

June 21, 2004

The Honorable Steven A. Williams
Director
Fish and Wildlife Service
U.S. Department of the Interior
Washington, D.C. 20240

Dear Director Williams:

This letter seeks further information from you regarding the role of the Fish and Wildlife Service (FWS) in the Western Everglades of Florida.¹ As you know, the FWS is, among other things, responsible for developing and implementing a “recovery plan” for the survival of the Florida panther in that area and for consulting with the U.S. Army Corps of Engineers (Corps) to insure that permits issued under Section 404 of the Clean Water Act are not likely to jeopardize the continued existence of any threatened or endangered species, including the Florida panther.² Of a population which once ranged into Louisiana and Tennessee and over to the Atlantic coast, only 30 to 70 of these majestic animals are left in Southwest Florida.

A report from an independent Science Review Team (SRT), which was convened by the FWS and the Florida Fish and Wildlife Conservation Commission to conduct a critical review of literature related to management of the Florida panther,³ raises troubling questions about the quality of the science being relied upon by the FWS and the

¹ Letter to The Honorable Steven A. Williams, Director, Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C. from Senator Joseph I. Lieberman, United States Senate, Washington, D.C. , August 7, 2003 (hereinafter “August 7, 2003 letter”).

² Citizens’ groups have criticized a lax Clean Water Act Section 404 permitting program that is effectively draining and filling the wetlands of the Western Everglades and expressed concerns that the FWS is failing to apply the best available science in conserving panther habitat in the area. They are concerned that “[t]he same kind of misguided development that decimated the Eastern Everglades and left American taxpayers with an \$8 billion restoration bill is happening again in the Western Everglades.” National Wildlife Federation, Florida Wildlife Federation, and Council of Civic Associations, Inc., *Road to Ruin: How the U.S. Government is Permitting the Destruction of the Western Everglades*, November, 2002, at 1.

³ This review was funded by the Nongame Wildlife Trust Fund of the Florida Fish and Wildlife Conservation Commission (FWC), the U.S. Fish and Wildlife Service (USFWS), and the Georgia and Virginia Cooperative Fish and Wildlife Research Units (FWS Interagency Agreement 1448-41910-02-N-0004, Research Work Order 74, Georgia Cooperative Fish and Wildlife Research Unit, Cooperative Agreement 1434-HQ-02-RU 1551).

Corps in making such decisions.⁴ Assistant Secretary Craig Manson assured Congress that he is committed to the views of this Administration that “public policies must be informed by sound science,”⁵ and that data and science must meet the highest possible ethical and professional standards. I am writing to inquire about the actions your agency is taking in response to the report’s findings and the FWS’s efforts to help insure the sufficiency of data which is relied upon as the “best available science.”

The SRT’s findings raise questions about decisions being made by the FWS and the Corps, the effectiveness of panther protection efforts in Southwest Florida, and the adequacy of the FWS response to warning signals about the quality of the science supporting government decisions. In addition, I am concerned that your response to my first letter of inquiry on this subject made no mention of the existence of this review, despite my request for a description of all independent reviews of the methodologies advanced by the very consultant whose science is criticized in the SRT report.⁶

The substantial federal investment in efforts to protect the Florida panther is placed at risk by failures in scientific analysis of the habitat needs of the panther as well as failures to implement the requirements of federal law effectively.⁷ The crux of the concern is the relative importance of habitat in non-forested areas to the panther and whether permits issued by the federal government are allowing development which is destroying its habitat. The panther is the top predator in South Florida. It performs an important role helping to keep the ecosystems in balance. It preys on deer, wild hogs, and racoons. The panthers stalk and kill individual prey animals selectively, culling sick and weak animals. This helps improve the stock of the breeding prey population. It also reduces disease and recycles nutrients within the ecosystem. Panthers help prevent overgrazing by keeping deer on the run.

In 1999, the FWS appointed a new Florida Panther Subteam to develop the panther habitat conservation strategy. To support this effort, a 4-member Science Review Team was commissioned to conduct an independent critical review of literature related to the ecology and management of the Florida panther. Its report, published in draft in July 2003 and final in December 2003, found a number of errors in panther literature authored by Dr. David Maehr, who is an advisor to applicants seeking Section

⁴ *An Analysis of Scientific Literature Related to the Florida Panther*, December, 2003, FWC Project Number NG01-105 (hereinafter “December SRT report”).

⁵ *Nomination of Harold Craig Manson to be Assistant Secretary for Fish, Wildlife, and Parks, Department of the Interior, Hearing Before the Senate Committee on Energy and Natural Resources*, 107th Cong., at 4 (2001) (statement of Harold Craig Manson).

⁶ August 7, 2003 letter at 4.

⁷ The area includes the Florida Panther National Wildlife Refuge along with other federal and state preserves. In addition, federal grant funds have been used to purchase land to help preserve the panther.

404 Clean Water Act permits from the Corps.⁸ Dr. Maehr is a member of the Florida Panther Recovery Team and the Panther Subteam of the Multi-Species Ecosystem Recovery Implementation Team. In addition, the FWS has an important role in helping the Corps of Engineers determine whether projects permitted under Section 404 are likely to jeopardize the continued existence of any endangered species (“consultation”). As noted in your November 11 response to my inquiry, Dr. Maehr’s methodology is one

⁸ Letter from Frank E. Matthews, Hopping, Green, Sams & Smith, Attorneys for Florida Rock Industries, Inc., to James J. Slack, U.S. Fish and Wildlife Service, Vero Beach, Florida, September 26, 2000; Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Summary Judgment, *National Wildlife Federation v. Caldera*, 2002 U.S. Dist. Lexis 7458; 54 ERC(BNA)1494; Memorandum from David S. Maehr, To: Florida Panther Recovery Team, Subject: Review of “An analysis of scientific publications related to the Florida Panther,” 21 January 2004; Gillis, “Panther report hits home on land-use, development issues, *Naples News*, April 5, 2004.

Among the criticisms of Dr. Maehr’s work identified by the SRT are the following:

“Florida panthers apparently are most active at night . . .” “Extrapolating daytime telemetry locations to describe 24-hour habitat use by the Florida panther is unjustified. . . .” December SRT report at 7.

“many of the publications . . . failed to mention that the [telemetry] data were collected in daylight hours only” December SRT at 7.

“The SRT discovered several unexplained examples of datasubsetting or selective use of data. . . . The most serious case of selective use of data occurred in the most influential paper on panther habitat use. . . . This exclusion probably created serious bias in their conclusions. . . . While there may be legitimate reasons to exclude data from certain analyses, it is incumbent upon the author(s) to explicitly state which data were and were not used, and to fully explain the reasons for excluding data.” December SRT report at 7 & 8.

“[U]sed locations rather than panthers as the sampling unit to determine habitat use. The SRT believes this is an incorrect approach because a single panther with an abnormally large number of locations could bias the analysis.” December SRT report at 8.

“The most influential paper on habitat use (Maehr and Cox, 1995) did not provide any estimate of telemetry error. . . .” December SRT report at 9.

“The SRT is more concerned about the impact of telemetry error on the claim by Maehr and Cox (1995, 1014) that ‘96% of panther locations were within 90 m of large forest patches.’ . . . “The SRT finds no empirical basis for the idea that panthers do not travel more than 90 m from forest cover. . . .” December SRT report at 10.

“Particularly unsound conclusions . . . are that panthers are reluctant to use areas farther than 90 m from forest cover, that panthers require forest blocks >500 ha, and that panthers are forest obligates.” December SRT report at 15.

Employing a method of analysis that “is biased toward a finding that panthers select forests. . . .” December SRT report at 12.

“The peer-review process similarly failed to detect that later manuscripts inappropriately cited Maehr and Cox (1995) as supporting conclusions not stated therein . . . perhaps because reviewers assumed Maehr would not misinterpret his own work.” December SRT report at 15.

of the methods of assessment which is being used by the FWS in evaluating a project's effect on the panther and its habitat.⁹

In addition, the SRT was critical of the peer review process that allowed errors to become part of the panther literature.¹⁰ The SRT noted that “[s]cientifically rigorous conclusions regarding Florida panther habitat requirements are critical because they affect land management decisions, particularly those decisions made in USFWS Section 7 consultations on land development and mitigation, where the ‘best available science’ is the standard.”¹¹ The team made several recommendations for improvement.

In light of the serious deficiencies identified by the SRT and the Administration's stated commitment to insuring that data and science meet the highest standards, I would appreciate your responses to the following questions:

General Response to the Science Review Team Report

1. Does the FWS have any substantive disagreements with the findings in the SRT report? If so, which findings and why?
2. What action does the FWS plan to take to address the findings of the SRT? Does the FWS plan to discontinue use of the science criticized by the SRT? If so, how will it do so? If not, why not?
3. The SRT made a variety of management recommendations to address data deficiencies and prevent similar problems from occurring in the future.¹² What are your views regarding these recommendations? Which, if any, recommendations does the FWS plan to implement?
4. The SRT's first recommendation for “management action” (an action characterized as important and inexpensive) is to cease reliance upon certain standards for making decisions about habitat mitigation and acquisition until appropriate analyses are completed. Are you implementing this recommendation? If not, why not?¹³

⁹ Letter to the Honorable Joseph I. Lieberman, Ranking Member, Committee on Governmental Affairs, United States Senate from Marshall P. Jones, Jr., Acting Director, U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. November 11, 2003, Attachment at 5 (hereinafter “November 11, 2003 letter”).

¹⁰ December SRT report, at 15.

¹¹ *Id.*

¹² December SRT report, at 68-79.

¹³ *Id.* at 69.

5. Are there any other actions which the FWS is taking to address the problems identified in the report? If so, please describe.

The Panther Strategy and the Findings of the SRT

As noted above, recovery teams are involved in the development and implementation of recovery plans for the conservation and survival of threatened and endangered species. You reported that the Multi-Species Ecosystem Recovery Implementation Team (MERIT) has a Florida Panther Subteam which is developing the landscape conservation strategy in an “open and collaborative venue.”¹⁴

6. In your November 11, 2003 letter, you reported that the Panther Subteam submitted a draft strategy for the Florida Panther to the FWS more than a year ago, in December 2002 and that the FWS was “currently reviewing” the draft (“The Landscape Conservation Strategy for the Florida Panther in South Florida”).¹⁵ When will the work on the draft Conservation Strategy be completed?

7. FWS also reported that this document and the Panther Conservation Strategy Implementation Guide will be released for public comment.¹⁶ When will this occur?

8. Please describe in detail the stages of review that the draft Conservation Strategy has undergone, include the reviewers, the purpose of the review, and the relationship between that review and the peer-review process. Please describe any additional reviews planned for the Strategy.

9. I am informed that peer-review comments to the draft Conservation Strategy received in November 2002 and February 2003 identified contradictions in the document, confirming problems in panther literature authored by Dr. Maehr as previously identified by independent members of the Panther Subteam. How is the FWS addressing these comments? Has the draft document been revised to address these comments and remove contradictory material? If not, why not?

10. Given the problems identified by the SRT with regard to panther/habitat associations in panther literature, how will the draft Conservation Strategy and Panther Subteam now describe and address panther habitat issues?

11. Critics of the FWS are concerned about how the MERIT panther Subteam was managed, asserting specifically that the Panther Subteam was precluded from exploring concerns expressed by some of its expert members that the FWS was

¹⁴ November 11, 2003 letter, at 1.

¹⁵ *Id.*

¹⁶ *Id.* at 2.

not following the “best available science.” Reportedly, the FWS failed to respond to concerns raised about the accuracy of the data raised by independent science members of the panel; would not schedule time on the agenda to resolve contested topics; and edited Conservation Strategy drafts to delete references to data errors and a new habitat definition. Please explain how the FWS handled challenges to regulatory policies and the science from members of the Panther Subteam.

12. What steps will FWS take to insure that in the future science teams are supported in their efforts to insure that, in fact, they are relying on the “best available science?”

The Consultation Process

A key FWS responsibility under the Endangered Species Act is to consult with Federal agencies to “insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”¹⁷

13. According to FWS consultation records, did errors identified by the SRT adversely affect the FWS consultation with the Corps on Section 404 permits? Were permits issued for projects that should not have been approved?

14. Does the FWS intend to make corrections in biological opinions that reflect the problem methods identified by the SRT?

15. In light of the findings of the SRT, what changes will be made in the conduct of future consultations involving the panther?

16. What is the FWS's position on the conditions that constitute jeopardy, and on what expert advice or literature are they based?

17. The Table in the Attachment to your November 11 letter indicates that more acres of land are developed for every acre of habitat which is identified as “compensation” for the projects listed.¹⁸ If the FWS continues to conduct consultations in this manner, it appears that a significant amount of the remaining panther habitat on private lands would be lost to development. Is this practice consistent with ensuring the survival and recovery of the Florida panther? Does the FWS plan to reduce or reverse this trend of habitat loss?

Concerns Raised Regarding Methodologies

¹⁷ 16 U.S.C. 1536(a)(2).

¹⁸ November 11, 2003 letter, Attachment at 4.

18. In addition to the concerns about the quality of the panther science which are noted above, similar concerns were raised by three scientists when they commented on a declaration submitted by Dr. Maehr in 2001 (on behalf of Agripartners) in a lawsuit in which the plaintiffs alleged that the FWS and other agencies failed to protect panther habitat.¹⁹ In light of the reliance by the FWS on Dr. Maehr's work, were these four conflicting declarations evaluated or reviewed by FWS personnel? If not, why not? If so, who performed the evaluations and what conclusions were reached?

19. In your letter, you stated that Dr. Maehr's methodology is "one" method of assessment of the habitat value to panthers and that other applicants for permits use other assessment methods.²⁰ However, critics assert that methods used by other applicants, for example, the Wilson-Miller Panther Habitat Assessment Methodology, are based on the same analyses used by Dr. Maehr. As a result, non-forested areas are generally excluded from impact assessment. Is this true?

Protecting Against Bias

Recovery teams provide important advisory functions for the FWS in the development of plans to identify management actions needed to insure the conservation and survival of a species. The Endangered Species Act provides that participants in the teams can include "other qualified persons," thus providing an opportunity for scientists employed by private industry and other interested parties to participate as team members.²¹ But recovery teams are exempt from the requirements of the Federal Advisory Committee Act, including requirements for an ethics officer's scrutiny of the members' Employment and Financial Interests.²²

20. What administrative requirements are currently in place regarding the selection of the membership of teams and subteams for the development of recovery plans? In particular, are there any requirements for scrutiny of employment and financial interests of recovery team members which might bias their analysis? Please submit copies of relevant policies and procedures.

21. I understand that the FWS declined a 2001 request from the National Wildlife Federation and the Florida Wildlife Federation for disclosure of information regarding financial compensation received by Panther Subteam members from

¹⁹ *National Wildlife Federation v. Caldera*, 2002 U.S. Dist. Lexis 7458; 54 ERC(BNA)1494.

²⁰ November 11, 2003 letter, Attachment at 5.

²¹ 16 U.S.C. 1533(f)(2).

²² 41 CFR Sec. 105-54.204(c).

entities with an interest in the work of the Subteam.²³ What is the FWS's rationale for not disclosing such information? What are the risks of full public disclosure of such information? What are the risks of disclosures of such affiliations and potential conflicts by Subteam members to each other? To the FWS?

22. The SRT recommended the creation of an independent Scientific Steering Committee to address longer-term issues of future research and monitoring, including the specific recommendation that no member have proprietary, legal or contractual involvement with any aspect of Florida panther recovery.²⁴ The SRT considers this an important recommendation which would not be expensive to implement. Is the FWS taking action to implement this recommendation? If not, why not?

23. Will the Service reevaluate its 2001 decision not to disclose information regarding affiliations and conflicts of interest that might exist on such panels? If not, what steps will be taken to safeguard the Panther Subteam as well as all other recovery panels from potential bias due to such affiliations and interests?

24. For the Panther Subteam, please provide copies of its charter, including a description of the purpose, goals, products, and membership of the Subteam.

FWS Responsibilities

25. In your November 11, 2003 response, you stated that with regard to the actions of the Corps in Southwest Florida:

The Service requested that the Corps perform more rigorous project analysis of wetland permits in southwest Florida. The Corps responded that they believed that those areas of wetlands permitting were not under our purview. Subsequent to the review, the Service restricted its formal comments to those that were more narrowly defined as within our area of responsibility.

Please clarify which areas the Service determined (in response to the Corps' position) are not within your area of responsibility and which are, with specific reference to applicable statutory authorities. Explain how the currently defined "roles" are consistent with the FWS's role in the administration of the Fish and Wildlife Coordination Act and the Endangered Species Act.

I look forward to receiving your response to these questions.

²³ Letter to Jay Slack, Project Leader, U.S. Fish and Wildlife Service, Vero Beach, Florida from Kris W. Thoenke, National Wildlife Federation and Nancy Anne Payton, Florida Wildlife Federation, May 7, 2001.

²⁴ December SRT report, at 77 & 79.

Sincerely yours,

Joseph I. Lieberman
Ranking Member