synonymous with “recovery.” How would these changes improve recovery of species under the Endangered Species Act (ESA)?
3. The draft rule revisions would define for the first time terms within the definitions of “endangered species” and “threatened species,” such as “in danger of extinction,” “significant portion of its range,” and “foreseeable future.” What effect would these changes have in the future on the likelihood of a species being listed, the number of species listed, and the status of a species (number of remaining individuals) at the time of listing?
4. What effect would the draft rule revision requiring concurrence of the Governor prior to establishment of non-essential experimental populations have on the likelihood that such experimental populations will be established in the future?
5. What effect would the draft rule revisions have on the likelihood that a given federal agency action would be the subject of section 7 consultation with the Fish and Wildlife Service?
6. How would the attempt to base jeopardy analysis on a comparison of “with” and “without” project conditions contribute to species conservation and recovery? How would this change conform to the requirements of the ESA, in light of the recent Ninth Circuit ruling, which rejected that approach as an “analytical slight of hand,” stating “ESA compliance is not optional”? *National Wildlife Federation v. Idaho* (9th Cir. Apr. 9, 2007) (Slip. Op.).
7. How would the change allowing agencies to make their own effects determinations contribute to species conservation and recovery? How is it consistent with the recent decision determining that the ESA “reinforces the notion that a section 7(a)(2) determination is not to be unilaterally made”? *Washington Toxics Coalition v. U.S. Dept. of the Interior*, 457 F.Supp.2d 1158, 1179 (W.D. Wash. 2006).
8. How does the move to limit the ESA’s applicability to only a narrow subset of federal agency activities contribute to species conservation and recovery? How would it follow legal precedent finding that because the ESA applies to “any” action “authorized, funded or carried out” by a federal agency, “we take the regulation as a gloss on what the statutory limitation means and interpret the term ‘discretionary’ accordingly.” *Defenders of Wildlife v. EPA*, 420 F.3d 946, 967 (9th Cir. 2005).

9. Who wrote and/or participated in drafting these proposed regulations within your Department? Did other federal agencies (e.g., Department of Commerce and NOAA Fisheries) participate in the drafting and, if so, how?
10. What has Deputy Assistant Secretary Julie MacDonald's involvement been in these draft rule revisions?
11. It appears that many of these regulations were drafted or considered before your "listening tour" on the ESA last year. Will the listening tour inform your administrative and regulatory oversight of the ESA? Will the results of the listening tour be made public before any draft regulations are proposed? What timing do you anticipate for these actions?
12. Is the Department considering issuing any new policy positions under the ESA? Do you anticipate further Interior Solicitor's opinions, such as the recent one that would weaken the statutory requirement to list species threatened or endangered in a "significant portion of its range"?
13. Which industry and/or commercial groups or entities have given opinions, input or information regarding these draft rule revisions?
14. Which environmental, conservation, scientific, religious and/or citizen groups have given opinions, input or information regarding these draft rule revisions?
15. How would these draft rule revisions, and any other draft regulations or policies you are considering, take into account the present and growing threat of global warming and climate change to imperiled and/or listed species?