

GAO

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Natural Resources, House of
Representatives

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**U.S. FISH AND WILDLIFE
SERVICE**

**Endangered Species Act
Decision Making**

Statement of Robin M. Nazzaro, Director
Natural Resources and Environment





Highlights of [GAO-08-688T](#), a testimony before the Committee on Natural Resources, House of Representatives

Why GAO Did This Study

The Department of the Interior's (Interior) U.S. Fish and Wildlife Service (Service) is generally required to use the best available scientific information when making key decisions under the Endangered Species Act (ESA). Controversy has surrounded whether former Deputy Assistant Secretary Julie MacDonald may have inappropriately influenced ESA decisions by basing decisions on political factors rather than scientific data. Interior directed the Service to review ESA decisions to determine which decisions may have been unduly influenced.

ESA actions include, among others, 90-day petition findings, 12-month listing or delisting findings, and recovery planning. The Service distributed informal guidance in May 2005 on the processing of 90-day petitions. Recovery plans generally must include recovery criteria that, when met, would result in the species being delisted.

GAO examined three separate issues: (1) what types of decisions, if any, were excluded from the Service's review of decisions that may have been inappropriately influenced; (2) to what extent the Service's May 2005 informal guidance affected 90-day petition findings; and (3) to what extent the Service has, before delisting species, met recovery criteria. GAO interviewed Service staff, surveyed Service biologists, and reviewed delisting rules and recovery plans. Interior did not provide comments in time for them to be included in this testimony.

To view the full product, including the scope and methodology, click on [GAO-08-688T](#). For more information, contact Robin M. Nazzaro at (202) 512-3841 or nazzaror@gao.gov.

U.S. FISH AND WILDLIFE SERVICE

Endangered Species Act Decision Making

What GAO Found

Several types of decisions were excluded from the Service's review of decisions that may have been inappropriately influenced. Using the following selection criteria, the Service identified eight ESA decisions for potential revision: (1) whether Ms. MacDonald influenced the decision directly, (2) was the scientific basis of the decision compromised, and (3) did the decision significantly change and result in a potentially negative impact on the species. The Service excluded (1) decisions made by Interior officials other than Ms. MacDonald, (2) policy decisions that limited the application of science, and (3) decisions that were changed but not significantly or to the point of negative impact on the species.

The Service's May 2005 informal guidance had no substantive effect on 90-day petition findings. In May 2005, Service headquarters distributed a guidance document via e-mail to endangered-species biologists that could have been interpreted as instructing them to use additional information collected to evaluate a 90-day petition only to refute statements made therein. GAO's survey of 90-day petition findings issued by the Service from 2005 through 2007 found that biologists used additional information collected to evaluate petitions to both support and refute claims made in the petitions, as applicable, including during the 18-month period when the May 2005 informal guidance was being used. However, GAO found that the Service faces various other challenges in processing petitions, such as making decisions within 90 days and adjusting to recent court decisions. None of the 90-day petition findings issued from 2005 through 2007 were issued within the desired 90-day time frame. During these years, the median processing time was 900 days, or about 2.5 years, with a range of 100 days to 5,545 days (over 15 years). Additionally, the Service faces several challenges in responding to court decisions issued since 2004. For example, the Service has not yet developed new official guidance on how to process 90-day petitions after the courts invalidated a portion of the prior guidance.

Finally, of the eight species delisted because of recovery from 2000 through 2007, the Service determined that recovery criteria were completely met for five species and partially met for the remaining three species because some recovery criteria were outdated or otherwise not feasible to achieve. When the delistings were first proposed, however, only two of the eight species had completely met all their respective recovery criteria. Although the ESA does not explicitly require the Service to follow recovery plans when delisting species, courts have held that the Service must address the ESA's listing/delisting threat factors to the maximum extent practicable when developing recovery criteria. In 2006, GAO reported that the Service's recovery plans generally did not contain criteria specifying when a species could be recovered and removed from the endangered species list. Earlier this year, in response to GAO's recommendation, the Service issued a directive requiring all new and revised recovery plans to include criteria addressing each of the ESA's listing/delisting threat factors.

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss our work related to Endangered Species Act (ESA) decision making and allegations that implementation of the act has been tainted by political interference.¹ Recent controversy has surrounded decisions by the Department of the Interior's (Interior) U.S. Fish and Wildlife Service (Service), specifically, over the role that "sound science" plays in decisions made under the ESA—that is, whether the Service bases its decisions on scientific data or on political considerations. Generally, Interior and the Service are required to use the best available scientific information when making key ESA decisions. At Interior some of the controversy centered on whether a former Deputy Assistant Secretary, Julie MacDonald, improperly influenced ESA decisions so as to limit protections for threatened and endangered species. On the basis of an anonymous complaint in April 2006, Interior's Office of Inspector General began investigating Ms. MacDonald's activities and whether her involvement in ESA implementation had undermined species protection.² Ms. MacDonald resigned on May 1, 2007, and little over a week later, the House Committee on Natural Resources held a hearing on political influence in ESA decision making.³ After the hearing, Interior asked the Service to determine which of its ESA decisions may have been inappropriately influenced by Ms. MacDonald.

¹The ESA requires that the law be implemented by the Secretaries of the Interior and Commerce, who have delegated implementation authority to the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration's Fisheries Service, (formerly the National Marine Fisheries Service) respectively. The U.S. Fish and Wildlife Service is responsible for implementing the ESA for freshwater and terrestrial species. The National Oceanic and Atmospheric Administration's Fisheries Service is responsible for implementing the ESA for most marine species and anadromous fishes (which spend portions of their life cycle in both fresh and salt water).

²Department of the Interior, Office of Inspector General, *Investigative Report on Allegations against Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife and Parks* (Washington, D.C.: Mar. 23, 2007). The Inspector General concluded that Ms. MacDonald had violated federal rules by sending internal agency documents to industry lobbyists. The Office of Inspector General issued a second investigative report on Ms. MacDonald's involvement in an ESA decision about the Sacramento splittail fish on November 27, 2007. This investigation concluded that Ms. MacDonald stood to gain financially from the decision and she should therefore have recused herself. Additionally, as of March 31, 2008, the Office of Inspector General was conducting a third investigation, concerning potential inappropriate political interference in ESA decisions for 20 species.

³*Endangered Species Act Implementation: Science or Politics? Oversight Hearing before the House Committee on Natural Resources*, 110th Cong. (2007).

In response to this directive, the Service identified eight decisions for further review, generally according to the following three criteria: (1) whether Ms. MacDonald influenced the decision directly, (2) was the scientific basis of the decision compromised, and (3) did the decision significantly change and result in a potentially negative impact on the species. The eight decisions selected for further review were out of a universe of more than 200 ESA decisions reviewed by Ms. MacDonald during her almost 5 years of employment at Interior. Upon further review, the Service concluded that seven of the eight selected decisions warranted revision. The Service has proposed revisions for three of the decisions and intends to revise the remaining decisions, as appropriate, in the coming years.

On December 17, 2007, we briefed your staff on our findings related to our work on the Service's review of ESA decisions that may have been inappropriately influenced. This testimony formally conveys the information provided during that briefing, as updated to reflect the most recent developments (see appendix III). In addition, this testimony presents the results of our work conducted since the December 2007 briefing on two other ESA issues.

The purpose of the ESA is to conserve threatened and endangered species and the ecosystems on which they depend. The act requires listing a species as endangered if it faces extinction throughout all or a significant portion of its range and as threatened if it is likely to become endangered in the foreseeable future.⁴ Specifically, in determining whether to list or delist a species, the Service evaluates the following five threat factors contained in the act:

1. whether a species' habitat or range is under a present or potential threat of destruction, modification, or curtailment;
2. whether the species is subject to overuse for commercial, recreational, scientific, or educational purposes;
3. the risk of existing disease or predation;
4. whether existing regulatory mechanisms are adequate; and

⁴16 U.S.C. §§ 1532(6), (20); 1533(a).

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5. whether other natural or manmade factors affect a species' continued existence.⁵

The process to list a species begins either through the Service's own initiative or through a petition (referred to as a 90-day petition) from an "interested person," and it is governed by the ESA, federal regulations, and other guidance that the Service may issue. The Service may initiate a review of species without a petition by conducting a candidate assessment to determine whether a species ought to be listed.⁶ A species may also be listed through the petition process. The ESA directs the Service to make a finding within 90 days (to the maximum extent practicable) after receiving a petition "as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted."⁷ Federal regulations define "substantial information" as the amount of information that would lead a reasonable person to believe that the petitioned action may be warranted.⁸ If the Service determines that the listing process should proceed, it issues a "substantial" 90-day finding, then conducts an in-depth 12-month review of the status of the species to determine if, according to the best available scientific and commercial information, the petitioned action is warranted. If the Service determines that the petition does not present credible evidence supporting plausible claims, it issues a negative, "not substantial" 90-day finding. A negative 90-day finding can be challenged in court.

In May 2005, the Service distributed a guidance document via e-mail to its endangered-species biologists that could have been interpreted as instructing them to use additional information collected to evaluate a 90-day petition only to refute statements made in the petition. Concerns

⁵16 U.S.C. § 1533(a)(1).

⁶The Service's candidate conservation program maintains a list of species for which listing is warranted but precluded by other higher-priority actions. According to Service officials, the candidate conservation program can support actions to reduce or remove threats so that listing may become unnecessary. Candidate species may be identified through assessments initiated by the Service or through a 12-month finding on a petition to list a species when the finding concludes that listing is warranted but precluded by higher-priority listing actions. Candidate assessments use the same "best available science" standard as used for a 12-month finding on a petition to list a species.

⁷16 U.S.C. § 1533(b)(3)(A).

⁸50 C.F.R. § 424.14(b).

then arose that this informal guidance would bias petition findings against listing species, thereby reducing the number of species that could have a chance at protection under the ESA.⁹

Environmental groups and the courts have also raised concern about the implementation of recovery plans for delisted species, specifically, that the Service has delisted species without fulfilling recovery criteria outlined in recovery plans. The ESA generally requires the Service to develop and implement recovery plans for the conservation of listed species.¹⁰ Since the act was amended in 1988, the Service has been required to incorporate, to the maximum extent practicable, several key elements in each recovery plan, including objective, measurable recovery criteria that, when met, would enable the species to be removed from the list of threatened or endangered species.¹¹ Recovery plans are not regulatory documents. Rather, they provide guidance on methods to minimize threats to listed species and on criteria that may be used to determine when recovery is achieved. To develop and implement a recovery plan, the Service may appoint a recovery team consisting of “appropriate public and private agencies and institutions, and other qualified persons.” After a recovery plan has been drafted or revised, the Service is required to provide public notice and an opportunity for public review and comment. Although the ESA does not explicitly require the Service to follow recovery plans when delisting species,¹² the possible high level of public involvement in the

⁹Seventy-two percent of the 90-day petition findings published in the *Federal Register* from calendar years 2005 through 2007 were on petitions to list species as threatened or endangered. According to federal regulations (50 C.F.R. § 424.14), petitioned actions may include (1) petitions to list, delist, or reclassify species (reclassification would involve “up-listing” a species from threatened to endangered or “down-listing” a species from endangered to threatened); (2) petitions to revise critical habitat; and (3) petitions to designate critical habitat or adopt special rules. The remaining 28 percent of the 90-day petition findings published in the *Federal Register* from calendar years 2005 through 2007 were on petitions to delist species, reclassify species, or revise critical habitat designations.

¹⁰16 U.S.C. §§ 1533(f)(1)–(5). Recovery plans are not required if the Service determines that a plan will not promote the species’ conservation.

¹¹16 U.S.C § 1533(f)(1)(B). As originally enacted in 1973, the ESA did not contain a requirement for recovery plans, see Pub. L. No. 93-305, 87 Stat. 884 (1973). A general provision on recovery plans was first added in 1978 by Pub. L. No. 95-632, § 11(5), 92 Stat. 3751, 3766 (1978). The general provision was amended in 1982 by Pub. L. No. 97-304, §§ 2(a)(4)(B)–(D), 96 Stat. 1411, 1415 (1982). The detailed provisions that exist today on recovery plans were largely added in 1988 by Pub. L. No. 100-478, title I, § 1003, 102 Stat. 2306–7 (1988).

¹²See 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(c).

development of recovery plans creates the expectation that the Service will adhere to them.

In this context, from our December 2007 briefing, we are reporting on the types of ESA decisions, if any, excluded from the Service's selection process of ESA decisions that had potentially been inappropriately influenced. Additionally, we are reporting on the extent to which the Service's May 2005 informal guidance affected the Service's decisions published from 2005 through 2007 on petitions to list or delist species and the extent to which the Service determined, before delisting, whether species met recovery criteria outlined in recovery plans.

To determine what types of ESA decisions, if any, were excluded from the Service's selection process for decisions to review, we interviewed the Director of the Service and all eight regional directors, and we conducted site visits, phone interviews, or both with staff from ten field offices in five regions that were actively engaged in ESA decision making. We also reviewed Service policies and procedures for making ESA decisions, as well as documentation on the Service's process for selecting decisions to review and on the status of the review. To evaluate the extent to which the May 2005 informal guidance affected 90-day petition findings, we surveyed 44 current and former Service biologists responsible for drafting 54 90-day petition findings issued from 2005 through 2007. We included only listing and delisting petitions for U.S. species; for this reason and others, we excluded 13 petition findings between 2005 and 2007 from our sample.¹³ To determine the extent to which the Service met recovery criteria outlined in recovery plans before delisting a species, we developed a list of all U.S. species delisted because of recovery from 2000 through 2007 and reviewed recovery plans and *Federal Register* proposed and final delisting decisions (rules); this information indicated whether the Service believed that it had met the criteria laid out in the recovery plans for the eight delisted U.S. species we identified.

We conducted this performance audit from August 2007 to May 2008 in accordance with generally accepted government auditing standards. Those

¹³We excluded 13 petition findings from our 2005–2007 sample for the following reasons: 5 had been overturned by the courts or were being redone as a result of a settlement agreement; 3 involved up-listing already protected species from threatened to endangered; 2 involved ongoing litigation; 2 involved species located outside the United States; and 1 involved a petition to revise a critical habitat designation for a species that was already protected.

standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. A more detailed discussion of our scope and methodology appears in appendix I. Appendix II presents a table of the 90-day petition findings included and excluded from our sample.

Summary

Under the criteria the Service used to select decisions to review for possible inappropriate influence, several types of ESA decisions were excluded. First, while the Service focused solely on Ms. MacDonald, we found that other Interior officials also influenced some ESA decisions. For example, after reviewing a petition to list the Miami blue butterfly on an emergency basis, Service officials at all levels supported a recommendation for listing the species. Citing a Florida state management plan and existence of a captive-bred population, however, an Interior official besides Ms. MacDonald determined that emergency listing was not warranted, and the blue butterfly was designated as a candidate instead of a listed species. Second, the Service excluded policy decisions that limited the application of science, focusing instead only on those decisions where the scientific basis of the decision may have been compromised. Under Ms. MacDonald, several informal policies were established that influenced how science was to be used when making ESA decisions. Third, the Service excluded decisions that were changed but not significantly or to the point of negative impact on the species. Finally, we identified several other categories of decisions that in some or all cases were excluded from the Service's selection process. For example, decisions were excluded from the Service's selection process if it was determined that the decision could not be reversed or if it could not be conclusively determined that Ms. MacDonald changed the decision.

While the Service's May 2005 informal guidance had no substantive effect on the processing of 90-day petitions, the Service still faces other challenges in processing these petitions. Stakeholders have expressed concern that the May 2005 guidance was slanted more toward refuting petitioners' listing claims, rather than encouraging Service biologists to use information to both support and refute listing petitions; consequently, they feared that a greater number of negative 90-day petition findings would result. In our survey of 54 90-day petition findings issued by the Service from 2005 through 2007, we found that biologists used information in addition to that cited by the petitioner to both support and refute claims made in the petitions, as applicable, including during the 18-month period

when the May 2005 informal guidance was being used. In November 2006, the Service distributed new draft guidance on the processing of 90-day petitions, which specified that additional information in Service files could be used to support and refute issues raised in the petition. Although the May 2005 informal guidance did not have a substantive effect on the Service's processing of 90-day petitions, the Service faces challenges in processing petitions in a timely manner and in responding to court decisions issued since 2004. None of the 90-day petition findings issued from 2005 through 2007 were issued within the desired 90-day time frame. During this period, the median processing time was 900 days, or about 2.5 years, with a range of 100 days to 5,545 days (more than 15 years). Additionally, the Service faces several challenges in responding to court decisions issued since 2004. For example, the Service has not developed new official guidance on how to process of 90-day petitions after a portion of the prior guidance was invalidated by the courts.

Of the eight U.S. species delisted from 2000 through 2007 because of recovery, the Service reported that recovery criteria were completely met for five species and partially met for the remaining three species because some recovery criteria were outdated or otherwise not achievable. When the delistings were first proposed, however, only two of the eight species had completely met all their respective recovery criteria. While the recovery criteria were not completely met in every case for each of the species we reviewed, the Service determined that the five threat factors listed in the ESA no longer posed a significant enough threat to the continued existence of the species to warrant continued listing as threatened or endangered. Since the ESA was amended in 1988, the Service has been required to incorporate in each recovery plan, to the maximum extent practicable, objective, measurable criteria that when met would result in a determination, in accordance with the provisions of the ESA, that the species should be removed from the list of threatened and endangered species (i.e., delisted). Courts have held that the Service must address the ESA's five threat factors for listing/delisting in developing recovery criteria, to the maximum extent practicable. In a 2006 report, we found that only 5 of the 107 recovery plans we reviewed included recovery criteria that addressed all five threat factors. We recommended that the Service include in recovery planning guidance direction that all new and revised recovery plans contain either recovery criteria to demonstrate consideration of all five threat factors or a statement about why it is not practicable to include such criteria. In January 2008, in response to our recommendation, the Director of the Service issued a memorandum requiring all new and revised recovery plans to include criteria addressing each of the five threat factors. Assuming successful implementation of this

directive, future delistings should meet the criteria laid out in recovery plans, except in situations where new information indicates criteria are no longer valid.

Although we requested comments from Interior on our findings and conclusions, none were provided in time for them to be included as part of this testimony.

Background

In addition to 90-day petition findings, 12-month status reviews, listings, and delistings, other key categories of ESA decisions include critical habitat designations, recovery plans, section 7 consultations, and habitat conservation plans (see table 1).¹⁴

Table 1: Key Types of ESA Decisions

| Decision | Description | Information used to make decision |
|--|--|---|
| Petition to list or delist (90-day petition finding) | Request for the Service to consider undertaking a 12-month review to determine whether listing or delisting a species is warranted | Information presented in the petition or information readily accessible in Service files |
| Listing, delisting | Analysis of whether a species warrants inclusion on or removal from the endangered or threatened list on the basis of its status | Best available scientific and commercial data |
| Critical habitat | Designation of habitat determined to be essential to a species' conservation | Best available scientific data, taking into consideration information on economic and other impacts |
| Recovery plan | Site-specific management plan for the conservation of listed species | Information from scientific experts, stakeholders, and others |
| Section 7 consultation | Determination of whether federal actions are likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat | Best available scientific and commercial data |
| Habitat conservation plan | Development of a plan that allows landowners "incidental take" of listed species in conjunction with mitigating actions that protect the listed species on their land | Not specified |

Source: GAO analysis of the ESA, federal regulations, and Service policies.

¹⁴Under the ESA the term "species" includes any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. 16 U.S.C. § 1532(16).

Service staff at headquarters, eight regional offices, and 81 field offices are largely responsible for implementing the ESA. Field office staff generally draft ESA decisions; listing, delisting, and critical habitat decisions are forwarded to regional and headquarters offices for review. Service headquarters forwards listing decisions to Interior's Office of Assistant Secretary for Fish and Wildlife and Parks for review, although it is the Service Director who generally approves the final decisions. The Assistant Secretary of the Interior for Fish and Wildlife and Parks makes final critical habitat decisions, after considering the recommendation of the Service and considering economic, national security, and other factors. Although the Service is responsible for making science-based decisions, Interior takes responsibility for applying policy and other considerations to scientific recommendations.

In most cases, ESA decisions must be based at least in part on the best available scientific information (see table 1). To ensure that the agency is applying the best available scientific information, the Service consults with experts and considers information from federal and state agencies, academia, other stakeholders, and the general public; some ESA decisions are both "peer reviewed" and reviewed internally to help ensure that they are based on the best available science. Nevertheless, because of differing interpretations of "best available scientific information" and other key concepts from the ESA such as "substantial" and "may be warranted," conservation advocacy groups have expressed concerns that ESA decisions are particularly vulnerable to political interference from officials within Interior.

While Ms. MacDonald was at Interior in two positions from July 7, 2002, through May 1, 2007, she reviewed more than 200 ESA decisions. After a May 9, 2007, congressional hearing, Interior's Deputy Secretary directed the Service Director to examine all work products produced by the Service and reviewed by Ms. MacDonald that could require additional review because of her involvement. Service Director Hall said the selection process should include any type of ESA decision made during Ms. MacDonald's time in office. He delegated the selection process to the regional directors and granted them considerable discretion in making their selections for potential revision.

The regions generally applied three criteria to identify decisions for potential revision: (1) Ms. MacDonald influenced the decision directly, (2) the scientific basis of the decision was compromised, and (3) the decision was significantly changed and resulted in a potentially negative impact on the species. Using these criteria, the Service ultimately selected

eight decisions for further review to determine if the decision warranted revision.¹⁵ After further review, the Service concluded that seven of the eight decisions warranted revision (see table 2).

Table 2: Result of the Service’s Selection Process and the Status of the Decisions Selected for Potential Revision

| Species | Decision | Description of Ms. MacDonald’s involvement | Service actions to address decision |
|---|---|--|--|
| Twelve species of Hawaiian picture-wing flies | Proposed critical habitat | Reduced acreage to about 1 percent of scientific recommendation | Published an amended proposed critical habitat on November 28, 2007 (72 Fed. Reg. 67428) |
| Arroyo toad | Final critical habitat | Reduced area by more than 85 percent | The Service and plaintiffs are negotiating a settlement agreement regarding a date for issuing proposed and final revisions of the critical habitat designation for this species |
| California red-legged frog | Final critical habitat | Directed the Service to use minimum range and disregard some scientific studies | Propose a revised critical habitat rule on or before August 29, 2008. Issue final revised critical habitat rule on or before August 31, 2009. |
| White-tailed prairie dog | 90-day petition finding | Reversed finding to “not substantial” | Initiate a status review on or before May 1, 2008. Issue a 12-month finding on or before June 1, 2010. |
| Preble’s meadow jumping mouse | 12-month review finding: proposed delisting | Directed the Service to use minority scientific opinion to support delisting | Withdrew proposed delisting and published an amended proposed listing rule on November 7, 2007 (72 Fed. Reg. 62992) |
| Preble’s meadow jumping mouse | Final critical habitat | Excluded three counties from critical habitat on the basis of habitat conservation plans that were not finalized | Revisit critical habitat when listing is final and funds are available |
| Canada lynx | Final critical habitat | Excluded U.S. Forest Service lands and private lands | Published a proposed rule describing revised critical habitat on February 28, 2008 (73 Fed. Reg. 10860) |
| Southwestern willow flycatcher | Final critical habitat | Reduced range area by about half | No action. The Service did not recommend revision of the critical habitat because the reduced range was scientifically supportable |

Source: GAO.

¹⁵Initially, the regional offices identified a total of 11 decisions for potential revision. One of these, on the Mexican garter snake, was subsequently withdrawn after further discussion determined that the decision was made internally by Service headquarters. Two additional decisions, regarding the bull trout and the marbled murrelet, were withdrawn by the region after it was determined that neither decision involved the inappropriate use of science but rather involved policy interpretations.

Several Types of Decisions Were Excluded from the Service’s Review of Potentially Inappropriately Influenced ESA Decisions

Several types of decisions were excluded from the Service’s review of decisions that may have been inappropriately influenced. First, while the Service focused solely on Ms. MacDonald, we found that other Interior officials also influenced some ESA decisions. Ms. MacDonald was the primary reviewer of most ESA decisions during her tenure, but other Interior officials were also involved. For example, in the Southeast, after reviewing a petition to list the Miami blue butterfly on an emergency basis, Service officials at all levels supported a recommendation for listing the species. Citing a Florida state management plan and existence of a captive-bred population, however, an Interior official other than Ms. MacDonald determined that emergency listing was not warranted, and the blue butterfly was instead designated as a candidate, not a listed species.

Second, the Service excluded policy decisions that limited the application of science, focusing instead only on those decisions where the scientific basis of the decision may have been compromised. Under Ms. MacDonald, several informal policies were established that influenced how science was to be used when making ESA decisions. For example, a practice was developed that Service staff should generally not use or cite recovery plans when developing critical habitat designations. Recovery plans can contain important scientific information that may aid in making a critical habitat designation. One Service headquarters official explained, however, that Ms. MacDonald believed that recovery plans were overly aspirational and included more land than was absolutely essential to the species’ recovery. Under another informal policy, the ESA wording “occupied by the species at the time it is listed” was narrowly applied when designating critical habitat. Service biologists were restricted to interpreting occupied habitat as only that habitat for which they had records showing the species to be present within specified dates, such as within 10 years of when the species was listed. In the case of the proposed critical habitat for the bull trout, Ms. MacDonald questioned Service biologists’ conclusions about the species’ occupied habitat. As a result, some proposed critical habitat areas were removed, in part because occupancy by the species could not be ascertained.

Third, the Service excluded decisions that were changed but not significantly or to the point of negative impact on the species. For example, under Ms. MacDonald’s influence, subterranean waters were removed from the critical habitat designation for Comal Springs invertebrates. Service staff said they believed that the exclusion of subterranean waters would not significantly affect the species because aboveground waters were more important habitat. They also

acknowledged that not much is known about these species' use of subterranean waters.

Finally, we identified several other categories of decisions that, in some or all cases, were excluded from the Service's selection process. For example, in some cases that we identified, decisions that had already been addressed by the courts were excluded from the Service's selection process; decisions that could not be reversed were also excluded. In the case of the Palos Verdes blue butterfly, Navy-owned land that was critical habitat was exchanged after involvement by Ms. MacDonald in a section 7 consultation. As a result, the habitat of the species' last known wild population was destroyed by development, and therefore reversing the decision would not have been possible. Additionally, decisions were excluded from the Service's selection process if it was determined that review would not be an efficient use of resources or if it could not be conclusively determined that Ms. MacDonald altered the decision. Several Service staff cited instances where they believed that Ms. MacDonald had altered decisions, but because the documentation was not clear, they could not ascertain that she was responsible for the changes. Additionally, decisions that were implicitly attributed to Ms. MacDonald were excluded from the selection process. Service staff described a climate of "Julie-proofing" where, in response to continual questioning by Ms. MacDonald about their scientific reasoning, they eventually learned to anticipate what might be approved and wrote their decisions accordingly.

The Service's May 2005 Informal Guidance Had No Substantive Effect on 90-Day Petition Findings, Although Other Challenges Exist

While the Service's May 2005 informal guidance had no substantive effect on the processing of 90-day petition findings, the Service still faces several other challenges in processing these petitions. Stakeholders have expressed concern that the wording of the May 2005 guidance was slanted more toward refuting petitioners' listing claims, rather than encouraging Service biologists to use information to both support and refute listing petitions; consequently, they feared that a greater number of negative 90-day petition findings would result. According to a senior Service official, it was never the Service's position that information collected to evaluate a petition could be used to support only one side, specifically, only to refute the petition. Rather, according to a senior Service official, its position is and has been that additional collected information can be used to either support or refute information presented in the petition; any additional information is not, however, to be used to augment or supplement a "weak" petition by raising new issues not already presented. According to the ESA, the petition itself must present "substantial scientific or commercial information indicating that the petitioned action

may be warranted.”¹⁶ Our survey of Service biologists responsible for drafting the 90-day petition findings issued from 2005 through 2007 found that the biologists generally used additional information, as applicable, to support as well as refute information in the petitions.¹⁷ The Service is facing several challenges with regard to the processing of 90-day petition findings. In particular, the Service finds it difficult to issue decisions within the desired 90-day time frame and to adjust to various court decisions issued in the last 4 years.

Notwithstanding the Service’s May 2005 Informal Guidance, Additional Information Collected by Service Biologists Was Used to Support and Refute 90-day Petitions

In our survey of 44 Service biologists who prepared 54 90-day petition findings from 2005 through 2007, we found that additional information collected to evaluate the petitions was generally used, as applicable, to both support and refute information in the petitions, including during the 18-month period when the May 2005 informal guidance was being used.¹⁸ The processing of 90-day petition findings is governed by the ESA, federal regulations, and various guidance documents distributed by the Service. To direct the implementation of the law and regulations, and to respond to court decisions, the Service issues guidance, which is implemented by Service staff in developing 90-day petition findings. This guidance can come in formal policies and memorandums signed by the Service Director, or informal guidance not signed by the Director but distributed by headquarters to clarify what information should be used and how it should be used in processing petitions. In July 1996, the Service issued a formal policy, called Petition Management Guidance, governing 90-day petition findings and 12-month status reviews.¹⁹ A component of this document was

¹⁶16 U.S.C. § 1533(b)(3)(A).

¹⁷In making a 90-day petition finding, the Service must consider whether the petition: (1) clearly indicates the administrative measure recommended and gives scientific and common names of the species involved; (2) contains detailed narrative justification for the recommended measure, describing, according to available information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information on the status of the species over all or a significant portion of its range; and (4) is accompanied by appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps. 50 C.F.R. § 424.14(b)(2).

¹⁸A senior Service official stated that, according to memory, no other informal guidance documents were issued during this 18-month period. If specific questions were asked by a particular region or field office, however, informal guidance could have been given by officials at Service headquarters through e-mail.

¹⁹See 61 *Fed. Reg.* 36075 (July 9, 1996). This guidance was issued jointly by the Service and the National Oceanic and Atmospheric Administration’s Fisheries Service.

invalidated by the District of Columbia district court in June 2004.²⁰ According to senior Service officials, since 2004 the Service has distributed a series of instructions through e-mails, conference calls, and draft guidance documents to clarify the development of 90-day petition findings. For example, in May 2005, the Service distributed via e-mail an informal guidance document that directed its biologists to create an outline listing additional information—that is, information not cited or referred to in a petition—that refuted statements made in the petition; biologists were not to list in the outline any additional information that may have clarified or supported petition statements.²¹

We identified a universe of 67 90-day petition findings issued by the Service from 2005 through 2007. To focus on how the Service used information to list or delist U.S. species, we surveyed Service biologists responsible for drafting 54 of the 67 90-day petition findings. For the 54 90-day petitions included in our survey, 40 were listing petitions, and 14 were delisting petitions; 25 resulted in positive 90-day petition findings, and 29 resulted in negative 90-day petition findings (see table 3).

Table 3: Outcomes of the Service’s 90-day Petition Findings Issued from 2005 through 2007

| Issuance date for 90-day petition findings | Number of positive, or “substantial,” petition findings | Number of negative, or “not substantial,” petition findings | Total number of petition findings | Percentage of negative findings |
|--|---|---|-----------------------------------|---------------------------------|
| 54 petition findings included in our survey sample | | | | |
| Jan. 2005–Apr. 2005 | 4 | 2 | 6 | 33% |
| May 2005–Nov. 2006 | 13 | 17 | 30 | 57 |
| Dec. 2006–Dec. 2007 | 8 | 10 | 18 | 56 |
| Subtotal | 25 | 29 | 54 | 54% |
| 13 petition findings excluded from our survey sample | | | | |
| Jan. 2005–Dec. 2007 | 2 | 11 ^a | 13 | 85 |
| Total | 27 | 40 | 67 | 60% |

Source: GAO.

²⁰ *ALA v. Norton*, Civ. No. 00-2339, 2004 WL 3246687 at *3 (D.D.C. June 2, 2004).

²¹ A senior Service official stated that the emphasis was put on compiling information to refute petitioners’ claims because if a petition was found to be “not substantial,” the 90-day petition finding was the agency’s final action on that petition. The Service therefore needed to adequately document in the administrative record the reasons that the petition was denied.

Note: The first time period, January 2005 through April 2005, includes the 90-day petition findings in our sample issued before the May 2005 informal guidance was being used. The second time period, May 2005 through November 2006, includes the 18-month period when the May 2005 information guidance was being used. The third time period, December 2006 through December 2007, includes the 90-day petition findings in our sample issued after the May 2005 informal guidance was superseded by new draft guidance in November 2006.

^aFive of these decisions have been or are being revised as the result of litigation, and two additional decisions were involved in ongoing litigation as of March 31, 2008.

In November 2006, the Service distributed new draft guidance on the processing of 90-day petitions, which specified that additional information in Service files could be used to refute or support issues raised in the petition but not to “augment a weak petition” by introducing new issues. For example, if a 90-day petition to list a species claimed that the species was threatened by predation and habitat loss, the Service could not supplement the petition by adding information describing threats posed by disease. The May 2005 informal guidance was thus in use until this November 2006 guidance was distributed, or approximately 18 months.

Our survey results showed that in most cases, the additional information collected by Service biologists when evaluating 90-day petitions was used to support as well as refute information in petitions (see table 4). According to the Service biologists we surveyed, additional information was used exclusively to refute information in 90-day petitions in only 8 of 54 cases. In these 8 cases, the biologists said, this approach was taken because of the facts, circumstances, and the additional information specific to each petition, not because they believed that it was against Service policy to use additional information to support a petition. In particular, with regard to the 4 petitions processed during May 2005 through November 2006 for which additional information was used exclusively to refute petition information, the biologists stated that the reasons they did not use information to support claims made in the petition was that either the claims themselves did not have merit or the information reviewed did not support the petitioner’s claims. Three of the four biologists responsible for these petitions also stated that they did not think it was against Service policy to use additional information to support issues raised in a petition. The fourth biologist was uncertain whether it was against Service policy to support issues raised in a petition.²²

²²The biologist did not cite the May 2005 guidance when asked what guidance was followed in evaluating the petition, so it is unlikely that the finding was affected by the May 2005 guidance document.

Table 4: How Service Biologists Used Additional Information from 2005 through 2007 to Evaluate 54 90-day Petitions Included in Our Survey

| Issuance date for 90-day petition findings | Support and refute | Support only | Refute only | Did not use additional information | Total |
|--|--------------------|--------------|-------------|------------------------------------|-----------|
| Jan. 2005–Apr. 2005 | 2 | 1 | 2 | 1 | 6 |
| May 2005–Nov. 2006 | 17 | 5 | 4 | 4 | 30 |
| Dec. 2006–Dec. 2007 | 13 | 1 | 2 | 2 | 18 |
| Total | 32 | 7 | 8 | 7 | 54 |

Source: GAO.

The Service Faces Challenges in Processing 90-day Petitions in a Timely Manner and in Responding to Court Decisions Issued since 2004

While the May 2005 informal guidance did not have a substantive effect on the Service’s processing of 90-day petitions, the Service still faces challenges in processing 90-day petitions in a timely manner and in responding to court decisions issued since 2004. None of the 90-day petition findings issued from 2005 through 2007 were issued within the desired 90-day time frame. During this period, the median processing time was 900 days, or about 2.5 years, with a range of 100 days to 5,545 days (more than 15 years).²³ According to Service officials, almost all of their ESA workload is driven by litigation. Petitioners have brought a number of individual cases against the Service for its failure to respond to their petitions in a timely manner. This issue presents continuing challenges because the Service’s workload increased sharply in the summer of 2007, when it received two petitions to list 475 and 206 species, respectively.

The Service is also facing several management challenges stemming from a number of court decisions since 2004:

- According to senior Service officials, the Service currently has no official guidance on how to develop 90-day petition findings, partially because of a 2004 court decision invalidating part of the Service’s 1996 Petition Management Guidance. The Service’s official 1996 Petition Management Guidance contained a controversial provision that treated 90-day petitions as “redundant” if a species had already been placed on

²³Processing times were calculated as number of days from the date the Service received the petition (or the date the petition was written, if the date of receipt was unavailable) to the date the associated finding was published in the *Federal Register*.

the candidate list via the Service's internal process.²⁴ In 2004, a federal district court issued a nationwide injunction striking down this portion of the guidance.²⁵ Senior service officials stated that the Service rescinded use of the document in response to this court ruling and began an iterative process in 2004 to develop revised guidance on the 90-day petition process. According to these officials, guidance was distributed in piecemeal fashion, dealing with individual aspects of the process in the form of e-mails, conference-call discussions, and various informal guidance documents. Our survey respondents indicated that the lack of official guidance created confusion and inefficiencies in processing 90-day petitions. Specifically, survey respondents were confused on what types of additional information they could use to evaluate 90-day petitions—whether they were limited to information in Service files, or whether they could use information solicited from their professional contacts to clarify or expand on issues raised in the petition. Several survey respondents also stated that unclear and frequently changing guidance resulted in longer processing times for 90-day petition findings, which was frustrating because potentially endangered species decline further as the Service determines whether they are worthy of protection. Further complicating matters, 31 of the 44 biologists we surveyed, or 70 percent, had never drafted a 90-day petition finding before. According to a senior Service official, the Service is planning to issue official guidance on how 90-day petition findings should be developed to eliminate confusion and inconsistencies.

- With regard to the use of outside information in evaluating petitions, the Service must continue to adapt to a number of court decisions dating back to 2004 holding that the Service should not solicit information from outside sources in developing 90-day petition findings. A December 2004 decision by the U.S. District Court for the District of Colorado stated that the Service's "consideration of outside information and opinions provided by state and federal agencies during the 90-day review was overinclusive of the type of information the ESA

²⁴Some of the 281 species on the candidate list have been waiting for a proposed listing decision for more than a decade.

²⁵*ALA v. Norton*, Civ. No. 00-2339, 2004 WL 3246687 at *3 (D.D.C. June 2, 2004) (permanent nationwide injunction based on Gunnison sage grouse). See also *ALA v. Norton*, 242 F. Supp. 2d 1, 18 (2003) (declaring this aspect of the guidance to be invalid). The adequacy of the guidance was also challenged in a 2001 decision, *Center for Biological Diversity v. Gale Norton*, 254 F.3d 833, 838–40 (2001) (holding that provisions of the guidance related to candidate species violated the ESA).

contemplates to be reviewed at this stage . . . , [and] those petitions that are meritorious on their face should not be subject to refutation by information and views provided by selected third parties solicited by [the Service].”²⁶ Since then, several other courts have reached similar conclusions.²⁷ Despite the constancy of various courts’ holdings, 25 out of the 54 90-day petition findings in our survey, or 46 percent, were based in part on information from outside sources, according to Service biologists. The Service’s May 2005 informal guidance directed biologists to use information in Service files or “other information,” which the guidance did not elaborate on. The Service’s November 2006 draft guidance stated that biologists should identify and review “readily available information within Service files” as part of evaluating information contained in petitions. The biologists we surveyed expressed confusion and lack of consensus on the meaning of the terms “readily available” and “within Service files.” Some Service officials were concerned that if information solicited from outside sources could not be considered in developing 90-day petition findings, many more 90-day petitions would be approved and moved forward for in-depth 12-month reviews, further straining the Service’s limited resources.

- In addition, the Service must continue to adapt to a number of court decisions since 2004 on whether it is imposing too high a standard in evaluating 90-day petitions. This issue—essentially, what level of evidence is required at the 90-day petition stage and how this evidence should be evaluated—goes hand in hand with the issue of using additional information outside of petitions in reaching ESA decisions. In overturning three negative 90-day petition findings, three recent court decisions in 2006 and 2007 have held, in part, that the Service imposed too high a standard in evaluating the information presented in the petitions.²⁸ These court decisions have focused on the meaning of

²⁶*Center for Biological Diversity v. Morganweck*, 351 F. Supp. 2d 1137, 1143 (D. Colo. 2004).

²⁷*Colorado River Cutthroat Trout, et al. v. Kempthorne*, 448 F. Supp. 2d 170 (2006); *Western Watersheds Project v. Norton*, Civ. No. 06-127, 2007 WL 2827375 (D. Idaho Sept. 6, 2007) (pygmy rabbit); *Center for Biological Diversity v. Kempthorne*, Civ. No. 07-0038, 2008 WL 659822 (D. Ariz. March 6, 2008) (Sonoran desert population of bald eagle).

²⁸*Defenders of Wildlife v. Kempthorne*, Civ. No. 05-99 (D. Mont. Sept. 29, 2006) (wolverine); *Center for Biological Diversity v. Kempthorne*, Civ. No. 06-04186, 2007 WL 163244 (N.D. Cal. Jan. 19, 2007) (Siskiyou Mountains salamander and Scott Bar salamander); *Western Watersheds Project v. Norton*, Civ. No. 06-127, 2007 WL 2827375 (D. Idaho Sept. 6, 2007) (pygmy rabbit).

key phrases in the ESA and federal regulations, such as “substantial” information, “a reasonable person,” and “may be warranted.” In 2006, the U.S. District Court for the District of Montana concluded that the threshold necessary to pass the 90-day petition stage and move forward to a 12-month review was “not high.”²⁹ Again, some Service officials are concerned that these recent court decisions may lead to approval of more 90-day petitions, thus moving them forward for in-depth 12-month reviews and straining the Service’s limited resources.

Beyond these general challenges, the Service’s 90-day petition finding in a recent case involving the Sonoran Desert population of the bald eagle has come under severe criticism by the U.S. District Court for the District of Arizona.³⁰ The court noted that Service scientists were told in a conference call that headquarters and regional Service officials had reached a “policy call” to deny the 90-day petition and that “we need to support [that call].” A headquarters official made this statement even though the Service had been unable to find information in its files refuting the petition and even though at least some Service scientists had concluded that listing may be warranted. The court stated that the Service participants in a July 18, 2006, conference call appeared to have received “marching orders” and were directed to find an analysis that fit a 90-day finding that the Sonoran Desert population of the bald eagle did not constitute a distinct population segment. The court stated that “these facts cause the Court to have no confidence in the objectivity of the agency’s decision-making process in its August 30, 2006, 90-day finding.” In contrast, in a September 2007 decision, the U.S. District Court for the District of Idaho upheld the Service’s “not substantial” 90-day petition findings on the interior mountain quail distinct population segment.³¹

²⁹*Defenders of Wildlife v. Kempthorne*, Civ. No. 05-99, slip op. at 20 (D. Mont. Sept. 29, 2006).

³⁰*Center for Biological Diversity v. Kempthorne*, Civ. No. 07-0038, 2008 WL 659822 (D. Ariz. Mar. 6, 2008).

³¹*Western Watersheds Project v. Hall*, Civ. No. 06-0073, 2007 WL 2790404 (D. Idaho Sept. 24, 2007).

Recovery Criteria for Threatened and Endangered Species Were Generally Met in Final Delisting Decisions but Not in Proposed Delisting Decisions

Of the eight U.S. species delisted from 2000 through 2007 because of recovery, the Service reported that recovery criteria were completely met for five species and partially met for the remaining three species. When the delistings were first proposed, however, the respective recovery criteria for only two of the eight species had been completely met. Although the ESA does not specifically require the Service to meet recovery criteria before delisting a species, courts have held that the Service must address the ESA's five threat factors for listing/delisting, to the maximum extent practicable, in developing recovery criteria. For each of the delisted species that we reviewed, the Service determined that the five threat factors listed in the ESA no longer posed a significant enough threat to the continued existence of the species to warrant continued listing as threatened or endangered.

Table 5 summarizes whether the recovery criteria for the eight species delisted from 2000 through 2007 were partially or completely met at the proposed rule stage and the final rule stage. At the proposed rule stage, only two of the eight species had completely met their respective recovery criteria; that fraction increased to five of eight at the final rule stage. The period between the proposed rules and the final rules ranged from less than 1 year for the gray wolf's western Great Lakes distinct population segment to just over 8 years for the bald eagle.

Table 5: The Extent to Which Recovery Criteria Were Met for the Eight U.S. Species Delisted from 2000 through 2007 Because of Recovery

| Species | Proposed Delisting Rule | Recovery criteria met | Final Delisting Rule | Recovery criteria met |
|--|---|-----------------------|---|-----------------------|
| Gray wolf: western Great Lakes distinct population segment | 71 <i>Fed. Reg.</i> 15266 (Mar. 27, 2006) | Completely | 72 <i>Fed. Reg.</i> 6051 (Feb. 8, 2007) | Completely |
| Hoover's woolly-star | 66 <i>Fed. Reg.</i> 13474 (Mar. 6, 2001) | Completely | 68 <i>Fed. Reg.</i> 57829 (Oct. 7, 2003) | Completely |
| Bald eagle ^a | 64 <i>Fed. Reg.</i> 36454 (July 6, 1999) | Partially | 72 <i>Fed. Reg.</i> 37345 (July 9, 2007) | Completely |
| Eggert's sunflower | 69 <i>Fed. Reg.</i> 17627 (Apr. 5, 2004) | Partially | 70 <i>Fed. Reg.</i> 48482 (Aug. 18, 2005) | Completely |
| Robbins' cinquefoil | 66 <i>Fed. Reg.</i> 30860 (June 8, 2001) | Partially | 67 <i>Fed. Reg.</i> 54968 (Aug. 27, 2002) | Completely |
| Grizzly bear: Yellowstone distinct population segment | 70 <i>Fed. Reg.</i> 69854 (Nov. 17, 2005) | Partially | 72 <i>Fed. Reg.</i> 14865 (Mar. 29, 2007) | Partially |
| Columbian white-tailed deer: Douglas County distinct | 64 <i>Fed. Reg.</i> 25263 (May 11, 1999) | Partially | 68 <i>Fed. Reg.</i> 43647 (July 24, 2003) | Partially |
| Aleutian Canada goose | 64 <i>Fed. Reg.</i> 42058 (Aug. 3, 1999) | Partially | 66 <i>Fed. Reg.</i> 15643 (Mar. 20, 2001) | Partially |

Sources: U.S. Fish and Wildlife Service and the *Federal Register*.

^aA federal district court prevented the delisting of the Sonoran Desert population of the bald eagle, pending a 12-month status review and lawful determination of its status as a distinct population segment.

For the species where the criteria were not completely met before final delisting, the Service indicated that the recovery criteria were outdated or otherwise not feasible to achieve. For example, the recovery plan for the Douglas County population of Columbian white-tailed deer was originally developed in 1976 and later updated in 1983. The recovery plan recommended maintaining a minimum population of 500 animals distributed in suitable, secure habitat within Oregon's Umpqua Basin. The Service reported it was not feasible to demonstrate, without considerable expense, that 500 specific deer live entirely within secure lands managed for their benefit, for most deer move between public and private lands. Even though this specific recovery criterion was not met, the Service indicated that the species warranted delisting because of the overall increase in its population and amount of secure habitat.

The West Virginia northern flying squirrel, whose final delisting decision was pending at the time of our review, offers an example of a species proposed for delisting even though the recovery criteria have not been met. The species was proposed for delisting on December 19, 2006.³² The squirrel's recovery plan was developed in 1990 and amended in 2001 to incorporate guidelines for habitat identification and management in the Monongahela National Forest, which supports almost all of the squirrel's populations. The Service asserted that, other than the 2001 amendment, the West Virginia northern flying squirrel recovery plan is outdated and no longer actively used to guide recovery. This was in part because the squirrel's known range at the time of proposed delisting was much wider than the geographic recovery areas designated in the recovery plan and because the recovery areas have no formal or regulatory distinction. In support of its delisting decision, the Service indicated that the squirrel population had increased and that suitable habitat had been expanding. The Service drew these conclusions largely on the basis of a 5-year review—an ESA-mandated process to ensure the continued accuracy of a listing classification—completed in 2006, and not on the basis of the squirrel's 1990 recovery plan. The Service also reported that the recovery plan's criteria did not specifically address the five threat factors.

³²71 *Fed. Reg.* 75924 (Dec. 19, 2006).

According to the Service, most recovery plan criteria have focused on demographic parameters, such as population numbers, trends, and distribution. While the Service acknowledges that these types of criteria are valid and useful, it also cautions that, by themselves they are not adequate for determining a species' status. The Service reports that recovery can be accomplished via many paths and may be achieved even if not all recovery criteria are fully met. A senior Service official noted that the quality of recovery plans varies considerably, and some criteria may be outdated. Furthermore, Service officials also noted, recovery plans are fluid documents, and the plan's respective criteria can be updated as new threat information about a particular species becomes available.

While the ESA does not specifically require the Service to meet recovery criteria before delisting a species, courts have held that it must address each of the five threat factors to the maximum extent practicable when developing recovery criteria.³³ In a 2006 report, we provided information on 107 randomly sampled recovery plans covering about 200 species.³⁴ Specifically, we found that only 5 of the 107 reviewed recovery plans included recovery criteria that addressed all five threat factors. We recommended that in recovery planning guidance, the Service include direction that all new and revised recovery plans contain either recovery criteria to demonstrate consideration of all five threat factors or a statement about why it is not practicable to include such criteria. In January 2008, in response to our recommendation, the Director of the Service issued a memorandum requiring all new and revised recovery plans to include criteria addressing each of the five threat factors.

³³See *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121 (D.D.C. 2001); *Fund for Animals v. Babbitt*, 903 F. Supp. 96 (D.D.C. 1995). In *Defenders of Wildlife*, the court remanded the recovery plan to the Service to incorporate delisting criteria or to provide an adequate explanation of why delisting criteria could not practicably be incorporated. In *Fund for Animals*, the court remanded the plan back to the Service for revision of the recovery criteria.

³⁴GAO, *Endangered Species: Time and Costs Required to Recover Species Are Largely Unknown*, GAO-06-463R (Washington D.C.: Apr. 6, 2006). The random sample of 107 recovery plans included 99 recovery plans (covering 192 species) for which the Service has either primary responsibility or shared responsibility with the National Oceanic and Atmospheric Administration's Fisheries Service, and 8 recovery plans (covering 9 species) for which the National Oceanic and Atmospheric Administration's Fisheries Service has primary responsibility.

Concluding Observations

In conclusion, Mr. Chairman, questions remain about the extent to which Interior officials other than Ms. MacDonald may have inappropriately influenced ESA decisions and whether broader ESA policies should be revisited. Under the original direction from Interior's Deputy Secretary and the three selection criteria followed by the Service, a variety of ESA decisions were excluded from the selection process. Broadening the scope of the review might have resulted in the selection of more decisions, but it is unclear to what extent.

The Service recognizes the need for official guidance on how 90-day petition findings should be developed to eliminate confusion and inconsistencies. The guidance will need to reflect the Service's implementation of recent court decisions on how far the Service can go in collecting additional information to evaluate 90-day petitions and reflect what standards should be applied to determine if a petition presents "substantial" information. The need for clear guidance is more urgent than ever with the Service's receipt in the summer of 2007 of two petitions to list 681 species.

Assuming successful implementation of the Service's January 2008 directive that recovery criteria be aligned with the five threat factors in the ESA, we believe that future delistings will more likely meet recovery criteria while also satisfying the ESA's delisting requirements based on the five threat factors.

Agency Comments

We provided Interior with a draft of this testimony for review and comment. However, no comments were provided in time for them to be included as part of this testimony.

Mr. Chairman, this completes my prepared statement. I would be happy to respond to any questions you or other members of the Committee may have at this time.

GAO Contacts and Staff Acknowledgments

For further information, please contact Robin M. Nazzaro at (202) 512-3841 or nazzaror@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals making key contributions to this testimony include Jeffery D. Malcolm, Assistant Director; Eric A. Bachhuber; Mark A. Braza; Ellen W. Chu; Alyssa M. Hundrup; Richard P. Johnson; Patricia M. McClure; and Laina M. Poon.

Appendix I: Objectives, Scope, and Methodology

We are reporting on (1) what types of decisions, if any, were excluded from the U.S. Fish and Wildlife Service's (Service) selection process of Endangered Species Act (ESA) decisions that were potentially inappropriately influenced; (2) the extent to which the Service's May 2005 informal guidance affected the Service's decisions on petitions to list or delist species; and (3) the extent to which the Service determined, before delisting, whether species met recovery criteria outlined in recovery plans.

To address our first objective, we interviewed the Director of the Service, all eight regional directors, and key regional staff. Also, we conducted site visits, phone interviews, or both with ESA staff from ten field offices in five regions that were actively engaged in ESA decision making. Further, we reviewed documentation developed by Service headquarters, regions, and field offices about the selection process and the status of the Service's review. In addition, we reviewed Service policies and procedures for making ESA decisions and reviewed other species-specific information.

To address our second objective, we identified 67 90-day petition findings issued by the Service from 2005 through 2007 and conducted structured telephone interviews of current and former Service biologists responsible for drafting 90-day petition findings issued in that time frame. Of the 67, we excluded 13 petition findings from our survey: 5 had been overturned by the courts or were being redone as a result of a settlement agreement; 3 involved up-listing already protected species from threatened to endangered; 2 involved ongoing litigation; 2 involved species located outside the United States; and 1 involved a petition to revise a critical habitat designation for a species that was already protected. In total, we surveyed 44 biologists responsible for drafting 54 90-day petition findings. To identify the lead author responsible for drafting the 90-day petition findings in our survey, we contacted the field office supervisor at the office where the petition finding was drafted. The field office supervisor directed us to the biologist who was the lead author of the finding or, if that person was not available, a supporting or supervising biologist. Of the 44 biologists we surveyed, 39 were lead biologists in drafting the finding, 3 were supervising biologists, and 2 were supporting biologists. From February 1, 2008, and February 6, 2008, we pretested the survey with 5 biologists from three regions between, and we used their feedback to refine the survey. The five 90-day petition findings we selected for the pretest were all published in 2004 to most closely approximate, but not overlap with, our sample. They represented a balance between listing and delisting petitions, substantial and not substantial findings, and types of information used in evaluating the petition as stated in the *Federal Register* notice. We conducted the pretests through structured telephone

interviews to ensure that (1) the questions were clear and unambiguous, (2) terms were precise, and (3) the questions were not sensitive and that the questions as phrased could be candidly answered. A GAO survey specialist also independently reviewed the questionnaire.

Our structured interview questions were designed to obtain information about the process the Service uses in making 90-day petition findings under the ESA and the types of information used to draft each 90-day petition finding. Specifically, the structured questions focused on information that was not cited or referred to in a listing or delisting petition but was either internal to Service files or obtained from sources outside the Service.¹ In each of these categories, we asked whether the information was used to support, refute, or raise new issues not cited in the petition.

Table 6 summarizes the key questions we are reporting on that we asked during the structured interviews. We also asked other questions in the survey that we do not specifically report on; these questions do not appear in the table below.

¹We defined information in Service files as information not included or cited in the petition but used regularly over the course of the lead biologists' work. We defined information external to Service files as information not included or cited in the petition but solicited from other entities or obtained through exhaustive literature searches during the process of reviewing the petition.

Table 6: Selected Survey Questions

General questions

Was this the first 90-day petition finding you drafted in your career?

What was your role in evaluating this 90-day petition?

Was there information in Service files related to this petition?

What is the name of, or how do you refer to, the Service's petition guidance that you followed in evaluating this 90-day petition?

Specific questions addressing information in Service files and information external to Service files

Did you use information [in Service files/external to Service files] in drafting your decision on the petition?

Did you use information [in Service files/external to Service files] to further support any specific issues raised in the petition?

If you did not use information [in Service files/external to Service files] to further support any specific issues raised in the petition, was this because, (a) information in Service files simply did not support the petition, (b) it is against Service policy to use information [in Service files/external to Service files] this way, or (c) some other reason?

Did you use information [in Service files/external to Service files] to refute any specific issues raised in the petition?

In your opinion, had you used information [in Service files/external to Service files] in evaluating the petition, how likely is it that the information would have changed your finding on this petition?

Specific questions on the definition of readily available

Would you consider information obtained through an exhaustive literature search or by soliciting the information from another entity "readily available"?

How would you define "readily available"?

Concluding question

Would you like to share any additional information regarding the Service's processing of 90-day petition findings or the Service's overall decision making under the ESA?

Source: GAO.

Our survey results demonstrated in several ways that the May 2005 guidance did not have a substantive effect on the outcomes of 90-day petition findings. First, Service biologists who chose not to use information outside of petitions to support claims made in the petitions said that Service policy had no influence on this choice. Second, when asked what guidance they followed in drafting their 90-day petition finding, very few respondents cited the May 2005 guidance, indicating that although this guidance may have been followed to create an internal agency outline, it did not have a substantive effect on the finding itself. Third, in response to our concluding, open-ended question, none of the biologists mentioned specific reservations about the May 2005 guidance.

To address our third objective, we generated a list of all of the Service's final delisting decisions published as rules in the *Federal Register* (and corresponding proposed delisting rules) from calendar years 2000 through 2007, to determine the number of species removed from the list of threatened and endangered species by the Service. As of December 31, 2007, the Service had issued final rules resulting in the delisting of 17 species. Of those 17 delisted species, 2 species were delisted because they had been declared extinct, 6 species were delisted because the original data used to list the species were in error, and 9 species were delisted as a result of recovery. Of the 9 recovered species, we excluded the Tinian monarch, a species located in a U.S. territory, which reduced the number of species we looked at to 8 U.S. species delisted because of recovery. To examine whether the Service met recovery criteria outlined in recovery plans before delisting species, we obtained and reviewed the Service's recovery plans for each of those 8 delisted species and also examined the *Federal Register* proposed and final delisting rules. This information indicated whether the Service believed that it had met the criteria laid out in the recovery plans for the 8 delisted U.S. species. Finally, we also reviewed the proposed rule to delist the West Virginia northern flying squirrel; as of March 31, 2008, the Service had not finalized this proposed rule.

We conducted this performance audit from August 2007 to May 2008 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: Ninety-Day Petition Findings Issued from 2005 through 2007

| Species | Petitioned action | 90-day petition finding | Federal Register citation |
|--|-------------------|-------------------------|--|
| Ninety-day petition findings included in our survey | | | |
| Arizona brome and nodding needlegrass | List | Not substantial | 70 <i>Fed. Reg.</i> 3504 (Jan. 25, 2005) |
| <i>Cicurina cueva</i> (a spider) | List | Substantial | 70 <i>Fed. Reg.</i> 5123 (Feb. 1, 2005) |
| Gentry indigo bush | List | Substantial | 70 <i>Fed. Reg.</i> 5401 (Feb. 2, 2005) |
| Porter feathergrass | List | Not substantial | 70 <i>Fed. Reg.</i> 5959 (Feb. 4, 2005) |
| Idaho springsnail | Delist | Substantial | 70 <i>Fed. Reg.</i> 20512 (Apr. 20, 2005) |
| Jackson Lake springsnail, Harney Lake springsnail, and Columbia springsnail | List | Substantial | 70 <i>Fed. Reg.</i> 20512 (Apr. 20, 2005) ^a |
| California spotted owl | List | Substantial | 70 <i>Fed. Reg.</i> 35607 (June 21, 2005) |
| American eel | List | Substantial | 70 <i>Fed. Reg.</i> 38849 (July 6, 2005) |
| Roundtail chub, lower Colorado River basin distinct population segment, and headwater chub | List | Substantial | 70 <i>Fed. Reg.</i> 39981 (July 12, 2005) |
| Wright fishhook cactus | Delist | Not substantial | 70 <i>Fed. Reg.</i> 44544 (Aug. 3, 2005) |
| Furbish lousewort | Delist | Not substantial | 70 <i>Fed. Reg.</i> 46467 (Aug. 10, 2005) |
| Slackwater darter | Delist | Not substantial | 70 <i>Fed. Reg.</i> 46465 (Aug. 10, 2005) |
| Gray wolf, northern Rocky Mountain distinct population segment | Delist | Substantial | 70 <i>Fed. Reg.</i> 61770 (Oct. 26, 2005) |
| Uinta mountainsnail | List | Not substantial | 70 <i>Fed. Reg.</i> 69303 (Nov. 15, 2005) |
| Peirson's milkvetch | Delist | Substantial | 70 <i>Fed. Reg.</i> 71795 (Nov. 30, 2005) |
| Gray wolf in Nevada | Delist | Not substantial | 70 <i>Fed. Reg.</i> 73190 (Dec. 9, 2005) |
| Northern Mexican garter snake | List | Substantial | 71 <i>Fed. Reg.</i> 315 (Jan. 4, 2006) |
| American dipper, Black Hills, South Dakota, population | List | Not substantial | 71 <i>Fed. Reg.</i> 4341 (Jan. 26, 2006) |
| Mussentuchit gilia | List | Not substantial | 71 <i>Fed. Reg.</i> 4337 (Jan. 26, 2006) |
| Polar bear | List | Substantial | 71 <i>Fed. Reg.</i> 6745 (Feb. 9, 2006) |

| Species | Petitioned action | 90-day petition finding | Federal Register citation |
|---|--------------------------|--------------------------------|---|
| Island marble butterfly | List | Substantial | 71 Fed. Reg. 7497 (Feb. 13, 2006) |
| Douglas County pocket gopher | List | Not substantial | 71 Fed. Reg. 7715 (Feb. 14, 2006) |
| Henderson's checkermallow | List | Not substantial | 71 Fed. Reg. 8252 (Feb. 16, 2006) |
| Black Hills mountainsnail | List | Not substantial | 71 Fed. Reg. 9988 (Feb. 28, 2006) |
| Andrews' dune scarab beetle | List | Not substantial | 71 Fed. Reg. 26444 (May 5, 2006) |
| California brown pelican | Delist | Substantial | 71 Fed. Reg. 29908 (May 24, 2006) |
| Sand Mountain blue butterfly | List | Substantial | 71 Fed. Reg. 44988 (Aug. 8, 2006) |
| Casey's June beetle | List | Substantial | 71 Fed. Reg. 44960 (Aug. 8, 2006) |
| Thorne's hairstreak butterfly | List | Not substantial | 71 Fed. Reg. 44980 (Aug. 8, 2006) |
| Hermes copper butterfly | List | Not substantial | 71 Fed. Reg. 44966 (Aug. 8, 2006) |
| Sixteen insect species from the Algodones Sand Dunes, Imperial County, California | List | Not substantial | 71 Fed. Reg. 47765 (Aug. 18, 2006) |
| Island night lizard | Delist | Substantial | 71 Fed. Reg. 48900 (Aug. 22, 2006) |
| <i>Usnea longissima</i> (a lichen) | List | Not substantial | 71 Fed. Reg. 56937 (Sept. 28, 2006) |
| Anacapa deer mouse | List | Not substantial | 71 Fed. Reg. 56932 (Sept. 28, 2006) |
| Plymouth red-bellied turtle | Delist | Substantial | 71 Fed. Reg. 58363 (Oct. 3, 2006) |
| Columbian sharp-tailed grouse | List | Not substantial | 71 Fed. Reg. 67318 (Nov. 21, 2006) |
| Tricolored blackbird | List | Not substantial | 71 Fed. Reg. 70483 (Dec. 5, 2006) |
| Sacramento Mountains thistle | Delist | Not substantial | 71 Fed. Reg. 70479 (Dec. 5, 2006) |
| Northern water snake, upper tidal Potomac River population | List | Not substantial | 71 Fed. Reg. 70715 (Dec. 6, 2006) |
| Uinta Basin hookless cactus | Delist | Not substantial | 71 Fed. Reg. 75215 (Dec. 14, 2006) |
| Pariette cactus | List | Substantial | 71 Fed. Reg. 75215 (Dec. 14, 2006) ^b |

| Species | Petitioned action | 90-day petition finding | Federal Register citation |
|---|--------------------------|--------------------------------|-------------------------------------|
| Jollyville Plateau salamander | List | Substantial | 72 Fed. Reg. 6699 (Feb. 13, 2007) |
| San Felipe gambusia | List | Not substantial | 72 Fed. Reg. 6703 (Feb. 13, 2007) |
| DeBeque milkvetch | List | Not substantial | 72 Fed. Reg. 6998 (Feb. 14, 2007) |
| Longnose sucker, Monongohela River population | List | Not substantial | 72 Fed. Reg. 10477 (Mar. 8, 2007) |
| Mt. Charleston blue butterfly | List | Substantial | 72 Fed. Reg. 29933 (May 30, 2007) |
| Yellow-billed loon | List | Substantial | 72 Fed. Reg. 31256 (June 6, 2007) |
| Utah (desert) valvata snail | Delist | Substantial | 72 Fed. Reg. 31264 (June 6, 2007) |
| Bliss Rapids snail | Delist | Substantial | 72 Fed. Reg. 31250 (June 6, 2007) |
| Bison, Yellowstone National Park herd | List | Not substantial | 72 Fed. Reg. 45717 (Aug. 15, 2007) |
| Goose Creek milkvetch | List | Substantial | 72 Fed. Reg. 46023 (Aug. 16, 2007) |
| Kenk's amphipod, northern Virginia well amphipod, and a copepod | List | Not substantial | 72 Fed. Reg. 51766 (Sept. 11, 2007) |
| Black-footed albatross | List | Substantial | 72 Fed. Reg. 57278 (Oct. 9, 2007) |
| Kokanee, Issaquah Creek summer run | List | Not substantial | 72 Fed. Reg. 59979 (Oct. 23, 2007) |
| 90-day petition findings excluded from our survey | | | |
| Overturned or settled as a result of litigation | | | |
| Pygmy rabbit ^c | List | Not substantial | 70 Fed. Reg. 29253 (May 20, 2005) |
| Gunnison's prairie dog ^d | List | Not substantial | 71 Fed. Reg. 6241 (Feb. 7, 2006) |
| Bald eagle, Sonoran Desert population ^e | List | Not substantial | 71 Fed. Reg. 51549 (Aug. 30, 2006) |
| Greater sage grouse, Mono Basin area ^f | List | Not substantial | 71 Fed. Reg. 76057 (Dec. 19, 2006) |
| Siskiyou Mountains salamander and Scott Bar salamander ^g | List | Not Substantial | 72 Fed. Reg. 23886 (Apr. 25, 2006) |

| Species | Petitioned action | 90-day petition finding | Federal Register citation |
|--|-------------------------|-------------------------|------------------------------------|
| Uplistings | | | |
| Florida scrub-jay | Uplist | Not substantial | 71 Fed. Reg. 4092 (Jan. 25, 2006) |
| Utah prairie dog | Uplist | Not Substantial | 72 Fed. Reg. 7843 (Feb. 21, 2007) |
| Grizzly bear, Yellowstone distinct population segment | Uplist | Not substantial | 72 Fed. Reg. 14865 (Mar. 29, 2007) |
| Ongoing litigation | | | |
| Giant Palouse earthworm ^h | List | Not substantial | 72 Fed. Reg. 57273 (Oct. 9, 2007) |
| Mountain whitefish in the Big Lost River, Idaho ⁱ | List | Not substantial | 72 Fed. Reg. 59983 (Oct. 23, 2007) |
| International species | | | |
| Morelet's crocodile | Delist | Substantial | 71 Fed. Reg. 36743 (June 28, 2006) |
| Twelve penguin species | List | Substantial | 72 Fed. Reg. 37695 (July 11, 2007) |
| Revision to critical habitat | | | |
| Indiana bat | Revise critical habitat | Not substantial | 72 Fed. Reg. 9913 (Mar. 6, 2007) |

Source: U.S. Fish and Wildlife Service and the *Federal Register*.

^aThe Service published findings for the petition to list three snail species and the petition to delist one snail species in the same *Federal Register* notice.

^bThe Service published findings for the petition to delist the Uinta Basin hookless cactus (found not substantial) and the petition to list the Pariette cactus (found substantial) in the same *Federal Register* notice.

^c*Western Watersheds Project v. Norton*, Civ. No. 06-127, 2007 WL 2827375 (D. Idaho Sept. 6, 2007).

^d*Forest Guardians v. Kempthorne*, Civ. No. 06-02115 (D.D.C.), settlement filed June 29, 2007.

^e*Center for Biological Diversity v. Kempthorne*, Civ. No. 07-0038, 2008 WL 659822 (D. Ariz. Mar. 6, 2008).

^f*Center for Biological Diversity v. United States Fish and Wildlife Service*, Civ. No. 07-4347 (N.D. Cal.), settlement filed Feb. 21, 2008.

^g*Center for Biological Diversity v. Kempthorne*, Civ. No. 06-04186, 2007 WL 163244, (N.D. Cal. Jan. 19, 2007).

^h*Western Watersheds Project v. Kempthorne*, Civ. No. 07-00409 (D. Idaho), complaint filed Jan. 25, 2008.

ⁱ*Palouse Prairie Foundation v. Kempthorne*, Civ. No. 08-032 (E.D. Wash.), complaint filed Jan. 24, 2008.

Appendix III: Briefing Slides



U.S. Fish and Wildlife Service: Review of Endangered Species Act Decision Making

**Briefing for the
House Natural Resources Committee**

December 17, 2007*

*Updated April 2008

1

Introduction

- In April 2006, an anonymous complaint prompted the Department of the Interior's (Interior) Office of Inspector General to begin investigating Deputy Assistant Secretary Julie MacDonald's activities and her involvement with Endangered Species Act (ESA) decisions.
- On March 23, 2007, Interior's Inspector General reported on its investigation of allegations that Ms. MacDonald was involved in unethical and illegal activities related to ESA decision making.
- The investigation did not reveal illegal activity but concluded that Ms. MacDonald violated federal rules by sending internal agency documents to industry lobbyists.
- On May 1, 2007, Ms. MacDonald resigned from her position as Deputy Assistant Secretary.

Introduction

- On May 9, 2007, the House Natural Resources Committee held a congressional hearing titled *Endangered Species Act Implementation: Science or Politics?* (House Hearing No. 110-24).
- On May 22, 2007, Interior's Deputy Secretary, Lynn Scarlett, directed Interior's U.S. Fish and Wildlife Service (Service) Director Dale Hall to examine all work products that were produced by the Service, reviewed by Ms. MacDonald, and could require additional review because of her involvement.
- In response to the directive, the Service identified eight decisions for further review.

Objectives

Subsequent to these events, we were requested to examine:

- The Service's selection process for determining which ESA decisions were potentially inappropriately influenced by former Deputy Assistant Secretary MacDonald and the status of the Service's review of these decisions.
- The types of decisions, if any, excluded from the Service's selection process.

Scope and Methodology

- Interviewed the Director of the Service, all eight regional directors, and key regional ESA staff.
 - Conducted site visits, phone interviews, or both with ESA staff from 10 field offices in five regions that were actively engaged in ESA decision making.
 - Reviewed documentation developed by Service headquarters, regions, and field offices about the selection process and the current status of the Service's review.
 - Reviewed Service policies and procedures for making ESA decisions and reviewed other species-specific documentation.
-

Results in Brief

Applying three criteria, the Service's selection process, which varied across regions, identified eight ESA decisions for potential revision.

- Director Hall granted the regions discretion to carry out the selection process and each region incorporated varying degrees of field input.
 - The regions generally applied all of three selection criteria:
 1. Ms. MacDonald influenced the decision directly.
 2. The scientific basis of the decision was compromised.
 3. The decision was significantly changed and resulted in a potentially negative impact on the species.
 - Upon further review, the Service concluded that seven of eight selected decisions warranted revision.
 - The Service proposed revisions on three decisions, is planning to take action on two in 2008, and is determining time frames for addressing two.
-

Results in Brief

Excluded from the Service's selection process were:

- decisions made by Interior officials other than Ms. MacDonald;
 - policy decisions that influenced how science was to be used;
 - decisions that were changed, but not significantly or to the point of having a negative impact on the species; and
 - Other decisions influenced by Ms. MacDonald but that, for various reasons, might not warrant revisiting, such as decisions that had already been addressed by the courts or were not feasible to reverse.
-

Background

Overview of the ESA

- The purpose of the Endangered Species Act of 1973 is to conserve threatened and endangered species and the ecosystems upon which they depend.
 - The ESA requires listing a species as endangered if it faces extinction throughout all or a significant portion of its range and as threatened if it is likely to become endangered in the foreseeable future.
 - The ESA has provisions to protect and recover species after they are listed, and it prohibits the “taking” of listed animal species.
 - Many ESA decisions must be based, at least in part, on the best available scientific information.
-

Background

Key types of ESA decisions

| Decision | Description | Information used to make decision |
|--|--|---|
| Petition to list (90-day petition finding) | Request for the Service to consider undertaking a 12-month review to determine whether listing a species is warranted | Information presented in the petition or information readily accessible in Service files |
| Listing/delisting | Analysis of whether a species warrants inclusion on or removal from the endangered or threatened list on the basis of its status | Best available scientific and commercial data |
| Critical habitat | Designation of habitat determined to be essential to a species' conservation | Best available scientific data, taking into consideration information on economic and other impacts |
| Recovery plan | Site-specific management plan for the conservation of listed species | Information from scientific experts, stakeholders, and others |
| Section 7 consultation | Determination of whether federal actions are likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat | Best available scientific and commercial data |
| Habitat conservation plan (HCP) | Development of a plan that allows landowners "incidental take" of listed species in conjunction with mitigating actions that protect the listed species on their land | Not specified |

Source: ESA and U.S Fish and Wildlife Service regulations and policies.

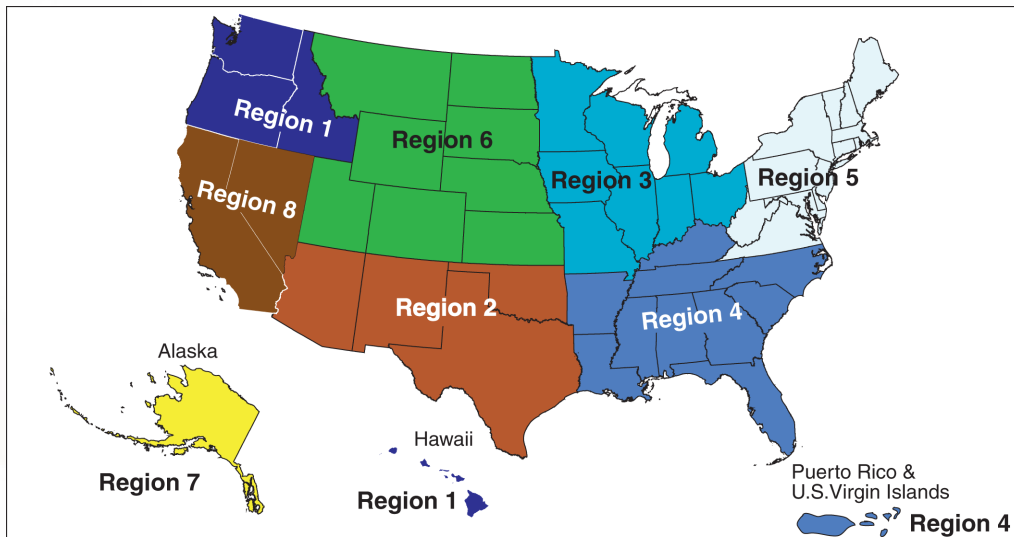
Background

Responsibilities for ESA implementation

- Interior is responsible for implementing the ESA for freshwater and terrestrial species.
 - Interior has delegated many of its ESA responsibilities to the Service.
 - Service staff at headquarters, regional, and field offices are largely responsible for implementing the various ESA provisions.
 - Field office staff are generally responsible for initiating ESA decision-making actions; listing and critical habitat decisions are forwarded to regional and headquarters offices for review.
-

Background

Service regions



Source: U.S. Fish and Wildlife Service.

Background

- The Service forwards listing decisions to Interior's Office of Assistant Secretary for Fish and Wildlife and Parks for review; the Service Director generally approves final decisions.
- For critical habitat, the Service forwards its recommendations to Interior's Office of Assistant Secretary for Fish and Wildlife and Parks, which applies economic, national security, and other factors before it approves a final determination.
- While in office from July 2002 until May 2007, Interior's former Deputy Assistant Secretary MacDonald reviewed more than 200 ESA decisions.
- Dale Hall was sworn in on October 12, 2005, as Service Director. In February 2006, he met with Ms. MacDonald and other Interior officials about their review and involvement in the Service's ESA decisions.

Background

Recent Interior Inspector General investigations

- On November 27, 2007, Interior's Inspector General reported on a an investigation of allegations that Ms. MacDonald's involvement resulted in the withdrawal of the Service's decision to list the Sacramento splittail as threatened. The investigation concluded that Ms. MacDonald stood to gain financially by the decision and therefore should have recused herself.
 - On November 30, 2007, Senator Wyden sent a letter to the Inspector General requesting an investigation of potential inappropriate involvement by Ms. MacDonald on 18 ESA decisions. Two more species were subsequently added to this investigation.
-

Objective 1: The Service's selection process and current status of reviews

The selection process the Service followed varied by region

- On May 30, 2007, Director Hall held a conference call with the regional directors to communicate Deputy Secretary Scarlett's directive to examine decisions reviewed by Ms. MacDonald that could require revision because of her involvement.
- Director Hall delegated the selection process to the regional directors and asked that they consult their field offices.
- Director Hall said the selection process should include any type of ESA decision made during Ms. MacDonald's time in office.
- The regions were given the month of June to select decisions for potential revision.
- Director Hall granted the regions considerable discretion in making their selections, deferring to them to submit decisions for potential revision.

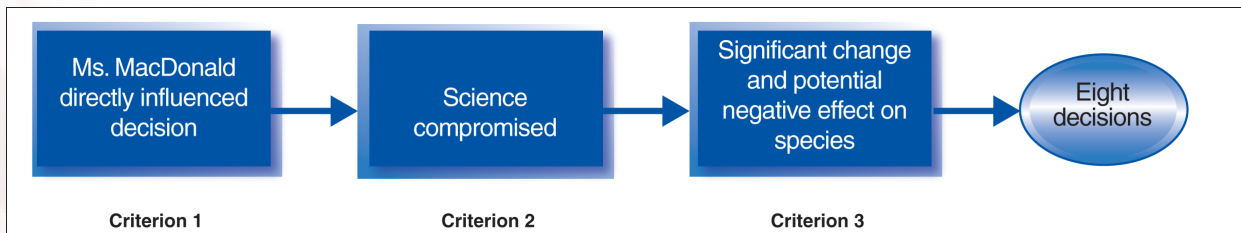
Objective 1: The Service's selection process and current status of reviews

- Regional selection processes varied: in one regional office, a few staff met to discuss decisions; in another, a systematic process was undertaken, including developing memos of instruction, reviewing decision files, and holding conference calls with field offices.
- Regional offices incorporated input from their field offices to varying degrees; a few interacted little or not at all with field staff in making their selections.
- Four of the eight regions reviewed documents from their decision files; many regional staff stated that they already knew which decisions might warrant revision without reviewing their records.
- The universe of decisions reviewed varied slightly by region: some regions reviewed decisions made through 2006; others reviewed decisions made during 2007.

Objective 1: The Service’s selection process and current status of reviews

The regions generally applied three criteria to identify decisions for potential revision:

1. Ms. MacDonald influenced the decision directly;
2. the scientific basis of the decision was compromised; and
3. the decision was significantly changed and resulted in a potentially negative impact on the species.



Source: GAO.

Objective 1: The Service's selection process and current status of reviews

The Service's selection process identified eight decisions

- At the end of the selection process, the regional offices discussed the results with Director Hall and submitted memos to the Director, listing 11 decisions for potential revision.
- One of the decisions, the Mexican garter snake, was subsequently withdrawn from the list after further discussion determined that the decision was made internally by Service headquarters.
- On July 12, 2007, Director Hall sent a memo to Deputy Secretary Scarlett reporting that 10 decisions submitted by the regions would be reviewed.

Objective 1: The Service's selection process and current status of reviews

- On July 19, 2007, 2 decisions were withdrawn by region 1—bull trout and marbled murrelet—after determining that neither decision involved the inappropriate use of science, but rather involved policy interpretations.
- On July 20, 2007, Director Hall sent a memo to Deputy Secretary Scarlett revising the original list of decisions based on the region 1 withdrawals, changing the total from 10 to 8.
- Of the 8 decisions, 6 were critical habitat designations.

Objective 1: The Service’s selection process and current status of reviews

Result of the Service’s selection process

| Region | Species | Decision | Description of MacDonald involvement | Date published |
|--------|---|--|--|----------------|
| 1 | Twelve species of Hawaiian picture-wing flies | Proposed critical habitat | Reduced acreage to about 1 percent of scientific recommendation | 8-15-06 |
| 2 | Southwestern willow flycatcher | Final critical habitat | Reduced range area by about half | 10-19-05 |
| | White-tailed prairie dog | 90-day petition finding | Reversed finding to “not substantial” | 11-9-04 |
| 6 | Preble’s meadow jumping mouse | 12-month review finding/proposed delisting | Directed the Service to use minority scientific opinion to support delisting | 2-2-05 |
| | Preble’s meadow jumping mouse | Final critical habitat | Excluded three counties from critical habitat on basis of HCPs that were not finalized | 6-23-03 |
| | Canada lynx | Final critical habitat | Excluded Forest Service lands and private lands | 11-9-06 |
| 8 | Arroyo toad | Final critical habitat | Reduced area by more than 85 percent | 4-13-05 |
| | California red-legged frog | Final critical habitat | Directed the Service to use minimum range and disregard some scientific studies | 4-13-06 |

Source: GAO.

Note: Regions 3, 4, 5, and 7 did not submit any decisions. Also, decisions regarding the bull trout, marbled murrelet, and Mexican garter snake were submitted by the regions in the initial list of 11, but subsequently withdrawn by the regions that submitted them.

Objective 1: The Service's selection process and current status of reviews

The Service concluded that seven of the eight decisions warranted revision

- Director Hall has stated that revising the decisions is a high priority.
- The Service has proposed amended rules for three decisions.
- The Service is planning to initiate one status review on or before May 1, 2008 and propose one revised critical habitat rule on or before August 29, 2008.
- The Service is determining time frames for addressing two other decisions.
- The Service is not planning to revise one decision because it concluded that the critical habitat designation represents a scientifically supportable and reasonable range for the species.

Objective 1: The Service’s selection process and status of reviews

Status of the decisions selected for potential revision

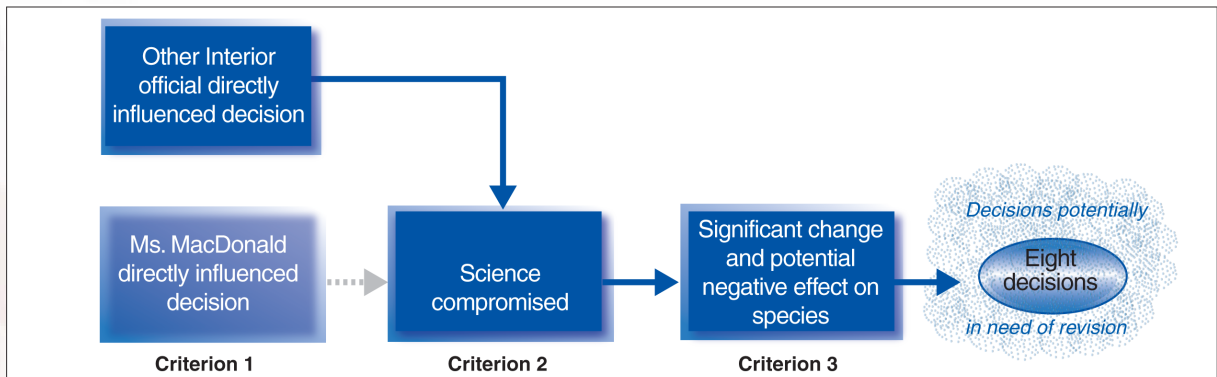
| Species | Decision | Service actions to address decision |
|---|---|--|
| Twelve species of Hawaiian picture-wing flies | Proposed critical habitat | Published an amended proposed critical habitat on November 28, 2007 (72 Fed. Reg. 67428). |
| Arroyo toad | Final critical habitat | The Service and the Plaintiffs are negotiating a settlement agreement regarding a date for issuing proposed and final revisions of the critical habitat designation for this species |
| California red-legged frog | Final critical habitat | Propose a revised critical habitat rule on or before August 29, 2008. Issue final revised critical habitat rule on or before August 31, 2009. |
| White-tailed prairie dog | 90-day petition finding | Initiate a status review on or before May 1, 2008. Issue a 12-month finding on or before June 1, 2010. |
| Preble’s meadow jumping mouse | 12-month review finding/ proposed delisting | Withdrew proposed delisting and published an amended proposed listing rule on November 7, 2007 (72 Fed. Reg. 62992). |
| Preble’s meadow jumping mouse | Final critical habitat | Revisit critical habitat when listing is final and funds are available. |
| Canada lynx | Final critical habitat | Published a proposed rule describing revised critical habitat on February 28, 2008 (73 Fed. Reg. 10860). |
| Southwestern willow flycatcher | Final critical habitat | No action. The Service did not recommend revision of the critical habitat because the reduced range was scientifically supportable |

Source: GAO.

Objective 2: Decisions excluded from the Service's selection process

Certain types of decisions were excluded from the Service's selection process

- Following criterion 1, the Service excluded decisions reviewed by Interior officials other than Ms. MacDonald.



Source: GAO.

Objective 2: Decisions excluded from the Service's selection process

- While Ms. MacDonald was the primary reviewer of most ESA decisions, other Interior officials were also involved.

Example: Miami blue butterfly

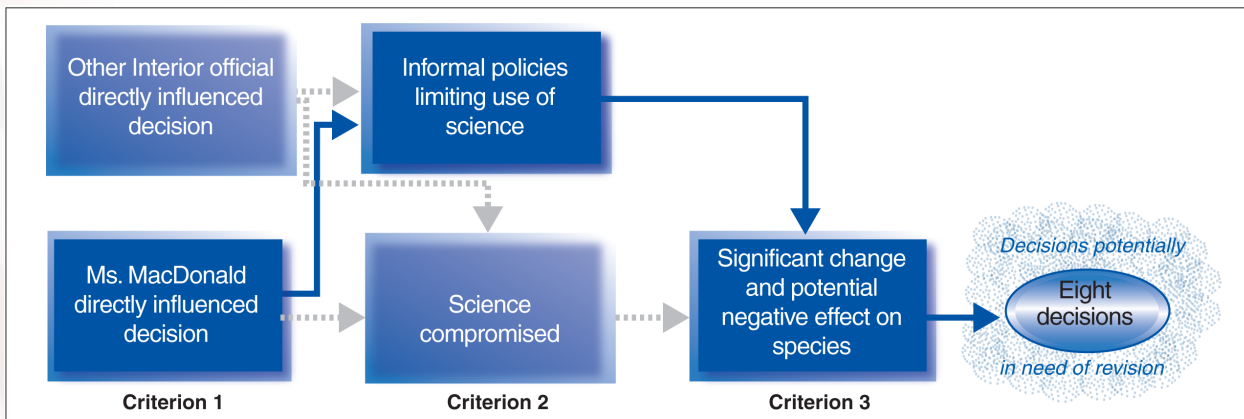
The Service received a petition to list the Miami blue butterfly on an emergency basis and reviewed the species' status to determine if such listing was warranted. After review, Service officials at all levels supported a recommendation for listing. Citing a Florida state management plan and existence of a captive-bred population, however, an Interior official besides Ms. MacDonald determined that emergency listing was not warranted, and the blue butterfly was designated as a candidate instead of a listed species.



Source: H.L. Salvato.

Objective 2: Decisions excluded from the Service's selection process

- Following criterion 2, the Service excluded policy decisions that limited the application of science.



Source: GAO.

Objective 2: Decisions excluded from the Service's selection process

- Under Ms. MacDonald, several informal policies were established that influenced how science was to be used when making ESA decisions.
 - *Petition guidance*: Service staff cited a practice whereby they were limited to using only the information contained in a petition when making a decision. They could, however, use information external to the petition if such information would support a decision that listing was not warranted.
 - *Recovery plans*: A practice was developed that Service staff could generally not use or cite recovery plans when developing critical habitat designations.

Objective 2: Decisions excluded from the Service's selection process

- *Defining occupancy:* Under Ms. MacDonald, the ESA wording “occupied by the species at the time it is listed” was narrowly applied when designating critical habitat.

Example: bull trout

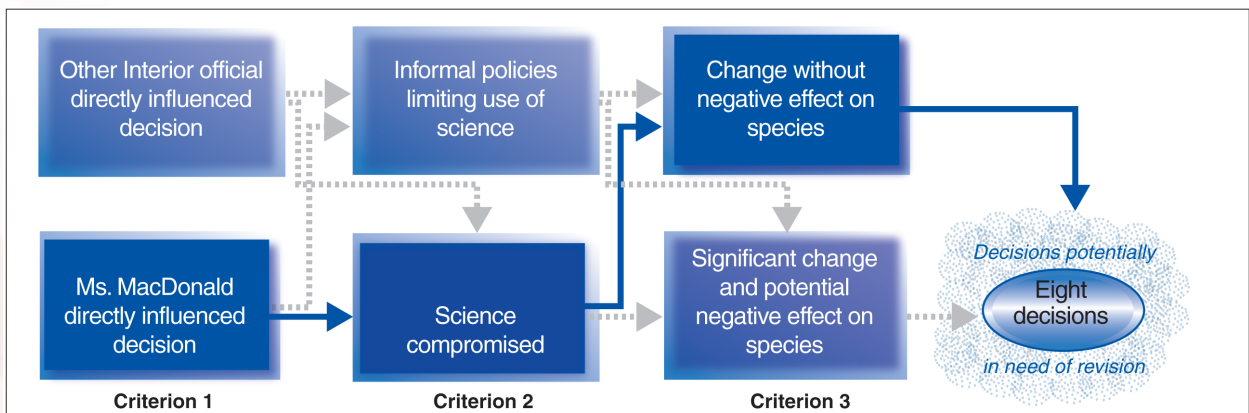
After the Service proposed critical habitat for the bull trout, Ms. MacDonald questioned Service biologists' conclusions about the species' occupied habitat. As a result, some proposed critical habitat areas were removed, in part because occupancy by the species could not be ascertained.



Source: U.S. Fish and Wildlife Service.

Objective 2: Decisions excluded from the Service's selection process

- Following criterion 3, the Service excluded decisions that were changed but not significantly or to the point of negative impact on the species.



Source: GAO.

Objective 2: Decisions excluded from the Service's selection process

Example: Comal Springs invertebrates

Under Ms. MacDonald's influence, subterranean waters were removed from the animals' critical habitat designation. Service staff said they believed that the exclusion of such habitats would not significantly affect the species because aboveground waters were more important habitat. They also acknowledged that not much is known about these species' use of subterranean waters.

Objective 2: Decisions excluded from the Service's selection process

Additionally, we identified six other categories of decisions that, in some or all cases, were excluded from the Service's selection process.

1. In some cases, decisions that already had been addressed by the courts were excluded from the Service's selection process.

Example: California tiger salamander

Under Ms. MacDonald, the Central California tiger salamander population was combined with two other populations of tiger salamanders, against the recommendation of Service staff. As a result, the Service changed the two populations' listing from endangered to threatened. This decision was challenged and overturned by a federal court. [*Center for Biological Diversity v. U.S. Fish and Wildlife Service*, Civ. No. 04-4324, slip. op. at 9 (N.D. Cal. August 19, 2005)]

Objective 2: Decisions excluded from the Service's selection process

2. Decisions that could not be reversed were excluded from the Service's selection process.

Example: Palos Verdes blue butterfly

Navy-owned land that was critical habitat for the Palos Verdes blue butterfly was exchanged after involvement by Ms. MacDonald in a section 7 consultation, and the habitat of the species' last known wild population was destroyed by development. Had the habitat not already disappeared, Service field staff believe the decision would warrant revisiting.

Objective 2: Decisions excluded from the Service's selection process

3. In some cases, decisions were excluded from the Service's selection process where revising the decision was determined to be an inefficient use of resources because it would not significantly alter the species' recovery.

Example: Spikedace and loach minnow

Ms. MacDonald limited the fishes' critical habitat to those areas that had been occupied within the previous 10 years, reducing the total area of critical habitat designated. Service staff did not believe the change would significantly alter the fishes' recovery and therefore felt that revisiting the decision would not be an efficient use of resources.



Source: U.S. Fish and Wildlife Service.

Objective 2: Decisions excluded from the Service's selection process

4. Decisions were excluded from the Service's selection process where it could not be conclusively determined that Ms. MacDonald changed the decision. Service staff cited instances where they believed that Ms. MacDonald had changed decisions, but because the documentation was not clear, it could not be determined for certain if the changes could be attributed to her.
5. Decisions that were implicitly attributed to Ms. MacDonald were excluded from the Service's selection process. Service staff described a climate under Ms. MacDonald where they were continually questioned about their scientific reasoning; staff said they learned to anticipate what would be approved—primarily with regard to critical habitat designations—and wrote their decisions accordingly.

Objective 2: Decisions excluded from the Service's selection process

6. Decisions were excluded from the Service's selection process where Ms. MacDonald did not change the final outcome but may have inappropriately affected supporting scientific information in the decision.

Example: Sacramento splittail

After a federal court required the Service to re-evaluate the species' threatened status, Ms. MacDonald raised concerns about a statistical approach the Service had applied in analyzing the species' population. In the final decision, she edited information regarding the statistical analysis. Service staff said that these edits could make it harder to use the scientific analysis in the future.



Source: Tina Swanson.

Concluding Observations

The Service was given the opportunity to identify all ESA decisions potentially warranting revision because of undue political influence by Ms. MacDonald. The Service's selection process led it to identify 8 decisions—less than 4 percent of more than 200 decisions reviewed—7 of which it has determined will need revision. Ms. MacDonald was significantly involved, and in some cases possibly inappropriately so, with more than 8 decisions. Nevertheless, additional decisions were not selected for further review for a variety of reasons; for example, her involvement did not always result in the reversal of a decision. The Service believes that all decisions inappropriately influenced by Ms. MacDonald and meriting revision are being addressed.

Concluding Observations

In a broader context, questions remain about the extent to which other Interior officials may have inappropriately influenced ESA decisions and whether broader ESA policies should be revisited. Under the original direction from Deputy Secretary Scarlett and the three selection criteria followed by the Service, a variety of ESA decisions were excluded from the selection process. Broadening the scope of the review might have resulted in the selection of more decisions, but it is unclear to what extent.

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