

Appendix A

1994 Fish and Wildlife Service and National Marine Fisheries Service Cooperative ESA policies

[Federal Register: July 1, 1994]

Part VIII

Department of the Interior
Fish and Wildlife Service

Department of Commerce
National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Policy Statements;
Notices

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of
**Interagency Cooperative Policy for Peer Review in Endangered Species
Act Activities**

AGENCIES: Fish and Wildlife Service, Interior, and National Marine
Fisheries Service, National Oceanic and Atmospheric Administration
(NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries
Service (hereafter referred to as Services) announce interagency policy
to clarify the role of peer review in activities undertaken by the
Services under authority of the Endangered Species Act of 1973 (Act),
as amended, and associated regulations in Title 50 of the Code of
Federal Regulations. This policy is intended to complement and not
circumvent or supersede the current public review processes in the
listing and recovery programs.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets, NW., Washington, D.C. 20240 (telephone 703/358-2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713-2322).

SUPPLEMENTARY INFORMATION:

Background

The Act requires the Services to make biological decisions based upon the best scientific and commercial data available. These decisions involve listing, reclassification, and delisting of plant and animal species, critical habitat designations, and recovery planning and implementation.

The current public review process involves the active solicitation of comments on proposed listing rules and draft recovery plans by the scientific community, State and Federal agencies, Tribal governments, and other interested parties on the general information base and the assumptions upon which the Service is basing a biological decision.

The Services also make formal solicitations of expert opinions and analyses on one or more specific questions or assumptions. This solicitation process may take place during a public comment period on any proposed rule or draft recovery plan, during the status review of a species under active consideration for listing, or at any other time deemed necessary to clarify a scientific question.

Independent peer review will be solicited on listing recommendations and draft recovery plans to ensure the best biological and commercial information is being used in the decisionmaking process, as well as to ensure that reviews by recognized experts are incorporated into the review process of rulemakings and recovery plans developed in accordance with the requirements of the Act.

Policy

A. In the following endangered species activities, it is the policy of the Services to incorporate independent peer review in listing and recovery activities, during the public comment period, in the following manner:

(1) Listing

(a) Solicit the expert opinions of three appropriate and independent specialists regarding pertinent scientific or commercial

data and assumptions relating to the taxonomy, population models, and supportive biological and ecological information for species under consideration for listing;

(b) Summarize in the final decision document (rule or notice of withdrawal) the opinions of all independent peer reviewers received on the species under consideration and include all such reports, opinions, and other data in the administrative record of the final decision.

(2) Recovery

(a) Utilize the expertise of and actively solicit independent peer review to obtain all available scientific and commercial information from appropriate local, State and Federal agencies; Tribal governments; academic and scientific groups and individuals; and any other party that may possess pertinent information during the development of draft recovery plans for listed animal and plant species.

(b) Document and use, where appropriate, independent peer review to review pertinent scientific data relating to the selection or implementation of specialized recovery tasks or similar topics in draft or approved recovery plans for listed species.

(c) Summarize in the final recovery plan the opinions of all independent peer reviewers asked to respond on an issue and include the reports and opinions in the administrative record of that plan.

Independent peer reviewers should be selected from the academic and scientific community, Tribal and other native American groups, Federal and State agencies, and the private sector; those selected have demonstrated expertise and specialized knowledge related to the scientific area under consideration.

B. Special Circumstances

(1) Sometimes, specific questions are raised that may require additional review prior to a final decision, (e.g. scientific disagreement to the extent that leads the Service to make a 6-month extension of the statutory rulemaking period). The Services will determine when a special independent peer review process is necessary and will select the individuals responsible for the review. Special independent peer review should only be used when it is likely to reduce or resolve the unacceptable level of scientific uncertainty.

(2) The results of any special independent peer review process will be written, entered into the permanent administrative record of the decision, and made available for public review. If the peer review is in the context of an action for which there is a formal public comment period, e.g., a listing, designation of critical habitat, or development of a recovery plan, the public will be given an opportunity to review the report and provide comment.

Scope of Policy

The scope of this policy is Servicewide for all species of fish and wildlife and plants, as defined pursuant to section 3 of the Act (16 U.S.C. 1532).

Authority

The authority for this policy is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1544).

Dated: June 27, 1994.

Mollie H. Beattie,
Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.

Rolland A. Schmitten,
Assistant Administrator for Fisheries, National Marine Fisheries
Service.

[FR Doc. 94-16021 Filed 6-30-94; 8:45 am]

BILLING CODE 4310-55-P

[Federal Register: July 1, 1994]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of
Interagency Cooperative Policy on Information Standards Under the
Endangered Species Act

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency policy to provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Services under the authority of the Endangered Species Act of 1973 (Act), as amended represent the best scientific and commercial data available. This policy is intended to complement the current public review processes prescribed by sections 4(b)(4)(6) and 10(a)(2)(B) of the Act and associated regulations in title 50 of the Code of Federal Regulations.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets NW., Washington, DC 20240 (telephone 703/358-2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713-2322).

SUPPLEMENTARY INFORMATION:

Background

The Act requires the Secretary of the Interior and the Secretary of Commerce to determine whether any species is endangered or threatened (16 U.S.C. 1533). When making these determinations, the Secretary is directed to use the best scientific and commercial data available.

The Services receive and use information on the biology, ecology, distribution, abundance, status, and trends of species from a wide variety of sources as part of their responsibility to implement the Act. Some of this information is anecdotal, some of it is oral, and some of it is found in written documents. These documents include status surveys, biological assessments, and other unpublished material (that is, "gray literature") from State natural resource agencies and natural heritage programs, Tribal governments, other Federal agencies, consulting firms, contractors, and individuals associated with professional organizations and higher educational institutions. The Services also use published articles from juried professional journals. The reliability of the information contained in these sources can be as variable as the sources themselves. As part of their routine activities Service biologists are required to gather, review, and evaluate information from these sources prior to undertaking listing, recovery, consultation, and permitting actions.

Policy

To assure the quality of the biological, ecological, and other information that is used by the Services in their implementation of the Act, it is the policy of the Services:

- a. To require biologists to evaluate all scientific and other information that will be used to (a) determine the status of candidate species; (b) support listing actions; (c) develop or implement recovery plans; (d) monitor species that have been removed from the list of threatened and endangered species; (e) to prepare biological opinions, incidental take statements, and biological assessments; and (f) issue scientific and incidental take permits. This review will be conducted to ensure that any information used by the Services to implement the Act is reliable, credible, and represents the best scientific and commercial data available.
- b. To gather and impartially evaluate biological, ecological, and other information that disputes official positions, decisions, and actions proposed or taken by the Services during their implementation of the Act.
- c. To require biologists to document their evaluation of

information that supports or does not support a position being proposed as an official agency position on a status review, listing action, recovery plan or action, interagency consultation, or permitting action. These evaluations will rely on the best available comprehensive, technical information regarding the status and habitat requirements for a species throughout its range.

d. To the extent consistent with sections 4, 7, and 10 of the ESA, and to the extent consistent with the use of the best scientific and commercial data available, use primary and original sources of information as the basis for recommendations to (1) place a species on the list of candidate species, (2) promulgate a regulation to add a species to the list of threatened and endangered species, (3) to remove a species from the list of threatened and endangered species, (4) designate critical habitat, (5) revise the status of a species listed as threatened or endangered, (6) make a determination of whether a Federal action is likely to jeopardize a proposed, threatened, or endangered species or destroy or adversely modify critical habitat; and (7) issue a scientific or incidental take permit. These sources shall be retained as part of the administrative record supporting an action and shall be referenced in all official Federal Register notices and biological opinions prepared for an action.

e. To collect, evaluate, and complete all reviews of biological, ecological, and other relevant information within the schedules established by the Act, appropriate regulations, and applicable policies.

f. To conduct management-level review of documents developed and drafted by Service biologists to verify and assure the quality of the science used to establish official positions, decisions, and actions taken by the Services during their implementation of the Act.

Scope of Policy

This policy applies Servicewide for all species of fish and wildlife and plants, as defined pursuant to section 3 of the Act (16 U.S.C. 1532), and for listing, recovery, interagency consultation, management and scientific authorities, and permitting programs as outlined in, and to the extent consistent with, the provisions of sections 4(a)(c), 4(e)(g), 7(a)(c), 8A(c), and 10(a) of the Act, respectively.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1544).

Dated: June 27, 1994.
Mollie H. Beattie,
Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.
Rolland A. Schmitten,
Assistant Administrator for Fisheries, National Marine Fisheries
Service.
[FR Doc. 94-16022 Filed 6-30-94; 8:45 am]
BILLING CODE 4310-55-P

[Federal Register: July 1, 1994]

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of
Interagency Cooperative Policy for Endangered Species Act Section 9
Prohibitions

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency cooperative policy to establish a procedure at the time a species is listed as threatened or endangered to identify to the maximum extent practicable those activities that would or would not constitute a violation of section 9 of the Endangered Species Act of 1973 (Act), as amended, and to increase public understanding and provide as much certainty as possible regarding the prohibitions that will apply under section 9. By identifying activities likely or not likely to result in violation of section 9 at the time a species is listed, the Services intend to increase public awareness of the effect of the listing on proposed and ongoing activities within a species' range.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets NW., Washington, DC 20240 (telephone 703/358-2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland

20910 (telephone 301/713-2322).

SUPPLEMENTARY INFORMATION:

Background

Section 9 of the Act prohibits certain activities that directly or indirectly affect endangered species. These prohibitions apply to all individuals, organizations, and agencies subject to United States jurisdiction. Section 4(d) of the Act allows the promulgation of regulations that apply any or all of the prohibitions of section 9 to threatened species. Under the Act and regulations, it is illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import or export, ship in interstate or foreign commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any endangered fish or wildlife species and most threatened fish and wildlife species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. With respect to endangered plants, analogous prohibitions make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or to remove and reduce to possession any such plant species from areas under Federal jurisdiction. In addition, for endangered plants, the Act prohibits malicious damage or destruction of any such species on any area under Federal jurisdiction, and the removal, cutting, digging up, or damaging or destroying of any such species on any other area in knowing violation of any State law or regulation, or in the course of any violation of a State criminal trespass law.

Policy

It is the policy of the Services to identify, to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of section 9. To the extent possible, activities that will be considered likely to result in violation also will be identified in as specific a manner as possible. For those activities whose likelihood of violation is uncertain, a contact will be identified in the final listing document to assist the public in determining whether a particular activity would constitute a prohibited act under section 9.

Scope of Policy

This policy applies for all species of fish and wildlife and plants, as defined under the Act, listed after October 1, 1994.

Authority

The authority for this policy is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1544).

Dated: June 27, 1994.
Mollie H. Beattie,
Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.
Rolland A. Schmitten,
Assistant Administrator for Fisheries, National Marine Fisheries
Service.
[FR Doc. 94-16023 Filed 6-30-94; 8:45 am]
BILLING CODE 4310-55-P

[Federal Register: July 1, 1994]

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of
Interagency Cooperative Policy on Recovery Plan Participation and
Implementation Under the Endangered Species Act

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency policy relative to recovery plan participation and implementation under the Endangered Species Act of 1973, as amended. This cooperative policy is intended to minimize social and economic impacts consistent with timely recovery of species listed as threatened or endangered under the Endangered Species Act of 1973, as amended (Act). In addition, this policy provides a Participation Plan process, which involves all appropriate agencies and affected interests in a mutually-developed strategy to implement one or more recovery actions.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets NW., Washington, DC 20240 (telephone 703/358-2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713-2322).

SUPPLEMENTARY INFORMATION:

Background

Section 4(f) of the Act directs the Secretary of the Commerce and the Secretary of Interior to develop and implement recovery plans for animal and plant species listed as endangered or threatened, unless such plans would not promote the conservation of the species. Coordination among State, Tribal or Federal agencies, academic institutions, private individuals and organizations, commercial enterprises, and other affected parties is perhaps the most essential ingredient for recovering a species.

Policy

To enhance recovery plan development and implementation, while recommending measures that accomplish the goals of a recovery plan, the Services will:

- A. Diversify areas of expertise represented on a recovery team,
- B. Develop multiple species plans when possible,
- C. Minimize the social and economic impacts of implementing recovery actions,
- D. Involve representatives of affected groups and provide stakeholders the opportunity to participate in recovery plan development, and
- E. Develop recovery plans within 2 1/2 years after final listing.

(1) Recovery Plan Preparation and Process

The method to be used for recovery plan preparation shall be based on several factors, including the range or ecosystem of the species (limited vs. extensive), the complexity of the recovery actions contemplated, the number of organizations responsible for the implementation of the recovery tasks, the availability and expertise of personnel, and the availability of funds. Outside expertise in the form of recovery teams, other Federal agencies, State agency personnel, Tribal governments, private conservation organizations, and private contractors shall be used, as necessary, to develop and implement recovery plans in a timely manner that will minimize the social and economic consequences of plan implementation.

Team members should be selected for their knowledge of the species or for expertise in elements of recovery plan design or implementation (such as local planning, rural sociology, economics, forestry, etc.), rather than their professional or other affiliations. Teams are to be composed of recognized experts in their fields and are encouraged to explore all avenues in arriving at solutions necessary to recover threatened or endangered species. Factors for selection of team members

are (1) expertise (including current involvement, if possible), with respect to the species, closely related species, or the ecosystem in which it is or may once again become a part, (2) special knowledge of one or more threats contributing to the listed status of the species and (3) knowledge of one or more related disciplines, such as land use planning, state regulations, etc. The Services also will select team members based on special knowledge essential for the development of recovery implementation schedules, particularly development of Participation Plans that are intended to minimize the social and economic effects of recovery actions. Teams should include representatives of State, Tribal, or Federal agencies, academic institutions, private individuals and organizations, commercial enterprises, and other constituencies with an interest in the species and its recovery or the economic or social impacts of recovery.

(2) Involvement of Affected Groups

Whether a recovery plan is developed by the Service's biologists, contractors, or a recovery team, each plan will seek the best information to fulfill the intent of the Act regarding recovery planning. This information and input from affected interests will be used to develop alternatives for recovery implementation that not only meet requirements for the recovery of a species, but minimize social and economic effects of recovery actions. Representatives of affected interests that can be determined during recovery plan development will be asked to participate during plan development and implementation.

(3) Implementing Recovery Actions

Implementation of recovery plans will be accomplished through the means that will provide for timely recovery of the species while minimizing social and economic impacts. The Services will involve all affected interests in the recovery plan implementation process through the development of a Participation Plan. A Participation Plan should involve all appropriate agencies and affected interests in a mutually developed strategy to implement one or more specifically designated recovery actions. Participation Plans should ensure that a feasible strategy is developed for all affected interests while providing realistic and timely recovery of the species.

Nothing in this policy is intended to change the current policy of developing recovery plans within 2½ years after final listing of a species (18 months for draft recovery plan and a final recovery plan within an additional 12 months of the draft).

Scope of Policy

The scope of this policy is Servicewide for all species of fish and wildlife and plants, as defined pursuant to section 3 of the Act (16 U.S.C. 1532).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 5131-1544).

Dated: June 27, 1994.

Mollie H. Beattie,
Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.

Rolland A. Schmitten,
Assistant Administrator for Fisheries, National Marine Fisheries
Service.

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[Federal Register: July 1, 1994]

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of
Interagency Cooperative Policy for the Ecosystem Approach to the
Endangered Species Act

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency policy to incorporate ecosystem considerations in Endangered Species Act actions regarding listing, interagency cooperation, recovery and cooperative activities.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets NW., Washington, DC 20240 (telephone 703/358-2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713-2322).

SUPPLEMENTARY INFORMATION:

Background

A primary purpose of the Act (section 2(b)) is ``to provide a means

whereby the ecosystems upon which endangered or threatened species depend may be conserved. . . ."

Section 5(a) authorizes the establishment and implementation of a program to conserve fish, wildlife, and plants, including those which are listed as endangered or threatened. Section 6 authorizes partnerships with the States to develop cooperative programs for the conservation of endangered and threatened species. Section 7(a)(1) obligates all Federal agencies to utilize their authorities to further the purposes of the Act by carrying out programs for the conservation of endangered and threatened species. Section 8 encourages partnerships with foreign countries to provide for conservation of fish or wildlife and plants. Section 10 conservation planning provides opportunities for ecosystem-level resource protection with non-federal partners to address concerns of threatened and endangered species.

Success of ecosystem management will depend on the cooperation of partners, (federal, state, and private). Setting new internal standards for teamwork and communication between regions and other agencies will be emphasized to support an ecosystem approach to species conservation. Species will be conserved best not by a species-by-species approach but by an ecosystem conservation strategy that transcends individual species. The future for endangered and threatened species will be determined by how well the agencies integrate ecosystem conservation with the growing need for resource use.

Policy

The purpose of this cooperative policy is to promote healthy ecosystems through activities undertaken by the Services under authority of the Endangered Species Act of 1973 (Act), as amended, and associated regulations in Title 50 of the Code of Federal Regulations. In the following endangered species activities, it is the policy of the Services to incorporate ecosystem considerations in Endangered Species Act activities in the following manner:

A. Listing

(1) Group listing decisions on a geographic, taxonomic, or ecosystem basis where possible.

(2) Develop partnerships with other Federal, State, Tribal, and private agencies to conduct comprehensive status reviews across the entire range of candidate species.

B. Interagency Cooperation

(1) Develop cooperative approaches to threatened and endangered species conservation that restore, reconstruct, or rehabilitate the structure, distribution, connectivity and function upon which those listed species depend.

C. Recovery

(1) Develop and implement recovery plans for communities or ecosystems where multiple listed and candidate species occur.

(2) Develop and implement recovery plans for threatened and endangered species in a manner that restores, reconstructs, or rehabilitates the structure, distribution, connectivity and function upon which those listed species depend. In particular, these recovery plans shall be developed and implemented in a manner that conserves the biotic diversity (including the conservation of candidate species, other rare species that may not be listed, unique biotic communities, etc.) of the ecosystems upon which the listed species depend.

(3) Expand the scope of recovery plans to address ecosystem conservation by enlisting local jurisdictions, private organizations, and affected individuals in recovery plan development and implementation.

(4) Develop and implement agreements among multiple agencies that allow for sharing of resources and decision making on recovery actions for wide-ranging species.

D. Cooperative Efforts

(1) Use the authorities of the Act to develop clear, consistent policies that integrate the mandates of Federal, State, Tribal, and local governments to prevent species endangerment by protecting, conserving, restoring, or rehabilitating ecosystems that are important for conservation of biodiversity.

(2) Integrate research and technology development on conservation of endangered and threatened species with initiatives for management of ecosystems that serve many other uses.

(3) Prioritize actions and system monitoring schemes to meet specific objectives for genetic resources, species populations, biological communities, and ecological processes through carefully designed adaptive management strategies.

(4) Integrate ecosystem-based goals of the Endangered Species Act with existing mandates under other environmental laws, such as the National Environmental Policy Act, Clean Water Act, Clean Air Act, Marine Mammal Protection Act, Magnuson Fishery Conservation and Management Act, and Fish and Wildlife Coordination Act.

Scope of Policy

The scope of this policy is Servicewide for all species of fish and wildlife and plants, as defined pursuant to section 3 under the Act (16 U.S.C. 1532) and for listing, recovery, land acquisition, interagency consultation, international cooperation, and permitting programs as outlined in, and to the extent consistent with the provisions of sections 4(a)(c), 4(e)(g), 7(a)(c), 8A(c), and 10(a) of the Act, respectively.

Authority

The authority for this policy is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1544).

Dated: June 27, 1994.

Mollie H. Beattie,
Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.

Rolland A. Schmitten,
Assistant Administrator for Fisheries, National Marine Fisheries
Service.

[FR Doc. 94-16025 Filed 6-30-94; 8:45 am]

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[Federal Register: July 1, 1994]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of
Interagency Cooperative Policy Regarding the Role of State Agencies in
Endangered Species Act Activities

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency policy to clarify the role of State agencies in activities undertaken by the Services under authority of the Endangered Species Act of 1973, as amended (Act), and associated regulations in title 50 Code of Federal Regulations.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets NW., Washington, DC 20240 (telephone 703/358-2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713-2322).

SUPPLEMENTARY INFORMATION:

Background

The Services recognizes that, in the exercise of their general governmental powers, States possess broad trustee and police powers over fish, wildlife and plants and their habitats within their borders. Unless preempted by Federal authority, States possess primary authority and responsibility for protection and management of fish, wildlife and plants and their habitats.

State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Services shall cooperate to the maximum extent practicable with the States in carrying out the program authorized by the Act. The term State agency means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

Policy

In the following Endangered Species Act programs, it is the policy of the Services to:

A. Prelisting Conservation

1. Utilize the expertise and solicit the information of State agencies in determining which species should be included on the list of candidate animal and plant species.
2. Utilize the expertise and solicit the information of State agencies in conducting population status inventories and geographical distribution surveys to determine which species warrant listing.
3. Utilize the expertise of State agencies in designing and implementing prelisting stabilization actions, consistent with their authorities, for species and habitat to remove or alleviate threats so that listing priority is reduced or listing as endangered or threatened is not warranted.
4. Utilize the expertise and solicit the information of State agencies in responding to listing petitions.

B. Listing

1. Utilize the expertise and solicit the information of State agencies in preparing proposed and final rules to: (a) List species as endangered or threatened, (b) define and describe those conditions under which take should be prohibited for threatened species, (c) designate critical habitat, and (d) reclassify a species from

endangered to threatened (or vice versa) or remove a species from the list.

2. Provide notification to State agencies of any proposed regulation in accordance with provisions of the Act.

C. Consultation

1. Inform State agencies of any Federal agency action that is likely to adversely affect listed or designated critical habitat; or that is likely to adversely affect proposed species or proposed critical habitat and request relevant information from them, including the results of any related studies, in analyzing the effects of the action and cumulative effects on the species and habitat.

2. Request an information update from State agencies prior to preparing the final biological opinion to ensure that the findings and recommendations are based on the best scientific and commercial data available.

3. Recommend to Federal agencies that they provide State agencies with copies of the final biological opinion unless the information related to the consultation is protected by national security classification or is confidential business information. Decisions to release such classified or confidential business information shall follow the action agency's procedures. Biological opinions, not containing such classified or confidential business information, will be provided to the State agencies by the Services, if not provided by the action agency, after 10 working days. The exception to this waiting period allows simultaneous provision of copies when there is a joint Federal-State consultation action.

D. Habitat Conservation Planning

1. Utilize the expertise and solicit the information and participation of State agencies in all aspects of the Habitat Conservation Planning (HCP) process.

E. Recovery

1. Utilize the expertise and solicit the information and participation of State agencies in all aspects of the recovery planning process for all species under their jurisdiction.

2. Utilize the expertise and solicit the information and participation of State agencies in implementing recovery plans for listed species. State agencies have the capabilities to carry out many of the actions identified in recovery plans and are in an excellent position to do so because of their close working relationships with local governments and landowners.

3. Utilize the expertise and authority of State agencies in designing and implementing monitoring programs for species that have been removed from the list of Endangered and Threatened Wildlife and Plants. Unless preempted by Federal authority, States possess primary authority and responsibility for protection and management of fish,

wildlife and plants and their habitats, and are in an excellent position to provide for the conservation of these species following their removal from the list.

Scope of Policy

The scope of this policy is Servicewide.

Authority

The authority for this policy is the Endangered Species Act of 1973, as amended (16 U.S.C. 1536).

Dated: June 27, 1994.

Mollie H. Beattie,
Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.

Rolland A. Schmitten,
Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 94-16026 Filed 6-30-94; 8:45 am]

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Appendix B.

Relevant Recovery related court decisions

Fund for Animals et al. v. Babbitt et al. – Grizzly Bear

Defenders of Wildlife et al. v. Bruce Babbitt et al. - Sonoran Pronghorn

Defenders of Wildlife et al. v. Gale Norton et al. – Flat-tailed Horned Lizard

THE FUND FOR ANIMALS, et al., Plaintiffs, v. BRUCE BABBITT, et al., Defendants. THE NATIONAL AUDUBON SOCIETY, et al., Plaintiffs, v. BRUCEBABBITT, et al., Defendants.
Civ. No. 94-1021 PLF, Civ. No. 94-1106 PLF

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

903 F. Supp. 96; 1995 U.S. Dist. LEXIS 14742; 42 ERC (BNA)1068; 26 ELR 20537

September 29, 1995, Decided
September 29, 1995, FILED

SUBSEQUENT HISTORY: [**1]

As Amended May 1, 1997.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs, environmental and conservation organizations and concerned individuals (environmentalists), challenged alleged deficiencies in the efforts by defendants, Secretary of Interior (Secretary) and Fish and Wildlife Service (FWS) (jointly federal officials), to fulfil their obligation under the Endangered Species Act (ESA), *16 U.S.C.S. §§ 1531-1544*, to protect grizzly bears, a threatened species. Both parties sought summary judgment.

OVERVIEW: The Secretary delegated day-to-day responsibility to the FWS, and a grizzly bear recovery plan (GBRP) was developed and implemented. The court determined that the federal officials met their required burden of incorporating site-specific management actions into the GBRP, but failed to incorporate objective, measurable recovery criteria. The FWS was accorded flexibility to recommend a range of management actions on a site-specific basis. The FWS had discretion in its choice of methods to stem the hunting threat to grizzly bears. The court declined to impose road density standards upon the FWS. The FWS was not required to establish linkage zones because it relied on its own determination that too little was known about the potential for such zones. The FWS, in designing objective, measurable criteria for recovery, was required to address five statutory delisting factors, and its failure to do so violated the ESA. The FWS complied with the applicable provisions of the Administrative Procedures Act, *5 U.S.C.S. § 551 et seq.*, in denying a request for a critical habitat designation for grizzly ecosystems because the FWS adequately explained the facts and policy concerns relied upon.

OUTCOME: The court granted the environmentalists' motion for summary judgment insofar as they alleged that the federal officials' GBRP failed to incorporate objective, measurable recovery criteria. The court denied the environmentalists' motion for summary judgment insofar as it challenged the federal officials' incorporation of site-specific management actions into the GBRP and denied a request for a critical habitat designation.

CORE TERMS: habitat, species, grizzly, grizzly bear, ecosystem, zone, delisting, conservation, site-specific, survival, designation, females, measurable, recommend, monitoring, designate, linkage, mortality, cubs, scientific, regulation, methodology, endangered, maximum, listing, destruction, occupancy, isolation, extinction, predation

CORE CONCEPTS -

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

In considering whether to list a species as "threatened" or "endangered," the Fish and Wildlife Service conducts a formal review in which it must consider the species' status according to five statutory factors. Those factors are: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. *16 U.S.C.S. § 1533(a)(1)*.

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

The Secretary of the Interior is required, in most cases, including cases involving grizzly bears, to develop and implement a recovery plan for each threatened or endangered species. *16 U.S.C.S. § 1533(f)*.

Environmental Law: Litigation & Administrative Proceedings: Judicial Review

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

Actions taken by the Fish and Wildlife Service (FWS) pursuant to the Endangered Species Act, *16 U.S.C.S. §§ 1531-1544*, are reviewed as agency actions subject to the standards of review under the Administrative Procedures Act (APA), *5 U.S.C.S. § 551* et seq. Under the APA, the court must assess whether the actions of the FWS were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or without observance of procedure required by law. *5 U.S.C.S. § 706(2)(A), (D)*.

Environmental Law: Litigation & Administrative Proceedings: Judicial Review

Environmental Law: Natural Resources & Public Lands: Wildlife Protection

In reviewing the action of the Fish and Wildlife Service, the court must be thorough and probing, but if the court finds support for the agency action, it must step back and refrain from assessing the wisdom of the decision unless there has been a clear error of judgment. In thoroughly reviewing the agency's actions, the court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors. The court is expected to recognize the agency's expertise and experience with respect to questions involving scientific or technical matters or policy decisions based on uncertain technical information.

Civil Procedure: Summary Judgment: Partial Summary Judgment

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Where a case involves a challenge to a final administrative action, the court's review is limited to the administrative record. Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record, even though the court does not employ the standard of review set forth in Fed. R. Civ. P. 56.

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

The Endangered Species Act, *16 U.S.C.S. §§ 1531-1544*, provides that, in developing and implementing recovery plans, the Secretary of the Interior and the Fish and Wildlife Service shall "to the maximum extent practicable" incorporate into each recovery plan a description of such site-specific management actions as may be necessary to achieve the plan's goals for the conservation and survival of the species. *16 U.S.C.S. § 1533(f)(1)(B)(i)*.

Administrative Law: Separation & Delegation of Power: Legislative Controls

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

By its silence Congress has delegated to the Fish and Wildlife Service the power to make policy choices that represent a reasonable accommodation of conflicting policies that were committed to the agency's care by the Endangered Species Act, *16 U.S.C.S. §§ 1531-1544*.

Administrative Law: Separation & Delegation of Power: Legislative Controls

The phrase "to the maximum extent practicable" does not permit an agency unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible.

Administrative Law: Judicial Review: Standards of Review: Abuse of Discretion

Administrative Law: Judicial Review: Standards of Review: Arbitrary & Capricious Review

The choice of one particular action over another is not arbitrary, capricious, or an abuse of discretion simply because one may happen to think it ill-considered, or to represent the less appealing alternative solution available.

Environmental Law: Litigation & Administrative Proceedings: Judicial Review

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

Disagreement between scientists about the necessity of establishing linkage zones is not sufficient to demonstrate arbitrariness by the government in the context of administration of the Endangered Species Act, *16 U.S.C.S. §§ 1531-1544*.

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

Under the Endangered Species Act, *16 U.S.C.S. §§ 1531-1544*, a recovery plan is required to include objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of the section, that the species be removed from the list. *16 U.S.C.S. § 1533(f)(1)(B)(ii)*.

Environmental Law: Litigation & Administrative Proceedings: Judicial Review

Governments: Legislation: Interpretation

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

While courts must defer to a reasonable agency interpretation of the dictates of the Endangered Species Act, *16 U.S.C.S. §§ 1531-1544*, where Congress has specifically addressed an issue, the intention of Congress must be given effect. Courts rely on the traditional tools of statutory construction in ascertaining Congress' intent. Where Congress has unambiguously expressed its intent, there is no room for a different interpretation proffered by the Department of Interior.

Administrative Law: Separation & Delegation of Power: Legislative Controls

Governments: Legislation: Interpretation

The word "shall" is an imperative denoting a definite obligation. Use of the phrase "to the maximum extent practicable" indicates a strong Congressional preference that the agency fulfill its obligation to the extent that it is possible or feasible.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Judicial deference to an agency is greatest when reviewing technical matters within its area of expertise, particularly its choice of scientific data and statistical methodology.

Administrative Law: Agency Rulemaking: Informal Rulemaking

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

Regulations issued by the Secretary of the Interior (Secretary), pursuant to the Endangered Species Act (ESA), *16 U.S.C.S. §§ 1531-1544*, permit any "interested person" to petition the Secretary requesting designation of critical habitat. *50 C.F.R. § 424.14(a)*; *43 C.F.R. § 14.2*. Neither the ESA nor the regulations prescribe a procedure for such petitions. Rather, they are considered under the provisions of the Administrative Procedures Act (APA), *5 U.S.C.S. §*

551 et seq. 50 C.F.R. § 424.14(a), 43 C.F.R. § 14.2, 5 U.S.C.S. § 553(e). The APA requires agencies to allow interested persons to petition for the issuance, amendment, or repeal of a rule, and, when such petitions are denied, to give a brief statement of the grounds for the denial. 5 U.S.C.S. §§ 553(e), 555(e). Agencies denying rulemaking provisions must explain their actions. Thus, the right to petition for rulemaking entitles the petitioning party to a response on the merits of the petition.

Environmental Law: Litigation & Administrative Proceedings: Judicial Review

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

In assessing the actions of the Fish and Wildlife Service(FWS), the court considers whether the actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.S. § 706(2)(A). Courts ordinarily afford agencies a particularly high degree of deference regarding their decision not to initiate a rulemaking proceeding. Such a refusal will be overturned only in the rarest and most compelling of circumstances. Nonetheless, the court must assure itself that the agency has adequately explained the facts and policy concerns it relied on, and that the facts have some basis in the record. Where an agency has reversed its course, it must supply a reasoned analysis justifying the reversal.

COUNSEL: For Fund for Animals, Plaintiff: Eric Robert Glitzenstein, Meyer & Glitzenstein, Washington, D.C. For Plaintiffs: Howard I. Fox, Sierra Club Legal Defense Fund, Washington, D.C.

For Defendants: Joseph R. Perella, Environment & Natural Resources Division, U.S. Dept. of Justice, Washington, D.C.

JUDGES: PAUL L. FRIEDMAN, United States District Judge

OPINIONBY: PAUL L. FRIEDMAN

OPINION: [*102] OPINION

I. BACKGROUND

Since the arrival of Europeans in North America, the grizzly bear has been eliminated from all but approximately two percent of its original range in the lower 48 states. Indeed, the bear's historic range, which once included most of the western half of the United States, has receded to small portions of Washington, Idaho, Montana and Wyoming. Grizzly Bear Recovery Plan ("Plan") at ix, 9-10, Administrative Record ("A.R.") Volume 7. Between 1800 and 1975, the grizzly bear population shrank from an estimated 50,000 bears to fewer than 1000. Id. at 9. It is estimated that today there are fewer than 1000 grizzlies in the lower 48 states. Id. at 10-11. In July of 1975, the Secretary of the Interior found that the grizzly bear is likely to become in danger of extinction within the foreseeable[**2] future. Under the authority of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, he therefore listed the [*103] grizzly bear in the lower 48 states as "threatened" with extinction. 40 Fed. Reg. 31,734 (1975).

In these companion cases, numerous environmental and conservation organizations and several interested individuals challenge alleged deficiencies in the Secretary's efforts to fulfill his obligation under the Act to protect the grizzly bear's survival. n1 Plaintiffs, Fund For Animals ("FFA"), National Audubon Society ("NAS") and others dispute the adequacy of the recovery plan developed by the Fish and Wildlife Service ("FWS"), to whom the Secretary has delegated his day-to-day responsibilities under the ESA. 50 C.F.R. § 402.01(b). FFA and others also dispute the legality of defendants' denial of a petition requesting that defendants designate "critical habitat" for the grizzly bear.

n1 Plaintiffs have standing to bring these suits. They have alleged sufficiently concrete and particularized injuries in fact that are fairly traceable to defendants' actions and redressable by the relief requested. See *Animal Legal Defense Fund, Inc. v. Espy*, 306 U.S. App. D.C. 188, 23 F.3d 496, 498 (D.C. Cir. 1994).

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The ESA requires that the FWS develop and implement a recovery plan "for the conservation and survival of" any threatened or endangered species. 16 U.S.C. § 1533(f)(1). Any such plan is supposed to be a basic road map to recovery, i.e., the process that stops or reverses the decline of a species and neutralizes threats to its existence. Policy and Guidelines for Planning and Coordinating Recovery of Endangered and Threatened Species (May 1990) ("FWS Recovery Guidelines"), A.R. Tab 78 at 1; 50 C.F.R. § 402.02. It is supposed to provide a means for achieving the species' long-term survival in nature. FWS Recovery Guidelines, A.R. Tab 78. The Act requires that the recovery plan shall, "to the maximum extent practicable," incorporate (1) site-specific management actions necessary for the conservation and survival of the species, and (2) objective, measurable criteria by which to monitor the species' recovery. 16 U.S.C. § 1533 (f)(1)(B). Plaintiffs charge that the final Grizzly Bear Recovery Plan ("GBRP"), issued in September 1993, fails adequately to set forth "site-specific management actions" or "objective, measurable criteria." They insist that the Plan will not stem or abate threats[**4] to grizzly bear survival and predict that, contrary to the intent of Congress, the GBRP will provide the "road map for the bears' forced march to extinction." NAS Mem. in Support of Summ. J. at 3. By contrast, defendants contend that the GBRP fully complies with the ESA.

In 1976, the FWS had proposed to designate "critical habitat" for the grizzlies. Proposed Determination of Critical Habitat, 41 Fed. Reg. 48,758 (1976), A.R. Tab 17. A "critical habitat" designation protects specific areas inside and outside the geographical region occupied by the threatened species if it is necessary for the conservation of the species. 16 U.S.C. § 1532(5). In 1979 the FWS withdrew its proposal because the 1978 amendments to the ESA had imposed additional obligations on the FWS before it designated critical habitat. Withdrawal of Proposals, 44 Fed. Reg. 12,382 (1979), A.R. Tab 23. In 1991 plaintiff Jasper Carlton, the director of the Biodiversity Legal Foundation, filed a petition requesting that defendants designate "criticalhabitat" for the grizzly bear. Letter from Carlton to Servheen of January 16, 1991, attachment at 33 ("Petition to Designate Critical Habitat"), Habitat Record ("H.R.") Tab [**5]4. That petition was denied without the opportunity for public comment. Plaintiffs contend that the denial of Mr. Carlton's petition to designate critical habitat for the grizzly bear was not in accordance with the ESA and the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 et seq.

Both plaintiffs and defendants have moved for summary judgment. For the reasons stated in this Opinion, the Court concludes that defendants have met their burden with respect to incorporating site-specific management actions into the 1993 GBRP, but not with respect to incorporating objective, measurable recovery criteria. The Court also concludes that defendants acted in accordance with the APA in denying Mr. Carlton's petition for the designation of critical habitat for the grizzly bear.

II. STATUTORY FRAMEWORK

The Supreme Court has described the Endangered Species Act as "the most comprehensive [*104] legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978). The Act was designed to "save from extinction species that the Secretary of the Interior designates as endangered or[**6] threatened." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 132 L. Ed. 2d 597, 115 S. Ct. 2407, 2409 (1995). An "endangered" species is "any species which is in danger of extinction throughout all or a significant portion of its range" 16 U.S.C. §

1532(6). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *16 U.S.C. § 1532(20)*.

In considering whether to list a species as "threatened" or "endangered", the FWS conducts a formal review in which it must consider the species' status according to five statutory factors. Those factors are:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). In listing the grizzly bear in the lower 48 states as "threatened" with extinction, the FWS relied on each^[**7] statutory factor except the "disease or predation" factor. *40 Fed. Reg. 31,734*.

Once a species is listed as threatened or endangered, the FWS "must do far more than merely avoid the elimination of [the] protected species. It must bring these species back from the brink so that they may be removed from the protected class . . ." *Defenders of Wildlife v. Andrus, 428 F. Supp. 167, 170 (D.D.C. 1977)*. The Act contains a number of provisions designed to stem the threat of extinction, promote recovery of those species found to be threatened or endangered, and establish systems to conserve the species even after the threat of extinction has passed.

Concurrent with making a determination to list a species as threatened or endangered, the Secretary is required "to the maximum extent prudent and determinable" to issue regulations "designating any habitat of such species which is then considered to be critical habitat." *16 U.S.C. § 1533(a)(3)(A)*. The duty to make a critical habitat designation at the same time as the determination is made to list a species was added to the ESA in 1978. Congress excused from this requirement those species that were already listed at the time the^[**8] Act was amended, specifying that "critical habitat may be established for [species listed prior to the amendment] . . . for which no critical habitat has heretofore been established." *16 U.S.C. § 1532(5)(B)*. Grizzly bears are a previously listed species.

The Secretary is required in most cases, including the grizzly bear's, to "develop and implement" a "recovery plan" for each threatened or endangered species. *16 U.S.C. § 1533(f)*. According to the FWS, a recovery plan "delineates, justifies, and schedules the research and management actions necessary to support recovery of a species, including those that, if successfully undertaken, are likely to permit reclassification or delisting of the species." FWS Guidelines, A.R. Tab 78 at 1. The ESA directs that the plan shall, "to the maximum extent practicable," include:

- (i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
- (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list

*16^[**9] U.S.C. § 1533(f)(1)(B)*.

The FWS is empowered to remove listed species from the threatened or endangered lists only when the species has recovered sufficiently so that the protections of the ESA no longer are needed. 16 U.S.C. § 1533(c)(2)(B)(i). To initiate a delisting process, [*105] the FWS must publish notice of a proposed regulation that concludes that delisting is appropriate in light of the same five factors considered for listing a species. 16 U.S.C. § 1533(a), (b), (c). After assessing all the technical or scientific data in the administrative record as they relate to the five factors, the agency must exercise its expertise in determining whether to list or delist the species. *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 480 (W.D. Wash. 1988).

III. STANDARD OF REVIEW

These actions are brought under the ESA's citizen suit provision, 16 U.S.C. § 1540(g), and the Administrative Procedure Act, 5 U.S.C. § 706. Actions taken by the FWS pursuant to the ESA are reviewed as agency actions subject to the standards of review under the APA. See *Las Vegas v. Lujan*, 282 U.S. App. D.C. 57, 891 F.2d 927, 932 (D.C. Cir. 1989). Under the APA, the Court must assess whether the actions[**10] of the FWS were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

In reviewing the action of the FWS, the Court must be thorough and probing, but if the Court finds support for the agency action, it must step back and refrain from assessing the wisdom of the decision unless there has been "a clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989). In thoroughly reviewing the agency's actions, the Court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors. *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 378; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971); *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 227 U.S. App. D.C. 312, 706 F.2d 1216, 1220 (D.C. Cir. 1983). The Court is[**11] expected to recognize the agency's expertise and experience with respect to questions involving scientific or technical matters or policy decisions based on uncertain technical information. *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 375-78; *State of New York v. Reilly*, 297 U.S. App. D.C. 147, 969 F.2d 1147, 1150-51 (D.C. Cir. 1992).

Because this case involves a challenge to a final administrative action, the Court's review is limited to the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142, 36 L. Ed. 2d 106, 93 S. Ct. 1241 (1973). n2 Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record, *Richards v. I.N.S.*, 180 U.S. App. D.C. 314, 554 F.2d 1173, 1177 n.228 (D.C. Cir. 1977), even though the Court does not employ the standard of review set forth in Rule 56, Fed. R. Civ. P.

n2 Defendants have objected to plaintiff NAS's filing of a December 1993 study and a newspaper article discussing the study, both of which post-date the agency decision at issue here. Generally, review of an agency's decision "is to be based on the full administrative record that was before the [agency] at the time [it] made [its] decision." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 420. Plaintiffs claim that their submission may properly be considered as demonstrating that the FWS failed to consider all of the relevant factors when adopting the GBRP. See *Environmental Defense Fund, Inc. v. Costle*, 211 U.S. App. D.C. 313, 657 F.2d 275, 285 (D.C. Cir. 1981). Plaintiffs' filing does not add any new information that compels the Court to make an exception to the rule that review is limited to the record before the agency. Accordingly, the Court has not considered this submission.

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IV. SITE-SPECIFIC MANAGEMENT ACTIONS

A. The Meaning of the Site-Specific Management Action Provision

The ESA provides that "in developing and implementing recovery plans," the Secretary and the FWS shall "to the maximum extent practicable" incorporate into each recovery plan "a description of such site-specific management actions as may be necessary to achieve the plan's goals for the conservation and survival of the species." *16 U.S.C. §1533(f)(1)(B)(i)*.

[*106] Defendants interpret the "site-specific" provision to require the FWS to identify specific "sites" inhabited by grizzly bears and to describe management actions for each of these "sites." The GBRP designates several distinct geographic ecosystems or recovery zones inhabited by grizzly bears and lists management measures to be taken within each of the ecosystems. Planat 33-37. Defendants therefore contend that the GBRP incorporates a description of "site-specific management actions." Plaintiffs, on the other hand, maintain that the ESA requires a description of "specific" management actions, techniques or standards. The Court's reading of the provision is consistent with defendants' interpretation.

The hyphen in "site-specific" [**13] indicates that the word "specific" modifies the word "site," not the term "management actions." The FWS has reasonably interpreted the ESA to require that the agency, in designing management actions, consider the distinct needs of separate ecosystems or recovery zones occupied by a threatened or endangered species. The Court may not reject the FWS' reasonable interpretation of the "site-specific management action" provision of the statute. *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

Resolution of that grammatical question, however, does not resolve the issue of what the "management actions" for each site must consist of. The ESA states that they must be those actions found by the agency to be "necessary to achieve the plan's goals for the conservation and survival of the species." *16 U.S.C. § 1533(f)(1)(B)(i)*. The ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any . . . species to the point at which the measures provided pursuant to this chapter are no longer necessary." *16 U.S.C. § 1532(3)*. While Congress has repeatedly amended the recovery[**14] plan provision in order to add express direction regarding the contents of what must be included in a recovery plan, the statute does not detail specific methods or procedures that are necessary to achieve conservation and survival. See *Sierra Club v. Lujan*, 1993 U.S. Dist. LEXIS 3361, 36 ERC (BNA) 1533 (W.D. Tex. 1993); S. Rep. No. 240, 100th Cong., 2d Sess. 9 (1988), reprinted in, 1988 U.S.C.C.A.N. 2708; FWS Guidelines, A.R. Tab 78 at 2-3. In fact, the legislative history shows that Congress recognized that a wide range of actions could be needed to conserve diverse species and the need for flexibility in choosing those actions. See S. Rep. No. 240, 100th Cong., 2d Sess. 2009 (1988), reprinted in, 1988 U.S.C.C.A.N. 2700, 2709.

To be sure, the ESA suggests that methods and procedures, including scientific resources management activities -- such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation -- may be necessary to conserve species. *16 U.S.C. § 1532(3)*. But none of these methods or procedures is mandated by the Act. Moreover, while the legislative history suggests that incorporation of "site-specific[**15] management objectives" is supposed to assure that recovery plans "are as explicit as possible in describing steps to be taken in the recovery of a species," S. Rep. No. 240, 100th Cong., 2d Sess. 9 (1988), reprinted in, 1988 U.S.C.C.A.N. 2709, it does not delineate the content of those steps. By its silence Congress has delegated to the FWS the power to make policy choices that "represent[] a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *State of Ohio v. United States Dep't of the Interior*, 279 U.S. App. D.C. 109, 880 F.2d 432, 441 (D.C. Cir. 1989) (quoting *Chevron, U.S.A., Inc. v. National Resources Defense*

Council, Inc., 467 U.S. at 844-45 (quotation omitted)). The Court concludes that the FWS has the flexibility under the ESA to recommend a wide range of "management actions" on a site-specific basis.

B. Application of the "Site-Specific Management Action" Requirement to the 1993 Grizzly Bear Recovery Plan

Plaintiffs dispute whether the Plan even meets the FWS' interpretation of the "site-specific management action" provision because, they contend, it does not contain management actions that, even accepting[**16] defendants' reading of the statute, are specific [*107] to particular sites. Plaintiffs point out that the management actions recommended for the various ecosystems are largely the same and are described in boilerplate statements. See, e.g., Plan at 56, 77, 96 (concerning management guidelines for private and state lands); Plan at 50, 71, 90 (concerning livestock grazing); Plan at 49, 70, 89, 107 (concerning law enforcement efforts); Plan at 49, 70, 89, 107 (concerning bear baiting); Plan at 50, 71-72, 90, 109 (concerning application of Interagency Grizzly Bear Guidelines to protect from threat of resource development).

The fact that many of the management actions are the same for the different geographic ecosystems does not render the Plan unlawful. Plaintiffs have not disagreed with defendants' assertion that certain of the same biological principles apply to grizzly bear management in the various ecosystems. More importantly, where the ecosystems differ, the Plan does recommend different management actions. For example, the Plan recommends that one bear be introduced into the Yellowstone ecosystem every ten years because of the biological need for genetic diversity. Plan at 56. This[**17] recommendation is not repeated for the other ecosystems. In addition, the Plan promises to develop separate minimum habitat values for each ecosystem. Plan at 55, 76, 96, 113. The site-specificity of the effort demonstrates that the FWS considered the specific needs of each grizzly ecosystem.

Plaintiffs' greater concern is the lack of detail in the recommended management actions. Defendants' responsibility is "to the maximum extent practicable" to identify management actions "necessary to achieve the Plan's goals for the conservation and survival of the species." Obviously, the phrase "to the maximum extent practicable" does not permit an agency unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible. *Doe v. Board of Educ. of Tullahoma City Schools*, 9 F.3d 455, 460 (6th Cir. 1993); *SMS Data Products Group, Inc. v. United States*, 853 F.2d 1547, 1553 (Fed. Cir. 1988); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 191 (3d Cir. 1983). Plaintiffs add that the ESA requires that a recovery plan be both developed and implemented. 16 U.S.C. § 1533(f). They argue that the word "implement" would[**18] be rendered meaningless in the absence of detailed and specific management measures and that "inaction eviscerates the recovery planning provisions . . . and amounts to an abdication of the Federal Defendants' responsibility to plan for the survival and recovery . . . of endangered and threatened species." *Sierra Club v. Lujan*, 1993 U.S. Dist. LEXIS 3361, 36 ERC (BNA) 1533, 1993 WL 151353 at *25.

The reality faced by the FWS, and alluded to in its papers, however, is that myriad factors potentially affect the grizzly bears. It is not feasible for the FWS to attempt to address each possibility. By the time an exhaustively detailed recovery plan is completed and ready for publication, science or circumstances could have changed and the plan might no longer be suitable. Thus, the FWS recognized in the Plan that it would be reviewed every five years and revised as necessary. Plan at 31. In these circumstances, the Court concludes that the FWS has provided sufficient detail to satisfy the statute.

It is not necessary for a recovery plan to be an exhaustively detailed document. Several other ESA provisions, some of which do not afford the FWS much discretion, already place limits on activities[**19] that may affect the grizzlies or empower the FWS to restrict threatening activities as needed. See, e.g., 16 U.S.C. §§ 1532(a)(3)(A), 1536(a)(2), 1536(b)(4)(B)(iii), 1539(a)(2)(A). It is true that the recovery plan provision places a separate obligation on the FWS aside from those imposed by other provisions of the ESA. See *Idaho Dep't of Fish and Game v. National Marine Fisheries Service*, 850 F. Supp. 886, 895 (D. Or. 1994). But the Plan's recommendations are

implemented through FWS programs, cooperation and consultation with states, and the obligation of federal agencies to consult with the FWS or to implement conservation programs. See *16 U.S.C. §§ 1535, 1536(a)(1), (2)*. These programs may in many cases require the development of detailed and possibly site or situation specific restrictions to protect the grizzly bear. Because science and circumstances [*108] change, however, the FWS needs, and the statute provides, some flexibility as it implements the recovery plan.

What the ESA requires is the identification of management actions necessary to achieve the Plan's goals for the conservation and survival of the species. A recovery plan that recognizes specific threats to the conservation and survival of a threatened or endangered species, but fails to recommend corrective action or explain why it is impracticable or unnecessary to recommend such action, would not meet the ESA's standard. Nor would a Plan that completely ignores threats to conservation and survival of a species. Here, the Court finds that the Plan does either recommend actions or recommend steps that could ultimately lead to actions to stave off the threats to the grizzly bears that have been identified.

Plaintiffs point, however, to several perceived deficiencies with the recommendations. The Court deals with these seriatim.

1. Hunting

Plaintiffs fault the Plan for identifying the danger to the grizzly bears posed by hunting, but merely recommending that information be circulated to hunters regarding storage of game that would be appetizing to the grizzly bears and the likely location and proper identification of grizzly bears. Plan at 49. The Plan also recommends coordination of state, federal and tribal law enforcement, that black bear hunting regulations be modified to reduce conflict with grizzly safety, and that attention be concentrated on eliminating black bear baiting in[*21] the recovery zones because it may attract grizzly bears. Plan at 48-49.

These measures do address one of the hunting concerns that was identified by the FWS when it listed the grizzly bears: humans kill grizzly bears out of fear and a perception that the bears pose a threat to human safety. See *40 Fed. Reg. 31,734*. They also address other threats related to hunting that are recognized in the GBRP, such as food conditioning and habituation. See Plan at 5-7. Plaintiffs have not pointed to any place in the ESA that requires more than the recommendation of actions to counter identified threats to the grizzly bear. The choice of one particular action over another is not arbitrary, capricious or an abuse of discretion "simply because one may happen to think it ill-considered, or to represent the less appealing alternative solution available." *Hondros v. United States Civil Service Comm'n*, 720 F.2d 278, 295 (3d Cir. 1983) (quoting *Calcutta E. Coast of India & E. Pakistan v. Federal Maritime Comm'n*, 130 U.S. App. D.C. 261, 399 F.2d 994, 997 (D.C. Cir. 1968)). The Court will not impose plaintiffs' or its own view of a better way to stem the threat posed by hunting than the methods chosen by the FWS. [*22]

2. Roads

The GBRP recognizes that roads have various deleterious impacts on grizzlies. Plan at 22, 145. It recommends the standardization of road density measurement techniques through an Interagency Grizzly Bear Committee Task Force, Plan at 149; the development of actual standards for each ecosystem and their adoption into land management planning, Plan at 149; and research regarding the effects of various road densities on grizzly bear habitat use and mortality, Plan at 53. It also provides interim open road density standards. Plan at 50, 71-72, 90, 109.

According to plaintiffs, there already is sufficient scientific data to set road density standards without further delay. They argue that a promise to design site-specific management actions in the future cannot meet the ESA's requirements and that the Plan's recommendation of interim standards to protect road management options is

insufficient. While plaintiffs have several objections to the content of the interim standards, the Plan recommends that the interim standards be implemented in such a manner as to maintain management options after the establishment of standards that are tailored to each ecosystem. These definite^[**23] management actions address the threat posed to the grizzlies by the infiltration of roads into their habitat. The Court therefore concludes that the FWS has met its statutory responsibility. For the Court to insist that the FWS impose different road density standards would be to interfere with the agency's discretion in designing ^[*109] management actions. See *Hondros v. United States Civil Service Comm'n*, 720 F.2d at 295.

3. Human Activities/Resource Development

In order to control the impact of resource development on the grizzly bear, the Plan recommends that land managers document the effect of resource development activities and apply the Interagency Grizzly Bear Guidelines to harmonize resource development with the grizzlies' needs. Plan at 21-22, 31, 47, 50-51, 71-72, 90-91, 109; see Interagency Grizzly Bear Guidelines ("IGB Guidelines"), A.R. Tab 236. The IGB Guidelines classify grizzly habitat into five separate Management Situations that are defined by their population and habitat conditions and the management direction for that particular habitat rather than geographically (which is how the recovery zones are classified). The management direction recommends various^[**24] actions to be taken with respect to the different threats to the grizzly bears within each particular Management Situation. The most aggressive protection measures are described for Management Situation 1 and the least aggressive for Management 5.

The Interagency Grizzly Bear Guidelines were established by agreement between federal, state and Canadian agencies. IGB Guidelines, A.R. Tab 236 at Preface. n3 Plaintiffs strenuously criticize both the Plan, for incorporating an external document -- the IGB Guidelines -- into the Plan without public comment, and the FWS for abdicating its responsibility to develop its own management actions and to make them available for public comment. 16 U.S.C. §§ 1533(f)(1), (f)(4). While it is true that the Guidelines were not separately subject to notice and comment procedures, all the released drafts of the GBRP incorporated the IGB Guidelines, and there was a sufficient opportunity to comment on each draft of the GBRP. The Court therefore finds that there has been a sufficient opportunity to comment on the incorporation of the IGB Guidelines into the Plan and the proposed management actions of the FWS. The procedures employed conformed with the ESA. ^[**25] See 16 U.S.C. § 1533(f)(4).

n3 The FWS is permitted under the ESA to procure the services of "appropriate public and private agencies and institutions and other qualified persons." 16 U.S.C. § 1533(f)(2).

While plaintiffs have pointed to several perceived flaws in the IGB Guidelines, they have not shown that defendants have traveled beyond the discretionary range permitted by the ESA. The GBRP identifies the threat to grizzly habitat posed by logging, mining, oil and gas development, livestock grazing, interference with grizzly dens and recreation. Plan at 7-8, 33-37, 90-91. The IGB Guidelines respond to each of these threats. Plan at 90-91; see, e.g., IGB Guidelines, A.R. Tab. 236 at 7-20, 21-34, 35-39, 40-49. In addition, the Plan recommends that land managers consider the needs of the grizzlies in making management decisions and provides for ongoing monitoring of the effect of threatening activities on the grizzly bear. Plan at 91. By directly and specifically addressing the threats posed by human^[**26] activities and resource development, the FWS has met its obligation under the ESA. The Court will not substitute plaintiffs' or its own view of the best way to combat such threats to grizzly survival. See *Hondros v. United States Civil Service Comm'n*, 720 F.2d at 295.

4. Linkage Zones

Isolation of grizzly bear populations was identified in 1975 as one of the reasons for listing the grizzly bear as threatened. *40 Fed. Reg. 31,734*. Linkage zones, which provide contiguous habitat of sufficient quality between the recovery zones to allow the movement of grizzly bears between the zones, are one possible means of combatting genetic isolation. Plan at 24-27. The Plan explains, however, that "linkage zones are desirable for recovery, but are not essential for delisting at this time." Plan at 25; see, also, Plan at 24, 26, 27-28, 56. The Plan's solution is to initiate a five year study to evaluate the potential linkage between the various ecosystems. The results of the study "will be the basis for future actions regarding the linkage zone question." Plan at 25. The Plan also recommends that, in the interim, [*110] land management agencies take precautions not to degrade the potential[**27] linkage areas. Plan at 24-26; FWS Response to Issues Raised Concerning the GBRP (January 1994) ("1994 FWS Response"), A.R. Tab 172 at 12.

Plaintiffs argue that the Plan is flawed because it does not currently protect linkage zones. It is true that the FWS recognizes linkage zones as one possible means of countering genetic isolation. Plan at 24-26. Nevertheless, the Plan explains that linkage zones are not necessary at this time and cautions that "at this time, very little is known about the potential for linkage zones." Plan at 25. Defendants point out that, of 460 grizzly bears who have been radio-tracked in four different ecosystems for the past 20 years, not one of the bears has been observed moving between the ecosystems. 1994 FWS Response, A.R. Tab 172 at 12.

While the record may be interpreted differently by plaintiffs than by defendants, disagreement between scientists about the necessity of establishing linkage zones is not sufficient to demonstrate arbitrariness by the government. *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 378; *State of New York v. Reilly*, 969 F.2d at 1150; *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1576 (9th Cir. 1993). The[**28] record supports the finding that grizzly bears are not currently moving between ecosystems and, therefore, that linkage zones may not be "necessary" at this time or may not be capable of being properly established. In addition, the Plan's recommendation that the Yellowstone grizzly population be augmented at regular intervals suggests that the FWS is not simply waiting for the results of the linkage zone study before it takes any action to combat genetic isolation. Plan at 27-28, 56. n4

n4 Plaintiffs accuse defendants of bowing to political and other non-scientific pressures in formulating the GBRP.

As evidence, they point to the statement in the Plan that its management approach is "sensitive to the social concerns of people living in [grizzly ecosystems]," Plan at 19, and the fact that the author of the Plan, Dr. Christopher Servheen, is quoted in a newspaper article as responding to a question about the Plan's lack of linkage zone protection by saying "that's politically naive. La-la land is where you can go and make decisions like that." "US Fish & Wildlife Presents: The Grizzly Bear Mating Game," *Missoula Independent*, October 2, 1992, at 9, A.R. Tab 510 at attachment 1.

The Court rejects plaintiffs' claim that these quotations are evidence that the FWS violated the ESA's requirement that recovery plans be "based solely on the best available scientific data." 134 Cong. Rec. 19273 (1988) (Statement of Senator Mitchell). The ESA's listing and delisting factors include consideration of manmade factors affecting the species' continued existence and overutilization of grizzly bears. *16 U.S.C. § 1533(a)*. These provisions demonstrate that human factors that have biological consequences for the bear are relevant considerations. In this limited manner, therefore, social consequences that might increase human-caused mortality are relevant, and consideration of such factors is not impermissible. As to Dr. Servheen's comments, their meaning is not entirely clear and the Court is not persuaded that they have the probative value that plaintiffs ascribe to them.

[**29]

For all these reasons, the Court finds that defendants have met their obligation under the ESA to incorporate site-specific management actions into the 1993 GBRP. n5

n5 Because the Court has found that the ESA permits substantial license to the FWS in recommending site-specific management actions and that the FWS has met its burden by recommending protective actions or explaining why it is impracticable to do so for identified threats to the conservation and survival of the grizzly bears; the Court need not address plaintiffs' argument respecting the applicability of NEPA to recovery plans. The Court rejects plaintiffs' suggestion that the FWS was improperly motivated by its desire to avoid NEPA.

V. OBJECTIVE, MEASURABLE CRITERIA FOR DELISTING

A. The Relationship Between The "Objective, Measurable Criteria" Requirement And The Delisting Factors

Plaintiffs' second challenge to the GBRP is based on the requirement that a recovery plan include "objective, measurable criteria which, when met, would result[**30] in a determination, in accordance with the provisions of this section, that the species be removed from the list . . ." 16 U.S.C. § 1533(f)(1)(B)(ii). The GBRP delineates six distinct geographic grizzly bear ecosystems in the lower 48 states. Plan at 10-11. It describes three monitoring or recovery criteria by which to measure grizzly bear population status in each ecosystem:

[*111] (1) the number of females with cubs seen annually over a six-year period;

(2) the distribution of females with cubs throughout the ecosystem over a six-year period; and

(3) the annual number of human-caused mortalities.

Plan at 19. The Plan specifies numerical or percentage population goals for each of these criteria within each identified grizzly ecosystem. See Plan at 33-34. In addition, the Plan requires the development and completion of a Grizzly Bear Conservation Strategy before the commencement of any delisting process by the FWS to ensure that adequate regulatory mechanisms will survive delisting.

Plaintiffs insist that the "objective, measurable criteria" must specifically assess whether the threats that originally led to a decision to list a species have been remedied[**31] in ways that would permit biological recovery of the listed species. Defendants dispute whether they are forced to design criteria that specifically address the five statutory listing and delisting factors, see *supra* at page 5, because, even if the recovery plan objectives are met, a species cannot be delisted without the publication of a notice of proposed rulemaking addressing the statutory factors and a public comment period. They assert that all that is required is that the GBRP's objective, measurable criteria should likely lead to a finding that the five statutory delisting factors are met. Defs.' Mem. in Support of Summ. J. at 29.

"Likely to lead," however, is not the language of the ESA. While the Court must defer to a reasonable agency interpretation of the dictates of the ESA, where Congress has specifically addressed an issue its intention must be given effect. *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. at 843 n.9. The Court relies on the "traditional tools of statutory construction" in ascertaining Congress' intent. *Id.*; *State of Ohio v. United States Dep't of the Interior*, 279 U.S. App. D.C. 109, 880 F.2d 432, 441 (D.C. Cir. [**32] 1989). And where Congress "has unambiguously expressed its intent . . . there is no room for [a different] interpretation proffered by the Department." *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, 310 U.S. App. D.C. 168, 45 F.3d 469, 473 (D.C. Cir. 1995).

The ESA states that the FWS "shall, to the maximum extent practicable," incorporate into the recovery plan "objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list." 16 U.S.C. § 1533(f)(V)(B)(ii). The word "shall" is an imperative denoting a definite obligation. *SMS Data Products Group, Inc. v. United States*, 853 F.2d at 1553. Use of the phrase "to the maximum extent practicable" indicates a strong congressional preference that the agency fulfill its obligation to the extent that it is possible or feasible. *Id.* at 1553; *Doe v. Board of Educ. of Tullahoma City Schools*, 9 F.3d at 460. As to the word "would," it is used in the conclusion of a conditional sentence to express a contingency or possibility. See Webster's Third New International Dictionary 2638 (3d ed. 1993). Therefore, "would result in a determination[**33] . . . that the species be removed from the list" sets a target to be aimed at by meeting the recovery goals set forth in the Plan.

Congress has spoken in clarion terms: the objective, measurable criteria must be directed towards the goal of removing the endangered or threatened species from the list. Since the same five statutory factors must be considered in delisting as in listing, 16 U.S.C. § 1533(a), (b), (c), the Court necessarily concludes that the FWS, in designing objective, measurable criteria, must address each of the five statutory delisting factors and measure whether threats to the grizzly bear have been ameliorated. See *Defenders of Wildlife v. Andrus*, 428 F. Supp. at 170; see H. Rep. No. 567, 97th Cong., 2d Sess. 12, reprinted in 1982 U.S.C.C.A.N. 2812 ("delisting should be based on the same criteria . . . as listing").

B. Application of "Objective, Measurable Criteria" Requirement To The Grizzly Bear Recovery Plan Criteria

Defendants contend that the recovery criteria, population parameters and Conservation Strategy detailed in the GBRP actually do address all five statutory delisting factors (threat to habitat, overutilization, disease or [*112]predation, [**34] inadequacy of existing regulatory mechanisms, other natural or manmade factors affecting existence). n6

n6 The GBRP explains that the purpose of the "females with cubs" criterion is to "demonstrate that a known minimum number of adult females are alive to reproduce and offset existing mortality . . . [but] is not adequate to characterize population trend or precise population size." Plan at 20. The "distribution of females with cubs" or "occupancy" criterion is designed to "demonstrate adequate distribution of the reproductive cohort in the recovery zone . . . provide evidence of adequate habitat management . . . [and] indicate future occupancy by grizzly bear offspring." Plan at 20. The "human-caused mortality" criterion is part of a mortality management method that permits annual recalculation of the sustainable mortality limits for each ecosystem. Plan at 20.

Defendants assert that the "females with cubs" and "occupancy" criteria together serve as an indicator of adequate habitat management (Delisting [**35]Factor 1). Habitat degradation and loss is acknowledged by all parties to be a significant threat to grizzly recovery. See Plan at 21. In listing the grizzly bear, the FWS specifically cited the diminution of the bear's range from much of the Western United States to isolated regions in a few states and the threats posed by resource development, trail construction and accessibility to livestock. 40 Fed. Reg. 31,734. In order adequately to address the first delisting factor, the "females with cubs" and "occupancy" criteria must measure the present or threatened danger to the quality and quantity of grizzly habitat, including the effect of those threats recognized in 1975.

There may be some rationale for concluding that minimum bear population and grizzly distribution throughout a habitat over time have a positive correlation to the quality of habitat. But see *The Fund for Animals, Inc. v. Turner*,

1991 U.S. Dist. LEXIS 13426, 1991 WL 206232 at *4 (D.D.C. 1991); Knight and Blanchard, "Can the status of the Yellowstone Grizzly Bear Population be determined by counting females with cubs-of-the-year," (1993), ("Knight and Blanchard Report"), A.R. Tab 258 at 8 (poor habitat quality may result in greater chances[**36] of observing bears). The "females with cubs" and "occupancy" criteria, however, fail to assess the number and distribution of bears beyond the borders of the recovery ecosystems. Plan at 17-18. Because grizzly bears inhabit more land than is included in the recovery zones, id., those criteria do not measure present danger or destruction to grizzly bear habitat. Moreover, the two criteria do not seem capable of assessing the habitat of a larger, recovered grizzly bear population, let alone threatened habitat destruction. See Letter from Barbee to Servheen of February 4, 1991, A.R. Tab 337 at 4; Letter from Willcox to Servheen of February 2, 1991, A.R. Tab 386 at 4. The FWS has not explained how minimum bear population and grizzly distribution goals consider how much habitat and of what quality is necessary for recovery or how the answers to these questions can be derived from the "females with cubs" and "occupancy" criteria. n7

n7 Plaintiffs criticize the "females with cubs" and "occupancy" criteria for failing to consider historic habitat destruction, thereby redefining the grizzly bear habitat in its threatened state, rather than according to the bear's historic range. By turning a blind eye to habitat restoration, plaintiffs argue, the Plan ignores what is acknowledged to be the greatest threat to the survival of the grizzly bear -- habitat destruction. While destruction in the past may be relevant to assessing some of the threats to the species, the ESA only requires the recovery criteria to consider "present and threatened" danger and destruction. There does not appear in the statute any requirement that habitat loss be measured against the grizzly range during its most expansive period. Nonetheless, because habitat loss was one of the factors specifically relied on by the FWS in listing the grizzly bear, the FWS must consider the habitat loss in its assessment of the quantity and quality of grizzly bear habitat. See *Defenders of Wildlife v. Andrus*, 428 F. Supp. at 170; see H. Rep. No. 567, 97th Cong., 2d Sess. 12, reprinted in 1982 U.S.C.C.A.N. 2812.

[**37]

Nor does the Plan's requirement that a Conservation Strategy (that will include minimum habitat values and additional monitoring methods) be implemented before any delisting process is commenced address this deficiency. The promise of habitat based recovery criteria some time in the future simply is not good enough. The purpose of the habitat recovery criteria is to measure the effect of habitat quality and quantity on grizzly recovery. See FWS Recovery Guidelines, [*113]A.R. Tab 78 at 1-5. Such monitoring is not possible if there is no scale against which to gauge the status of the habitat. Defendants have not met their burden to develop objective, measurable criteria by which to assess present or threatened destruction, modification or curtailment of the grizzly bear's habitat or range.

Defendants initially claimed that the "females with cubs" and "occupancy" criteria address the threat of disease to the grizzly bears (Delisting Factor 3, along with predation). After plaintiffs conceded that there is no current threat of disease to the grizzlies and no such threat was recognized at the time the grizzly bear was listed, however, defendants acknowledged that the criteria do not[**38] address disease. Defs.' Mem. in Support of Summ. J. at 23. As discussed above, the recovery criteria must be aimed at achieving the goal of delisting the grizzly bears and, thus, the FWS is not excused from addressing any of the five delisting factors. By wholly failing to consider whether there is a need or an appropriate means of monitoring whether disease is a threat to the grizzly bear, the FWS has failed to meet its obligation under the ESA.

Defendants next assert that the "human-caused mortality" criterion and the Conservation Strategy relate to the overutilization of the species and predation delisting factors (Delisting Factors 2 and 3). When the bears were listed, the FWS specifically noted that humans killed grizzly bears out of fear and a perception that the bears posed a threat to human safety and that other losses were caused by livestock predation. 40 Fed. Reg. 31,734. As to the human-

caused mortality criterion, it seems to directly monitor overutilization by humans for commercial, recreational, scientific, or educational purposes. Defendants have not explained, however, how the human-caused mortality criterion addresses the threat caused by grizzly predation of livestock. [**39] As with habitat assessment, the yet-to-be-developed Conservation Strategy is not an adequate substitute for recovery criteria that measure the threat posed by livestock predation by the grizzly bear.

Defendants also claim that the Conservation Strategy addresses the inadequacy of the existing regulatory mechanisms factor (Delisting Factor 4). At the time the bears were listed, the FWS noted that management measures and regulation were hindered by the agencies' lack of sufficient data regarding habitat, population size, reproduction, mortality and "most importantly" annual turnover and population trends. *40 Fed. Reg. 31,734*. The promise that the eventual Conservation Strategy will ensure adequate regulatory mechanisms suggests that the FWS still has not gathered sufficient data. Nonetheless, as the Conservation Strategy is not yet developed, it is paradoxical to say that it measures the inadequacy of "existing" regulatory mechanisms. Defendants have not met their obligation to develop objective, measurable criteria by which to assess the inadequacy of existing regulatory mechanisms.

Defendants claim that all three monitoring or recovery criteria help assess the other natural or manmade[**40] threats factor (Delisting Factor 5). In determining that the bears should be listed, the FWS specifically recognized that isolation of grizzly bear subpopulations prevented biological reinforcement of the species and that increasing human use of the national parks inhabited by the bears was detrimental to the bears. *40 Fed. Reg. 31,734*. The Court finds that defendants have not explained how any of the recovery criteria considers isolation. Because isolation was one of the reasons that the grizzlies were listed in the first place, the Court agrees with plaintiffs that the FWS therefore has failed to meet its obligation under the ESA to incorporate into the GBRP objective, measurable criteria addressing genetic isolation.

C. Scientific Validity of Monitoring Methods and Population Targets

As noted above, the Plan specifies numerical or percentage population goals for each of the three recovery criteria within each identified grizzly ecosystem, see Plan at 33-34, and, with the three recovery criteria, a methodology for monitoring whether those goals have been met. Plaintiffs object that (1) the [*114] method of monitoring the bears' population status is unreliable and (2) the population[**41] goals are not based upon the best scientific evidence available.

The Plan explains that the "females with cubs" measurement "demonstrate[s] that a known minimum number of adult females are alive to reproduce and offset existing mortality in the ecosystem." Plan at 20. The FWS concedes, however, that the methodology will not gauge population "trends or precise population size . . ." Plan at 20. Numerous grizzly bear biologists have criticized this monitoring methodology because, despite its own acknowledged limitations, it is being relied on in the Plan as the principal determinant of whether population goals have been met. See, e.g., Comments from Metzgar to Servheen of January 7, 1990, ("Metzgar Comments"), A.R. Tab 439 at 2. Plaintiffs' foremost objection is that the "females with cubs" methodology is vulnerable to variable observer effort and for that reason has been criticized as unreliable and subjective. See Knight and Blanchard Report, A.R. Tab 258 at 7; Metzgar Comments, Tab 439 at 3. Even a report appended to the Plan acknowledges that "the application of sighting efficiency estimates [which are a base assumption of the monitoring criteria] cannot be substantiated[**42] since there is no way to assess their accuracy and they are therefore little better than guesses." Plan at 159 (Appendix C), Report of the Yellowstone Grizzly Bear Population Task Force (1988). Defendants argue (without reasonable explanation) that both under and over-intensive observer effort are accounted for by the Plan's monitoring methodology, so the grizzly bear is guaranteed appropriate protection. Defs.' Mem. in Support of Summ. J. at 15.

Judicial "deference to the agency is greatest when reviewing technical matters within its area of expertise, particularly its choice of scientific data and statistical methodology." *State of Louisiana ex rel. Guste v. Verity*, 853

F.2d 322, 329 (5th Cir. 1988). Here, however, the Plan's own acknowledgement of the limitations of the monitoring methodology and the fact that the methodology is unreliable undermines the decision of the FWS to adopt the methodology incorporated into the Plan. The Court is unable to find in the record a rational reason for the agency's decision. The Court therefore finds that the agency failed to "explain the evidence which is available, and [failed to] offer a 'rational connection between the facts found[**43] and the choice made.'" *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. at 52; see *Northern Spotted Owl v. Hodel*, 716 F. Supp. at 482. In addition, the Court notes that it has found the three recovery criteria incorporated into the Plan (females with cubs, occupancy, human-caused mortality) to be largely inadequate to meet the FWS' burden to address the ESA's delisting factors. Accordingly, the FWS must reconsider the available evidence and its decision to adopt the population monitoring methodology that it has incorporated into the GBRP.

Plaintiffs' second objection is that the population goals are defective. They contend that the FWS, while purporting to rely on conservation biology principles, did not properly conduct a population viability analysis in setting the goals. In other words, plaintiffs contend that defendants' results are defective and that the population targets are too low. Plaintiffs claim that the population targets in the Plan are not based on the best scientific data available and that they therefore are arbitrary and capricious.

Plaintiffs have painstakingly detailed the reasons why they maintain the goals are too low and have[**44] pointed to numerous studies finding that larger populations of grizzly bears than those recommended in the Plan are necessary to make the grizzly populations viable. Nonetheless, the Court must accord a high level of deference to agency judgments involving scientific matters within the FWS' area of expertise. *Mount Graham Squirrel v. Espy*, 986 F.2d at 1571; *State of Louisiana ex rel Guste v. Verity*, 853 F.2d at 329. While deference does not require the Court to accept the population targets if there is no scientific support for them or if they are blatantly wrong, the fact that a judgment may be disputable does not render it arbitrary and capricious. See *Mount Graham Squirrel v. Espy*, 986 F.2d at 1571. [*115] The government is entitled to rely on analyses and opinions that are non-dispositive without its decision being rendered arbitrary and capricious. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992).

In this case, defendants have demonstrated that there is disagreement among experts regarding the correct population size that is necessary for viability. See Mark S. Boyce, "Population Viability Analysis," 23 *Annu. Rev. Ecol. Syst.* 481 (1992), A.R. Tabs[**45] 189; Mark S. Boyce, "Population Viability Analysis: Adaptive Management for Threatened and Endangered Species" (1993), A.R. Tab 189A; see also 1994 FWS Response, A.R. Tab 172 at Attachment. The fact that there is such disagreement does not render the agency's action arbitrary and capricious, however. *Greenpeace Action v. Franklin*, 982 F.2d at 1350. Based on the record, the Court does not find that defendants' designation of population targets is arbitrary and capricious.

Plaintiffs also criticize defendants' reliance on the existence of Canadian grizzly populations to justify low population goals, Plan at 27, because there is no evidence of the contiguity of the population and because the ESA does not apply to Canada. Moreover, the FWS itself has recognized that Canadian grizzly bears suffer the same development pressures as do United States bears. Plan at 23; 58 *Fed. Reg.* 43,856 (1992). The Court agrees that it appears contradictory for the FWS to concede that "bear populations in Canada immediately north of the [Cabinet/Yaak grizzly bear ecosystem] and in the Canadian portions of the Selkirk and Northern Continental Divide grizzly bear ecosystems are small," and that "continuing[**46] human development in areas in Canada north of these ecosystems is threatening to isolate these grizzly populations from other bear populations in British Columbia," Plan at 23, and yet still to rely on the protection posed by the contiguity of the Cabinet/Yaak and Selkirk ecosystems with Canadian grizzly bear populations. Plan at 27. The FWS has not explained how the uncontrollable threats to Canadian grizzly bears were offset in the calculation of population targets. Therefore, the FWS must explain whether reliance on the existence of Canadian bears influenced its population targets and why such reliance is reasonable.

V. CRITICAL HABITAT DESIGNATION

Regulations issued by the Secretary of the Interior permit any "interested person" to petition the Secretary requesting designation of critical habitat. *50 C.F.R. § 424.14(a)*; *43 C.F.R. § 14.2*. Neither the ESA nor the regulations prescribe a procedure for such petitions. Rather, they are considered under the provisions of the APA. *50 C.F.R. § 424.14(a)*; *43 C.F.R. § 14.2*; *5 U.S.C. § 553(e)*. n8

n8 A "critical habitat" designation protects specific areas inside and outside the geographical region occupied by the threatened species if it is necessary for the conservation of the species. *16 U.S.C. § 1532(5)*. For those species listed after the 1978 amendments to the ESA, the FWS is required to designate critical habitat unless it finds that the benefits of nondesignation outweigh the benefits of designation. *16 U.S.C. § 1533(b)(2)*. For previously listed animals, such as the grizzly bear, the ESA states that "critical habitat may be established for those species . . . as set forth in subparagraph (A) of this paragraph." *16 U.S.C. § 1532(5)(B)*. Subparagraph A defines critical habitat.

Defendants argue that the decision to designate critical habitat for a species listed prior to the 1978 Amendments is discretionary. Plaintiffs argue that the ESA's recognition of the centrality of critical habitat to the protection of species indicates that the critical habitat designation must be made even for those species listed prior to the 1978 amendments unless the benefits of non-designation outweigh the benefits of designation. *16 U.S.C. § 1533(b)(2)*. The Court agrees with defendants that the plain language of the ESA renders the decision to designate critical habitat a discretionary decision.

[**47]

The APA requires agencies to allow interested persons to "petition for the issuance, amendment, or repeal of a rule," *5 U.S.C. § 553(e)*, and, when such petitions are denied, to give "a brief statement of the grounds for the denial," *5 U.S.C. § 555(e)*. Agencies denying rulemaking provisions must explain their actions. *American Horse Protection Ass'n, Inc. v. Lyng*, 258 U.S. App. D.C. 397, 812 F.2d 1, 4 (D.C. Cir. 1987). Thus, the right to petition [*116] for rulemaking entitles the petitioning party to a response on the merits of the petition.

In assessing the actions of the FWS, the Court considers whether they were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A)*; *American Horse Protection Ass'n, Inc. v. Lyng*, 812 F.2d at 4-5. Courts ordinarily afford agencies a particularly high degree of deference regarding their decision not to initiate a rulemaking proceeding. *Id.* Such a refusal will be overturned only in the rarest and most compelling of circumstances. *WWHT, Inc. v. FCC*, 211 U.S. App. D.C. 218, 656 F.2d 807, 817 (D.C. Cir. 1981). Nonetheless, the Court must assure itself that the agency "has adequately explained the facts and[**48] policy concerns it relied on, and that the facts have some basis in the record." *National Ass'n of Regulatory Utility Comm'rs v. U.S. Dep't of Energy*, 271 U.S. App. D.C. 197, 851 F.2d 1424, 1430 (D.C. Cir. 1988) (citation omitted); *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 227 U.S. App. D.C. 312, 706 F.2d 1216, 1220-21 (D.C. Cir. 1983). Plaintiffs contend that the FWS reversed its course because it withdrew its 1976 proposal to designate critical habitat after the ESA was amended in 1978 and new obligations were imposed on the FWS before the designation of critical habitat. Where an agency has reversed its course, it must supply a reasoned analysis justifying the reversal. *Motor Vehicle Manufacturers Ass'n, Inc. v. State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29, 57, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).

In January 1991, as part of his comments on the first revised GBRP, Jasper Carlton, the director of the Biodiversity Legal Foundation, petitioned the FWS for a "critical habitat" designation for the four main grizzly bear

ecosystems. Petition to Designate Critical Habitat, H.R. Tab 4, 5. n9 In his petition Mr. Carlton maintained that "disruption[**49] of grizzly habitat by human activities is the principal cause of the precarious status of the remaining grizzly populations." Petition to Designate Critical Habitat, H.R. Tab 4, Attachment at 33; see Letter from Carlton to Turner of September 12, 1991, H.R. Tab 8. He argued that the IGB Guidelines are inadequate because (1) since they are not statutes or regulations, citizens may not use the IGB Guidelines to compel action or sue for violations of the Guidelines; (2) individual agencies can avoid safeguarding the grizzly bears because the IGB Guidelines permit agencies discretion in designating the different management areas, and the level of protection afforded the different management situations varies widely; (3) the Guidelines do not provide sufficiently strong protection to those bears in the two lowest priority management situations; and (4) the national forests have been slow to incorporate the guidelines into their forest plans or have avoided the guidelines. A critical habitat designation, contended Mr. Carlton, would not only impose an obligation on all federal agencies to insure that their actions are not likely to jeopardize the continued existence of the grizzly bear, [**50]but would also mandate that federal agencies refrain from any action likely to result in the destruction or adverse modification of critical habitat. Petition to Designate Critical Habitat, H.R. 5, Attachment at 35.

n9 In a letter dated February 20, 1991, the FWS explained that the ESA does not provide for a petition to designate critical habitat, but that his petition would be considered under the provisions of the APA. Letter from Buterbaugh to Carlton of February 20, 1991, H.R. Tab 6. On April 20, 1992, the FWS published in the Federal Register notice of Mr. Carlton's petition and its determination that it was not a petitionable action under the ESA. *Petitions to Change Status of Grizzly Bear Population*, 57 *Fed. Reg.* 14,372, 14,374 (1992).

In September 1992, the FWS denied Mr. Carlton's petition without either publishing the petition in the Federal Register for public comment or soliciting scientific review addressing Mr. Carlton's concerns. Letter from Morgenweck to Carlton of September 14, 1992, H.R. Tab[**51] 13. n10 In denying the [*117]petition, the FWS acknowledged that critical habitat for a listed species should be designated to the maximum extent prudent and determinable. 50 *C.F.R.* § 424.12(a). FWS regulations explain that such a designation would not be prudent if identification of critical habitat can be expected to increase the degree of taking or other human activities, if it would not be beneficial to the species, or if it would be redundant. 50 *C.F.R.* § 424.12(a)(1). In this case, the FWS explained that recovery zones and management situations within the recovery zones were developed for the conservation of grizzly bear habitat. These zones are covered by the IGB Guidelines, with which member agencies have agreed to comply, and all federal agencies are required to consult with the FWS before carrying out permitting, leasing and selling actions in the recovery zones. For these areas, the FWS must ensure biological nonjeopardy. The FWS asserted that the current habitat protection is comparable to that of critical habitat and that designation of critical habitat would be redundant, i.e., not prudent.

n10 Plaintiffs charge that because the FWS did not solicit comments and opinions, there is no record to support the agency's decision. *National Ass'n of Regulatory Utility Comm'n v. United States Dep't of Energy*, 851 *F.2d* at 1430. Under Department of the Interior regulations, if the official responsible for acting on a petition determines "that public comment may aid in consideration of the petition," he or she may initiate a comment proceeding. 43 *C.F.R.* § 14.4. And the APA requires an opportunity for public comment when an agency proposes rules. 5 *U.S.C.* § 553(b), (c). There is no requirement, however, in either the APA or Department of Interior regulations that the FWS must solicit comments on a decision not to propose a rule to designate critical habitat. See 43 *C.F.R.* § 14.4; 5 *U.S.C.* § 553(b), (c). The Court will not impose procedural requirements on the FWS that are not already required by statute or provided for by the agency's own rules. See *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 *U.S.* 519, 524, 55 *L. Ed.* 2d 460, 98 *S. Ct.* 1197 (1978).

[**52]

The FWS further explained that the current recovery zones encompass more land than a critical habitat designation likely would include. If critical habitat were designated for Management Situation 1 areas, the highest priority areas, then the current regime of regulation would likely be eliminated and protection for Management Situation 2 and 3 areas, which has been beneficial, might be deemphasized, diluted or eliminated entirely. Therefore, the FWS asserted that a critical habitat designation would not benefit the species. Finally, the FWS explained that the current management regime has achieved social acceptance and that designating critical habitat could lead to a backlash that would jeopardize recovery.

The FFA plaintiffs allege that the FWS violated the ESA by providing an inadequate explanation of its reasoning and by failing to provide a reasoned justification for the reversal of its 1976 proposal to designate critical habitat. Having considered the record in this case, the Court is satisfied, however, that the denial of Mr. Carlton's petition must be left undisturbed. The FWS adequately explained the facts and policy concerns it relied on and plaintiffs have not demonstrated[**53] that these assertions and opinions are unlawful, arbitrary, capricious or wholly irrational.

VI. CONCLUSION

For all of these reasons, plaintiffs' motions for summary judgment are granted in part and denied in part and defendants' motion for summary judgment is granted in part and denied in part. An Order consistent with this Opinion is entered this same day.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 9/29/95

ORDER

Upon consideration of plaintiffs' motions for summary judgment, defendants' motion for summary judgment, the responses and replies, and the administrative record, and for the reasons stated in the Opinion issued this same day, it is hereby

ORDERED that plaintiffs' motions for summary judgment are GRANTED in part and DENIED in part. Partial judgment is entered for plaintiffs on Count One of their complaint in Civil Action 94-1021. Judgment is entered for plaintiffs on Counts One and Two of their complaint in Civil Action 94-1106; it is

FURTHER ORDERED that defendants' motion for summary judgment is GRANTED in part and DENIED in part. Partial judgment is entered for defendants on Count One of the complaint in Civil Action 94-1021. Judgment[**54] is entered for defendants on Count Two of the complaint in Civil Action 94-1021. Judgment is entered for defendants on Count Three of the complaint in Civil Action 94-1106; it is

[*118] DECLARED that defendants have acted in a manner that is arbitrary and capricious and contrary to law by issuing a Recovery Plan that fails to establish objective, measurable criteria which, when met, would result in a

determination, in accordance with the provisions of the Endangered Species Act, that the grizzly bear be removed from the threatened species list; and it is

FURTHER ORDERED that this matter is remanded to the Fish and Wildlife Service, which has 90 days from the date of this Order to reconsider those portions of the 1993 Grizzly Bear Recovery Plan that have been found to be contrary to the dictates of the Endangered Species Act.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 9/29/95

DEFENDERS OF WILDLIFE, et al., Plaintiffs, v. BRUCE BABBITT, et al., Defendants.

Civil Action No. 99-927 (ESH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

130 F. Supp. 2d 121; 2001 U.S. Dist. LEXIS 1480; 52 ERC(BNA) 1301; 31 ELR 20477

February 12, 2001, Decided

February 12, 2001, Filed

DISPOSITION: [**1] Plaintiff's motion for summary judgment [32-1] GRANTED in part and DENIED in part. Partial judgment entered for plaintiffs on Count I and Count VI. Judgment entered for plaintiffs on Count III; and Defendant's motion for summary judgment [58-1] GRANTED in part and DENIED in part. Partial judgment entered for defendants on Count I and Count VI. Judgment entered for defendants on Count II, Count IV, and Count V; and Defendant's motion to strike [34-1] DENIED as moot.

CASE SUMMARY

PROCEDURAL POSTURE: Each party moved for summary judgment in plaintiffs' environmental suit against defendant agencies over survival of the Sonoran pronghorn under the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., the National Environmental Policy Act, *42 U.S.C.S. § 4321* et seq., and the Administrative Procedure Act, *5 U.S.C.S. § 706*.

OVERVIEW: Plaintiffs sued defendants in their official capacities, for failure to comply with the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., the National Environmental Policy Act, *42 U.S.C.S. § 4321* et seq., and the Administrative Procedure Act, *5 U.S.C.S. § 706*, with respect to survival of the endangered Sonoran pronghorn. Each side sought summary judgment. The court granted each motion in part and denied each in part. It granted plaintiffs summary judgment as to the relevant biological opinions (BOs), but in favor of the consulting agency defendants as to their biological assessments (BAs). The court remanded for analysis of the environmental baseline in each BO and the effects of actions when added to that baseline, plus the impact of authorized incidental takes and cumulative impacts of federal activities, including military activities. Several BOs were deficient because of their overly narrow definitions, such as for an action area. But several environmental impact statements had taken a sufficiently "hard look" at the environmental consequences of their various actions and remand was not required.

OUTCOME: Plaintiffs' and defendants' summary judgment motions were each granted in part and denied in part. The biological opinions, recovery plan, and certain environmental impact statements (EISs) did not fully comply with law, but defendants were taking steps to conserve and recover the pronghorn, and the biological assessments prepared by consulting agencies and certain EISs did comply with law.

CORE TERMS: pronghorn, cumulative, species, environmental, baseline, consultation, regulation, habitat, endangered species, delisting, summary judgment, practicable, survival, estimate, incidental, jeopardize,

anticipated, conservation, measurable, grazing, proposed action, biological, wildlife, indirectly, continued existence, immediate area, endangered, site-specific, deficient, insure

CORE CONCEPTS -

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Under the standards of review set forth in the Administrative Procedure Act, *5 U.S.C.S. § 706*, the court must review whether the agency actions at issue are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *5 U.S.C.S. § 706(2)(A)*.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

In thoroughly reviewing an agency's actions, the court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors.

Civil Procedure: Summary Judgment: Summary Judgment Standard

Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record, even though the court does not employ the standard of review set forth in Fed. R. Civ. P. 56.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection

Under § 7 of the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., when a federal agency undertakes or permits actions that may affect a listed species, the agency must consult with the U.S. Fish and Wildlife Service to insure that their activities are not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat of such species. *16 U.S.C.S. § 1536(a)(2)*.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection

Under the formal consultation process, an agency prepares a Biological Assessment (BA) that evaluates the impact of its activities on the listed species, and the U.S. Fish and Wildlife Services, after evaluation of the BA and the best scientific and commercial data available, issues a Biological Opinion detailing how the agency action affects the species and whether the action is likely to jeopardize the continued existence of the species. *16 U.S.C.S. § 1536 (a)(2), (b)(3)(A), (c)*.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection

If the U.S. Fish and Wildlife Services concludes that activities are not likely to jeopardize a species, it may provide for incidental take of the species. *16 U.S.C.S. § 1536(b)(4)*. "Take" is defined to include action that would harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. *16 U.S.C.S. § 1532(19)*.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection

Pursuant to U.S. Fish and Wildlife Services regulations, "harass" in the definition of "take" in the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. *50 C.F.R. § 17.3*.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection

Under § 4 of the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., the U.S. Fish and Wildlife Services is required to develop and implement a recovery plan for the conservation and survival of a listed endangered or threatened species. *16 U.S.C.S. § 1533(f)(1)*.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
Consulting agencies do not have the duty to evaluate cumulative effects in the Biological Assessments they prepare.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
See *50 C.F.R. § 402.14(g)*.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
Under the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., "cumulative effects" are those effects of future state or private activities, not involving federal activities, that are reasonably certain to occur within the action area of the federal action subject to consultation. *50 C.F.R. § 402.02*.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
A Biological Opinion must include an analysis of the effects of the action on the species when added to the environmental baseline -- in other words, an analysis of the total impact on the species. *50 C.F.R. § 402.02*. Moreover, there must be analysis of the impact of the total amount of take authorized, not simply a listing of those numbers.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
The regulations define "action area" as all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
A biological opinion is arbitrary and capricious and will be set aside when it has failed to articulate a satisfactory explanation for its conclusions or it has entirely failed to consider an important aspect of the problem.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
Under the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., the U.S. Fish and Wildlife Service is required to develop and implement a recovery plan for the conservation and survival of the Sonoran pronghorn. *16 U.S.C.S. § 1533(f)(1)*. Any such recovery plan is supposed to be a basic road map to recovery, i.e., the process that stops or reverses the decline of a species and neutralizes threats to its existence.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
See *16 U.S.C.S. § 1533(f)(1)(B)(i)-(iii)*.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
A recovery plan that recognizes specific threats to the conservation and survival of a threatened or endangered species, but fails to recommend corrective action or explain why it is impracticable or unnecessary to recommend such action, would not meet the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., standard.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
Objective, measurable criteria must be directed towards the goal of removing an endangered or threatened species from the list. Since the same five statutory factors must be considered in delisting as in listing, the U.S. Fish and Wildlife Services, in designing objective, measurable criteria, must address each of the five statutory delisting factors and measure whether threats to the species have been ameliorated.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
See *16 U.S.C.S. § 1533(a)(1)*.

Administrative Law: Judicial Review: Standards of Review: Arbitrary & Capricious Review
The requirement that an agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
A biological opinion is arbitrary and capricious and will be set aside when it has failed to articulate a satisfactory explanation for its conclusions.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
Agencies shall utilize their authorities in furtherance of the purposes of the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., by carrying out programs for the conservation of endangered species. *16 U.S.C.S. § 1536 (a)(1)*.

Administrative Law: Judicial Review: Standards of Review
The case law is well settled that federal agencies are accorded discretion in determining how to fulfill their *16 U.S.C.S. § 1536(a)(1)* obligations.

Environmental Law: Environmental Quality Review
The National Environmental Policy Act, *42 U.S.C.S. § 4321* et seq., mandates the preparation of an environmental impact statement on any major federal action significantly affecting the quality of the human environment. *42 U.S.C.S. § 4332(C)*.

Environmental Law: Environmental Quality Review
The required scope of an environmental impact statement is defined as the range of actions, alternatives, and impacts to be considered. *40 C.F.R. § 1508.25*. To determine the scope of environmental impact statements, agencies shall consider three types of actions, three types of alternatives, and three types of impacts. They include connected, cumulative, and similar actions, alternatives and mitigating measures, and impacts, which may be direct, indirect, and cumulative.

Environmental Law: Environmental Quality Review
"Cumulative impact" is the impact on the environment which results from the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions. regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *40 C.F.R. § 1508.7*.
Environmental Law: Environmental Quality Review
See *40 C.F.R. § 1508.7*.

Environmental Law: Environmental Quality Review
Administrative Law: Judicial Review: Standards of Review: Standards Generally
In reviewing a federal agency's compliance with the National Environmental Policy Act (NEPA), *42 U.S.C.S. § 4321* et seq., the court employs a highly deferential standard of review. Neither NEPA nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. The only role for a court is to insure that the agency has taken a hard look at environmental consequences. A court must enforce the statute by ensuring that agencies comply with NEPA's procedures, and not by trying to coax agency decisionmakers to reach certain results.

Environmental Law: Environmental Quality Review

Under 40 C.F.R. § 1502.2(a), environmental impact statements shall be analytic rather than encyclopedic.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection

Under 40 C.F.R. § 1502.2(b), impacts shall be discussed in proportion to their significance. There shall only be brief discussion of other than significant issues.

COUNSEL: For Plaintiffs: Howard M. Crystal, Meyer & Glitzenstein, Washington, DC.

For Defendants: Kenneth E. Kellner, Martin Lalond, U.S. Department of Justice, Washington, DC.

JUDGES: ELLEN SEGAL HUVELLE, United States District Judge.

OPINIONBY: ELLEN SEGAL HUVELLE

OPINION: [*122]

MEMORANDUM OPINION

Plaintiffs, Defenders of Wildlife and Paul Huddy, bring this suit against defendants in their official capacities as the Secretaries and Directors of the Department of the Interior, Fish and Wildlife Service, Bureau of Land Management, National Park Service, Department of Defense, United States Air Force, United States Navy, United States Army, United States Army National Guard, United States Marine Corps, Department of Justice, [**2] Immigration and Naturalization Services, and the United States Border Patrol, alleging failure to comply with the Endangered Species Act of 1973, as amended, ("ESA"), 16 U.S.C. §§ 1531 et seq.; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq.; and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, with respect to the survival of the Sonoran pronghorn.

As grounds for their motion for summary judgment, plaintiffs argue (1) that the Biological Assessments ("BA") and Biological Opinions ("BO") prepared by defendants pursuant to the consultation process set forth in Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), are deficient because they fail to analyze the cumulative impacts or effects of other federal agency activities on the survival of the Sonoran pronghorn; (2) that the December 1998 Final Revised Sonoran Pronghorn Recovery Plan ("Plan" or "Recovery Plan") prepared by the Fish and Wildlife Service ("FWS") fails to comply with Section 4(f) of the ESA, 16 U.S.C. § 1533(f), for its failure to set forth required site-specific[**3] management actions; objective, measurable criteria; and estimates of the time required to carry out those measures, and to provide for appropriate notice and public [*123] comment; (3) that the Environmental Impact Statements ("EIS") prepared by defendants do not analyze the cumulative impacts of all agency activities as required by the NEPA; and (4) that defendants are failing to utilize their authority to implement programs for the conservation and recovery of the Sonoran pronghorn, in violation of Section 7(a)(1) of the ESA, 16 U.S.C. § 1536(a)(1). Defendants contend that they have complied with the requirements of the ESA and NEPA in their consultations, preparation of the Recovery Plan, and formulations of the EISs, and that they are taking actions to conserve and recover the pronghorn as required by the ESA.

Both plaintiffs and defendants move for summary judgment. For the reasons set forth more fully below, the Court finds that the BOs, the Recovery Plan, and certain EISs do not fully comply with the ESA and NEPA, and therefore grants plaintiffs' motion in part and denies defendants' motion in part. The Court further finds that defendants are taking steps to[**4] conserve and recover the pronghorn as required by the ESA, the BAs prepared by the consulting agencies do comply with the ESA, and that certain EISs do comply with NEPA, and therefore grants defendants' motion in part and denies plaintiffs' motion in part. n1

n1 Defendants have also moved to strike affidavits submitted by plaintiffs in support of their summary judgment motion as being outside the administrative record and therefore beyond the scope of the Court's

review. The Court does not rely on these affidavits in its decision and therefore will deny defendants' motion to strike as moot.

BACKGROUND

The Sonoran pronghorn (*Antilocapra americana sonoriensis*), one of five subspecies of pronghorn, evolved in a unique desert environment and have distinct adaptations to this environment which distinguish it from other subspecies. Plan at 1-4. In 1967, the FWS designated the Sonoran subspecies as endangered. *32 Fed. Reg. 4001* (March 11, 1967). While there is uncertainty as to the current population^[**5] of Sonoran pronghorn in the United States, the most recent estimates range between 120 and 250 pronghorn. Def. St. P4; Pl. St. P4. The only habitat in which Sonoran pronghorn currently remain in the United States is federally-owned land in Southwest Arizona. See Plan at 8. In Arizona, pronghorn inhabit the Barry M. Goldwater Range ("BMGR" or "Goldwater Range"), the Cabeza Prieta National Wildlife Refuge ("CPNWR" or "Cabeza Prieta NWR"), the Organ Pipe Cactus National Monument ("OPCNM" or "Organ Pipe Cactus NM"), and to a lesser extent, nearby Bureau of Land Management ("BLM") grazing allotments. Id. The Goldwater Range is reserved for the use of the United States Air Force ("USAF") and United States Marine Corps ("USMC"), and is also used by the United States Army National Guard ("ARNG"). The CPNWR is administered by FWS and OPCNM is administered by the National Park Service ("NPS"). The Immigration and Naturalization Service ("INS") and United States Border Patrol ("BP") also operate in the area of the pronghorn habitat, primarily along the United States-Mexico border.

Factors threatening the continued survival of the Sonoran subspecies include lack of recruitment (survival^[**6] of fawns), insufficient forage and/or water, drought coupled with predation, physical manmade barriers to historical habitat, illegal hunting, degradation of habitat from livestock grazing, diminishing size of the Gila and Sonoyta rivers, and human encroachment. Plan at 21. Plaintiffs contend that the various military activities taking place in the pronghorn habitat are contributing significantly to the threat of extinction. Defendants claim that although the military activities "must be monitored and controlled, they do not constitute a survival threat to the Sonoran pronghorn." Def. Mot. at 4. Plaintiffs also contend that INS/BP activities, grazing on BLM lands, and recreational activities in Cabeza Prieta ^[*124] NWR and Organ Pipe Cactus NM are adversely impacting the pronghorn. Defendants argue that these activities do not jeopardize the continued survival of the species.

STANDARD OF REVIEW

This case is brought pursuant to the ESA's citizen suit provision, *16 U.S.C. § 1540(g)*, and the Administrative Procedure Act, *5 U.S.C. § 706*. Under the standards of review set forth in the APA, the Court must review whether the agency actions at^[**7] issue are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A)*.

In reviewing the action of the agencies, the Court must engage in a "thorough, probing, in-depth review," *Citizens to Preserve Overton Park v. Volpe*, *401 U.S. 402, 415, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971)*, to determine whether the agencies have "examined the relevant data and articulated a satisfactory explanation for its action. . . ." *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Ins. Co.*, *463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)*. "In thoroughly reviewing the agency's actions, the Court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors." *Fund for Animals v. Babbitt*, *903 F. Supp. 96, 105 (D.D.C. 1995)* (citing *Marsh v. Oregon Natural Resources Council*, *490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989)*);

Citizens to Preserve Overton Park, 401 U.S. at 415-16; [**8] *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 227 U.S. App. D.C. 312, 706 F.2d 1216, 1220 (D.C. Cir. 1983)). "Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record . . . , even though the Court does not employ the standard of review set forth in Rule 56, Fed. R. Civ. P." *Id.* (citations omitted).

I. ENDANGERED SPECIES ACT CLAIMS

A. Statutory Framework

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA v. Hill*, 437 U.S. 153, 180, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978). In enacting the ESA, Congress recognized that "from the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask." *Id.* at 178 (citing H.R. Rep. No. 93-412, pp. 4-5 (1973)). Its stated purposes are "to provide a means whereby the ecosystems upon which endangered species and [**9] threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species" 16 U.S.C. § 1531(b).ⁿ² The Supreme Court has noted that "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id.* at 184. The Court has also recognized the enactment of the ESA constituted "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species . . . [and] reveals a conscious decision by Congress [*125] to give endangered species priority over the 'primary missions' of federal agencies." *Id.* at 185. "All persons, including federal agencies, are specifically instructed not to 'take' endangered species, . . . [and federal] agencies in particular are directed by . . . the Act to 'use . . . all methods and procedures which are necessary' to preserve endangered species." *Id.* at 184-85 (citations omitted).

ⁿ² One of the primary threats to endangered species and their habitat is that "man and his technology has [sic] continued at any ever-increasing rate to disrupt the natural ecosystem. This has resulted in a dramatic rise in the number and severity of the threats faced by the world's wildlife." *Id.* at 176 (citation omitted).

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Under Section 7 of the ESA, when a federal agency undertakes or permits actions that may affect a listed species, the agency must consult with FWS to "insure" that their activities are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). Under the formal consultation process, the agency prepares a Biological Assessment ("BA") that evaluates the impact of its activities on the listed species, and the FWS, after evaluation of the BA and "the best scientific and commercial data available," issues a Biological Opinion ("BO") detailing "how the agency action affects the species" and whether the action is "likely to jeopardize the continued existence" of the species. 16 U.S.C. § 1536(a)(2), (b)(3)(A), (c). If the FWS concludes that the activities are not likely to jeopardize the species, it may provide for incidental take of the species. 16 U.S.C. § 1536(b)(4). "Take" is defined to include action that would "harass, harm, pursue, hunt, shoot, wound, kill, [**11] trap, capture, or collect, or [] attempt to [engage in any such conduct]." 16 U.S.C. § 1532(19).ⁿ³ Pursuant to FWS regulations, "harass in the definition of 'take' in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3. Under Section 4 of the ESA, FWS is also required to develop and implement a

recovery plan "for the conservation and survival of" a listed endangered or threatened species. *16 U.S.C. § 1533(f)(1)*.

n3 Under the ESA the "take" of an endangered or threatened animal is prohibited, unless authorized by the ESA or by an incidental take statement. *16 U.S.C. § 1538(a)(1)*.

B. Section 7(a)(2) -- Consideration of Other Agency Activities

Under Section 7 of the ESA, each defendant^[**12] agency "shall . . . insure that" its activities are "not likely to jeopardize the continued existence" of the Sonoran pronghorn. *16 U.S.C. § 1536(a)(2)*. Plaintiffs argue that defendants have failed to comply with this mandate because they have not taken into account the cumulative effects of all of the federal activities that affect pronghorn in preparing the BAs and BOs, and therefore, the BAs and BOs have incorrectly concluded that each defendant agency's activities would not jeopardize the continued survival of the pronghorn. Plaintiffs move the Court to remand the BAs and BOs to the defendant agencies for consultation about and consideration of these cumulative effects. Defendants contend that the BAs prepared by the consulting agencies need not evaluate cumulative effects. Defendants also contend that the consideration of "cumulative effects" in the BOs prepared by FWS need not include a discussion of other federal agency activities under the regulations implementing the ESA, but instead they are to be evaluated within the context of the "environmental baseline." Defendants argue that the BO's prepared by FWS have adequately addressed the other federal ^[**13]activities in the "action area" that constitute the "environmental baseline." Plaintiffs respond by arguing that defendants have, in certain cases, used an overly narrow definition of the action area of a particular agency's activities so as to exclude consideration of other federal activities, and that while some of the BO's list or acknowledge other federal activities affecting pronghorn, none ^[*126] of the BO's provides an analysis of the impacts of all the federal activities on the species or analyzes the proposed actions in the context of that aggregate impact.

Contrary to defendant's argument, the Court is persuaded, as explained more fully below, that FWS must analyze the effects of the action in conjunction with the effects of other agencies' actions on the pronghorn, and that this has not been adequately done with respect to the BOs at issue here. The purpose of Section 7(a)(2)'s consultation requirement is to insure that an agency's activities do not jeopardize endangered species such as the pronghorn. For this reason, applicable regulations require an agency to analyze the effects of its activities when added to the past and present impacts of all federal activities in the^[**14] action area on an endangered species, as well as certain anticipated actions that have already undergone formal or early consultation. An agency cannot fulfill this duty by simply listing the relevant activities or by narrowly defining the action area to exclude federal activities that are impacting the pronghorn. By limiting their analysis in such a manner, defendants avoid their statutory duty under the ESA to insure that their activities do not jeopardize the existence of the pronghorn. Therefore, the Court will grant summary judgment to plaintiffs on their Section 7(a)(2) claims relating to the BOs prepared by FWS in consultation with defendants, and remand those BOs for further consideration consistent with the regulations and the Court's opinion. n4

n4 By contrast, the Court finds that the consulting agencies do not have the duty to evaluate the cumulative effects in the BAs they prepare. Under *50 C.F.R. § 402.12(f)*, "the contents of a biological assessment are at the discretion of the Federal agency and will depend on the nature of the Federal action." The regulation further provides that "the following may be considered for inclusion: . . . an analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies." *Id.* (emphasis added). The Court therefore will grant summary judgment in favor of the consulting agency defendants with respect to the BAs.

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1. Environmental Baseline

The applicable regulations mandate that FWS address the following pursuant to formal consultation:

- (1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.
- (2) Evaluate the current status of the listed species or critical habitat.
- (3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.
- (4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.14(g) (emphasis added). n5

n5 Under the ESA, "cumulative effects" are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." *50 C.F.R. § 402.02* (emphasis added). Therefore, defendants are correct that an analysis of "cumulative effects," as defined by the regulations, need not incorporate an analysis of the effects of other federal agency activities on the pronghorn.

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The "effects of the action" refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline." *50 C.F.R. § 402.02* (emphasis added). n6 In turn, "the environmental [*127] baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." *Id.* (emphasis added). It is therefore in the analysis of the environmental baseline that other federal activities in the action area that impact pronghorn must be taken into account by FWS. In turn, the analysis of the effects of the action must address these effects in conjunction with the impacts that constitute the baseline. In addition, the Secretary is required, if an incidental take is authorized, to specify in its[*17] opinion the impact of such incidental taking on the species. *16 U.S.C. § 1536(b)(4)*. The impact of an authorized incidental take cannot be determined or analyzed in a vacuum, but must necessarily be addressed in the context of other incidental take authorized by FWS. As illustrated below, the BOs prepared with respect to the activities of defendants do not contain this required analysis. Therefore, the Court will remand the BOs to the FWS to complete an analysis of the environmental baseline in each opinion and the effects of the action when added to that baseline. n7 Such analysis should also address any take authorized with respect to the pronghorn, as an anticipated future impact.

n6 "Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration." *Id.* Plaintiffs do not argue that the activities of the defendants which are the subjects of separate BOs are interrelated or interdependent.

n7 In that each incidental take statement relies on its accompanying BO in reaching its no jeopardy conclusion, FWS should also reconsider the incidental take statements in light of the revisions made to the BOs.

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For example, the September 5, 2000, INS/Border Patrol BO for "United States Border Patrol Activities in the Yuma Sector, Wellton Station, Yuma, Arizona," which is the most recent of the BOs at issue, concludes that agency action is not likely to jeopardize the continued existence of the pronghorn, and anticipates incidental take in the form of harassment that is likely to injure up to one pronghorn every ten years. Attachment to Plaintiffs' Notice of Filing at Summary 1. As required by the regulations, in its discussion of the environmental baseline, the BO sets forth all of the federal activities in the action area, which is broadly defined, that have past, present, or future anticipated impact on the pronghorn. n8 Id. at 15-18. The BO notes activities of CPNWR, BLM, USAF, USMC, and OPCNM, and indicates the amount of take authorized, if any, with respect to each activity. Id. at 17-18. The BO also sets forth the anticipated effects of the Border Patrol activities on the pronghorn. Id. at 18-21. The BO is deficient, however, in that it does not analyze the effects of the activity in light of the environmental baseline. Simply reciting [*128] the activities and impacts that constitute[*19] the baseline and then separately addressing only the impacts of the particular agency action in isolation is not sufficient. See *Greenpeace v. National Marine Fisheries Service*, 80 F. Supp. 2d 1137, 1149 (W.D. Wash. 2000) ("Although [the BO] states that its conclusions are based on a "cumulative effects analysis," and even contains a section titled "Cumulative Effects," in fact this section contains no analysis whatsoever and is nothing more than a list The section contains no explanation of how the various groundfish fisheries and fishery management measures interrelate and how the overall management regime may or may not affect Steller sea lions.") (citations omitted); see also *Natural Resources Defense Council v. Hodel*, 275 U.S. App. D.C. 69, 865 F.2d 288, 298 (D.C. Cir. 1988) (under NEPA, finding insufficient "conclusory remarks [and] statements that do not equip a decisionmaker to make an informed decision about alternative courses of action, or a court to review the Secretary's reasoning"). There must be an analysis of the status of the environmental baseline given the listed impacts, not simply a recitation of the activities of the[*20] agencies. See *Greenpeace*, 80 F. Supp. 2d at 1149. The BO must also include an analysis of the effects of the action on the species when "added to" the environmental baseline -- in other words, an analysis of the total impact on the species. 50 C.F.R. § 402.02. Moreover, there must be analysis of the impact of the total amount of take authorized, not simply a listing of those numbers. Such a critical analysis is missing from the INS BO, as well as the other BOs at issue here. n9

n8 The BO includes all the federal activities impacting pronghorn which have been the subject of consultation between an agency and FWS. None of the other BOs even contains a comprehensive list of these activities, let alone an analysis of their impacts on the pronghorn or an analysis of the effect of the proposed action when added to those impacts. For example, in the April 17, 1996 USMC BO for "Existing and Proposed Activities by the Marine Corps Air Station-Yuma in the Arizona Portion of the Yuma Training Range Complex," the discussion of the environmental baseline acknowledges USAF activities in the Goldwater Range, Army National Guard activities in the Goldwater Range, Border Patrol activities in the Goldwater Range and the Cabeza Prieta NWR, recreational use of CPNWR, Organ Pipe Cactus NM, and BLM lands, and livestock grazing. FWS ESA R. 2380-81 (hereinafter cited as "FWS "). But a mere listing of activities does not constitute an analysis of the impacts of these activities, which is what is required by the regulation defining the baseline. 50 C.F.R. § 402.02 ("the environmental baseline includes the past and present impacts of all Federal, State, or private actions . . . [and] the anticipated impacts . . .") (emphasis added). The USAF, BLM and NPS BOs do not even mention certain of the other federal activities that impact pronghorn in the action area.

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n9 NPS has reinitiated consultation with FWS with respect to Organ Pipe Cactus NM. This does not, however, moot the Court's consideration of the existing BO. *Greenpeace*, 80 F. Supp. 2d at 1151-52.

2. Action Area

The BOs of several of the defendant agencies are also deficient because of their overly narrow definition of action area, which results in the exclusion of certain relevant impacts from the environmental baseline. The environmental baseline includes, inter alia, "the past and present impacts of all Federal, State, or private actions and other human activities in the action area, [and] the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation." 50 C.F.R. § 402.02. The regulations define "action area" as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." Id. In certain BOs, defendants have defined the action area in a manner inconsistent with this definition.

Defendants[**22] attempt to argue that their analysis need not consider other federal activities, since the action area is limited to the federal lands under the control of that agency and/or the immediate area of that agency's action. For example, defendants claim the USMC BO went further than necessary in noting the USAF use of the Gila Bend segment of the BMGR, because USMC "has no direct authority" there. Def. Mot./Opp. at 40. That is not the test of whether an area is part of the action area. If pronghorn there will be directly or indirectly affected by USMC activity, the impacts of other activities there must be included as part of the environmental baseline. See 50 C.F.R. § 402.02. Similarly, with respect to the BLM grazing allotments BO, defendants argue that the action area consists solely of the grazing allotment lands, in other words, the immediate area involved. Id. at 50. n10 The regulations [*129] explicitly reject such a definition of the action area. See 50 C.F.R. § 402.02. n11

n10 Similarly, defendants argue that the action area at issue in the NPS "Organ Pipe Cactus National Monument General Management" BO consists only of the national monument area, which is the immediate area, without acknowledging indirect effects on pronghorn outside that immediate area. Def. Mot./Opp. at 55. However, in the section labeled "Effects of the Action," the BO notes the possibility that traffic along State Road 85, which is located in part within the monument, "may act as a barrier to the pronghorn, restricting their movements to east of the highway," FWS 902, which is separate from the present range of most pronghorn, which is west of the highway. Def. Ex. 3. The opinion notes that "not only is the highway a possible deterrent to expanding pronghorn populations, but the resulting modified behavior patterns may lead to a reduction in genetic exchange, reduced viability, and the ability to adapt to environmental change." FWS 902. Notwithstanding these possible direct and indirect effects from activities in Organ Pipe, including the potential isolation of pronghorn east of SR 85 from the rest of the population, and restriction of the remainder of the population to areas west of SR 85, the BO contains no discussion of past, present, or anticipated future impacts of federal activities in the pronghorn range north and west of Organ Pipe, including BLM grazing lands, the Goldwater Range, and Cabeza Prieta. These lands should be considered part of the action area, as they were by USMC and INS, as the pronghorn there will be indirectly affected by the activities in the immediate area (Organ Pipe) if their range is restricted by such activities. See 50 C.F.R. § 402.02.

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n11 While defendants maintain other federal activities need not legally be included in this limited action area, the BLM BO does mention the USAF and USMC BOs in its discussion of the environmental baseline. FWS 1780. However, there is no analysis of the BLM action in connection with those impacts. Second, defendants' mere reference to other agency activities does not cure the narrow definition of the action area as limited to the grazing allotments, which the BLM BO applies.

The Court cannot accept these overly narrow applications of the definition of an "action area," since they are inconsistent with both the broad purpose of the statute and the definition of "action area" set forth in *50 C.F.R. § 402.02*. Pronghorn move across this relatively discreet area of land entirely under federal management without regard to which federal agency is responsible for administering a particular area. Given the unambiguous definition of an "action area," it cannot be narrowly applied so as to avoid taking into account the impacts of other federal activities on the pronghorn. Such^[**24] an application would undermine the Act's requirement that agencies "insure" that their actions do not jeopardize the continued existence of endangered species.

Such a narrow approach to defining the action area in these three BOs is also inconsistent with the broader the definition of action area correctly applied in the INS and USMC BOs. n12 For example, as discussed above, the INS BO correctly includes all federal activities impacting pronghorn in its discussion of the environmental baseline, not just those activities in the immediate area of the Border Patrol activities. Similarly, the USMC BO discussion of the environmental baseline, while it did not specifically define the action area, noted activities in the Goldwater Range and Cabeza Prieta (which overlaps with the Goldwater Range) undertaken by USAF and Border Patrol, grazing on adjacent BLM lands, and recreational activities in Cabeza Prieta, Organ Pipe, and BLM lands. n13 This is consistent with the expansive ^[*130] regulatory definition of action area, as these adjacent areas may be indirectly affected by the military action on the Goldwater Range since all U.S. pronghorn are found in this area. In contrast, the USAF BO, while^[**25] not specifically defining the action area, considered only USMC activities in the Goldwater Range. n14 The Court finds that the USAF, BLM, and NPS BOs have failed to define the "action area" to include areas where pronghorn may be directly or indirectly affected by the agency action, and in turn to address the impacts that constitute the environmental baseline in that larger area. In contrast, the Court considers that the listing of federal activities contained in the INS BO, which are referenced more generally in the USMC BO, is an appropriate scope of analysis for the environmental baseline under the definition of action area set forth in *50 C.F.R. § 402.02*.

n12 Moreover, the defendants' argument on this point is inconsistent. For example, while defendants argue there is no basis to extend an action area to include other agency actions, they nonetheless claim that "FWS takes into account all federal impacts through its baseline analysis, even though the particular action may be far more limited in scope." Reply at 11 (emphasis added) (citing the INS BO as an example). By its terms, the environmental baseline includes only federal activities in the action area. Therefore, defendants' argument that other federal activities are not part of the action area but are part of the environmental baseline does not make sense. To the extent that defendants are arguing a BO need not re-analyze a separate federal action, that is not the issue. The environmental baseline must include the impacts of that action, not a re-examination of the action in its entirety. While defendants appear to concede such baseline analysis is required, *id.*, as discussed above, they also argue in effect that they need not include these impacts in the environmental baseline given their limited definition of the action area.

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n13 As discussed above, the USMC BO noted these activities without discussing the impacts of the activities. The USMC BO expresses concern about USAF military activities but states that analysis of those would be more appropriately addressed in consultation with Luke Air Force Base. FWS 2402. However, the

regulations require that in addressing the effects of the action, FWS must consider the effects when added to the past and present impacts of other federal activities, as well as anticipated future impacts of federal activities which have "already undergone formal or early section 7 consultation." 50 C.F.R. § 402.02. The USMC BO need not undertake comprehensive analysis of those USAF activities which are properly the subject of a separate consultation which was underway at the time the BO was issued, but if particular impacts of those activities are anticipated, they must be incorporated into the environmental baseline. Id.

n14 The ARNG activities on the North-Tac of the Gila Band sector of the Goldwater Range are also addressed in this BO. No BO addressed the ARNG activities on East-Tac because there are no pronghorn there.

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The Court therefore remands the USAF, BLM, and NPS BOs for an analysis of the past and present impacts of the additional activities in the action area where pronghorn may be indirectly affected, as well as any anticipated impacts of activities in that area which have begun Section 7 consultation. See 50 C.F.R. § 402.02.

3. Incidental Take

On remand, FWS must also reconsider its opinions as to the impact of the incidental take authorized by each BO in light of the revisions made to the BOs. See 16 U.S.C. § 1536(b)(4). The Court recognizes that the authorization of an incidental take by these BOs does not necessarily mean that take will occur, or that it will occur at the level anticipated. However, FWS has authorized a total level of take greater than the incidental take provided for in any individual BO without analyzing whether that total level jeopardizes the survival of the pronghorn species. Each incidental take statement simply cites the conclusion of the accompanying BO that the activity at issue is not likely to jeopardize the pronghorn. The population of the Sonoran pronghorn is sparse and its range is relatively [**28] limited. While the take of one or two pronghorn as a result of a particular activity may not jeopardize the species as a whole, the aggregate take of pronghorn resulting from each federal activity affecting pronghorn may pose such a risk. As incremental incidental takes are authorized, the impact of those takes on the species must be viewed in the context of previously authorized takes and other impacts that are part of the environmental baseline.

In sum, the BOs do not, contrary to regulatory mandate, adequately analyze the effect of each proposed action when added to the environmental baseline. See 50 C.F.R. §§ 402.14(g), 402.02. Nowhere is there a comprehensive discussion, as opposed to a listing, of the impacts that the various federal activities have in the aggregate on the pronghorn. While the Court has reviewed the defendants' actions with deference, defendants' actions do not appear to have been "based on a consideration of the relevant factors." *Citizens to Preserve Overton Park*, 401 U.S. at 416. See also *State Farm Mutual Ins. Co.*, 463 U.S. at 52 [*131] (agency must "offer a rational connection between the facts found [**29] and the choice made") (citation omitted); *Greenpeace*, 80 F. Supp. 2d at 1147 ("A biological opinion is arbitrary and capricious and will be set aside when it has failed to articulate a satisfactory explanation for its conclusions or it has entirely failed to consider an important aspect of the problem.").

Therefore the Court grants summary judgment in favor of plaintiffs on the Section 7(a)(2) claim concerning the BOs and will remand the BOs to the FWS and the consulting agency defendants for further consultation, consideration, and any revisions that may be warranted. n15

n15 The Court declines to hold that given the insufficiency of the BOs, the defendants are, as a matter of law, acting in violation of Section 9 of the ESA, which prohibits unauthorized take. *16 U.S.C. § 1538*. While the record supports the conclusion that defendants' activities may result in take, there is no evidence that there has in fact been a take of pronghorn since the opinions were issued. Plaintiffs also argue that defendants are violating ESA Section 7(d), which provides that "after initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." *16 U.S.C. § 1536(d)*. There is no evidence that the activities engaged in by defendants involve the irreversible or irretrievable commitment of resources within the meaning of this section. Summary judgment is therefore granted in favor of defendants with respect to the claims made by plaintiff under Section 9 and Section 7(d).

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C. Section 4(f) -- Sufficiency of the Recovery Plan

The FWS is responsible for the formulation of a recovery plan pursuant to a delegation of authority from the Secretary under the ESA. See *50 C.F.R. § 402.01(b)*. Under the ESA, FWS is required to develop and implement a recovery plan "for the conservation and survival of" the Sonoran pronghorn. *16 U.S.C. § 1533(f)(1)*. "Any such [recovery] plan is supposed to be a basic road map to recovery, i.e., the process that stops or reverses the decline of a species and neutralizes threats to its existence." *Fund for Animals, 903 F. Supp. at 103*. Such a plan "shall, to the maximum extent practicable . . . incorporate in each plan":

- (i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
- (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
- (iii) estimates of the time required and the cost to carry out those measures needed to achieve[**31] the plan's goal and to achieve intermediate steps toward that goal.

16 U.S.C. § 1533(f)(1)(B)(i)-(iii). "The phrase 'to the maximum extent practicable' does not permit an agency unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible." *Fund for Animals, 903 F. Supp. at 107* (citations omitted). Plaintiffs allege that the "Final Revised Sonoran Pronghorn Recovery Plan" ("the Plan") issued by FWS in December 1998 is deficient in all three respects. n16

n16 Plaintiffs also allege that FWS did not provide for an adequate public comment period before approval of the final plan. The Court need not decide whether the FWS complied with the ESA requirement that "the Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan [and] shall consider all information presented during the public comment period prior to approval of the plan," *16 U.S.C. § 1533(f)(4)*, since FWS will have the opportunity on remand to remedy any arguable procedural deficiencies.

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1. Site-Specific Management Actions

The ESA provides that "in developing and implementing recovery plans," the [*132]Secretary and the FWS shall "to the maximum extent practicable" incorporate into each recovery plan "a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species." *16 U.S.C. § 1533(f)(1)(B)(i)*. "While the legislative history suggests that incorporation of 'site-specific management objectives' is supposed to assure that recovery plans 'are as explicit as possible in describing steps to be taken in the recovery of a species,' . . . the FWS has the flexibility under the ESA to recommend a wide range of 'management actions' on a site-specific basis." *Fund for Animals, 903 F. Supp. at 106* (citations omitted). Plaintiffs argue that the Plan does not contain site-specific management actions, but provides only for further research and sets broad, unspecific goals.

The plan proposes four main categories of recovery actions: (1) "Enhance present population of Sonoran pronghorn to reach recovery goal of 300 adults. Decrease factors that are potentially[**33] limiting growth"; (2) "Establish and monitor new, separate herd(s)"; (3) "Continue monitoring the Sonoran pronghorn population. Maintain a protocol for a repeatable, comparable and justifiable survey technique"; and (4) "Verify taxonomic status of the species." Plan at 38-42. Under each action is a series of steps or tasks to be undertaken to accomplish the action. "What the ESA requires is the identification of management actions necessary to achieve the Plan's goals for the conservation and survival of the species. A recovery plan that recognizes specific threats to the conservation and survival of a threatened or endangered species, but fails to recommend corrective action or explain why it is impracticable or unnecessary to recommend such action, would not meet the ESA's standard." *Fund for Animals, 903 F. Supp. at 108*.

The Court finds that the Plan does "recommend actions or . . . steps that could ultimately lead to actions" to address the threats identified. *Id.* While some of the tasks and interim steps merely provide for further investigation or research, others are concrete, specific actions. The Court cannot say that too many of them involve only research[**34] or investigation, or that alternative or additional actions should be implemented. See *id.* ("The choice of one particular action over another is not arbitrary, capricious or an abuse of discretion simply because one may happen to think it ill-considered, or to represent the less appealing alternative solution available. The Court will not impose plaintiffs' or its own view of a better way to stem the threat posed . . . than the methods chosen by the FWS.") (citations and internal quotation marks omitted).

The Plan also states that "this plan is to be short-term (about 7 years) as critical survival information is not sufficiently understood about this animal. Annual updates, rather than a new plan or major revision, will be the concept for maintaining an up-to-date recovery plan. Implementation plans will be written for each major recovery project and will provide necessary details of the project." Plan at iv. See *Fund for Animals, 903 F. Supp. at 107-08* ("Because science and circumstances change, however, the FWS needs, and the statute provides, some flexibility as it implements the recovery plan."). The Court will defer to the agency's discretion that critical[**35] information is not sufficiently known to implement an exhaustively detailed plan at this time, and that annual updates for the short-term duration of the plan are the best method to insure that the plan is current and up-to-date. *Id. at 107* ("It is not feasible for the FWS to attempt to address each possibility. By the time an exhaustively detailed recovery plan is completed and ready for publication, science or circumstances could have changed and the plan might no longer be suitable. Thus, the FWS recognized in the Plan that it would be reviewed every five years and revised as necessary. In these circumstances, the Court concludes that the FWS has [*133] provided sufficient detail to satisfy the statute.").

2. Objective Measurable Criteria

The ESA states that the FWS "shall, to the maximum extent practicable," incorporate into the recovery plan "objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list." *16 U.S.C. § 1533(f)(1)(B)(ii)*. "Congress has spoken in clarion terms: the objective, measurable criteria must be directed towards the goal of removing the endangered or threatened[**36] species from the list. Since the same five statutory factors must be considered in delisting as in listing, the Court

necessarily concludes that the FWS, in designing objective, measurable criteria, must address each of the five statutory delisting factors and measure whether threats to the [species] have been ameliorated." *Fund for Animals*, 903 F. Supp. at 111 (citations omitted). Pursuant to the ESA, the five delisting factors are:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence. . . .

16 U.S.C. § 1533(a)(1). The Plan sets forth a program and certain criteria for downlisting the species from endangered to threatened, rather than delisting altogether. Plan at iii ("The recovery objective is to remove the Sonoran pronghorn from the list of endangered species. This revision addresses first downlisting the subspecies to threatened."). The[*37] criteria set forth in the Plan for consideration of reclassifying the Sonoran pronghorn as "threatened" rather than "endangered" are either 1) when there are "an estimated 300 adult Sonoran pronghorn in one U.S. population and a second separate population is established in the U.S. and remains stable over a five year period," or 2) "numbers are determined to be adequate to sustain the population through time." Plan at 37. These criteria plainly do not address the five delisting factors. Defendants argue that the factors are otherwise addressed in the Plan in that certain recovery actions recognize, study, and attempt to address these five categories of potential threats. The fact that these factors are discussed elsewhere in the plan as areas for further research fails to satisfy the requirement that the criteria proposed for downlisting address these five factors and whether these factors pose a continuing threat to the species. Indeed, the factors are not even mentioned with respect to the criteria.

Defendants cite *Southwest Center for Biological Diversity v. Babbitt*, Civ. 98-372 TUC JMR (D.Ariz. Aug. 18, 1999), slip. op. at 12, where the court deferred to the FWS's determination[*38] that it was not practicable to incorporate the five statutory delisting factors into the objective, measurable delisting criteria in the recovery plan at issue. The court found that FWS had outlined where the record "supports the conclusion that development of delisting criteria was not practicable without first satisfying downlisting criteria," and outlined plans to research the delisting factors. *Id.* at 11-12. Here, however, defendant FWS has simply stated that the plan will first address downlisting the pronghorn to threatened, Plan at iii, without explaining the reasoning behind that determination or outlining where the record supports that determination. The court in *Southwest Center for Biological Diversity* found that such a "conclusory statement does not alone constitute an adequate justification for the failure to incorporate delisting criteria." *Id.* at 11. Here, FWS has provided little more than [*134] its conclusion. n17 This is insufficient to excuse compliance with the requirement to incorporate the five statutory delisting factors into the objective, measurable criteria. See *Jost v. Surface Transp. Bd.*, 338 U.S. App. D.C. 289, 194 F.3d 79, 85 (D.C. Cir. 1999)[*39] ("The requirement that an agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result. . . . We may not supply a reasoned basis for the agency's decision that the agency itself has not given.") (citations and internal quotation marks omitted); *American Lung Ass'n v. EPA*, 328 U.S. App. D.C. 232, 134 F.3d 388, 392 (D.C. Cir. 1998) ("Judicial review can only occur when agencies explain their decisions with precision for it will not do for a court to be compelled to guess at the theory underlying the agency's action.") (citations and internal quotation marks omitted); *Greenpeace*, 80 F. Supp. 2d at 1147 ("A biological opinion is arbitrary and capricious and will be set aside when it has failed to articulate a satisfactory explanation for its conclusions . . .").

n17 Defendants state that because the pronghorn was listed as endangered before these statutory criteria were established, the FWS has never been required to make a determination as to which of the five factors are present with respect to the pronghorn. This does not explain why they need not make the determination at this time. The Plan also states that "because some significant aspects of the life history of the Sonoran pronghorn are not yet known, a delisting date cannot be projected at this time." Plan at iv. Similarly, the fact

that a delisting date cannot be projected with exactitude does not explain why the delisting criteria cannot be incorporated into the Plan.

[**40]

The Court will therefore remand the Plan to FWS to incorporate the criteria, or alternatively, to provide an adequate explanation as to why the delisting criteria cannot practicably be incorporated at this time.

3. Time Estimates

The recovery plan is required "to the maximum extent practicable" to incorporate "estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal." *16 U.S.C. § 1533(f)(1)(B)(iii)*. The Plan contains an "Implementation Schedule," which is a chart of the tasks listed under each of the four categories of management actions. Plan at 43-45. However, of the 23 tasks listed, only 5 have a specific estimate of the time required to carry out that task. *Id.* at 44-45. The other 19 are described simply as "ongoing." *Id.* No time estimates are provided for the intermediate steps that are listed below certain tasks. All of the tasks implementing actions (2) "establish and monitor new, separate herd(s)" and (3) "continue monitoring the Sonoran pronghorn population, maintain a protocol for a repeatable, comparable and justifiable survey technique" [**41] are listed as ongoing without any specific time estimates. *Id.*

Undoubtedly, certain measures cannot be completed by a time certain, for they are by definition ongoing. For example, "protect present range" (task 1.5) will presumably continue indefinitely into the future. *Id.* at 38. However, time estimates could be provided for certain interim measures listed under that task which are not even included on the chart, such as "investigate preferred habitat, determine areas preferred for pronghorn activities . . . [.] investigate preferred forage species . . . , complete a vegetation map that includes all pronghorn habitat." *Id.* (task 1.52). That such measures will be subject to ongoing revision and updating does not mean that it is not practicable to provide a time estimate within which they could initially be completed. Other tasks, such as some of the many investigation and research projects described as ongoing, do not appear to be tasks of indefinite duration. While a particular research project may require more time than is initially anticipated, the statute does not require that binding deadlines be set. It does require, where practicable, time estimates. The Court [**42] will therefore remand the Plan to FWS to provide estimates where practicable [*135] or to explain why estimates are not practicable for the tasks or interim measures.

In sum, the Court will grant partial summary judgment for defendants on plaintiff's Section 4(f) claim, as defendants have included in the Plan site-specific management actions for the recovery of pronghorn. The Court will grant partial summary judgment for plaintiffs on their Section 4(f) claim, as defendants have failed to incorporate into the Plan objective measurable criteria for the delisting of the pronghorn, and estimates of the time required to carry out those measures needed to achieve the plan's goal and intermediate steps toward that goal. The Court will therefore remand the Plan to the FWS for inclusion of these elements or for an explanation why their inclusion is not practicable.

D. Section 7(a)(1) - Programs for the Conservation of Endangered Species

Plaintiffs contend that defendants are violating Section 7(a)(1)'s requirement that the agencies "shall . . . utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of endangered species . . ." *16 U.S.C. § 1536 [**43]* (a)(1). Plaintiffs claim that the defendants are violating the statute by continuing to engage in certain activities that plaintiffs allege are harmful to the pronghorn or by failing to take certain measures that plaintiffs believe will help to conserve the pronghorn. Plaintiffs cite as examples the USAF's opposition to lowering the speed limit on State Road 85, which runs through the Organ

Pipe Cactus National Monument, to facilitate movement of the pronghorn, and the military's continued training and flight activities during the fawning season. Pl. Mot. at 40-42. Plaintiffs state that they do not intend for the Court to order defendants to implement particular conservation actions, but instead contend that defendants are not "in compliance with this [statutory] mandate in any respect." Pl. Opp. at 42 (emphasis in original). The record does not support a finding that defendants have failed entirely to carry out programs for the conservation of the pronghorn. Plaintiffs clearly dispute that defendants are doing enough, and believe that the additional measures they advocate should be implemented. However, "the case law is well settled that federal agencies are accorded discretion[**44] in determining how to fulfill their § 1536(a)(1) obligations. . . . Likewise, this court is not the proper place to adjudge and declare that defendants have violated the ESA as a matter of law by not implementing the processes listed by [plaintiff]." *Coalition for Sustainable Resources v. U.S. Forest Service*, 48 F. Supp. 2d 1303, 1315-16 (D. Wyo. 1999) (and cases cited therein). Therefore, the Court cannot find that defendants have failed to comply with Section 7(a)(1).

II. NATIONAL ENVIRONMENTAL POLICY ACT CLAIMS

The National Environmental Policy Act ("NEPA") mandates the preparation of an environmental impact statement ("EIS") on any major federal action "significantly affecting the quality of the human environment" 42 U.S.C. § 4332(C). n18 Plaintiffs allege that the EISs prepared with respect to defendants' activities affecting the pronghorn are deficient in that they do not adequately address the cumulative impacts of all actions that affect the pronghorn. Defendants argue, citing *Allison v. Department of Transportation*, 285 U.S. App. D.C. 265, 908 F.2d 1024 (D.C. Cir. 1990), that they are not required to[**45] address [*136] the impacts of actions that are not related to or dependent on the proposed action at issue in an EIS. Defendants overstate the holding of *Allison*, and ignore the definition of cumulative impacts set forth in the regulations. The required scope of an EIS is defined as "the range of actions, alternatives, and impacts to be considered in an environmental impact statement." 40 C.F.R. § 1508.25. "To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts." *Id.* They include connected, cumulative, and similar actions, alternatives and mitigating measures, and impacts, which may be direct, indirect, and cumulative. *Id.* "Cumulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7 [**46].

n18 The statement shall include: "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." *Id.*

In *Allison*, petitioners asserted that the FAA "failed to analyze the cumulative impact of the proposed airport together with the impacts of other planned but unrelated projects in the area, in violation of applicable CEQ regulations." 908 F.2d at 1031 (emphasis added). n19 The Court of Appeals rejected that argument, holding that "it is not required by the pertinent CEQ regulations to consider projects that are neither related to nor dependant on the airport," for 40 C.F.R. § 1508.25(a) [**47] provides that "unconnected single actions" need not be considered within the scope of an EIS. *Id.* But here, plaintiffs are not arguing that future, unrelated planned actions by other federal agencies should be considered within the scope of the EISs prepared by defendants. Rather, plaintiffs argue that the regulations require an EIS to address a proposed action's incremental impact on the pronghorn when added to the impact of other past, present, and reasonably foreseeable future federal

activities that also affect the pronghorn. n20 They are clearly correct, for the regulations require agencies to consider cumulative impacts in an EIS, which are defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. n21

n19 The Council on Economic Quality ("CEQ"), an agency within the Executive Office of the President, has promulgated regulations implementing NEPA that are "binding on all federal agencies." 42 U.S.C. § 4342; 40 C.F.R. § 1500.3.

[**48]

n20 As set forth above, the scope of an EIS must address certain "actions" and certain "impacts." 40 C.F.R. § 1508.25. Under the regulations, connected, cumulative and similar actions are within the scope of an EIS. Id. Similarly, direct, indirect and cumulative impacts are to be considered. Id. While Allison reiterates that 40 C.F.R. § 1508.25(a) does not require unrelated single actions to be considered in an EIS, the decision does not address the requirement that cumulative impacts must be considered.

n21 Plaintiffs also rely on cases that address when a single EIS addressing all regional federal activities (a "REIS") must be prepared. There has not been a showing that defendants should be required to prepare a REIS, as opposed to preparing separate EISs that address cumulative impacts under 40 C.F.R. § 1508.25 and § 1508.7.

In reviewing a federal agency's compliance with NEPA, the Court employs a highly deferential standard of review. "Neither [NEPA] nor its legislative history[**49] contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21, 49 L. Ed. 2d 576, 96 S. Ct. 2718 (1976). "The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences" Id. (citation omitted). A court must "enforce the statute by ensuring that agencies [*137] comply with NEPA's procedures, and not by trying to coax agency decisionmakers to reach certain results." *Citizens Against Burlington, Inc. v. Busey*, 290 U.S. App. D.C. 371, 938 F.2d 190, 194 (D.C. Cir. 1991). Plaintiffs argue that defendants have failed to satisfy the requirement that they address cumulative impacts. Upon review of the EISs at issue, the discussion of cumulative impacts contained therein and the record herein, the Court finds that the EISs prepared by USAF and BLM have taken a sufficiently "hard look" at the environmental consequences of their various actions. However, the EISs prepared by USMC and by NPS with respect to Organ Pipe Cactus NM are remanded for further consideration of cumulative impacts.

The September[**50] 1998 Department of Defense/USAF Barry M. Goldwater Range Renewal Legislative EIS ("USAF LEIS") notes in its discussion of cumulative impacts U.S. Border Patrol activities, Cabeza Prieta NWR activities, BLM activities, USMC activities, and Organ Pipe Cactus NM activities. USAF LEIS 6-6 to 6-8. n22 The LEIS discusses the impacts of these activities on a variety of environmental concerns, including biological resources, wildlife, and the pronghorn in particular. USAF LEIS at 6-11 to 6-20; 6-18 to 6-20. n23 While the analysis could be more comprehensive, the Court finds this discussion to be sufficient to satisfy the regulations and the "hard look" requirement. See 40 C.F.R. § 1502.2(a) ("Environmental impact statements shall be analytic rather than encyclopedic.").

n22 Army National Guard activities on North-Tac and South-Tac are also addressed in the USAF LEIS, rather than in a separate EIS. There is no basis for the Court to conclude that ARNG activities on East-Tac impact pronghorn either directly or indirectly by increasing use of North-Tac or South-Tac. Therefore, the cumulative impacts analysis of the ARNG in its Western Army National Guard Aviation Training Site Expansion EIS need not address impacts on pronghorn.

[**51]

n23 Plaintiffs argue that the omission from the LEIS of discussion of the take authorized by the FWS by defendants' activities alone renders this and all of the other EISs deficient under the statute. The LEIS does incorporate the issue of authorized take by reference to the USAF and USMC BOs under *40 C.F.R. § 1502.21*. Moreover, the Court finds no legal basis upon which to require an EIS prepared under NEPA to specifically consider authorized takes under the ESA in order to satisfy NEPA's requirement of considering cumulative impacts.

The 1985 BLM EIS for the Resource Management Plan ("RMP") for the Lower Gila area concludes that the proposed action may lead to positive long-term impact on pronghorn habitat, and that pronghorn would not be affected by rangeland developments recommended in the proposed action. BLM NEPA 646. Similarly, the 1990 BLM EIS addressing the Goldwater Amendment to the RMP found that the "net effect" of the proposed actions on pronghorn "will be beneficial through the long term as plant communities recover and human-pronghorn conflicts diminish. [**52]" BLM NEPA 1655. There is no section entitled "cumulative impacts" and there is no discussion of other federal agency activities in the area. However, because the EISs found that the actions proposed would result in long-term benefit to the pronghorn (and by implication no incremental adverse impact), discussion of other actions by other agencies that adversely impact the pronghorn would not be necessary within the BLM EIS. See *40 C.F.R. § 1502.2(b)* ("Impacts shall be discussed in proportion to their significance. There shall only be brief discussion of other than significant issues.").

By contrast, the January 1997 USMC Yuma Training Range Complex Final Environmental Impact Statement ("USMC EIS") fails to satisfy the regulations. While the USMC EIS contains a comprehensive discussion of the various impacts of the proposed USMC activities on the environment in general, it fails to provide sufficient analysis of cumulative impacts on the pronghorn. The USMC EIS recognizes that "cumulative impacts may result [*138] from ongoing military activities, recreational use of the Range land and wildlife management operations, and U.S. Immigration Service operations to[**53] monitor the borderlands." USMC NEPA 21265. n24 The discussion of cumulative impacts on natural resources states that "impacts to biological resources from existing and proposed Marine Corps use of the Goldwater Range result primarily from use of the airspace and vehicular use." USMC NEPA 21266. The EIS states that "the proposed changes to airspace use would slightly increase the amount of noise to which wildlife are exposed to on the Cabeza Prieta NWR, and other portions of the Range. Civilian use of the airspace includes use by the U.S. Immigration Service, USFWS, and [Arizona Game and Fish Department]. . . . Sonoran pronghorn are also exposed to noise from military aircraft and ground impacting activities on the Air Force portion of the range." Id. n25 The EIS also acknowledges that "other non-military activities potentially affecting biological resources on the Range include vehicular traffic from the U.S. Border Patrol and by the general public . . . [which] could potentially disturb Sonoran pronghorn . . . as well as disturb habitat." Id. at 21267. While the EIS states that noise would be increased and both the pronghorn and their habitat will be disturbed, there is [**54]no analysis of what the nature and extent of the impacts would be on the pronghorn. See *Natural Resources Defense Council v. Hodel*, 275 U.S. App. D.C. 69, 865 F.2d 288, 299 (D.C. Cir. 1988) ("The FEIS does devote a few more sentences here to the inter-regional effects on migrating species but these snippets do not constitute real analysis; they merely state (and restate) the obvious . . ."). n26 Because the discussion of cumulative impacts consists only of "conclusory remarks, statements that do not

equip a decisionmaker to make an informed decision about alternative courses of action, or a court to review the Secretary's reasoning," 865 F.2d at 298, the Court will remand the EIS for further consideration of such impacts and further revisions to the EIS as warranted.

n24 The EIS also states that existing land uses within close proximity include the Air Force section of the Range and Cabeza Prieta NWR. Id.

n25 The EIS also cites research activities such as capturing and fitting pronghorn with radio telemetry equipment which may increase disturbance to the pronghorn but benefit them in the long term. Id.

[**55]

n26 Again, reference to the USMC BO, at USMC NEPA 21163, does not cure this deficiency as that BO is also lacking in such analysis. Defendants also cite the discussion of cumulative impacts at USMC NEPA 21260-61, which discussed the impact of USMC action on the airspace. This discussion does not address the impact of increased use of this airspace on wildlife, but considers issues such air safety, visitor disturbance and civil/commercial aviation access and congestion.

Similarly, the NPS EIS, which was prepared in 1997 for its Organ Pipe Cactus National Monument Final General Management Plan, is deficient. In its discussion of "cumulative impacts," the EIS states that the proposed actions would result in "a negligible loss of additional wildlife habitat," since all areas of planned development are already intruded upon by humans. NPS NEPA 5059. The EIS also found that notwithstanding the monument's protection of the habitat which supports endangered species, "excessive highway mortality along State Road 85 would continue to decimate all forms of wildlife along this 27-mile road corridor." [**56] Id. The EIS concluded that because some species (such as the pronghorn) are at the boundary of their range in Organ Pipe Cactus NM, "highway mortality could possibly eliminate some species from this portion of their range as well as potentially reduce their genetic variability and reproductive fitness." Id. n27 While the section is entitled "cumulative impacts," there is no discussion of the incremental impact of this effect [*139]"when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. As in *Hodel*, 865 F.2d at 298, while "the [EIS contains sections headed 'Cumulative Effects' . . . nothing in the [EIS provides the requisite [cumulative] analysis." This EIS is therefore remanded to the NPS for consideration and analysis of such impacts. n28

n27 There is additional discussion of the issue of highway mortality at NPS NEPA 5800-01, but no discussion of cumulative impacts.

n28 Neither INS nor NPS (for Cabeza Prieta NWR) have prepared EISs. Plaintiffs do not address in their opening motion the NEPA compliance of INS or NPS (with respect to management of Cabeza Prieta NWR). In opposition to defendants' motion, however, plaintiffs argue that initiation of the NEPA process by NPS and INS does not moot their claims, citing *Greenpeace*. In *Greenpeace*, the court held that re-initiation of consultation under the ESA did not moot plaintiff's claims that the existing BO was inadequate, because until a comprehensive opinion is in place, the court "retains the authority to determine whether

any continuing action violates the ESA" 80 F. Supp. 2d at 1152. Here plaintiffs are not asking that the Court review any existing NEPA document prepared by INS or by NPS on Cabeza Prieta NWR. Nor have plaintiffs requested that the Court order NPS and INS to initiate consultation under NEPA, which defendants state they either have done or intend to do. Plaintiffs have similar complaints regarding the compliance of INS, Tucson Sector and NPS, Cabeza Prieta NWR (Comprehensive Conservation Plan) with the ESA, both of which have initiated consultation but have not yet produced biological opinions. While plaintiffs argue their claims are not moot as to these two agencies, they fail to request any relief as to these defendants. The Court will therefore grant defendants summary judgment as to these claims.

[**57]

Because the EISs prepared by USMC and NPS (Organ Pipe Cactus NM) fail to provide sufficient consideration of cumulative impacts, as required by 40 C.F.R. §§ 1508.7 and 1508.25, the Court will grant partial summary judgment to plaintiffs on their NEPA claims against these defendants. The Court will grant partial summary judgment to defendants on the NEPA claims relating to the USAF EIS and the BLM EIS. The Court will also grant partial summary judgment to defendants ARNG, INS, and NPS (Cabeza Prieta NWR) on plaintiff's NEPA claims.

CONCLUSION

For all of these reasons, plaintiffs' motion for summary judgment is granted in part and denied in part and defendants' motion for summary judgment is granted in part and denied in part. An accompanying Order consistent with this opinion will be issued.

ELLEN SEGAL HUVELLE

United States District Judge

DATE: 2/12/01

ORDER

Upon consideration of plaintiffs' motion for summary judgment, defendants motion for summary judgment, the oppositions thereto, the replies, and the entire record of this proceeding, it is hereby

ORDERED that plaintiff's motion [32-1] is GRANTED in part and [**58] DENIED in part. Partial judgment is entered for plaintiffs on Count I and Count VI. Judgment is entered for plaintiffs on Count III; and it is

FURTHER ORDERED that defendant's motion [58-1] is GRANTED in part and DENIED in part. Partial judgment is entered for defendants on Count I and Count VI. Judgment is entered for defendants on Count II, Count IV, and Count V; and it is

DECLARED that the Fish and Wildlife Service has acted in a manner that is arbitrary and capricious and contrary to law by issuing Biological Opinions that fail to address the impact of each defendant's activities on the pronghorn when added to the environmental baseline, 50 C.F.R. §§ 402.02, 402.12(g), and fail to include in the environmental baseline the impacts of all federal activities in the area in which defendants are proposing or engaging in action that may affect, directly or indirectly, the pronghorn, 50 C.F.R. § 402.02; and it is

FURTHER ORDERED that this matter is remanded to Fish and Wildlife Service, [*140]which has 120 days from the date of the Order to reconsider, in consultation with defendants, those portions of[**59] the Biological Opinions that have been found to be contrary to the dictates of the Endangered Species Act; and it is

DECLARED that the Fish and Wildlife Service has acted in a manner that is arbitrary and capricious and contrary to law by issuing a Recovery Plan that fails to establish (1) objective measurable criteria which, when met, would result in a determination that the pronghorn may be removed from the list of endangered species or, if such criteria are not practicable, an explanation of that conclusion and (2) estimates of the time required to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal where practicable, or, if such estimates are not practicable, an explanation of that conclusion; and it is

FURTHER ORDERED that this matter is remanded to the Fish and Wildlife Service, which has 120 days from the date of this Order to reconsider those portions of the December 1998 Final Revised Sonoran Pronghorn Recovery Plan that have been found to be contrary to the dictates of the Endangered Species Act; and it is

DECLARED that the United States Marine Corps and the National Park Service (Organ Pipe Cactus[**60] National Monument) have acted in a manner that is arbitrary and capricious and contrary to law by issuing Environmental Impact Statements that fail to address the cumulative impacts of their activities on the pronghorn, when added to other past, present, and reasonably foreseeable future actions, regardless of what agency undertakes those actions, *40 C.F.R. § 1508.7*; and it is

FURTHER ORDERED that this matter is remanded to the United States Marine Corps and the National Park Service (Organ Pipe Cactus National Monument), which have 120 days from the date of the Order to reconsider, in consultation with defendants, those portions of the Environmental Impact Statements that have been found to be contrary to the dictates of the National Environmental Policy Act; and it is

FURTHER ORDERED that defendant's motion to strike [34-1] is DENIED as moot.

ELLEN SEGAL HUVELLE

United States District Judge

DATE: 2/12/01

DEFENDERS OF WILDLIFE; TUCSON HERPETOLOGICAL SOCIETY; HORNED LIZARD
CONSERVATION SOCIETY; SIERRA CLUB; DESERT PROTECTIVE COUNCIL; BIODIVERSITY LEGAL
FOUNDATION; DALE TURNER; WENDY HODGES; FRANCIS ALLAN MUTH, Plaintiffs-Appellants v. GALE
NORTON, Secretary of the Department of the Interior, * JAMIE RAPPAPORT CLARK, Director, U.S. Fish and
Wildlife Service; GAIL KOBETICH, Supervisor, Carlsbad Field Office, Defendants-Appellees. * Gale Norton is
substituted for Bruce Babbitt as Secretary of the Department of the Interior, pursuant to Fed. R. App. P. 43(c)(1).

Nos. 99-56362, 00-55496

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

258 F.3d 1136; 2001 U.S. App. LEXIS 17030; 53 ERC (BNA)1297; 2001 Cal. Daily Op. Service 6429; 2001 Daily
Journal DAR 7927; 31 ELR20846

January 9, 2001, Argued and Submitted, Pasadena, California
July 31, 2001, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Southern District of California. D.C. No. CV-97-02330-TJW/LSP. Thomas J. Whelan, District Judge, Presiding.

DISPOSITION: REVERSED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, environmental organizations and individuals (environmentalists), sued defendant Secretary of the Interior and other government officials, challenging the secretary's decision not to designate a species as threatened under the Endangered Species Act (ESA). The environmentalists appealed the order of the United States District Court for the Southern District of California, which granted the officials' motion for summary judgment.

OVERVIEW: The flat-tailed horned lizard was listed as a candidate for protection as a threatened species under the ESA, but the secretary subsequently withdrew the listing. The secretary argued that protection was no longer warranted since public land habitats were sufficient to neutralize threats to the lizard on private land, and the conservation agreement between federal and state agencies provided adequate protection for the lizard. The appellate court first noted that, while the secretary erroneously deemed the lizard not to be in danger of extinction if its population remained viable on public lands, the environmentalists were equally incorrect in determining the danger of extinction based solely on the quantitative amount of habitat projected to be lost. The court then held that the lizard could be extinct throughout a significant portion of its range if there were major geographical areas in which it was no longer viable. The secretary was thus required to explain why the area in which the lizard could no longer live was not a significant portion of its range, and to address the lizard's viability in a site-specific manner with regard to the potential conservation agreement.

OUTCOME: The order granting summary judgment to the officials was reversed, with directions to remand the case to the secretary for reconsideration.

CORE TERMS: species, lizard, extinction, habitat, listing, endangered, endangered species, proposed rule, conservation, extinct, animal, Endangered Species Act, candidate, foreseeable future, horned lizard, flat-tailed, public land, final decision, public lands, recommending, viability, survival, legislative history, alligator, grizzly, quantitative, moratorium, deference, withdraw, desert

LexisNexis (TM) HEADNOTES - Core Concepts:

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

[HN1] The Endangered Species Act, *16 U.S.C.S. § 1531* et seq., protects species of fish, wildlife, and plants which the Secretary of the Department of the Interior identifies as either endangered or threatened. A species is endangered if it is in danger of extinction throughout all or a significant portion of its range. *16 U.S.C.S. § 1532(6)*. Similarly, a species is threatened if it is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. *16 U.S.C.S. § 1532(20)*.

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

[HN2] If the Secretary of the Department of the Interior decides that, based on the best scientific and commercial data available, one or more of five statutorily defined factors demonstrates that a species is endangered or threatened, she must issue a proposed rule recommending that species for protection under the Endangered Species Act, *16 U.S.C.S. § 1531* et seq. *16 U.S.C.S. § 1533(b)(1)(A)*. A period of public comment follows. Within one year, the secretary must either publish a final rule designating the species for protection or, if she finds that available evidence does not justify the action, withdraw the proposed rule. *50 C.F.R. § 424.17(a)(iii)*.

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

[HN3] The five factors the Secretary of the Department of the Interior must consider when determining a species' eligibility for protection under the Endangered Species Act, *16 U.S.C.S. § 1531 et seq.*, are: (A) the present or threatened destruction, modification, or curtailment of the species' habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting the species continued existence. *16 U.S.C.S. § 1533(a)(1)*.

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

[HN4] Candidates are any species being considered by the Secretary of the Department of the Interior for listing as an endangered or threatened species, but not yet the subject of a proposed rule. 50 C.F.R. § 424.02(b). The 1982 United States Fish and Wildlife Service regulations define candidates designated category 2 as taxa for which information in the possession of the Service indicated that proposing to list as endangered or threatened was possibly appropriate, but for which sufficient data on biological vulnerability and threats were not currently available to support proposed rules.

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

[HN5] See Pub. L. No. 104-6, 109 Stat. 73 (1995).

Governments: Legislation: Interpretation

[HN6] When interpreting a statute, the court must follow a natural reading which would give effect to all of the statute's provisions.

Governments: Legislation: Interpretation

[HN7] When the plain language of a statute is ambiguous, courts may examine the textual evolution of the contested phrase and the legislative history that may explain or elucidate it.

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

[HN8] A species can be extinct throughout a significant portion of its range if there are major geographical areas in which it is no longer viable but once was. Those areas need not coincide with national or state political boundaries, although they can.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

[HN9] A satisfactory explanation of agency action is essential for adequate judicial review, because the focus of judicial review is not on the wisdom of the agency's decision, but on whether the process employed by the agency to reach its decision took into consideration all the relevant factors.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

[HN10] Deference to an agency interpretation is not due when the agency has apparently failed to apply an important term of its governing statute. The court cannot defer to what it cannot perceive.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

[HN11] The court ordinarily will not defer to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

[HN12] The court cannot affirm the decision of an agency on a ground that the agency did not invoke in making its decision.

COUNSEL: Neil Levine, Earthlaw, Denver, Colorado, for the plaintiffs-appellants.

Robert H. Oakley and Andrew Mergen, U.S. Department of Justice, Environment & Natural Resources Division, Washington, D.C., for the defendants-appellees.

JUDGES: Before: Stephen S. Trott, Sidney R. Thomas, and Marsha S. Berzon, Circuit Judges. Opinion by Judge Berzon.

OPINIONBY: Marsha S. Berzon

OPINION: [*1137]

BERZON, Circuit Judge:

The Defenders of Wildlife ("Defenders") appeal from an order of the district court granting summary judgment in favor of the Secretary of the Interior (the "Secretary"). The order upheld a decision by the Secretary not to designate the flat-tailed horned lizard for protection as a threatened species under the Endangered Species Act ("ESA"). *16 U.S.C. § 1531* et seq. We find that, in making that decision, the Secretary both relied on an improper standard and failed to consider important factors relevant to the listing process. Accordingly, we find her decision arbitrary and capricious and reverse^[**2] the district court's order.

I. Background

[HN1] The Endangered Species Act protects species of fish, wildlife and plants which the Secretary identifies as either "endangered" or "threatened." A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." *16 U.S.C. § 1532(6)*. Similarly, a species is "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *16 U.S.C. § 1532(20)*.

[HN2] If the Secretary decides that, based on "the best scientific and commercial data available," one or more of five statutorily defined factors demonstrates that a species is endangered or threatened, n1 she ^[*1138] must issue a proposed rule recommending that species for ESA protection. *16 U.S.C. § 1533(b)(1)(A)*. A period of public comment follows. Within one year, the Secretary must either publish a final rule designating the species for protection or, if she findsⁿ² that available evidence does not justify the action, "withdraw the proposed rule." *50 C.F.R. § 424.17(a)(iii)*; see ^[**3] also *16 U.S.C. § 1533(b)(6)(A)*. n2

n1 [HN3] The five factors the Secretary must consider when determining a species' eligibility for protection are:

(A) the present or threatened destruction, modification, or curtailment of [the species'] habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms;

(E) other natural or manmade factors affecting[the species] continued existence. *16 U.S.C. § 1533(a)(1)*.

n2 The Secretary may also delay a final decision for up to six months because of "substantial disagreement" in the scientific community regarding the "sufficiency or accuracy of the available data relevant to the determination or revision concerned." *16 U.S.C. § 1533(b)(6)(B)(i)*.

A. The Flat-Tailed Horned Lizard

At issue in this case is the flat-tailed horned lizard (*Phrynosoma [**4]mcallii*) (the "lizard"), "a small, cryptically colored iguanid" that has adapted to the harsh conditions of the western Sonoran desert. *58 Fed. Reg. 62,624, 62,625/1* (Nov. 29, 1993). "It has the typically flattened body shape of horned lizards, a dark mid-vertebral stripe, a somewhat flattened tail, relatively long head spines or horns, and two rows of fringed scales on each side of the body. Dorsally, the flat-tailed horned lizard is pale gray to light rusty brown; the animal's ventral surface is white and unmarked." *Id.*

The lizard's natural habitat stretches across parts of southern California (namely, Imperial and eastern San Diego counties), southwestern Arizona and northwestern Mexico. *Id. at 62,626/1*. Over the last century, human activity has markedly affected this habitat. The filling of the Salton Sea, the conversion of arid desert into productive agricultural land, and the development of urban areas around Yuma, Arizona and El Centro, California have resulted in the disappearance of approximately 34% of the lizard's historic range. *Id.* As a result, animal conservation groups, including Defenders, have expressed concerns about the lizard's[**5] continued viability, and the United States Fish and Wildlife Service ("FWS") had targeted the lizard for ESA protection for much of the past two decades. *62 Fed. Reg. 37,852, 37,854* (July 15, 1997).

B. The Lizard's Listing History

The Secretary first identified the lizard as a category 2 candidate for listing under the ESA in 1982. [HN4] Candidates are "any species being considered by the Secretary for listing as an endangered or threatened species, but not yet the subject of a proposed rule." 50 C.F.R. § 424.02(b). At that time, n3 FWS regulations defined candidates designated category 2 as "taxa for which information in the possession of the Service indicated that proposing to list as endangered or threatened was possibly appropriate, but for which sufficient data on biological vulnerability and threats were not currently available to support proposed rules." *61 Fed. Reg. 7596, 7597* (Feb. 28, 1996).

n3 The FWS dropped the subcategorization of candidates in 1996. *61 Fed. Reg. 7596, 7597-98* (Feb. 28, 1996).

[**6]

The lizard remained a category 2 candidate until 1989, when the Secretary elevated it to category 1 status. Category 1 included species "for which the Service has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposed rule." *Id.* It was not until November 29, 1993, however, that the Secretary finally published a proposed rule listing the lizard as a threatened species. [*1139] *58 Fed. Reg. at 62,624/3*. Pursuant to the statutory requirements, the Secretary should have completed her review of the lizard and issued her final order by November 29, 1994. *16 U.S.C. § 1533(b)(6)(A)(i)* (requiring action within one year of publication of the proposed rule). That day passed, however, without further action by the Secretary.

The passage of Public Law No. 104-6, 109 Stat. 73 (1995), in April 1995 interrupted progress on the lizard and other species awaiting listing decisions. Although the statute's primary purpose was to replenish funds for various overseas military operations, it included a rider that withdrew \$1.5 million "from the amounts available [to the FWS] for making determinations about whether a[**7] species is a threatened or endangered species and whether habitat is critical habitat under the Endangered Species Act of 1973." *Id.* Furthermore, the rider provided that:

[HN5]

none of the remaining funds appropriated under [the Endangered Species Act] may be made available for making a final determination that a species is threatened or endangered or that habitat constitutes a critical habitat (except a final determination that a species previously determined to be endangered is no longer endangered but continues to be threatened).

To the extent that the Endangered Species Act of 1973 has been interpreted or applied in any court order (including an order approving a settlement between the parties to a civil action) to require the making of a determination respecting any number of species or habitats by a date certain, that Act shall not be applied to require that the determination be made by that date if the making of the determination is made impracticable by the rescission made by the preceding sentence.

Id.; see also *Environmental Defense Center v. Babbitt*, 73 F.3d 867 (9th Cir. 1995) (discussing the impact of Public Law No. 104-6). Thus, while[**8] the 1995 rider did not directly repeal the ESA, it imposed a virtual moratorium on all species listings. *Id.* at 870-71.

The moratorium remained in effect until April 26, 1996, when President Clinton signed an executive waiver allowing the Secretary to once again list species for protection. n4 Another year passed, however, without a final decision on the lizard. Finally, on May 16, 1997, in response to a lawsuit brought by Defenders to compel action on the lizard, the district court in Arizona ordered the Secretary to issue a final decision within 60 days.

n4 A Resolution, H.R. 3019, granted the President authority to waive the moratorium at his discretion. See Jeffrey S. Kopf, *Slamming Shut the Ark Doors: Congress's Attack on the Listing Process of the Endangered Species Act*, 3 ANIMAL L. 103, 126 (1997).

One month after the court's order, a group of federal and state agencies n5 signed a Conservation Agreement ("CA") implementing a recently completed rangewide management strategy to[**9] protect the lizard, developed by representatives of the Federal Bureau of Land Management ("BLM"), the FWS, and state and local agencies. Pursuant to the CA, cooperating parties agreed to take voluntary steps aimed at "reducing threats to the species, [*1140] stabilizing the species' populations, and maintaining its ecosystem." The underlying management strategy was based on an earlier effort by the BLM and the California Department of Fish and Game to provide protections for the lizard after it had been elevated to category 1 candidate status by the FWS in 1989.

n5 The participating parties included the United States Fish and Wildlife Service, the United States Bureau of Land Management, The United States Bureau of Reclamation, the United States Marine Corps, the United States Navy, the Arizona Game and Fish Department, and the California Department of Parks and Recreation. The California Department of Fish and Game participated in the development of the Conservation Agreement but was not a signatory at the time the Secretary issued her withdrawal decision.

[**10]

Critical to the implementation of the CA was the designation of five "management areas" (MAs) subject to protective measures, including the monitoring of lizard populations, limitation of habitat disturbance including off-highway vehicle use, and acquisition of private inholdings. Some of the measures included in the CA had been in place for years, long before the Secretary published the initial proposed rule recommending the lizard for protection. Many of the actions and the overall scope of the MAs effected by the conservation effort, however, were new.

The Secretary issued her final decision on July 15, 1997 (the "Notice") withdrawing the proposed rule that had earlier recommended the lizard for listing as a threatened species. The Notice was premised on three factors: (1) that population trend data did not conclusively demonstrate significant population declines; (2) that some of the threats to the lizard's habitat had grown less serious since the proposed rule was issued; and (3) that the recently devised "conservation agreement would ensure further reductions in threats. " *62 Fed. Reg. 37852*. The Secretary's ultimate conclusion also turned on her determination that, [**11] however serious the threats to the lizard on private land, "large blocks of habitat with few anticipated impacts exist on public lands throughout the range of this species" *62 Fed. Reg. 37860*. The Secretary did not, however, separately consider whether the lizard is or will become extinct in "a significant portion of its range, "as that term is used in the statute.

Six months after the Secretary withdrew the proposed rule, Defenders filed the instant suit challenging that decision. The district court granted summary judgment in favor of the Secretary on June 16, 1999, upholding the Secretary's decision not to list the lizard. The court accepted the Secretary's conclusion that none of the five statutory factors were present with respect to the lizard, holding that the Secretary reasonably relied on the Conservation Agreement to support that conclusion. This appeal followed.

II. Analysis

Defenders claims that "the best scientific evidence" available on the lizard and its habitat demonstrates the presence of as many as four of the five statutory factors indicating that a species is either threatened or endangered and thus eligible for ESA protection. The[**12] Secretary's answer to this claim is two-fold: First, although the Secretary does not dispute that these factors may evidence threats to the lizard on private land, she contends that adequate habitat exists on public land to ensure the species' viability. Second, the Secretary relies on the newly introduced Conservation Agreement, which she contends will establish added protections for the lizard's public land habitat and thus remove the threat of extinction throughout all or a significant portion of its range in the foreseeable future. Both parts of this analysis, we conclude, are faulty.

A. "Extinction throughout . . . a significant portion of its range"

The distinction between public and private land explains much of the dispute between the Secretary and Defenders. Defenders' arguments in support of its claim that listing is warranted focus primarily on the loss of lizard habitat on [*1141] private land. The Secretary, on the other hand, emphasizes the conservation efforts on public land to support her conclusion that the lizard is not threatened with extinction. *62 Fed. Reg. at 37,858* ("Because of the large amount of flat-tailed horned lizard habitat located[**13] on public lands within the United States and the reduction of threats on these lands due to changing land-use patterns and conservation efforts of public agencies, threats due to habitat modification and loss do not warrant listing of the species at this time." (Emphasis added)). The distinction also explains, in large part, the shift between the Secretary's initial findings that accompanied the proposed rule, recommending the lizard for protection based on concern about habitat loss on private land, and her findings that accompanied the withdrawal decision, emphasizing that available public lands are sufficient to support the species.

Whether the lizard's potential survival in its public land habitat is sufficient to preclude ESA protection depends largely on the meaning of the phrase "in danger of extinction throughout . . . a significant portion of its range." *16 U.S.C. § 1532(6)* (emphasis added). Assuming the lizard's population remains viable on public land, it is not in danger of extinction throughout all its range. Defenders argue, however, that if the lizard's private land habitat constitutes "a significant portion of its range" and[**14] its survival there, as Defenders allege, is in jeopardy, the ESA requires the Secretary to designate the lizard for protection.

Standing alone, the phrase "in danger of extinction throughout . . . a significant portion of its range "is puzzling. According to the Oxford English Dictionary, "extinct" means "has died out or come to an end Of

a family, class of persons, a race of species of animals or plants: Having no living representative." Thus, the phrase "extinct throughout . . . a significant portion of its range" is something of an oxymoron. Similarly, to speak of a species that is "in danger of extinction" throughout "a significant portion of its range" may seem internally inconsistent, since "extinction" suggests total rather than partial disappearance. n6 The statute is therefore inherently ambiguous, as it appears to use language in a manner in some tension with ordinary usage.

n6 See also the Oxford English Dictionary's relevant definition of "extinction":

4. Of a race, family, species, etc.: The fact or process of becoming extinct; a coming to an end or dying out; the condition of being extinct.

[**15]

1. The Secretary's Explanation

The Secretary's explanation of this odd phraseology is of no assistance in puzzling out the meaning of the phrase, since her interpretation simply cannot be squared with the statute's language and structure. The Secretary in her brief interprets the enigmatic phrase to mean that a species is eligible for protection under the ESA if it "faces threats in enough key portions of its range that the entire species is in danger of extinction, or will be within the foreseeable future." She therefore assumes that a species is in danger of extinction in "a significant portion of its range" only if it is in danger of extinction everywhere. n7

n7 As we explain later, the Secretary has at other times applied the statute inconsistently with her current interpretation.

If, however, the effect of extinction throughout "a significant portion of its range" is the threat of extinction everywhere, then the threat of extinction throughout "a significant portion of its range" is equivalent[**16] to the threat of extinction throughout all its range. Because the [*1142] statute already defines "endangered species" as those that are "in danger of extinction throughout all . . . of [their] range," the Secretary's interpretation of "a significant portion of its range" has the effect of rendering the phrase superfluous.

Such a redundant reading of a significant statutory phrase is unacceptable. [HN6] When interpreting a statute, we must follow a "natural reading . . . , which would give effect to all of [the statute's] provisions." *United Food and Commercial Workers Union Local 571 v. Brown Group, Inc.*, 517 U.S. 544, 549, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996) (emphasis added). By reading "all" and "a significant portion of its range" as functional equivalents, the Secretary's construction violates that rule.

The Secretary tries to distinguish her definition of a species in danger "throughout . . . a significant portion of its range" from a species in danger "throughout all" its range by noting Congress' expressed commitment to long-term conservation and its hope that the ESA would protect species well before they reached the brink of extinction. The extension[**17] of ESA protections to a species in danger "throughout . . . a significant portion of its range," the Secretary asserts, offers protection to species not yet faced with imminent extinction and therefore reflects the incremental approach Congress intended the ESA to provide. But this function too is fulfilled elsewhere in the statute.

As noted, the ESA provides protection to both "endangered species" and "threatened species." While an "endangered species" is a species "in danger of extinction throughout all or a significant portion of its range," 16

U.S.C. § 1532(6), "threatened species" include those "which are likely to become . . . endangered species within the foreseeable future throughout all or a significant portion of [their]range." *16 U.S.C. § 1532(20)*. The Secretary's interpretation thus conflates the distinct ESA protections for species facing extinction throughout "all" and throughout "a significant portion" of their range with the separate protections for "threatened" and for "endangered species." As such, the Secretary's construction once again views the statute as saying the same thing twice.

This understanding of the[**18] statutory language not only clashes with the rule against surplusage we have already discussed, but also runs up against the statute's legislative history. n8 Congress did recognize that, as the Secretary stresses, "extinction is a gradual process," but Congress incorporated that recognition not in the "significant portion" phrase but in the protection for "threatened" species. During the Senate floor debate, Senator Tunney of California observed that the ESA

provides protection to a broader range of species by affording the Secretary the power to list animals which he determines are likely in the foreseeable future to become extinct, as well as those animals which are presently threatened with extinction. This gives the Secretary and the States which adopt endangered species management plans, the ability not only to protect the last remaining members of the species but to take steps to insure that species which are likely to be threatened with extinction never reach the state of being presently endangered.

120 Cong. Rec. 25,668 (1973) (statement of Sen. Tunney) (emphasis added); see, also [*1143] *16 U.S.C. § 1531(b)* ("The purposes of this chapter [**19]are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species." (Emphasis added)). Congress' desire to provide incremental protection to species in varying degrees of danger does not, therefore, explain the ESA's protection for species facing extinction throughout only "a significant portion of [their] range."

n8 [HN7] When the plain language of a statute is ambiguous, courts may "examine the textual evolution of the [contested phrase] and the legislative history that may explain or elucidate it." *United States v. R.L.C.*, 503 U.S. 291, 298, 112 S. Ct. 1329, 117 L. Ed. 2d 559 (1992).

2. Defenders' Explanation

Defenders' interpretation of the phrase "extinction throughout . . . a significant portion of its range" is similarly unsatisfactory. Defenders takes a more quantitative approach to the phrase, arguing that the projected loss of 82% of the lizard's habitat[**20] in this case constitutes "a substantial portion of its range." Appellants then cite to other cases in which courts found listing of species warranted after the loss of even smaller amounts of habitat. *Federation of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, Civ. No. 99-981-SI (N. D. Cal. Oct. 25, 2000), Slip Op. at 17-18 (finding listing of the steelhead trout warranted despite protections covering 64% of its range); *ONRC v. Daley*, 6 F. Supp. 2d 1139, 1157 (D. Or. 1998) (finding the coho salmon in danger of extinction despite federal forest land protections extending over 35% of its range); *45 Fed. Reg. 63,812, 63,817-18* (Sept. 25, 1980) (listing the Coachella Valley fringe-toed lizard as a threatened species although 50% of its historical habitat remained).

There are two problems with Defenders' quantitative approach. First, it simply does not make sense to assume that the loss of a predetermined percentage of habitat or range would necessarily qualify a species for listing. A species with an exceptionally large historical range may continue to enjoy healthy population levels despite the loss of a substantial amount of suitable habitat. Similarly, a species with an exceptionally[**21] small historical range may quickly become endangered after the loss of even a very small percentage of suitable habitat. n9 As

the examples cited by Defenders and noted above demonstrate, the percentage of habitat loss that will render a species in danger of extinction or threatened with extinction will necessarily be determined on a case by case basis. Furthermore, were a bright line percentage appropriate for determining when listing was necessary, Congress could simply have included that percentage in the text of the ESA.

n9 The Secretary offers a compelling counter-argument to the Defenders' suggested approach:

A reading of the phrase "significant portion of its range," that adopts a purely quantitative measurement of range and ignores fact-based examination of the significance of the threats posed to part of the species' range to the viability of the species as a whole, does not carry out the purpose of the statute. Such an interpretation would fail to protect species in danger of extinction because it might not allow listing of species where areas of range vital to the species' survival--but not the majority of the range--face significant threats. Additionally, this interpretation could erroneously result in listing of species that are in no danger of extinction merely because they no longer inhabit all of their historical range. This latter result would greatly multiply the listing of species and subject both federal agencies and private individuals to the requirements of the ESA, even though such species are self-sustaining in the wild and do not require the protective measures of the ESA.

[**22]

In the absence of a fixed percentage, Defenders' suggested interpretation of the phrase begins to look a lot like the faulty definition offered by the Secretary, i.e., "a substantial portion of its range" means an amount of habitat loss such that total extinction [*1144] is likely in the near future. As noted above, this reading does not comport with the other terms of the statute.

3. Insight from the Legislative History

The legislative history of the ESA suggests an entirely different meaning of the inherently ambiguous phrase "extinction throughout . . . a significant portion of its range."

The ESA was actually the third in a series of laws enacted in the late 1960s and early 1970s aimed at protecting and preserving endangered species. The previous two, however, defined endangered species narrowly, including only those species facing total extinction. Neither extended protection to a species endangered in only a "significant portion of its range." See Endangered Species Conservation Act, Pub. L. 91-135 § 3(a), 83 Stat. 275 (Dec. 5, 1969) (describing endangered species as those threatened by "worldwide extinction"); Endangered Species Preservation Act, Pub. L. 89-669 § 1(c), [**23] 80 Stat. 926 (Oct. 15, 1966) (describing an endangered species as one whose "existence is endangered because its habitat is threatened with destruction, drastic modification, or severe curtailment, or because of overexploitation, disease, predation, or because of other factors, and that its survival requires assistance").

The ESA's broadened protection for species in danger of extinction throughout "a significant portion of their range" was thus a significant change. The House Report accompanying the bill acknowledged as much, noting that the new definition's expansion to include species in danger of extinction "in any portion of its range" represented "a significant shift in the definition in existing law which considers a species to be endangered only when it is threatened with worldwide extinction." H.R. Rep. No. 412, 93rd Cong., 1 Sess. (1973) (emphasis added).

It appears that Congress added this new language in order to encourage greater cooperation between federal and state agencies and to allow the Secretary more flexibility in her approach to wildlife management. The case

of the American alligator, which was frequently cited during the Senate debate, illustrates this^[**24] likely intent:

In 1973, the range of the alligator stretched from the Mississippi Delta in Louisiana to the Everglades of Florida. Its distribution over that range, however, varied widely. While habitat loss had pushed the species to the verge of extinction in Florida, conservation efforts had resulted in an overabundance of alligators in Louisiana, such that harvesting was required to keep the alligators from overrunning the human population. In order to address problems such as this, the Act allows the Secretary to "list an animal as 'endangered' through all or a portion of its range." *62 Fed. Reg. 25,669 (July 25 1973)*. Senator Tunney explained:

An animal might be "endangered" in most States but overpopulated in some. In a State in which a species is overpopulated, the Secretary would have the discretion to list that animal as merely threatened or to remove it from the endangered species listing entirely while still providing protection in areas where it was threatened with extinction. In that portion of its range where it was not threatened with extinction, the States would have full authority to use their management skills to insure the proper conservation^[**25] of the species.

Id. In describing this provision as "perhaps the most important section of this bill," id., Senator Tunney also noted that

The plan for Federal-State cooperation provides for much more extensive discretionary action on the part of the Secretary and the State agencies. Under existing law [(namely, the Endangered [*1145] Species Conservation Act of 1969)], a species must be declared "endangered" even if in a certain portion of its range, the species has experienced a population boom, or is otherwise threatening to destroy the life support capacity of its habitat. Such a broad listing prevents local authorities from taking steps to insure healthy population levels.

Id.

The historical application of the Act is consistent with this interpretation of the statute, not with the interpretation suggested by the Secretary in her briefs in this case. Grizzly bears, for example, are listed as threatened species within the contiguous 48 states, but not in Alaska. Similarly, only the California, Oregon and Washington populations of the marbled murrelet, whose range in North America extends from the Aleutian Archipelago in Alaska to Central California, are listed^[**26] as threatened. *57 Fed. Reg. 45,328 (Oct. 1, 1992)*. See also *63 Fed. Reg. 13,134 (Mar. 18, 1998)* (listing the desert bighorn sheep in the peninsular ranges of southern California, although not in the range extending into Baja California); *62 Fed. Reg. 30,772 (June 5, 1997)* (listing as endangered the population of Stellar sea lions occurring west of 144 degrees W. longitude, while continuing to list the remaining population as threatened); *52 Fed. Reg. 25,229 (July 6, 1987)* (listing the Florida population of Audubon's crested caracara, a hawk that occurs from Florida, southern Texas and Arizona, and northern Baja California, south to Panama, as threatened); *50 Fed. Reg. 50,726 (Dec. 11, 1985)* (listing the population of piping plovers as endangered in the watershed of the Great Lakes and threatened throughout the remainder of its range). n10

n10 The text of the ESA and its subsequent application seems to have been guided by the following maxim:

There seems to be a tacit assumption that if grizzlies survive in Canada and Alaska, that is good enough. It is not good enough for me. . . . Relegating grizzlies to Alaska is about like relegating happiness to heaven; one may never get there.

ALDO LEOPOLD, A SAND COUNTY ALMANAC 277 (1966).

[**27]

We conclude, consistently with the Secretary's historical practice, that [HN8] a species can be extinct "throughout . . . a significant portion of its range" if there are major geographical areas in which it is no longer viable but once was. Those areas need not coincide with national or state political boundaries, although they can. The Secretary necessarily has a wide degree of discretion in delineating "a significant portion of its range," since the term is not defined in the statute. But where, as here, it is on the record apparent that the area in which the lizard is expected to survive is much smaller than its historical range, the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a "significant portion of its range." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1159 (9th Cir. 1980) (" [HN9] A satisfactory explanation of agency action is essential for adequate judicial review, because the focus of judicial review is not on the wisdom of the agency's decision, but on whether the process employed by the agency to reach its decision took into consideration all the relevant factors.").

4. Application to This Case

As noted, [**28] the Secretary did not, in her Notice, expressly consider the "extinction throughout . . . a significant portion of its range" issue at all. n11 Had she applied the [*1146] flexible standard we have adopted to the instant case, she might have determined that the lizard is indeed in danger of "extinction throughout . . . a significant portion of its range."

n11 Accordingly, we owe the Secretary's interpretation no deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). As the D.C. Circuit explained in analogous circumstances, [HN10] deference "is not due when the [agency] has apparently failed to apply an important term of its governing statute. We cannot defer to what we cannot perceive." *International Longshoremen's Ass'n, AFL-CIO v. National Mediation Bd.*, 276 U.S. App. D.C. 319, 870 F.2d 733, 736 (D.C. Cir. 1989). Nor do we owe deference to the interpretation of the statute now advocated by the Secretary's counsel--newly minted, it seems, for this lawsuit, and inconsistent with prior agency actions--as [HN11] we ordinarily will not defer "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988).

[**29]

First, the habitat on private land may constitute "a significant portion of its range" demanding enhanced protections not required on public lands; alternatively, the inverse may be true. Second, and perhaps more persuasively given this interpretation of the statute, the lizard may face unique threats in either California or Arizona, or in major subportions of either state. Notably, the California Department of Fish and Game initially declined to sign the Conservation Agreement relied upon by the Secretary, suggesting perhaps that the lizard's habitat in the two states may require different degrees of protection.

The Secretary does not address at all in the Notice whether, on either of these bases, the lizard was "extinct throughout . . . a significant portion of its range." This omission with respect to a significant legal issue raised by the factual circumstances would itself be a sufficient basis for remanding the case to the Secretary to consider the question. *People of State of Cal. v. FCC*, 39 F.3d 919, 925 (9th Cir. 1994) (we will reverse an agency action "if the record reveals that the agency has failed to consider an important aspect of the problem.") (internal[**30] quotation marks omitted). Further, the explanation of the Secretary's lawyers, even were we to consider it, n12 is, for the reasons already surveyed, flatly inconsistent with the statute.

n12 In general, " [HN12] we cannot affirm the decision of an agency on a ground that the agency did not invoke in making its decision." *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001).

Nor did the Secretary address the lizard's viability in a site-specific manner with regard to the putative benefits of the CA. Although the Notice asserts that "MAs have been designated in the" five areas identified in the CA, *62 Fed. Reg. 37860*, there is evidence that, in at least three of those areas, the designation process was either incomplete or wholly unstarted at the time the Notice was issued. See *63 Fed. Reg. 16272*; *63 Fed. Reg. 66561, 66561-62*. Nowhere does the Secretary account for the effects of failure to implement the CA immediately in those areas where delay was expected. [**31] Thus, it is unclear how the benefits assertedly flowing from the CA affected any particular portion of the lizard's habitats, and accordingly unclear how the CA could have mitigated threats to the lizard throughout "a significant portion of its range." We therefore conclude that the Secretary's decision to withdraw the proposed rule designating the lizard as protected cannot be enforced on the basis of the Notice.

III. Conclusion

For the foregoing reasons, we conclude that the Secretary's decision to withdraw the proposed rule recommending the lizard for ESA protection was arbitrary and capricious. We therefore REVERSE the district court's decision dismissing the Defenders' claim, with directions that the case be remanded to the Secretary for consideration in accord with the legal standards outlined in this opinion of the question [*1147] whether the proposed rule listing the lizard as threatened should be withdrawn.

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SOUTHWEST CENTER FOR
BIOLOGICAL DIVERSITY, a non-profit
corporation; and RIO GRANDE CHAPTER
OF TROUT UNLIMITED, a non-profit
corporation,
Plaintiffs,

CIV 98-372 TUC JMR

v.

BRUCE BABBITT, Secretary of the
Department of the Interior,
Defendant.

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This case focuses on the recovery plan issued by U.S. Fish and Wildlife Service ("FWS") for the Gila trout, a small fish indigenous to Arizona and New Mexico that has been listed as an endangered species.

Plaintiffs, Southwest Center for Biological Diversity ("Southwest Center") and Rio Grande Chapter of Trout Unlimited ("Trout Unlimited"), challenge the Secretary of the Department of the Interior's compliance with the statutory provisions of the Endangered Species Act ("ESA"). Plaintiffs request the Court to (1) declare the recovery plan developed for the Gila trout to be in violation of ESA, and (2) enjoin the Secretary to issue a new recovery plan that specifies delisting objectives and provides delisting criteria.

The parties have filed cross-motions for summary judgment. After a hearing before this Court on April 26, 1999, the parties have submitted supplemental briefs in support of their

motions. Plaintiffs argue that, as a matter of law, the Gila trout recovery plan does not comply with ESA's mandate to provide for measures that enable a species to be taken off the list of threatened or endangered species. Defendant counters that plaintiffs do not have standing and cannot challenge the Secretary's discretion.

For the following reasons, defendant's Motion for Summary Judgment will be granted.

BACKGROUND

The parties' statements of facts and the administrative record reveal the following undisputed facts. The Gila trout has been listed as an endangered species since 1967. It is native to the streams of the Mogollon Plateau of New Mexico and Arizona and is distinguished by iridescent gold sides. The Secretary considers the Gila trout to be a recoverable species. Administrative Record ("AR") 245.

In 1960, the Gila trout was limited to five small populations in the upper Gila River system. High water quality and stream cover are required to sustain the species. Habitat degradation along with competition and hybridization with non-indigenous trout represent the major threats to the Gila trout.

In 1983, FWS¹ issued a recovery plan for the Gila trout, which was then revised in 1984. In 1987, FWS proposed to downlist the Gila trout from endangered to threatened. However, when new information demonstrated that the Gila trout continued to decline, FWS withdrew this proposal.

In 1993, FWS revised its recovery plan for the Gila trout. The recovery plan states that "if recovery efforts are successful, downlisting may be expected. Delisting criteria have not been

¹FWS was delegated authority for non-marine species such as the Gila trout.

determined...The estimated date for downlisting is the year 2000. Delisting criteria cannot be addressed at present, but will be determined when downlisting criteria are met." AR 276 at 35.

DISCUSSION

A. Standard of Review

This action is brought pursuant to ESA's citizen suit provision, 16 U.S.C. § 1540(g), and the Administrative Procedure Act, 5 U.S.C. § 706. Pursuant to the APA, the Court must assess whether the agency actions were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A).

The standard of review is highly deferential and presumes an agency's action to be valid. Ethyl Corp. v. Environmental Protection Agency, 541 F. 2d 1, 34 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976). The agency's interpretation of a statute and its interpretation of its own regulations are entitled to great deference, but the judiciary is the final authority on issues of statutory construction. Natural Resources Defense Council v. Department of Interior, 113 F. 3d 1121, 1124 (9th Cir. 1997). In conducting its inquiry, the Court's role is not to substitute its judgment for that of the agency. Arizona v. Thomas, 824 F. 2d 745, 748 (9th Cir. 1987). The Court will conduct a thorough, probing, in-depth review, limited to ensuring that the agency's decision is based on relevant statutory factors and is not a clear error of judgment. Camp v. Pitts, 411 U.S. 138, 142 (1973). The Court will consider whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis on the record, and whether the agency considered the relevant factors. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989).

Generally, the Court will not look beyond the administrative record. Camp, 411 U.S. at 141-142. However, the Court may consider material outside the administrative record when necessary to determine whether the agency has considered all relevant factors and has explained its decision, when the agency relied on documents not in the record, or when necessary to explain technical terms or complex subject matter. Southwest Center for Biological Diversity v. Forest Service, 100 F. 3d 1443, 1450 (9th Cir. 1996).

B. Statutory Framework

ESA states that the Secretary “shall develop and implement recovery plans for the “conservation and survival” of listed species. 16 U.S.C. § 1533(f)(1). Conservation is defined as “the use of all methods and procedures which are necessary to bring any endangered species to the point at which such measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. § 1532(3). The Secretary’s regulations define recovery as “the point at which protection under the Act is no longer required.” 50 C.F.R. § 424.11(d)(2).

The Secretary, in developing and implementing recovery plans, “shall, to the maximum extent practicable,” incorporate (1) site specific management actions as may be necessary to achieve the goal for conservation and survival of the species, and (2) objective, measurable criteria which, when met, would result in a determination that a species be removed from the list. 16 U.S.C. § 1533(f)(1)(B). The objective, measurable criteria must address each of the five statutory factors considered in listing the species pursuant to Section 1533. Those factors are:

- (A) the present or threatened destruction, modification or curtailment of the species’ habitat or range;
- (B) over-utilization for commercial, recreational, scientific, or educational purposes;

- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1).

The 1990 Recovery Guidelines of FWS ("FWS Guidelines") instruct that recovery "is the process by which the decline of an endangered or threatened species is arrested or reversed, and threats to its survival are neutralized, so that its long-term survival in nature can be ensured." AR 227. "A recovery plan delineates, justifies, and schedules the research and management actions necessary to support recovery of a species, including those that, if successfully undertaken, are likely to permit reclassification or delisting of the species."

Relevant to delisting, the FWS Guidelines provide:

There may be cases where not enough habitat remains to support a population that meets viability criteria. In these cases, full recovery is not achievable, and the plan should clearly state why delisting is not a practical objective....

Though most of the tasks included in the outline should be those that are expected to be carried out in the near future, all tasks necessary to achieve full recovery of the species should be identified.

The FWS Guidelines advise that it "is important to consider all strategies that may alleviate known threats..." At the same time, the FWS Guidelines instruct FWS to "[c]hoose among delisting, downlisting, or protection of existing populations for a specific time period for the foreseeable future. Be ambitious but do not set an unobtainable objective."

C. Standing

Defendant challenges the plaintiffs' standing to bring this action. To establish standing,

plaintiffs must show (1) an injury-in-fact that is (a) concrete and particularized, and actual or imminent; (2) a causal connection between the injury and the complained of conduct; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). In cases of procedural injury claims, a plaintiff must show a threatened concrete interest underlying the procedural interest. Id. at 560-63.

To survive this challenge to standing on summary judgment, plaintiffs must submit affidavits or other evidence to demonstrate that one or more of the plaintiffs' members would be directly affected by the contested activity.

1. Injury-In-Fact

Plaintiffs claim a procedural injury due to the Secretary's alleged failure to satisfy his statutory obligations pursuant to ESA in developing a recovery plan for the Gila trout. Defendant argues that plaintiffs cannot demonstrate injury-in-fact because they have only a generalized concern for the environment. According to the defendant, plaintiffs' action is based on an unsupported assumption that more could or should be done to help the Gila trout. Additionally, defendant argues that plaintiffs have no injury because the Gila trout species has improved in certain areas. Defendant points out that plaintiffs waited more than five years to file suit after the recovery plan was issued.

Defendant's argument against standing relies largely upon Lujan v. Defenders of Wildlife, where several environmental groups challenged a regulation affecting the habitat of an endangered species abroad. The Secretary had allegedly promulgated the regulation without following the proper procedures. The environmental groups argued that they had standing because ESA

conferred upon them the right to have the correct procedures followed. The Supreme Court held, *inter alia*, that the plaintiffs could not establish an injury-in-fact based on "some day" intentions to visit the threatened areas without a description of a concrete plan. Lujan, 504 U.S. at 564.

The instant circumstances are distinguishable from those of Lujan. Plaintiff, Southwest Center, is a New Mexico non-profit corporation that is actively involved in species and habitat protection. The members and staff of Southwest Center participate in efforts to protect and preserve the habitat essential to the continued survival of the Gila trout. By affidavit, David Hogan, the Desert Rivers Coordinator of Southwest Center, avers that he uses the Gila trout habitat for biological, educational, and scientific research, and that he is harmed professionally and personally by the failure of the Secretary to seek full recovery of Gila trout. Mr. Hogan makes annual trips to the Gila trout habitat for research and recreational purposes.

Plaintiff, Trout Unlimited, which is a local trout conservation organization, has supplied the affidavit of its president, Michael Norte. Mr. Norte is an avid recreational fly-fisherman, who has participated in the Gila trout recovery measures, uses the Gila trout habitat, and is harmed by any failure to ensure the Gila trout's full recovery, which prevents him from fishing for the species.²

Plaintiffs explain that they waited five years to file suit because they were involved in efforts to participate in and promote the Gila trout based on the current recovery plan. Plaintiffs filed suit when they realized that the Gila trout would not fully recover without an articulation of delisting objectives and criteria in the recovery plan:

²To date, the Gila trout has increased in numbers but recovery has not even progressed far enough to downlist the species to "threatened" and it remains a "nofish" species.

In this instance, the plaintiffs' members have averred to more than "some day" intentions to visit the Gila trout habitat. Plaintiffs' members live in the vicinity of the Gila trout habitat and have described specific plans to return to that habitat within the next year. Their professional and recreational interests depend on the well-being of the Gila trout. Since non-compliance with ESA has an adverse effect upon their use and enjoyment of the Gila trout, plaintiffs have demonstrated a concrete injury-in-fact that is more than a generalized interest in the environment.

2. Redressability

In a second argument against standing, defendant asserts that a new recovery plan addressing delisting criteria would not redress plaintiffs' injuries because the recovery plan already sets forth the process for the Gila trout's recovery. Defendant claims that the recovery plan represents a guideline for future goals but does not mandate action to obtain those goals. Therefore, defendant contends that it is conjectural whether any recovery activity would be altered or affected with a new recovery plan that addresses delisting.

Plaintiffs counter that they assert a procedural right pursuant to ESA's citizen suit provision. A plaintiff may assert a procedural right to protect his concrete interests even though he cannot establish with any certainty that the remedy will meet all normal standards for redressability. Lujan, 504 U.S. at 572 n. 7. As the Supreme Court elaborated, a person living next to a proposed dam site may challenge an agency's failure to prepare an environmental impact statement even though he cannot establish with any certainty that the statement will cause the license for the dam construction to be withheld. Therefore, in the instant case, plaintiffs have standing to challenge the Secretary's failure to comply with ESA in developing the recovery plan although the incorporation of delisting objectives and criteria into the recovery plan may not

necessarily result in the Gila trout's full recovery.

D. Incorporation of Delisting Objectives and Criteria

Plaintiffs allege that the Gila trout recovery plan violates ESA because it lacks delisting objectives and incorporates no delisting criteria. Plaintiffs claim that by limiting the goal merely to downlisting, the Secretary allows the Gila trout to remain vulnerable to catastrophic events.

Defendant asserts that the Secretary has the discretion to decline to incorporate delisting objectives and criteria. Therefore, defendant contends that this Court does not have jurisdiction over this action since ESA's citizen suit provision provides for enforcement of only the Secretary's non-discretionary acts. Plaintiffs counter that incorporation of delisting objectives and criteria into the recovery plan is a mandatory requirement for a recoverable species except where delisting is not practicable.

To ascertain congressional intent, the Court interprets the relevant provisions of ESA according to the traditional canons of statutory construction. Where Congress has unambiguously expressed its intent, there is no room for a different interpretation of agency intent. Legal Assistance for Vietnamese Asylum Seeker v. Department of State, 45 F.3d 469, 473 (D.C. Cir. 1995). The Court must defer to a reasonable agency interpretation of ESA, but where Congress has specifically addressed an issue its intention must be given effect. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984).

ESA requires the Secretary to develop recovery plans for the "conservation and survival" of the species and states that the Secretary "shall, to the maximum extent practicable," incorporate into the recovery plan "objective, measurable criteria which, when met, would result in a determination ... that the species be removed from the list." 16 U.S.C. § 1533(f)(1). The

in a determination ... that the species be removed from the list." 16 U.S.C. § 1533(f)(1). The word "shall" is an imperative denoting a definite obligation. SMS Data Products Group, Inc. v. United States, 853 F. 2d 1547, 1553 (Fed. Cir. 1988). The word "practicable" in common usage means "possible to practice or perform," or "capable of being put into practice, done or accomplished: feasible." Webster's Third New International Dictionary (1993). Therefore, the statutory language of Section 1533 demonstrates that Congress unambiguously intended that the Secretary be required to incorporate delisting criteria where possible or feasible.³ Fund for the Animals v. Babbitt, 903 F. Supp. 96, 111 (D.C.C, 1995). Where it is not feasible or possible to develop delisting criteria, Congress granted the Secretary discretion to decline to do so.

Since it is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking, this Court has jurisdiction to review this claim pursuant to ESA's citizen suit provision. Bennett v. Spear, 520 U.S. 154, 172 (1997). The Court will review the Secretary's action to determine whether he arbitrarily and capriciously failed to fulfill his duty to incorporate "to the maximum extent practicable" delisting criteria and objectives.

ESA requires that decisions be made upon the "best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). It is not necessary for a recovery plan to be an exhaustively detailed document, but a recovery plan will not meet ESA's standards if it only

³The Court does not agree that language cited by the defendant from the FWS Guidelines relieves the Secretary of the duty to incorporate delisting objectives and criteria when practicable. The FWS Guidelines state, "Choose among delisting, downlisting, or protection of existing populations for a specific time period or for the foreseeable future." (emphasis added) AR 227 at 1. This directive suggests only that the agency develop short term goals as appropriate. It does not indicate that the Secretary has unfettered discretion to ignore incorporation of delisting objectives and criteria when practicable.

recognizes specific threats to the conservation and survival of a threatened or endangered species, but fails to recommend corrective action or explain why it is impracticable or unnecessary to recommend such action. Fund for Animals, 903 F. Supp. at 108.

In this instance, the recovery plan states that delisting cannot be addressed until downlisting criteria are met, which is estimated to occur in 2000. This conclusory statement does not alone constitute an adequate justification for the failure to incorporate delisting criteria. However, the defendant has outlined where the record supports the conclusion that development of delisting criteria was not practicable without first satisfying downlisting criteria. A court may uphold an agency decision of less than ideal clarity if the agency's path may be reasonably discerned. Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 43 (1983).

In this instance, the agency's reasoning may be discerned from the record as follows. Flood and fires in 1988 and 1989 destroyed wild Gila trout populations, severely damaged the species' habitat, and reversed the recovery efforts that had taken place during the last decade. AR 261 at 6; 256 at 123. As a result, FWS shifted its priorities to focus on renovation of whole drainages rather than small headwater streams, which action requires increased captive-breeding efforts and identification of more streams for evaluation and restoration. AR 210 at 1; 244 at 6-7; 276 at 1.

While developing the 1993 revision to the recovery plan, FWS determined that it needed to research whether the five remaining Gila trout populations should be maintained in isolation to preserve genetic diversity or whether they safely could be interbred. At the same time, FWS found that captive-breeding efforts had not yet been sufficiently successful to ensure a steady,

plentiful fish supply to restock and restore whole drainages. Therefore, FWS needed to research the Gila trout's taxonomy, hatchery development, reestablishment efforts, and the number of suitable streams for reintroduction prior to developing delisting criteria. Since these four areas of research are relevant to the five statutory factors of Section 1533(a)(1), the Court defers to the agency's discretion that it was not practicable to incorporate the objective, measurable delisting criteria for the 1993 recovery plan. Furthermore, the recovery plan specifies delisting objectives by outlining the corrective action necessary to achieve recovery of the Gila trout. AR 276 at 35-41.

Plaintiffs claim that the scientific data available was sufficient to develop delisting criteria. However, judicial deference to the agency is greatest when reviewing technical matters within its area of expertise, and the Court will not evaluate the quality of FWS's scientific data. State of Louisiana ex rel. Guste v. Verity, 853 F. 2d 322, 329 (5th Cir. 1988).

Since the Secretary's decision to defer incorporation of specific delisting criteria into the recovery plan was not arbitrary and capricious, summary judgment will enter in favor of the defendant.

CONCLUSION

For the foregoing reasons, plaintiffs' Motion for Summary Judgment is DENIED. The defendant's Motion for Summary Judgment is GRANTED. The Clerk of the Court is directed to enter judgment in favor of the defendant and to close this case.

It is SO ORDERED this 18th day of August, 1999.


WARREN W. EGINTON, SENIOR UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF CONNECTICUT, SITTING BY DESIGNATION

Appendix C

THREATS ASSESSMENT

Glossary of Threat Terms

Stresses - The types of threats afflicting species and their habitats. This term breaks the concept of threats down to two components, stresses and sources of the stress. The purpose of narrowing the definition of threats is having the ability to develop conservation measures that focus on the stress, rather than focusing on the source of the stress.

Source of stresses - The agent generating the stress on species or habitats. The source of stress can come from within the system itself or threats imposed from the outside. Most sources of stresses are human induced.

Conceptual model - A qualitative model of the system and species life stages with the interrelations between the system and threats shown in diagram form. Several threats are interlinked or independent and these can be illustrated on the model of the system.

Critical threats - Those threats that rank highest as deteriorating species or system. Persistent stresses may be critical threats.

Background on Threat Assessment Method

The Nature Conservancy developed a planning approach that addresses threats and called it the “Five S’s”(TNC 2000). Part of this approach involves an analysis of stresses and sources of stress of conservation sites. The Five S approach, developed for sites, can be adapted as a tool for our recovery planning for threats to species.

The online automated Microsoft Excel worksheet is available at <http://www.consci.org/scp/>. Click on 5S Handbook, then click on Download workbook. To adapt the tool for use with endangered and threatened species, instead of conservation sites, it may be helpful to print out the worksheet and fill it in manually, rather than use the automated version.

Two components of threats:

- (1) Stress - a process or event with direct negative impact on species or system upon which it depends; for example, increased sedimentation is a stress on freshwater mussels.
- (2) Source of stress - the action or entity from which a stress is derived; for example, the

source of increased sedimentation could be over-collection, clear-cutting trees, road construction, etc.

Applications for Recovery Planning

Every recovery plan should contain a fair assessment of conditions and stresses and sources of stresses and prioritize the stresses. The Nature Conservancy technique is one method, but any similar approach would be just as valuable.

The TNC threats assessment framework provides an organized way to evaluate a situation with threats surrounding your species of interest for evaluating stresses, sources of stress and strategies for addressing threats. This type of organizing model can be useful even to the most seasoned practitioners as a way of articulating assumptions and testing the ideas of a recovery team.

Be as honest and object and unbiased as possible. You should not be labeling a human activity as a source of a stress if you have not verified it.

Recognize and respond to any emerging threats so that your preliminary thoughts can at least be considered in the later iterations of a threats assessment. Emerging threats have become even more important to consider in the dynamically changing environment we are facing because a potential threat could provide a rapid challenge.

A recovery plan that lists the threats only in the “Reasons for Listing” section is not sufficient. A threats assessment involves the following general steps (The TNC method has been adapted here to focus on species rather than conservation sites).

Steps to conducting a threats assessment

1. Define the ecological systems and species that will be considered in the assessment. (May be effective to consolidate individual species into major ecological system groupings). If conservation requirements for several species are related, or the same or different, it make s sense to combine the two into a system. If an action for conserving one species threatens the other, then your model should show the relationship.
2. Collect information on the ecological context and human context for the species and habitat
3. Identification - Can you pinpoint which threat(s) led to species decline? This is usually answered initially in the listing package. The threats used to list the species should be re-evaluated during recovery planning, although there should be consistency in identification of threats between listing document and recovery plan. What is threatening the target species, ecological communities and natural process on which the species depends currently? Brainstorm on the ways that species is affected and list all possible threats. What critical threats

- must be abated first? Build a model of the natural processes and patterns that characterize the interactions of the species, ecological and human setting and relating threats.
4. Identify the major stresses to the species and system. The stresses to consider should be happening now, or have high potential to occur within the next ten years.
 5. Assessment - Rank relative importance of each threat in recovery planning. The evaluation and ranking of stresses and the sources of stress is made easier by using a matrix, such as the simplified one below). The matrix is a visual way of organizing complicated interactions and potential threats and system behavior. How immediate and severe are the stresses? How much knowledge does the recovery team have of the stresses? Which of the stresses are most serious?
 6. Rank the stresses.
 7. Verify the threats through a planning process to refine information.

Criteria for evaluating and ranking stresses and sources of stresses:

Scope - The geographic scope of the threat to the species or system. Impacts can be widespread or localized.

Severity - A measure of the level of damage to species or system that can reasonably be expected within 10 years under current circumstances. Ranges from total destruction, serious or moderate degradation or slight impairment.

Magnitude - The severity plus scope.

Frequency - A temporal measure of the threat.

Immediacy - There are varying degrees of immediacy, including, a species is intrinsically vulnerable to threats, or identifiable threats can be “mapped” and seen as increasing or decreasing, or the threats are reasonably predictable.

Persistence - To identify a persistent threat the active and historical sources of the stress are evaluated.

Restoration feasibility - If the threats have undermined the integrity of the system to the point that it can not be recovered, then the restorability has been reduced. The other end of the scale is if the system can be recovered once the threat is removed.

Likelihood - For a potential threat, a statement of likelihood could be measured.

Irreversibility - some threats may be so severe or may no be currently serious, but in the future will increase inexorably and be impossible to reverse if not abated within the

next 10 years.

The Recovery Narrative portion of the recovery plan should outline how to mitigate threats in recovery implementation. What current and potential stresses interfere with the maintenance of ecological processes? A strategy to eliminate or mitigate threats and reach recovery goals should be based on a realistic assessment of the ability to affect human uses and the surrounding landscape. For instance, if it is not realistic to restore a species to a functioning component of the ecosystem due to threats, it may mean that you review your goals (determine that species will be down listed to a permanent management state).

Threats Assessment is an iterative process that should provide feedback to management actions. Look for information gaps, where research into the causes and effects of threats may be needed. Look at threats as they affect the dynamics of the populations and critical paths for recovery. Decide where to link management and where to put resources addressing threats when resources are limited.

Florida Panther Example -

Loggerhead Sea turtle Example -

Simple example of a stress analysis that uses a scoring system based on weights for the criteria of restoration feasibility and severity.

Stress	Severity	Source of Stress	Restoration feasibility	Score
Sedimentation	High	cattle operations	Med	5
Altered hydrology	Med	roads, development	Low	3
Non-native species	Low	stocking game fish	High	4
Recreational use	Low	fishing, boating	Low	2

Once a threats assessment has been completed, a recommended approach for determining and prioritizing actions to abate priority threats is found in Appendix ---- This should include an adaptive management approach. Where can this appendix direct to the next step? Determining actions??

Further Reference

“The Five-S Framework for Site Conservation: A Practitioner’s Handbook for Site Conservation Planning and Measuring Conservation Success” Volume I and II. The Nature Conservancy 2000.

Appendix D.

MEMORANDUM OF UNDERSTANDING
ESTABLISHING
THE CANADA/MEXICO/UNITED STATES
TRILATERAL COMMITTEE FOR WILDLIFE AND ECOSYSTEM
CONSERVATION AND MANAGEMENT

**MEMORANDUM OF UNDERSTANDING
ESTABLISHING
THE CANADA/MEXICO/UNITED STATES
TRILATERAL COMMITTEE FOR WILDLIFE AND ECOSYSTEM
CONSERVATION AND MANAGEMENT**

Environment Canada, through the Canadian Wildlife Service, the *Secretaria de Medio Ambiente, Recursos Naturales y Pesca de los Estados Unidos Mexicanos* (SEMARNAP), through the *Unidad Coordinadora de Asuntos Internacionales*, and the U.S. Fish and Wildlife Service, hereinafter called "the Parties".

DESIRING to facilitate the conservation of species and the ecosystems on which they depend;

CONSIDERING that the Governments of Canada, Mexico and the United States are signatories to a number of Treaties and Conventions that provide for bilateral, trilateral or multilateral cooperation related to the conservation of species and the ecosystems on which they depend; including but not limited to the following :

- a) 1916 Convention Between the United States and Great Britain for the Protection of Migratory Birds,
- b) 1936 Treaty for the Protection of Migratory Birds and Game Mammals, between Mexico and the United States,
- c) 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere,
- d) 1971 Convention of Wetlands of International Importance Especially as Waterfowl Habitat,
- e) 1973 Convention on International Trade of Endangered Species of Wild Fauna and Flora,
- f) 1992 Convention on Biological Diversity,
- g) 1993 North American Agreement on Environmental Cooperation.

CONSIDERING that a number of arrangements have been created to facilitate cooperation between "national entities" relative to the conservation of species and the ecosystems on which they depend, including those establishing the following committees preceding this Memorandum of Understanding:

- a) The Mexico-U.S. Joint Committee on Wildlife and Plant Conservation, created in 1975 by an interagency agreement (revised in 1984) to facilitate cooperation between the current *Dirección General de Conservación y Aprovechamiento Ecológico de México* (formerly within SEDUE and SEDESOL) and the U.S. Fish and Wildlife Service (Department of the Interior); and
- b) The Tripartite Committee for the Conservation of Migratory Birds and their Habitat, created in 1988 by a Memorandum of Understanding among the Canadian Wildlife Service (Environment Canada), the *Dirección General de Conservación y Aprovechamiento Ecológico de México* (SEMARNAP), and the United States Fish and Wildlife Services (Department of the Interior);

AFFIRMING that the establishment of a Trilateral Committee for Wildlife and Ecosystem Conservation and Management will replace the above agreements with the aim of facilitating the efficient and effective coordination of these cooperative activities;

AGREE on the following :

ARTICLE I

PURPOSE

To facilitate and enhance coordination , cooperation and the development of partnerships among the wildlife agencies of the three countries, and with other associated and interested entities, regarding projects and programmes for the conservation and management of wildlife, plants, biological diversity and ecosystems of mutual interest, the Parties hereby establish the Canada/Mexico/United States Trilateral Committee for Wildlife and Ecosystems Conservation and Management, hereinafter called the "Trilateral Committee". Such projects and programs will include scientific research, law enforcement, sustainable use and any other aspect related to this purpose.

ARTICLE II

ORGANIZATION

1. The Trilateral Committee will comprise the following members:
 - a) the Director General of the Canadian Wildlife Service;
 - b) the Chief of the *Unidad Coordinadora de Asuntos Internacionales* of the Ministry of Environment, Natural Resources and Fisheries of Mexico; and
 - c) the Director of the United States Fish and Wildlife Service.
2. Each member will designate an organizational contact.
3. The Trilateral Committee will meet once a year. These meetings will be organized, on a rotational basis, by each of the Parties signatory to this Memorandum of Understanding. Special meetings of the Directors or their support staff may be held as needed.
4. The Trilateral Committee may establish sub-committees or working groups to provide advice regarding particular program areas or assignments.
5. The Trilateral Committee may invite representatives of other entities, non-governmental organizations or individuals, to participate in their deliberations, and as appropriate, will facilitate cooperation with such entities.

ARTICLE III

FUNCTIONS

1. The Trilateral Committee will perform the following functions:
 - a) Implement this Memorandum of Understanding in accordance with the international Treaties and Conventions referenced in the preamble as well as with the North American Waterfowl Management Plan (as revised in 1994), the federal, state, provincial and local laws, and the conservation priorities of each country;
 - b) Develop, implement, review and coordinate specific cooperative conservation projects and programs; and
 - c) Integrate its projects and programs into the conservation priorities of the country in which those projects and programs take place.
 - d) Any other functions that the Parties may agree upon.

ARTICLE IV
OPERATIONS

1. Decisions will be made through a consensus of the Chief of the *Unidad Coordinadora de Asuntos Internacionales* and the Directors or their designated representatives.
2. A preliminary agenda will be prepared and distributed at least four weeks prior to the meeting by the Organizational Contact of the host country.
3. Projects and programs decided upon at the annual Trilateral Committee meeting will be followed-up in a timely manner.
4. The Organizational Contact of the host agency will prepare and distribute minutes within two weeks following the meeting.
5. The Organizational Contacts will coordinate the implementation of cooperative projects and programs in the three countries.
6. Activities undertaken pursuant to this Memorandum of Understanding will be subject to the availability of funds and other relevant resources available to each Director, to the Chief of the *Unidad Coordinadora*, and to the laws and regulations of the countries involved.

ARTICLE V
FINAL PROVISIONS

1. This Memorandum of Understanding will take effect upon signature, and will remain in effect for a period of five years, extended automatically for similar time periods, unless any of the Parties wishes to withdraw by giving written notification to the other Parties three months in advance of the desired date of termination.
2. The termination of this Memorandum of Understanding will not affect the completion of cooperative actions formalized while it was in force.
3. This Memorandum of Understanding may be modified by mutual agreement among the Parties, formalized through written communications, in which the date in which such modifications will enter into force shall be specified.

DONE in the City of Oaxaca on the ninth day of April of the year One Thousand, Nine Hundred Ninety Six, in three originals, each in the Spanish, French and English languages, each of texts being equally authentic.

For Environment Canada
the Canadian Wildlife Service

David Brackett
Director General

For the Secretaria de Medio
Ambiente, Recursos Naturales y
Pesca de Mexico

Jose Luis Samaniego Leyva
Chief, Unidad Coordinadora de
Asuntos Internacionales

For the U.S. Fish and
Wildlife Service

John G. Rogers
Director

Appendix E.

FRAMEWORK FOR COOPERATION BETWEEN
THE US. DEPARTMENT OF THE INTERIOR AND
ENVIRONMENT CANADA IN THE PROTECTION AND
RECOVERY OF WILD SPECIES AT RISK

FRAMEWORK FOR COOPERATION BETWEEN THE U.S. DEPARTMENT OF THE INTERIOR AND ENVIRONMENT CANADA IN THE PROTECTION AND RECOVERY OF WILD SPECIES AT RISK

The goal of this framework is to prevent populations of wild species shared by the United States and Canada from becoming extinct as a consequence of human activity, through the conservation of wildlife populations and the ecosystems on which they depend.

THE UNITED STATES AND CANADA:

- ♦ share a common concern for and commitment to the protection and recovery of wild species at risk of extinction;
- ♦ have a long history of cooperation in the management of shared populations of wildlife and plants, as demonstrated by collaborative efforts for the recovery of endangered migratory species such as the whooping crane (*Grus americana*) and the piping plover (*Charadrius melodus*);
- ♦ recognize that greater success in protecting and recovering shared populations of species at risk can be achieved through cooperative, coordinated action; and
- ♦ acknowledge that conservation action is most often effective when implemented using a multi species approach at the landscape level.

THE UNITED STATES DEPARTMENT OF THE INTERIOR AND ENVIRONMENT CANADA ANNOUNCE A FRAMEWORK FOR COOPERATIVE ACTION TO:

- I. facilitate the exchange of information and technical expertise regarding the conservation of species at risk and their habitat;
- II. harmonize the evaluation and identification of such species;
- III. provide a means of identifying species at risk that require bilateral action;
- IV. promote the development and implementation of joint or multi-national recovery plans for species identified as endangered or threatened;
- V. encourage expanded and more effective partnerships between our two agencies and states, provinces, and territorial, aboriginal and tribal governments, and the private sector (individuals, conservation groups, corporations, etc.) in recovery efforts;
- VI. create greater public awareness and involvement regarding the need to conserve wildlife populations and the ecosystems on which they depend, and to prevent the loss of shared species; and

- VII. use the cooperative arrangements established in the Trilateral Committee for Wildlife and Ecosystem Conservation and Management to provide a mechanism for establishing mutual priorities, coordinating recovery actions, and ensuring efficient use of available resources for the protection and recovery of species at risk.

The implementing agencies for this framework are the U.S. Fish and Wildlife Service of the U.S. Department of the Interior and the Canadian Wildlife Service of Environment Canada.

In recognition of the continental nature and importance of many species at risk, and existing partnerships, the United States and Canada intend to invite the participation of Mexico in this framework.

Signed at Washington, D.C.

This 7th day of April 1997;

FOR THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR

FOR CANADA
DEPARTMENT OF THE ENVIRONMENT


Secretary Bruce Babbitt


Minister Sergio Marchi

Appendix F.

Tribal Coordination Documents

Joint Secretarial Order on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the
Endangered Species Act

Executive Order: Consultation and Coordination With Indian Tribal Governments

Executive Order 13007: Indian Sacred Sites

Presidential Memorandum of April 29, 1994: Government-to-Government Relations With Native
American Tribal Governments

American Indian and Alaska Native Policy of the U.S. Department of Commerce

SECRETARIAL ORDER

American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act

Issued by the
**Department of the Interior
&
The Department of Commerce**

Sec. 1. Purpose and Authority. This Order is issued by the Secretary of the Interior and the Secretary of Commerce (Secretaries) pursuant to the Endangered Species Act of 1973, 16 U.S.C. 1531, as amended (the Act), the federal-tribal trust relationship, and other federal law. Specifically, this Order clarifies the responsibilities of the component agencies, bureaus and offices of the Department of the Interior and the Department of Commerce (Departments), when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights, as defined in this Order. This Order further acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes. Accordingly, the Departments will carry out their responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.

Sec. 2. Scope and Limitations.

(A) This Order is for guidance within the Departments only and is adopted pursuant to, and is consistent with, existing law.

(B) This Order shall not be construed to grant, expand, create, or diminish any legally enforceable rights, benefits or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Order be construed to alter, amend, repeal, interpret or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribe, or to preempt, modify or limit the exercise of any such rights.

(C) This Order does not preempt or modify the Departments' statutory authorities or the authorities of Indian tribes or the states.

(D) Nothing in this Order shall be applied to authorize direct (directed) take of listed species, or any activity that would jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. Incidental take issues under this Order are addressed in Principle 3(C) of Section 5.

(E) Nothing in this Order shall require additional procedural requirements for substantially completed Departmental actions, activities, or policy initiatives.

(F) Implementation of this Order shall be subject to the availability of resources and the requirements of the Anti-Deficiency Act.

(G) Should any tribe(s) and the Department(s) agree that greater efficiency in the implementation of this Order can be achieved, nothing in this Order shall prevent them from implementing strategies to do so.

(H) This Order shall not be construed to supersede, amend, or otherwise modify or affect the implementation of, existing agreements or understandings with the Departments or their agencies, bureaus, or offices including, but not limited to, memoranda of understanding, memoranda of agreement, or statements of relationship, unless mutually agreed by the signatory parties.

Sec. 3. Definitions. For the purposes of this Order, except as otherwise expressly provided, the following terms shall apply:

(A) The term "Indian tribe" shall mean any Indian tribe, band, nation, pueblo, community or other organized group within the United States which the Secretary of the Interior has identified on the most current list of tribes maintained by the Bureau of Indian Affairs.

(B) The term "tribal trust resources" means those natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.

(C) The term "tribal rights" means those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and which give rise to legally enforceable remedies.

(D) The term "Indian lands" means any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Sec. 4. Background. The unique and distinctive political relationship between the United States and Indian tribes is defined by treaties, statutes, executive orders, judicial decisions, and agreements, and differentiates tribes from other entities that deal with, or are affected by, the federal government. This relationship has given rise to a special

federal trust responsibility, involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights.

The Departments recognize the importance of tribal self-governance and the protocols of a government-to-government relationship with Indian tribes. Long-standing Congressional and Administrative policies promote tribal self-government, self-sufficiency, and self-determination, recognizing and endorsing the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. The Departments recognize and respect, and shall consider, the value that tribal traditional knowledge provides to tribal and federal land management decision-making and tribal resource management activities. The Departments recognize that Indian tribes are governmental sovereigns; inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights and protect tribal trust resources. The Departments shall be sensitive to the fact that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.

Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.

Because of the unique government-to-government relationship between Indian tribes and the United States, the Departments and affected Indian tribes need to establish and maintain effective working relationships and mutual partnerships to promote the conservation of sensitive species (including candidate, proposed and listed species) and the health of ecosystems upon which they depend. Such relationships should focus on cooperative assistance, consultation, the sharing of information, and the creation of government-to-government partnerships to promote healthy ecosystems.

In facilitating a government-to-government relationship, the Departments may work with intertribal organizations, to the extent such organizations are authorized by their member tribes to carry out resource management responsibilities.

Sec. 5. Responsibilities. To achieve the objectives of this Order, the heads of all agencies, bureaus and offices within the Department of the Interior, and the Administrator of the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce, shall be responsible for ensuring that the following directives are followed:

Principle 1. THE DEPARTMENTS SHALL WORK DIRECTLY WITH INDIAN TRIBES ON A GOVERNMENT-TO-GOVERNMENT BASIS TO PROMOTE HEALTHY ECOSYSTEMS.

The Departments shall recognize the unique and distinctive political and constitutionally based relationship that exists between the United States and each Indian tribe, and shall view tribal governments as sovereign entities with authority and responsibility for the health and welfare of ecosystems on Indian lands. The Departments recognize that Indian tribes are governmental sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources. Accordingly, the Departments shall seek to establish effective government-to-government working relationships with tribes to achieve the common goal of promoting and protecting the health of these ecosystems. Whenever the agencies, bureaus, and offices of the Departments are aware that their actions planned under the Act may impact tribal trust resources, the exercise of tribal rights, or Indian lands, they shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable. This shall include providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes. To facilitate the government-to-government relationship, the Departments may coordinate their discussions with a representative from an intertribal organization, if so designated by the affected tribe(s).

Except when determined necessary for investigative or prosecutorial law enforcement activities, or when otherwise provided in a federal-tribal agreement, the Departments, to the maximum extent practicable, shall obtain permission from tribes before knowingly entering Indian reservations and tribally-owned fee lands for purposes of ESA-related activities, and shall communicate as necessary with the appropriate tribal officials. If a tribe believes this section has been violated, such tribe may file a complaint with the appropriate Secretary, who shall promptly investigate and respond to the tribe.

Principle 2. THE DEPARTMENTS SHALL RECOGNIZE THAT INDIAN LANDS ARE NOT SUBJECT TO THE SAME CONTROLS AS FEDERAL PUBLIC LANDS.

The Departments recognize that Indian lands, whether held in trust by the United States for the use and benefit of Indians or owned exclusively by an Indian tribe, are not subject to the controls or restrictions set forth in federal public land laws. Indian lands are not federal public lands or part of the public domain, but are rather retained by tribes or set aside for tribal use pursuant to treaties, statutes, court orders, executive orders, judicial decisions, or agreements. Accordingly, Indian tribes manage Indian lands in accordance with tribal goals and objectives, within the framework of applicable laws.

Principle 3. THE DEPARTMENTS SHALL ASSIST INDIAN TRIBES IN DEVELOPING AND EXPANDING TRIBAL PROGRAMS SO THAT HEALTHY ECOSYSTEMS ARE PROMOTED AND CONSERVATION RESTRICTIONS ARE UNNECESSARY.

(A) The Departments shall take affirmative steps to assist Indian tribes in developing and expanding tribal programs that promote healthy ecosystems.

The Departments shall take affirmative steps to achieve the common goals of promoting healthy ecosystems, Indian self-government, and productive government-to-government

relationships under this Order, by assisting Indian tribes in developing and expanding tribal programs that promote the health of ecosystems upon which sensitive species (including candidate, proposed and listed species) depend.

The Departments shall offer and provide such scientific and technical assistance and information as may be available for the development of tribal conservation and management plans to promote the maintenance, restoration, enhancement and health of the ecosystems upon which sensitive species (including candidate, proposed, and listed species) depend, including the cooperative identification of appropriate management measures to address concerns for such species and their habitats.

(B) The Departments shall recognize that Indian tribes are appropriate governmental entities to manage their lands and tribal trust resources.

The Departments acknowledge that Indian tribes value, and exercise responsibilities for, management of Indian lands and tribal trust resources. In keeping with the federal policy of promoting tribal self-government, the Departments shall respect the exercise of tribal sovereignty over the management of Indian lands, and tribal trust resources.

Accordingly, the Departments shall give deference to tribal conservation and management plans for tribal trust resources that: (a) govern activities on Indian lands, including, for the purposes of this section, tribally-owned fee lands, and (b) address the conservation needs of listed species. The Departments shall conduct government-to-government consultations to discuss the extent to which tribal resource management plans for tribal trust resources outside Indian lands can be incorporated into actions to address the conservation needs of listed species.

(C) The Departments, as trustees, shall support tribal measures that preclude the need for conservation restrictions.

At the earliest indication that the need for federal conservation restrictions is being considered for any species, the Departments, acting in their trustee capacities, shall promptly notify all potentially affected tribes, and provide such technical, financial, or other assistance as may be appropriate, thereby assisting Indian tribes in identifying and implementing tribal conservation and other measures necessary to protect such species.

In the event that the Departments determine that conservation restrictions are necessary in order to protect listed species, the Departments, in keeping with the trust responsibility and government-to-government relationships, shall consult with affected tribes and provide written notice to them of the intended restriction as far in advance as practicable. If the proposed conservation restriction is directed at a tribal activity that could raise the potential issue of direct (directed) take under the Act, then meaningful government-to-government consultation shall occur, in order to strive to harmonize the federal trust responsibility to tribes, tribal sovereignty and the statutory missions of the Departments. In cases involving an activity that could raise the potential issue of an

incidental take under the Act, such notice shall include an analysis and determination that all of the following conservation standards have been met: (i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv) the restriction does not discriminate against Indian activities, either as stated or applied; and, (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose.

Principle 4. THE DEPARTMENTS SHALL BE SENSITIVE TO INDIAN CULTURE, RELIGION AND SPIRITUALITY.

The Departments shall take into consideration the impacts of their actions and policies under the Act on Indian use of listed species for cultural and religious purposes. The Departments shall avoid or minimize, to the extent practicable, adverse effects upon the noncommercial use of listed sacred plants and animals in medicinal treatments and in the expression of cultural and religious beliefs by Indian tribes. When appropriate, the Departments may issue guidelines to accommodate Indian access to, and traditional uses of, listed species, and to address unique circumstances that may exist when administering the Act.

Principle 5. THE DEPARTMENTS SHALL MAKE AVAILABLE TO INDIAN TRIBES INFORMATION RELATED TO TRIBAL TRUST RESOURCES AND INDIAN LANDS, AND, TO FACILITATE THE MUTUAL EXCHANGE OF INFORMATION, SHALL STRIVE TO PROTECT SENSITIVE TRIBAL INFORMATION FROM DISCLOSURE.

To further tribal self-government and the promotion of healthy ecosystems, the Departments recognize the critical need for Indian tribes to possess complete and accurate information related to Indian lands and tribal trust resources. To the extent consistent with the provisions of the Privacy Act, the Freedom of Information Act (FOIA) and the Departments' abilities to continue to assert FOIA exemptions with regard to FOIA requests, the Departments shall make available to an Indian tribe all information held by the Departments which is related to its Indian lands and tribal trust resources. In the course of the mutual exchange of information, the Departments shall protect, to the maximum extent practicable, tribal information which has been disclosed to or collected by the Departments. The Departments shall promptly notify and, when appropriate, consult with affected tribes regarding all requests for tribal information relating to the administration of the Act.

Sec. 6. Federal-Tribal Intergovernmental Agreements. The Departments shall, when appropriate and at the request of an Indian tribe, pursue intergovernmental agreements to formalize arrangements involving sensitive species (including candidate, proposed, and listed species) such as, but not limited to, land and resource management, multi-jurisdictional partnerships, cooperative law enforcement, and guidelines to

accommodate Indian access to, and traditional uses of, natural products. Such agreements shall strive to establish partnerships that harmonize the Departments' missions under the Act with the Indian tribe's own ecosystem management objectives.

Sec. 7. Alaska. The Departments recognize that section 10(e) of the Act governs the taking of listed species by Alaska Natives for subsistence purposes and that there is a need to study the implementation of the Act as applied to Alaska tribes and natives. Accordingly, this Order shall not apply to Alaska and the Departments shall, within one year of the date of this Order, develop recommendations to the Secretaries to supplement or modify this Order and its Appendix, so as to guide the administration of the Act in Alaska. These recommendations shall be developed with the full cooperation and participation of Alaska tribes and natives. The purpose of these recommendations shall be to harmonize the government-to-government relationship with Alaska tribes, the federal trust responsibility to Alaska tribes and Alaska Natives, the rights of Alaska Natives, and the statutory missions of the Departments.

Sec. 8. Special Study on Cultural and Religious Use of Natural Products. The Departments recognize that there remain tribal concerns regarding the access to, and uses of, eagle feathers, animal parts, and other natural products for Indian cultural and religious purposes. Therefore, the Departments shall work together with Indian tribes to develop recommendations to the Secretaries within one year to revise or establish uniform administrative procedures to govern the possession, distribution, and transportation of such natural products that are under federal jurisdiction or control.

Sec. 9. Dispute Resolution. (A) Federal-tribal disputes regarding implementation of this Order shall be addressed through government-to-government discourse. Such discourse is to be respectful of government-to-government relationships and relevant federal-tribal agreements, treaties, judicial decisions, and policies pertaining to Indian tribes. Alternative dispute resolution processes may be employed as necessary to resolve disputes on technical or policy issues within statutory time frames; provided that such alternative dispute resolution processes are not intended to apply in the context of investigative or prosecutorial law enforcement activities.

(B) Questions and concerns on matters relating to the use or possession of listed plants or listed animal parts used for religious or cultural purposes shall be referred to the appropriate Departmental officials and the appropriate tribal contacts for religious and cultural affairs.

Sec. 10. Implementation. This Order shall be implemented by all agencies, bureaus, and offices of the Departments, as applicable. In addition, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service shall implement their specific responsibilities under the Act in accordance with the guidance contained in the attached Appendix.

Sec. 11. Effective Date. This Order, issued within the Department of the Interior as

Order No. _____, is effective immediately and will remain in effect until amended, superseded, or revoked.

This Secretarial Order, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," and its accompanying Appendix were issued this fifth day of June, 1997, in Washington, D.C., by the Secretary of the Interior and the Secretary of Commerce.

APPENDIX

Appendix to Secretarial Order issued within the Department of the Interior as Order No.

Sec. 1. Purpose. The purpose of this Appendix is to provide policy to the National, regional and field offices of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), (hereinafter "Services"), concerning the implementation of the Secretarial Order issued by the Department of the Interior and the Department of Commerce, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." This policy furthers the objectives of the FWS Native American Policy (June 28, 1994), and the American Indian and Alaska Native Policy of the Department of Commerce (March 30, 1995). This Appendix shall be considered an integral part of the above Secretarial Order, and all sections of the Order shall apply in their entirety to this Appendix.

Sec. 2. General Policy. (A) Goals. The goals of this Appendix are to provide a basis for administration of the Act in a manner that (1) recognizes common federal-tribal goals of conserving sensitive species (including candidate, proposed, and listed species) and the ecosystems upon which they depend, Indian self-government, and productive government-to-government relationships; and (2) harmonizes the federal trust responsibility to tribes, tribal sovereignty, and the statutory missions of the Departments, so as to avoid or minimize the potential for conflict and confrontation.

(B) Government-to-Government Communication. It shall be the responsibility of each Service's regional and field offices to maintain a current list of tribal contact persons within each Region, and to ensure that meaningful government-to-government communication occurs regarding actions to be taken under the Act.

(C) Agency Coordination. The Services have the lead roles and responsibilities in administering the Act, while the Services and other federal agencies share responsibilities for honoring Indian treaties and other sources of tribal rights. The Bureau of Indian Affairs (BIA) has the primary responsibility for carrying out the federal responsibility to administer tribal trust property and represent tribal interests during formal Section 7 consultations under the Act. Accordingly, the Services shall consult, as appropriate, with each other, affected Indian tribes, the BIA, the Office of the Solicitor (Interior), the Office of American Indian Trust (Interior), and the NOAA Office of General Counsel in determining how the fiduciary responsibility of the federal government to Indian tribes may best be realized.

(D) Technical Assistance. In their roles as trustees, the Services shall offer and provide technical assistance and information for the development of tribal conservation and management plans to promote the maintenance, restoration, and enhancement of the ecosystems on which sensitive species (including candidate, proposed, and listed

species) depend. The Services should be creative in working with the tribes to accomplish these objectives. Such technical assistance may include the cooperative identification of appropriate management measures to address concerns for sensitive species (including candidate, proposed and listed species) and their habitats. Such cooperation may include intergovernmental agreements to enable Indian tribes to more fully participate in conservation programs under the Act. Moreover, the Services may enter into conservation easements with tribal governments and enlist tribal participation in incentive programs.

(E) Tribal Conservation Measures. The Services shall, upon the request of an Indian tribe or the BIA, cooperatively review and assess tribal conservation measures for sensitive species (including candidate, proposed and listed species) which may be included in tribal resource management plans. The Services will communicate to the tribal government their desired conservation goals and objectives, as well as any technical advice or suggestions for the modification of the plan to enhance its benefits for the conservation of sensitive species (including candidate, proposed and listed species). In keeping with the Services' initiatives to promote voluntary conservation partnerships for listed species and the ecosystems upon which they depend, the Services shall consult on a government-to-government basis with the affected tribe to determine and provide appropriate assurances that would otherwise be provided to a non-Indian.

Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

The Services shall coordinate with affected Indian tribes in order to fulfill the Services' trust responsibilities and encourage meaningful tribal participation in the following programs under the Act, and shall:

(A) Candidate Conservation.

- (1) Solicit and utilize the expertise of affected Indian tribes in evaluating which animal and plant species should be included on the list of candidate species, including conducting population status inventories and geographical distribution surveys;
- (2) Solicit and utilize the expertise of affected Indian tribes when designing and implementing candidate conservation actions to remove or alleviate threats so that the species' listing priority is reduced or listing as endangered or threatened is rendered unnecessary; and
- (3) Provide technical advice and information to support tribal efforts and facilitate voluntary tribal participation in implementation measures to conserve candidate species on Indian lands.

(B) The Listing Process.

(1) Provide affected Indian tribes with timely notification of the receipt of petitions to list species, the listing of which could affect the exercise of tribal rights or the use of tribal trust resources. In addition, the Services shall solicit and utilize the expertise of affected Indian tribes in responding to listing petitions that may affect tribal trust resources or the exercise of tribal rights.

(2) Recognize the right of Indian tribes to participate fully in the listing process by providing timely notification to, soliciting information and comments from, and utilizing the expertise of, Indian tribes whose exercise of tribal rights or tribal trust resources could be affected by a particular listing. This process shall apply to proposed and final rules to: (i) list species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to threatened (or vice versa); (iv) remove a species from the list; and (v) designate experimental populations.

(3) Recognize the contribution to be made by affected Indian tribes, throughout the process and prior to finalization and close of the public comment period, in the review of proposals to designate critical habitat and evaluate economic impacts of such proposals with implications for tribal trust resources or the exercise of tribal rights. The Services shall notify affected Indian tribes and the BIA, and solicit information on, but not limited to, tribal cultural values, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development, for use in: (i) the preparation of economic analyses involving impacts on tribal communities; and (ii) the preparation of "balancing tests" to determine appropriate exclusions from critical habitat and in the review of comments or petitions concerning critical habitat that may adversely affect the rights or resources of Indian tribes.

(4) In keeping with the trust responsibility, shall consult with the affected Indian tribe(s) when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally-owned fee lands, or the exercise of tribal rights. Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

(5) When exercising regulatory authority for threatened species under section 4(d) of the Act, avoid or minimize effects on tribal management or economic development, or the exercise of reserved Indian fishing, hunting, gathering, or other rights, to the maximum extent allowed by law.

(6) Having first provided the affected Indian tribe(s) the opportunity to actively review and comment on proposed listing actions, provide affected Indian tribe(s) with a written explanation whenever a final decision on any of the following activities conflicts with comments provided by an affected Indian tribe: (i) list a species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to

threatened (or vice versa); (iv) remove a species from the list; or (v) designate experimental populations. If an affected Indian tribe petitions for rulemaking under Section 4(b)(3), the Services will consult with and provide a written explanation to the affected tribe if they fail to adopt the requested regulation.

(C) ESA 7 Consultation.

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected Indian tribes in addition to data provided by the action agency during the consultation process. The Services shall provide timely notification to affected tribes as soon as the Services are aware that a proposed federal agency action subject to formal consultation may affect tribal rights or tribal trust resources.

(2) Provide copies of applicable final biological opinions to affected tribes to the maximum extent permissible by law.

(3)(a) When the Services enter formal consultation on an action proposed by the BIA, the Services shall consider and treat affected tribes as license or permit applicants entitled to full participation in the consultation process. This shall include, but is not limited to, invitations to meetings between the Services and the BIA, opportunities to provide pertinent scientific data and to review data in the administrative record, and to review biological assessments and draft biological opinions. In keeping with the trust responsibility, tribal conservation and management plans for tribal trust resources that govern activities on Indian lands, including for purposes of this paragraph, tribally-owned fee lands, shall serve as the basis for developing any reasonable and prudent alternatives, to the extent practicable.

(b) When the Services enter into formal consultations with an Interior Department agency other than the BIA, or an agency of the Department of Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and provide for the participation of the BIA in the consultation process.

(c) When the Services enter into formal consultations with agencies not in the Departments of the Interior or Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and encourage the action agency to invite the affected tribe(s) and the BIA to participate in the consultation process.

(d) In developing reasonable and prudent alternatives, the Services shall give full consideration to all comments and information received from any affected tribe, and shall strive to ensure that any alternative selected does not discriminate against such tribe(s). The Services shall make a written determination describing (i) how the selected alternative is consistent with their trust responsibilities, and (ii) the extent to which tribal

conservation and management plans for affected tribal trust resources can be incorporated into any such alternative.

(D) Habitat Conservation Planning.

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected tribal governments in habitat conservation planning that may affect tribal trust resources or the exercise of tribal rights. The Services shall facilitate tribal participation by providing timely notification as soon as the Services are aware that a draft Habitat Conservation Plan (HCP) may affect such resources or the exercise of such rights.

(2) Encourage HCP applicants to recognize the benefits of working cooperatively with affected Indian tribes and advocate for tribal participation in the development of HCPs. In those instances where permit applicants choose not to invite affected tribes to participate in those negotiations, the Services shall consult with the affected tribes to evaluate the effects of the proposed HCP on tribal trust resources and will provide the information resulting from such consultation to the HCP applicant prior to the submission of the draft HCP for public comment. After consultation with the tribes and the non-federal landowner and after careful consideration of the tribe's concerns, the Services must clearly state the rationale for the recommended final decision and explain how the decision relates to the Services' trust responsibility.

(3) Advocate the incorporation of measures into HCPs that will restore or enhance tribal trust resources. The Services shall advocate for HCP provisions that eliminate or minimize the diminishment of tribal trust resources. The Services shall be cognizant of the impacts of measures incorporated into HCPs on tribal trust resources and the tribal ability to utilize such resources.

(4) Advocate and encourage early participation by affected tribal governments in the development of region-wide or state-wide habitat conservation planning efforts and in the development of any related implementation documents.

(E) Recovery.

(1) Solicit and utilize the expertise of affected Indian tribes by having tribal representation, as appropriate, on Recovery Teams when the species occurs on Indian lands (including tribally- owned fee lands), affects tribal trust resources, or affects the exercise of tribal rights.

(2) In recognition of tribal rights, cooperate with affected tribes to develop and implement Recovery Plans in a manner that minimizes the social, cultural and economic impacts on tribal communities, consistent with the timely recovery of listed species. The Services shall be cognizant of tribal desires to attain population levels and conditions

that are sufficient to support the meaningful exercise of reserved rights and the protection of tribal management or development prerogatives for Indian resources.

(3) Invite affected Indian tribes, or their designated representatives, to participate in the Recovery Plan implementation process through the development of a participation plan and through tribally- designated membership on recovery teams. The Services shall work cooperatively with affected Indian tribes to identify and implement the most effective measures to speed the recovery process.

(4) Solicit and utilize the expertise of affected Indian tribes in the design of monitoring programs for listed species and for species which have been removed from the list of Endangered and Threatened Wildlife and Plants occurring on Indian lands or affecting the exercise of tribal rights or tribal trust resources.

(F) Law Enforcement.

(1) At the request of an Indian tribe, enter into cooperative law enforcement agreements as integral components of tribal, federal, and state efforts to conserve species and the ecosystems upon which they depend. Such agreements may include the delegation of enforcement authority under the Act, within limitations, to full-time tribal conservation law enforcement officers.

(2) Cooperate with Indian tribes in enforcement of the Act by identifying opportunities for joint enforcement operations or investigations. Discuss new techniques and methods for the detection and apprehension of violators of the Act or tribal conservation laws, and exchange law enforcement information in general.

Questions & Answers

Secretarial Order No.3206

1. What is the purpose of this new Secretarial Order for implementing the Endangered Species Act (ESA)?

This Secretarial Order clarifies responsibilities of the Departments of Commerce and the Interior when the implementation of the ESA affects (or may affect) Indian lands, tribal trust resources, or the exercise of tribal rights.

2. What is the Federal trust responsibility to Indian tribes?

The Federal government maintains a special trust relationship with Indian tribes pursuant to treaties, statutes, Executive Orders, judicial decisions and other legal instruments. Inherent in this relationship is an enforceable fiduciary responsibility to Indian tribes to protect their lands and resources, unless otherwise unencumbered through mutual agreement.

3. How much land does the Federal government hold in trust for Indian people:?

95 million acres are held in trust by the Federal government.

4. The Secretarial Order applies only to Federally-recognized tribes. How many Federally-rec:ognized tribes are there?

The Secretary of the Interior has recognized 555 tribes for special status with the Department of the Interior.

5. What is meant by a government-to-government relationship?

The President's executive memorandum' of April 29, 1994, requires the Federal government to recognize tribal governments as the governments of separate, sovereign nations. This relationship is unique as the Federal government does not owe any other entity, state or private, a trust responsibility.

6. What role did the Indian community have in the development of this Order'?

Various representatives were designated by the Indian community to be part of the tribal negotiation team that developed the final Order. While it was impossible to include all tribes in the negotiation process, lboth the Federal and tribal participants felt that the Indian community was well represented in this process. In addition, the Fish & Wildlife Service included its Native American Liaison and the Bureau of Indian Affairs was represented by its Deputy Assistant Secretary for Indian A.ffa.irs in these negotiations.

7. By their participation in the development of this Order, are the tribes now acknowledging that the ESA applies to them?

No. 'The tribes acknowledge that the ESA is administered by the Fish & Wildlife Service and NMFS. In their administration of the Act, the Services must, on occasion, deal with Indian tribes. By participating in the development of this Order, the tribes were seeking to ensure that tribal sovereignty, tribal rights and the Federal trust responsibility to Indian people receive full and fair recognition in the implementation of the ESA. Both the Federal team and the tribal acknowledged that species conservation could be best achieved through gove:rnment-to-government collaboration and communication rather than through litigation.

8. If tribal governments and the Services still have different views regarding the affect of the ESA upon tribal rights, what really 'has been accomplished by this Secretariatl Order'?

The long-standing legal disagreement regarding the application of the ESA to treaty rights has often created a barrier to closer cooperation between the Federal government and tribes on endangered species conservation. By agreeing to set aside their legal differences and focus on the mutual goals of maintaining and restoring healthy ecosystems and promoting species conservation, the Services and tribal governments have forged a new conservation partnership that will ultimately benefit both endangered trust resources and the exercise of treaty rights.

9. Isn't there an inherent conflict between the Services' trust responsibility to the tribes and their statutory responsibility to adlminister the ESA?

As trustees, the Services are obligated to ensure that tribal trust resources and tribal lands are protected to the maximum extent practicable within the law. Some of those same trust resources may be afforded protection under the ESA. Thus, the Services view their responsibilities under the ESA to restore and conserve endangered species as supportive of, and consistent with, their responsibilities as trustees to Indian people.

10. The Order, in its Purpose, states that the Departments will ensure that "Indian tribes do not bear a disproportionate burden for the conservation of listed species . . ." Does that imply that someone else will share a "disproportionate burden?"

No. The Order implies that no one should carry a disproportionate burden and that the Act should be implemented fairly and consistently for all Americans, including Native Americans.

11. Will this Order somehow circumvent the requirements of the Act in favor of Indian tribes:?

No. The Order plainly states that it shall not be construed to grant, expand, create or diminish any legally enforceable rights, benefits or trust responsibilities not otherwise granted or created under existing law. The Order also states that it does not preempt or modify the Department's statutory authorities and is consistent with existing law.

12. Will government-to-government consultation always require that the Departments consult with each individual tribe whenever an ESA activity impacts, or may impact, tribal lands or resources?

Not necessarily. The Order allows Indian tribes to use intertribal organizations to speak for tribes, at the tribes' behest, in certain matters. For instance, the NW Indian Fisheries Commission may speak for a number of tribes in the northwest.

13. Why aren't "Indian lands" considered part of the Federal land base---doesn't the Federal government have responsibility for these lands?

Indian lands are designated as such by virtue of Indian treaties, statutes, court orders, Executive Orders, judicial decisions or other agreements. They are not considered part of the Federal land base because the Federal government only holds these lands in trust for Indian tribes and Indian individuals. They are, rather, considered part of the "Indian land base" over which the Federal government maintains a fiduciary responsibility of protection.

14. What is meant by "deference" to tribal conservation management plans for Indian lands?

The Departments recognize that Indian tribes value and take responsibility for the management of their lands and resources. Deference will be given to those tribal conservation plans that a) speak to those activities on Indian lands (including tribally--owned fee lands) and b) address the conservation needs of the listed species. In other words, if the tribe has a conservation plan that addresses the concerns of the Departments for a particular listed

species----even if it was not specifically developed for that species----the plan will be given deference. There would be no expectation or requirement for the tribe to develop an alternative plan.

15. Will this same "deference" apply to tribal trust resources management plans for off--reservation resources?

The degree of deference to tribal management plans for off-reservation tribal trust resources will depend upon the extent to which such plans address the Departments' concerns. This will be ascertained through a government-to-government consultation where all concerns and plans are "put on the table" for review.

16. Does this Order authorize the "direct take" of listed species by Indian tribes?

No. the Order does not override the statutory provisions of the Act, including the prohibition against direct take. Whenever a situation arises that may raise the possible issue of direct take, a government-to-government consultation will occur to ascertain the appropriate action to take given the statutory mission of the Departments, the Federal trust responsibility and the role of sovereignty.

17. Under what circumstances will the "incidental" take of listed species be allowed?

A series of Supreme Court decisions in the 1960's and 1970's established a 5-prong test that needed to be satisfied before state conservation measures could be applied to restrict treaty hunting and fishing rights. Eventually known as the "5 conservation necessity principles", this 5-prong test was adopted as Federal policy for applying incidental take restrictions under the ESA to tribal treaty rights and was cited in the settlement of U.S. v. Oregon, 699 F.Supp. 1456 (1988). The Secretarial Order restates this Federal enforcement policy as applied to incidental take of listed species. Accordingly, an analysis and determination must be made that all the following standards have been met: (i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv) the restriction does not discriminate against Indian activities, either as stated or applied; and, (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose. Therefore, conservation restrictions may be imposed on Indian tribes only when all 5 standards have been met.

18. Will the implementation of this Order in any way disturb the intergovernmental agreements already in place or those nearing completion after (sometimes) years of negotiation?

No. The Order specifically states that it will not supersede, amend, or otherwise modify or affect the implementation of agreements or understandings already in place unless both parties agree otherwise.

19. Alaska Natives are not included in the Order. What accommodations are being for Alaska Natives?

Alaska Natives were not included in the Order because there was a concern that their subsistence exemption under 10(e) of the Act might be otherwise impacted. However, the Departments have agreed to make an independent study of the Alaska Native situation within one year of the signing of the Order.

20. Will this Order make access to eagle feather arty easier for Native American religious practitioners?

The Departments recognized the tribal concerns for better and quicker access to eagle feathers and other species that may be sacred to them. The Order, 'therefore, makes a commitment to convene another Federal/tribal working group to address the issue in some detail and make recommendations to the Secretaries of the Interior and Commerce accordingly. It was felt that this issue was of sufficient importance on its own to warrant an independent study of the matter, rather than try to address it specifically in the body of the Order.

21. Are the Departments setting aside monies to fund the effort to consult with Indian tribes on ESA matters?

Until such time as funds may be appropriated for Federal consultation efforts, including efforts on other Indian-related issues, the Departments will encourage their Regional and field offices to provide on-the-ground technical assistance to the tribes in the form of personnel, machinery,, research tools and information exchanges. It is anticipated that the tribes will contribute to this effort in similar fashion to forge effective consultations.

22. Does the Order provide for any proactive ESA related activities with Indian tribes?

Upon the tribes' request, the Services may review and assess tribal conservation plans and other measures for conserving sensitive species. This type of proactive consultation will allow the Services to become better acquainted with tribal positions and sensitivities and, consequently, allow the tribes a greater presence in the ESA activities of the Services.

23. **The Appendix of the Order goes to some length to state that Indian tribes will be given prompt notification of petitions, (opportunities to participate in the ESA activity, ability to provide information, etc. How is this any different from the opportunities that are afforded the general public in this process?**

Through government-to-government protocols, the Services will make a special effort to include the affected tribes in significant ways in the ESA process. Face-to-face meetings would be standard protocol---not notices in the newspapers or other postings. The Services would solicit tribal information not only on the species at issue but on tribal cultural values, hunting, fishing, and gathering rights, a review of treaty obligations, and impacts on tribal economy.

24. **Will there be any change in the way the Services designate critical habitat with respect to Indian lands?**

Critical habitat shall not be designated on Indian lands unless it is determined essential to conserve a listed species. The Services believe that this is consistent with the special trust responsibility the Federal government has to Indian people to preserve and protect their lands and resources.

25. **Does tribal involvement in the 57 consultation process have any impact; on the development of reasonable and prudent alternatives? ***

The development of reasonable and prudent alternatives will be scientifically based. However, the affected tribes will be allowed to provide pertinent information and viewpoints that would enable the Services to develop informed reasonable and prudent alternatives.

26. **With respect to 57 consultations, explain the various mechanisms the Services would employ to elicit pertinent information from the affected tribes.**

When the consultation is with the BIA, the affected tribes will be considered as license or permit applicants and participate in the consultation as such. When the consultation is with some other Interior or Commerce agency, the Departments will provide for the participation of the BIA. With the participation of the BIA, the tribes at least have a spokesperson to represent their interests, even though they may not be "at the table." When the consultation is with an out-side agency, the tribes will be notified of such consultation and the outside agency will be encouraged to include the BIA and affected tribes in the process.

27. In soliciting the tribes for information in the various ESA processes,, mention is made of "traditional knowledge." To what extent will this traditional knowledge be used in developing recommendations, plans of action,, or opinions that should be based on the! best scientific evidence available?

The use of the best scientific evidence available does not preclude the consideration of other factors that would shed light on the scientific evidence at hand. For instance, the scientific data available might refer generally to a particular behavior pattern of a species. Traditional knowledge might inform the Services on the times, seasons, conditions, etc., of such behavior pattern which has been observed since time immemorial by an Indian tribe. The Services would find this information useful in evaluating their scientific evidence.

28. Will Indian tribes have any input into the habitat conservation plans (HCPs) that are developed by private landowners or local governments?

The Order allows for the use of information provided by the affected tribes in HCPs. While this will not require that HCP applicants include the tribes in actual negotiations, the Services will take full advantage of the information provided by the tribes through formal submissions and during the public comment process. The Services will share this information with the HCP applicants and advocate incorporation of measures into HCPs that will restore or enhance tribal trust resources.

EXECUTIVE ORDER

CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

- (a) "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.
- (b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.
- (c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).
- (d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

- (a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.
- (b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers

over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

- (A) consulted with tribal officials early in the process of developing the proposed regulation;
 - (B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
 - (C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.
- (c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,
- (1) consulted with tribal officials early in the process of developing the proposed regulation;
 - (2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
 - (3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.
- (d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

- (a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.
- (b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.
- (c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons

therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

WILLIAM J. CLINTON

THE WHITE HOUSE,

November 6, 2000.

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Presidential Documents

Executive Order 13007 of May 24, 1996

Indian Sacred Sites

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of Sacred Sites. (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

(i) "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;

(ii) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe; and

(iii) "Sacred site" means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Sec. 2. Procedures. (a) Each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments."

(b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites; (ii) any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and (iii) procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Sec. 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, "agency action" has the same meaning as in the Administrative Procedure Act (5 U.S.C. 551(13)).

Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.



THE WHITE HOUSE,
May 24, 1996.

[FR Doc. 96-13597
Filed 5-27-96; 8:45 am]
Billing code 3195-01-P

[Federal Register: May 4, 1994]

Presidential Documents

Federal Register
Vol. 59, No. 85
Wednesday, May 4, 1994

Title 3--
The President
Memorandum of April 29, 1994

Government-to-Government Relations With Native American Tribal Governments

Memorandum for the Heads of Executive Departments and Agencies

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Today, as part of an historic meeting, I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments.

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

- (a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments.
- (b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

- (c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.
- (d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.
- (e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.
- (f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

The head of each executive department and agency shall ensure that the department or agency's bureaus and components are fully aware of this memorandum, through publication or other means, and that they are in compliance with its requirements.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

(Presidential Sig.)<Clinton1>><Clinton2>

THE WHITE HOUSE,

Washington, April 29, 1994.

[FR Doc. 94-10877
Filed 5-2-94; 3:49 pm]
Billing code 3110-01-M

3/20/95

AMERICAN INDIAN AND ALASKA NATIVE POLICY
OF THE
U.S. DEPARTMENT OF COMMERCE

"All men were made by the Great Spirit Chief. They are all brothers. The earth is the mother of all people, and all people should have equal rights upon it...Let me be a free man-free to travel, free to stop, free to work, free to trade, where I choose, free to choose my own teachers, free to follow the religion of my fathers, free to think and talk and act for myself and I will obey every law, or submit to the penalty."

Chief Joseph, Nez Perce Nation

From the Secretary of Commerce:

In the great mosaic of our country, we all know it takes work, cooperation, and knowledge to make our dreams reality. This policy offers cooperation, access to information, which is knowledge, and my pledge to create an environment that will foster dreams, free will, and productivity. It is time for our nations to realize that we are interdependent. With that wisdom, we must work together to build a strong future for all of us.



RONALD H. BROWN,
Secretary of Commerce

Date: March 30, 1995

AMERICAN INDIAN AND ALASKA NATIVE POLICY
of the
U.S. DEPARTMENT OF COMMERCE

INTRODUCTION

In recognition of the unique status of American Indian and Alaska Native tribal governments, the Department of Commerce hereby proclaims its American Indian and Alaska Native Policy. This policy outlines the principles to be followed in all Department of Commerce interactions with American Indian and Alaska Native tribal governments. This policy is based on the United States Constitution, Federal treaties, policy, law, court decisions, and the ongoing political relationship among the tribes and the Federal government.

Acknowledging the government wide fiduciary obligations to American Indian and Alaska Native tribes but also supporting tribal autonomy, the Department of Commerce espouses a government-to-government relationship between the Federal government and American Indian and Alaska Native tribes.

This policy pertains to Federally recognized tribes and provides guidance to Commerce personnel for issues affecting American Indians and Alaska Natives. This policy does not apply to Commerce interactions with state recognized tribes, Indians, or Alaska Natives who are not members of tribes with respect to matters provided for by statute or regulation.

This policy is for internal management only and shall not be construed to grant or vest any right to any party in respect to any federal action not otherwise granted or vested by existing law or regulations.

DEFINITIONS

Indian tribe (or tribe). Any Indian tribe, band, nation, Pueblo, or other organized group or community, including any Alaska Native village (as defined in, or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)), which is acknowledged by the Federal government to constitute a tribe with a government-to-government relationship with the United States and eligible for the programs, services, and other relationships established by the United States for Indians because of their status as Indians and tribes.

Tribal government. The recognized government of an Indian tribe and any affiliated or component Band government of such tribe that has been determined eligible for specific services by Congress or officially recognized by inclusion in 25 CFR part 83, "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," as printed in the Federal Register.

POLICY PRINCIPLES

The following policy statements provide general guidance to U.S. Department of Commerce employees for actions dealing with American Indian and Alaska Native governments.

1. **THE DEPARTMENT RECOGNIZES AND COMMITS TO A GOVERNMENT-TO-GOVERNMENT RELATIONSHIP WITH AMERICAN INDIAN AND ALASKA NATIVE TRIBAL GOVERNMENTS.**

Commerce recognizes that the tribal right of self-government flows from the inherent sovereignty of tribes and nations and that Federally recognized tribes have a unique and direct relationship with the Federal government. Commerce further recognizes the rights of each tribal government to set its own priorities and goals for the welfare of its membership and that Commerce will deal with each tribal government, when appropriate, to meet that tribe's needs.

2. **THE DEPARTMENT ACKNOWLEDGES THE POLICY COMMITMENTS OF THE U.S. CONGRESS AND THE CHIEF EXECUTIVE AS PRECEDENCE.**

Commerce recognizes the U.S. Congress passed House Concurrent Resolution #331, in 1988, declaring the Policy "To Acknowledge the Contribution of the Iroquois Confederacy of Nations to Reaffirm the Continuing Government-to-Government Relationship between Indian Tribes and the United States Established in the Constitution." And, additionally, incorporates the Policy Memorandum of the White House, issued April 29, herein, as so much guides the Executive Departments and Agencies in the "Government-to-Government relations with Native American tribal Governments."

3. **THE DEPARTMENT ACKNOWLEDGES THE TRUST RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND AMERICAN INDIAN AND ALASKA NATIVE TRIBES AS ESTABLISHED BY SPECIFIC STATUTES, TREATIES, COURT DECISIONS, EXECUTIVE; ORDERS, REGULATIONS, AND POLICIES.**

Commerce, in keeping with the fiduciary relationship, recognizes its trust responsibility and will consult and work with tribal governments prior to implementing any action when developing legislation, regulations, and/or policies that will affect tribal governments, their development efforts, and their lands and resources.

4. **THE DEPARTMENT ACKNOWLEDGES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IS ALSO KNOWN AS THE "INDIAN COMMERCE CLAUSE."**

Commerce recognizes the "Commerce Clause" of the United States Constitution (Article I, Section 8, Clause 3) is also known as the "Indian Commerce Clause" and states: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;". Commerce

understands that trade and commerce were the original building blocks that established government-to-government relationships with the Indian Tribes. Commerce pledges to honor the constitutional protections secured to Indian Commerce.

5. THE DEPARTMENT WILL CONSULT AND WORK WITH TRIBAL GOVERNMENTS BEFORE MAKING DECISIONS OR IMPLEMENTING **POLICY, RULES**; OR PROGRAMS THAT MAY AFFECT TRIBES TO ENSURE THAT TRIBAL **RIGHTS** AND CONCERNS ARE ADDRESSED.

Commerce recognizes that as a sovereign government, the tribe is responsible for the welfare and rights of its membership and has the right to regulate commerce within its tribal boundaries. Therefore, Commerce will involve tribes and seek tribal input at the appropriate level on policies, rules, programs, and issues that may affect a tribe.

6. THE DEPARTMENT WILL IDENTIFY AND TAKE APPROPRIATE STEPS TO REMOVE ANY **IMPEDIMENTS** TO WORKING DIRECTLY AND EFFECTIVELY WITH **TRIBAL** GOVERNMENTS.

Commerce recognizes there may be legal, procedural, organizational, and other impediments that affect its working relationship with tribes. Commerce will apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") and the "Regulatory Flexibility Act" to design solutions and tailor Federal programs, when appropriate, to address specific or unique needs of tribal communities. Commerce will use the National Performance Review and government reorganization to implement effective means for direct cooperation with tribal governments.

7. THE DEPARTMENT WILL WORK COOPERATIVELY WITH OTHER FEDERAL DEPARTMENTS **AND** AGENCIES, WHERE APPROPRIATE, TO FURTHER THE GOALS OF THIS POLICY.

Commerce recognizes the importance of interagency cooperation. Therefore, Commerce will encourage and strive for communication, coordination, and cooperation among all governmental agencies to ensure that the rights of tribal governments are fully recognized and upheld.

8. THE DEPARTMENT WILL WORK WITH TRIBES TO ACHIEVE THEIR GOAL OF ECONOMIC SELF-SUFFICIENCY.

Commerce recognizes the importance of economic independence to tribal self-determination and tribal self-sufficiency and pledges to assist tribes; with developing strong and stable economies to participate in today's national and global marketplace. Therefore, Commerce will make every effort to ensure that eligible tribes have access to Commerce programs that will help them meet their economic goals.

9. THE DEPARTMENT WILL INTERNALIZE THIS POLICY TO THE EXTENT THAT IT WILL BE INCORPORATED INTO ONGOING AND LONG-TERM PLANNING AND MANAGEMENT PROCESSES, AS WELL AS DAE!-TO-DAY OPERATIONS.

Commerce recognizes that policies are not relevant or successful unless they are acted upon and properly implemented. Commerce will effectively and fully incorporate all of the principles of this policy into all operations and basic tenets of its mission. Commerce will identify the office or individual to coordinate this policy and act as liaison with American Indian and Alaska Native tribes in implementing and working with the policy and principles.

10. THE EFFECTIVE DATE OF THIS DEPARTMENTAL POLICY IS UPON SIGNING BY THE DEPARTMENT OF COMMERCE AFTER **CONSULTATION** WITH TRIBAL GOVERNMENTS.

Therefore, the Secretary of the Department of Commerce hereby directs all Commerce agencies, bureaus, and their components to implement this policy by **incorporating** all the above principles in their planning **and management** activities, their legislative and regulatory initiatives, **as** well as their policy development.

Appendix G.

Recovery Team Subgroups

Scientific and Implementation Subgroups

Depending on the nature and complexity of the threats facing the species and the number of stakeholders involved on the recovery team, there may be common-sense organizational schemes/structures that will aid the team in organizing and analyzing information pertinent to the recovery planning process. For instance, in many cases, there is a clear distinction between the scientific questions that need to be answered by the team (e.g., does habitat fragmentation affect the species? how?) and the more socio-political questions that arise (will more roads be needed in this area in the future to deal with increasing human population?). It may, therefore, be beneficial to divide the team into subgroups to tackle these different issues. A scientific subgroup of scientific experts on the species and its habitat would be tasked with determining what recovery means for the species, and an implementation subgroup composed of policy, management, and conservation experts would be tasked with exploring different ways to achieve recovery.

The responsibilities of the scientific subgroup might include:

- development of the background data on the species/ecosystem (Introduction data),
- identification of factors and activities affecting the species and its recovery (Recovery analysis), and
- development of the preliminary Implementation Schedule.

The responsibilities of the implementation subgroup might include:

- development of a participation plan, and
- assistance to the Secretary in implementing the recovery plan.

The two groups may work independently or collaboratively at different stages of the planning process depending on their preferences and current objectives. For instance, the scientific subgroup could work independently to develop a Population Viability Analysis, but the groups may work together to incorporate comments from the public review into the draft/approved plan. In cases of dispute between or within the subgroups, a moderator may be brought in to resolve differences and keep the project on track.

PACIFIC ISLANDS ECOREGION RECOVERY ADVISORY NETWORK

In early 1992, the National Academy of Sciences' National Research Council released a report entitled "The Scientific Bases for the Preservation of the Hawaiian Crow." Contained within this report was a recommendation that the U.S. Fish and Wildlife Service (Service) reestablish a Hawaiian crow (or 'alala) recovery team to offer the necessary knowledge and skills for joint management of the wild and captive populations of this critically endangered species, monitor the progress of the species' recovery, and identify research priorities. Thus, in May 1992, the Service's Pacific Islands Office (PIO) sought and received the Regional Director's approval to establish a new 'Alala Recovery Team. Soon thereafter, in July 1992, it became apparent that this same approach was needed for the more than 40 listed bird species under the PIO's jurisdiction, and approval was sought and received again from the Regional Director to establish a Recovery Network, made up of a central Pacific Avifauna Recovery Coordinating Committee (PARCC) with several recovery teams working in close association with this central Committee (reference the attached July 1992 memorandum).

The 'Alala Recovery Team was officially appointed by the Regional Director in November 1992, and the PARCC was appointed in December 1992. During their first meeting, which was held in January 1993, the PARCC reviewed the proposed recovery network schematic put together by the Pacific Islands Office and recommended the priority in which recovery teams should be established. It was suggested that a Hawaii Forest Birds Recovery Team (HFBRT) be established as the first priority, immediately followed by a Mariana Islands (or Western Pacific) Recovery Team. The PARCC met again in April 1993 and, following that meeting, submitted formal recommendations to the Regional Director.

In their formal recommendations, the PARCC advised the Regional Director to immediately establish two recovery teams and two working groups, or task forces. The first recovery team recommended was the HFBRT, to guide recovery efforts for the forest birds on all of the main Hawaiian islands, with the exception of the 'alala, which already had its own recovery team. As the second highest priority, PARCC recommended that the Regional Director appoint a Western Pacific Recovery Team to guide recovery efforts for all listed birds and fruit bats in Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Republic of Palau. And, finally, the PARCC recommended the immediate establishment of two working groups, or task forces: the Captive Breeding Task Force (now called the Captive Propagation Recovery Working Group (CPRWG)) and the Avian Disease Recovery Working Group (ADRWG).

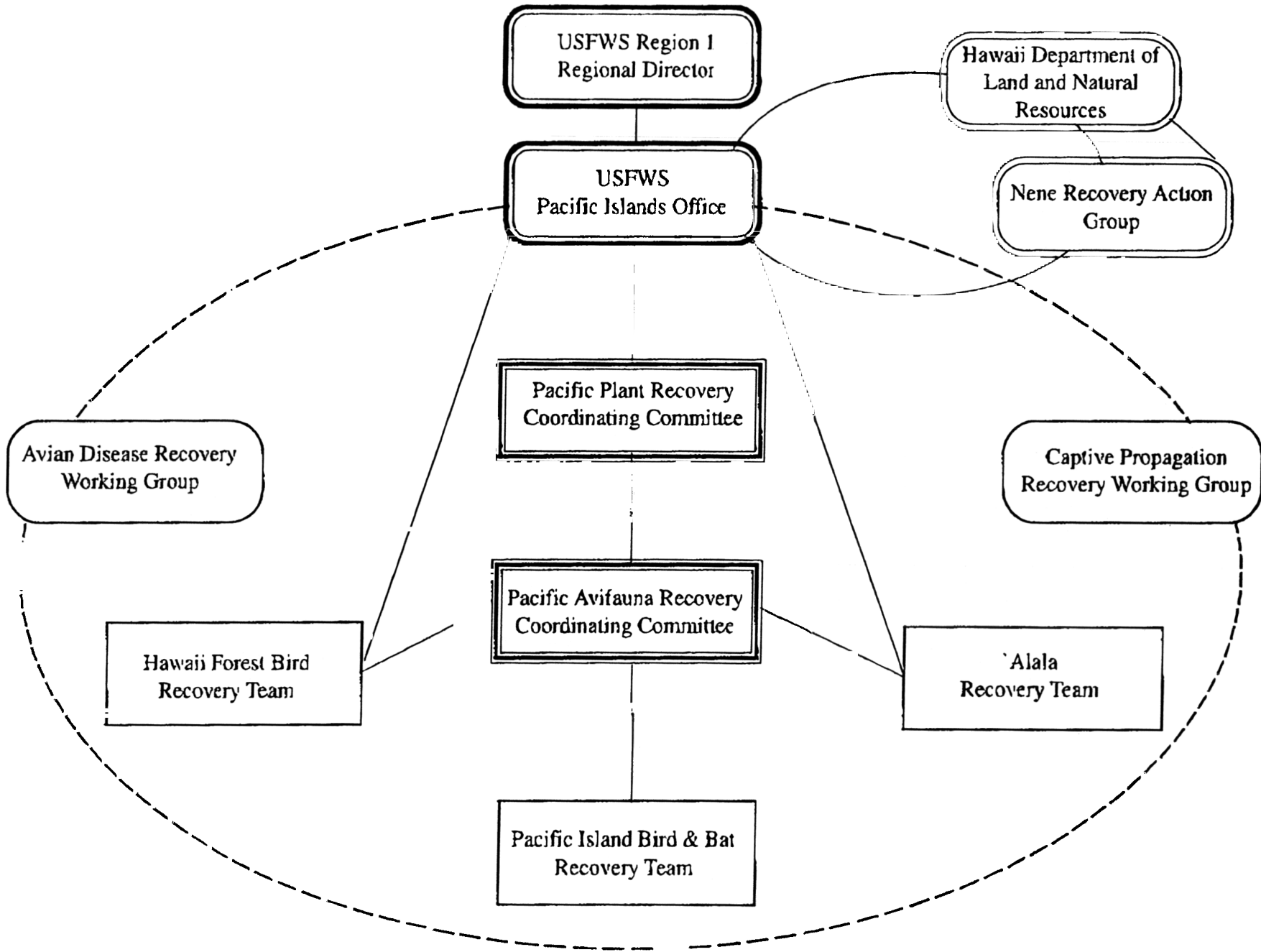
The CPRWG was established in December 1993 to advise the Service on all aspects of captive propagation as a recovery tool for Hawaii and Pacific Island birds, including: 1) evaluation of captive propagation facility options; 2) development of protocols for capturing, handling, transporting, and maintaining birds from the wild; 3) preparation of husbandry and veterinary protocols; 4) prioritization of species for captive propagation; 5) evaluation of the progress of captive propagation efforts for Pacific Island birds; and, 6) advising the PARCC on captive propagation issues. The ADRWG was established in May 1994 to guide research in avian disease and evaluate its impacts on Hawaii and Pacific Island birds.

In the meantime, the Service's Pacific Islands Office quickly realized that, with the listing of over 200 species of plants in the Hawaiian Islands and the concurrent requirement that recovery plans be written for such taxa, a recovery coordinating committee, similar to the PARCC, needed to be established for Hawaii and Pacific Plants. Due to the interdependency of recovery of the flora and fauna of the Pacific Islands, it was envisioned that this committee would be a sister committee to the PARCC and would serve a similar function with respect to guiding the Service in Ecoregion-wide plant recovery actions. Thus, in April 1993, the Regional Director appointed the Hawaii and Pacific Plant Recovery Coordinating Committee (HPPRCC) to guide all aspects of recovery for the listed, proposed, and candidate plants of the Hawaiian and other Pacific Islands.

In addition to the above-listed, Service-appointed recovery teams, coordinating committees, and working groups, the Pacific Islands Recovery Network includes a State-initiated recovery group called the Nene Recovery Action Group (NRAG). The Pacific Islands Ecoregion assists the State of Hawaii's Division of Forestry and Wildlife in coordinating the functioning of this group. It is made up of land managers from all of the 5 main Hawaiian Islands, as well as researchers, administrators, and aviculturists. This group is now working on revising the Nene Recovery Plan.

With over 200 listed and proposed plant species, over 40 listed and proposed birds, innumerable candidate invertebrates, and several bat species either listed or candidates for listing, the Pacific Islands Ecoregion's need for recovery teams to assist in guiding and implementing recovery efforts continues to increase. It is anticipated that within the next couple of years the Recovery Advisory Network for the Pacific Islands will need to be expanded to include island-by-island recovery teams for listed Hawaiian plants, as well as at least one recovery coordinating committee, or team, for invertebrate species.

Prepared by Karen Rosa (03/01/95)



Pacific Island Advisory Recovery Network

Appendix H.

Sample Technical Consultant Invitation Letter

Sample Recovery Team Appointment Letter

Sample Letter for Disbanding a Recovery Team

Sample Technical Consultant Invitation Letter

Note: When the prospective team consultant is employed by a public agency, the letter requesting the services of the employee should be addressed to either the head of the agency or the potential team consultant's supervisor. Minor wording changes will be necessary. Verbal concurrences from the prospective team consultant should be obtained before the letter is sent. Discussion of travel expenses should be tailored to the specific situation.

Dear _____ :

As you know, the [common name, followed by scientific name] was recently listed by the [U.S. Fish and Wildlife Service/National Marine Fisheries Service] as [threatened or endangered] under the Endangered Species Act of 1973, as amended. This [Regional Office/Assistant Administrator's Office] has the responsibility for developing the recovery plan for this species. To accomplish this task, we are forming a recovery team comprised of persons who have expertise regarding this or similar species, the threats it faces, and habitat management [refer to the final listing rule to specifically identify the type of expertise needed to address the threats, such as karst topography, cave systems, avian diseases, short/long-lived plant species, etc.].

We are also inviting individuals to be consultants to the recovery team. Consultants may attend recovery team meetings to provide information regarding their specific areas of expertise. You have expressed and interest in participating in the recovery process in an advisory capacity. You may participate as much, or as little, as you have the time and inclination to do so. However, only recovery team members appointed by the [Regional Director/Assistant Administrator] may exercise voting rights for the purposes of the tasks at hand.

I would like to invite you to be a consultant to the [name of recovery team]. We are also inviting [list the individuals, and their affiliations, if any] to participate as consultants to the team.

Prospective recovery team members are: [list the individuals, and their affiliations]

The recovery team is expected to complete the draft recovery plan, which will be available for public review and comment, by [state date]; the preliminary initial recovery plan will be completed by approximately [state date]. I anticipate that [state estimated number of meeting needed during the 2 ½ year period] and duration (usually 2-3 days) team meetings will be necessary to prepare the plan during preparation 2 ½ year period. The time and location of such meetings will be decided by the team. Once the recovery plan has been approved, the team may be asked to advise me on various matters regarding the recovery of the [name of species] until it can be removed from the list of *Endangered and Threatened Species*.

The first meeting of the recovery team will be [provide date (month/year)]. The Service's recovery team liaison is [state name of liaison and telephone number], who will contact you about the meeting. Please call [name of liaison] or me if you have any questions.

Please confirm your acceptance as a consultant to the [name of the recovery team] to [name of liaison] via telephone, or e-mail to [provide liaison's e-mail address]. I hope you will be able to make this contribution to the preservation of our Nation's biological heritage.

Sincerely,

Regional Director/Assistant Administrator

FISH AND WILDLIFE SERVICE
Bishop Henry Whipple Federal Building
1 Federal Drive
Fort Snelling, MN 55111

Mr. Eric Carey
Conservation Unit Botanic Garden
Department of Agriculture
Chippingham Road
P. O. Box N3704
Nassau, Bahamas

Dear Mr. Carey:

I am pleased to accept Director of Agriculture Carl F. Smith's May 11, 2000, nomination of you as a member of the Kirtland's Warbler Recovery Team. On behalf of the Secretary of the Interior, I appoint you to the team. Your membership will help maintain and improve international cooperation for the conservation of the Kirtland's warbler (*Dendroica kirtlandii*). Your unique knowledge of the bird's wintering grounds in your country will help assure that the Secretary, through the U.S. Fish and Wildlife Service (Service), will continue to receive the best scientific advice and guidance from the team for the recovery and protection of the warbler.

The recovery team meets twice yearly and includes the following biologists and foresters employed by our state and Federal agencies: Kenneth R. Ennis (Recovery Team Leader, U.S. Forest Service), Carol I. Bocetti (U.S. Geological Survey), Michael DeCapita (U.S. Fish and Wildlife Service), Donald Hennig (Michigan Department of Natural Resources), Philip W. Huber (U.S. Forest Service), John R. Probst (U.S. Forest Service), Ray Rustem (Michigan Department of Natural Resources), Michael Tansy (U.S. Fish and Wildlife Service), and Jerry Weinrich (Michigan Department of Natural Resources). With regards to expenses for your travel to team meetings and other related activities, we understand that our private cooperators are attempting to finance your travel needs. The U.S. Fish and Wildlife Service will attempt to assist in this effort, provided funds are available. The next recovery team meeting will be held July 10-11, 2000, in Mio, Michigan. You will receive more specific information from Mr. Ennis regarding that meeting.

The Service's liaison to the team is Mr. Michael DeCapita. Please confirm your acceptance by contacting Mr. DeCapita at 517-351-6274 or e-mail to: mike-decapita@fws.gov. Please contact Mr. DeCapita or me if you have questions.

I extend my thanks and congratulations to you for consenting to serve as a team member and wish you success in meeting the challenges that lie ahead.

Sincerely,

Regional Director

FWS/AES/ESO-TE

Memorandum

To: (See Distribution)

From: Regional Director, Region 3

Subject: Disbanding of the Great Lakes and Northern Great Plains Piping Plover Recovery Team

Over the past year, the Service has made several Regional Office responsibility modifications pertinent to the inland piping plover (*Charadrius melodus*) populations. The recovery implementation lead was divided between Regions 3 and 6 in June 1996, and the recovery plan development lead was divided between the two Regions in February 1997. Dividing the lead responsibilities for the populations was necessary to address each populations' specific biological concerns and recovery plan issues.

As a means to enhance coordination with those affected by, interested, and knowledgeable about plover recovery activities and issues, Region 6 established the Piping Plover Recovery Implementation Team earlier this year, which will provide advice and address recovery and management issues pertaining to the Northern Great Plains plover population. Region 3 has been working with a group of experts and the Recovery Team for the State of Michigan to address issues specific to the Great Lakes population. These actions will assist Regions 6 and 3 Ecological Services Field Office staffs in developing revised recovery plans for each population. Additionally, both Regions will also utilize the expertise of the recently formed International Piping Plover Coordination Group.

In view of the Service's reorganization of its inland piping plover recovery activities, a joint Great Lakes and Northern Great Plains Piping Plover Recovery Team is no longer appropriate or necessary. Therefore, this letter constitutes my decision to disband the Great Lakes and Northern Great Plains Piping Plover Recovery Team. This action does not diminish nor discredit those persons who served as Recovery Team members. They all made monumental contributions to the two piping plover populations, and their dedication, commitment, and contributions toward plover recovery issues in the Midwest and throughout the country are certainly appreciated. Instead, it reflects a greater commitment on the part of the Service to move piping plover recovery planning and implementation to field stations, where we believe additional resources can

be brought to bear on the problems the species faces. We look forward to their continued interest in participating in this new approach to piping plover recovery.

Distribution: FWS, R6, Pierre, SD, Field Office (Attn.: Field Supervisor)
FWS, R5, Great Meadows NWR (Attn.: Anne Hecht)
FWS, R1, 2, 4, 5, 6 ES Regional Office TE, Chiefs
FWS, R3, ARD ARW/GEO-1
FWS, R3, ARD AES/GEO-2
FWS, R3, ARD AF/GEO-3

Appendix I.

DRAFT 8/23/01 Hawaiian Monk Seal Recovery Team Terms of Reference - 2001

Introduction

The Hawaiian monk seal (*Monachus schauinslandi*) is the only endangered marine mammal that is found completely within U. S. jurisdiction. The National Marine Fisheries Service (NMFS) is responsible for its conservation and recovery. NMFS is also responsible for the development of a Recovery Plan (RP) through the establishment of the Hawaiian Monk Seal Recovery Team (HMSRT), which also provides guidance for the implementation of actions designed to enhance the recovery of the species.

Within NMFS, the SW Region¹ has lead responsibility for activities related to recovery planning and implementation. The Office of Protected Resources provides assistance as needed, concurs on the terms of reference and membership of the HMSRT, concurs on draft and final RPs and collaborates with regional and center staff on annual or periodic oversight of the recovery effort.

A major role of the HMSRT will be to provide a draft revised recovery plan, with a strong emphasis on management measures. The RP may require modification when new information is obtained or unexpected conservation issues arise. Under the Endangered Species Act, an RP includes, at minimum, a description of the site specific management actions needed for conservation and recovery; objective and measurable criteria defining recovery; and estimates of the time and cost required to implement the recovery measures. One of the NMFS policies that affects the recovery planning process is the requirement that recovery plans are to be developed and implemented in a manner that will minimize the social and economic impacts consistent with timely recovery of listed species and/or critical habitat (59 FR 34272).

Purpose and Objectives

The purpose of the Terms of Reference is to provide guidelines for developing, coordinating and implementing a plan for the recovery of the endangered Hawaiian monk seal. The objectives of the Terms of Reference are to: 1) Define the roles and composition of the HMSRT, 2) Describe

¹The FY2002 Senate appropriation bill would direct funds to the Pacific Islands Area Office from the Southwest Region to address administrative costs associated with the transition of the Pacific Islands Area Office to become the Western Pacific Regional Office. If and when that transition occurs, responsibility for Hawaiian monk seals would transfer from the Southwest Region to the Western Pacific Region. Accordingly, references to the Southwest Region, Southwest Regional Administrator, and Pacific Islands Area Office in this document would be changed to Western Pacific Region or Western Pacific Regional Administrator, as appropriate.

the formation and duties of sub-committees, 3) Define the roles and responsibilities a Recovery Plan Coordinator (RPC), and 4) Detail the responsibilities of NMFS.

Hawaiian Monk Seal Recovery Team

1. Description of role

The role of the HMSRT is to advise the Southwest Regional Administrator (SWRA) on issues concerning the conservation and recovery of the endangered Hawaiian monk seal, in particular, developing and overseeing the implementation of a revised RP. The SWRA identifies specific functions of the HMSRT and determines the schedule for completing assigned tasks. HMSRT responsibilities include reviewing, updating, and revising the RP; prioritizing RP activities; and providing guidance for and overseeing the implementation of recovery actions. HMSRT input may involve evaluating research and management programs, assessing the efficacy of specific recovery efforts, evaluating species status and listing classification when appropriate, and recommending new or emergency actions needed to enhance the recovery of the species. A revised RP will be submitted to the SWRA for approval and adoption. All HMSRT input and recommendations to the SWRA do not necessarily represent the views of NMFS and are independent of the Service.

The HMSRT is expected to be convened indefinitely and will periodically review the RP and supplemental work plans to advise NMFS if revisions are required. The HMSRT will also receive and review status reports on the progress made by NMFS and other collaborators involved in the implementation of the RP.

HMSRT meetings will be conducted annually and are generally open to the public when facilities allow; however, private working sessions of the HMSRT or its sub-committees may occur at the discretion of the Chair.

2. HMSRT Composition

The HMSRT is to be composed of experts in science and resource management and may include local, State, Federal, and non-government entities interested in the recovery of the endangered Hawaiian monk seal. HMSRT membership will consist of individuals appropriately divided between those with expertise in science and management. Total team membership will consist of approximately 10 individuals.

The HMSRT science members may include individuals with experience in the following appropriate areas of scientific expertise: (1) research experience with Hawaiian monk seals or closely related species, (2) knowledge of the Hawaiian monk seal ecosystem, (3) knowledge of threats to the Hawaiian monk seal, and (4) knowledge of related disciplines involving the conservation, management, and recovery of endangered species.

The HMSRT management members will consist of individuals selected on the basis of knowledge essential for developing recovery actions and schedules, and for formulating plans that maximize the compatibility of recovery actions and social/economic interests. The management members may come from pertinent entities such as conservation organizations, fisheries, and federal, state, or local government agencies and will emphasize site-specific management measures in the RP.

The HMSRT will meet annually to review the status of the Hawaiian monk seal, review progress in the implementation of the RP and to evaluate efforts to recover the species. Additional meetings may be held in emergency situations. The HMSRT may choose to meet more frequently to address issues of concern or to complete tasks identified by the SWRA (e.g., revise RP). The final draft of the RP will be submitted to the SWRA for NMFS approval. The SWRA may request the HMSRT to provide periodic input on the impact of Hawaiian monk seal recovery actions on all stakeholders.

The SWRA may disband the team or replace or reappoint members of the HMSRT at any time.

Subcommittees

The HMSRT, in coordination with the RPC, may establish subcommittees to advise the Team on specific issues (e.g., scientific questions, implementation of the RP, institutional relations, local/State planning, etc). A qualified member of the HMSRT will lead each of these subcommittees to ensure their input is consistent with the goals and objectives of the RP.

Recovery teams are specifically exempted from the requirements of the Federal Advisory Committee Act (FACA). Subcommittees are also exempt from FACA requirements as long as they report to the HMSRT.

3. Terms of Service

HMSRT members are advised to avoid conflicts of interest and other ethical problems in accordance with the following guidelines (April 2, 1992, Dept. of Commerce, Office of General Council).

“Members should disqualify themselves from advising on a matter which has direct and predictable affect on their personal financial matters, those of a client, or those of a company by which they are employed, apart from matters which are inherent in their employment or outside affiliation.

Members should not solicit business for themselves or their firms or seek an economic advantage based on their position on the HMSRT.

Members should hold any non-public information obtained as a result of their services on the HMSRT in confidence and ensure that it is used exclusively for official purposes.

Members should not use or permit the use of such information for their own private gain or the gain of another person.

Members should not use the resources available to the HMSRT for the purposes of assisting a political campaign, or for any campaign business.”

Members will have a fixed term of 3 years, which will be staggered. Initially members will be offered 3, 4 or 5 year terms so that one-third of each sub-discipline (science, management) will be reappointed annually.

4. NMFS Responsibilities

NMFS will oversee and coordinate all HMSRT activities and will be responsible for: 1) establishing and disbanding the HMRST, and subcommittees; 2) defining Team functions (including the revision of Terms of Reference for the HMRST) and establishing schedules for completing products; 3) approving, adopting, and amending recovery plans; 4) transmitting Team recommendations to other agencies and organizations, as appropriate; and 5) overseeing team logistics and approving meeting/travel requests.

Recovery Plan Coordinator

The SWRA will appoint the RPC to serve as a liaison between NMFS/SWRA and the HMSRT. The RPC is responsible for coordinating the development of the draft and final RP. The RPC also monitors and promotes implementation of the RP and serves as the point of contact between the HMSRT and the SWRA or designee(s). Summaries of all HMSRT meetings will be sent by the RPC to HMSRT members, the SWRA, and the Director of the Office of Protected Resources, and others as appropriate. The RPC will also distribute summaries of research and management actions taken to implement the RP.

The selection of a permanent RPC is a high priority action for NMFS. Until an appropriate individual can be identified and selected the SWRA has appointed a 90-day interim RPC (Mr. Alan Everson NMFS, PIAO) to initiate this process and complete the following tasks:

1. Revise and finalize RT Terms of Reference
2. Complete membership list, contact prospective members, draft letters of invitation for the SWRA
3. Formulate a strategic view on the process from formation of the team to implementation of the RP
4. Develop an outreach program related to updating/revising the RP and obtaining participation of local affected groups in recovery efforts and planning.
5. Plan and schedule the first meeting of the team

Funding

NMFS will provide funds for HMSRT member travel expenses for meetings and other administrative costs as appropriate; however, NMFS will not pay salaries to members or advisors. NMFS will provide administrative assistance such as photocopying, procurement of supplies, and expenses related to the printing and distribution of materials. In addition, NMFS may contract for services to the HMSRT or outside experts to facilitate the drafting and the assembling of the RP and/or other HMSRT documents.

Appendix J.

FWS Policies on

Assembling an Administrative Record

United States Department of the Interior
FISH AND WILDLIFE SERVICE

Washington, D.C. 20240

IN REPLY REFER TO:
FWS/PDM

Memorandum

To: All Fish and Wildlife Service Employees

From: Director /s/ Jamie Rapport Clark

FEB 14, 2000

Subject: Compiling an Administrative Record

An administrative record is the paper trail that documents our decision-making process and the basis for our decisions. An incomplete record may affect our ability to defend our decisions if we are challenged in court.

All managers as well as any employee who could be involved in establishing an administrative record must read and follow the attached guidance from the Solicitor's Office and the Department of Justice. If you have questions about administrative record requirements, contact your Solicitor's Office.

We will incorporate the attached guidance into the Fish and Wildlife Service Manual.

Attachment

MEMORANDUM

JAN 7, 2000

To: Director, U.S. Fish and Wildlife Service

From: Assistant Solicitor, Fish Wildlife and Environmental Protection Branch
/s/ Pete Raynor

Subject: Guidance on Compiling an Administrative Record

The first, and sometimes most difficult, part of a lawsuit is assembling the administrative record - the collection of documents that reflects the Service's decision-making process. These are the documents that a judge will review to determine whether that process and the Service's final decision were proper. This memo explains what the administrative record is, summarizes major points to consider when assembling the record, and explains why an accurate and thorough record is crucial. Attached is guidance provided by the Department of Justice, which gives more detailed advice on how to compile an administrative record.

The requirement to provide an administrative record in the course of litigation comes from the Administrative Procedure Act, which states that judges must review agency actions based on the "whole record." As explained further in the attached guidance, this has been interpreted to mean all documents and materials directly or indirectly considered by persons involved in the decision-making process. Thus, the record should include:

- ★ All documents and materials that were before or available to persons involved in the decision at the time the decision was made.
- ★ All documents that were considered or relied upon by persons involved in the decision.
- ★ Documents that relate to both the substance and procedure of making the decision.
- ★ All pertinent documents regardless of whether they favor the decision that was finally made, favor alternatives other than the final decision, or express criticism of the final decision. Documents should never be withheld just because they reflect negatively on the decision that was finally made.
- ★ Documents that may end up later being redacted or removed from the record on the basis of privilege.

The record should not include:

- ★ Documents associated with, but not part of, the decision-making process, such as fax cover sheets.
- ★ Various versions of a document where the differences among the drafts reflect minor editing changes. Include drafts, however, where hand-written notes or changes from one version to the next reflect the evolving process.
- ★ E-mails and other correspondence that discuss the agency action generally but do not reflect decision-making considerations by staff (for example, communications between biologists whose work may be affected by the outcome of the decision-making process but who are not involved in the decision itself).

Providing a thorough and accurate record to the court allows the Service to show a judge that it fully considered all relevant factors during the decision-making process. While a judge may allow the Service to later supplement a record with documents that were overlooked during the initial compilation, we lose credibility when we have to add documents that should have been included from the beginning. At worst, an incomplete record may affect the Service's ability to defend its final decision by signaling to the court that the agency's decision was not based on a reasoned consideration of all important information.

The importance of a complete and accurate record underscores the need not to wait until a lawsuit is filed before collecting all documents before the Service during the decision-making process. Any and all documents that are considered should be collected and organized as the decision-making process evolves. In the new world of e-mail and the Internet, correspondence that reflects the decision-making process should be printed out and stored with memos, research papers, and other documents. Where options are weighed or decisions made during meetings and conference calls, a document such as a memo to the file will memorialize how the decision was reached and show that the agency fully considered all aspects of the situation before making the decision. Finally, the person assigned the responsibility of compiling and organizing the administrative record should remember to check with all other persons and offices - including the Washington office - that may have documents that should be included in the record.

Putting together a good administrative record is complicated, and questions will always arise over whether or not a particular document belongs in the record. We strongly recommend that managers and anyone who could be involved in assembling an administrative record read this memo and the attached guidance from the Department of Justice. That guidance was put together specifically because of the importance of building a good administrative record when defending agencies such as the Service. It is imperative that Service staff understand and follow this guidance. Any Service staff that have questions about administrative record requirements in general or any document in particular should contact the Solicitor's Office for assistance.

cc: Regional Solicitors

Dated: January 1999

Guidance to Federal Agencies on Compiling

The Administrative Record

Introduction

Under the Administrative Procedure Act (APA), a court reviews an agency's action to determine if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (A). In making this determination, a court evaluates the agency's whole administrative record. The administrative record is the paper trail that documents the agency's decision-making process and the basis for the agency's decision.

The APA governs judicial review of a challenged agency decision. However, several statutes specify what documents and materials constitute an administrative record, e.g., 42 U.S.C. § 7607(d)(7)(A) (provision states what materials will constitute the record for the purpose of judicial review of certain enumerated types of rulemaking issued under the Clean Air Act); 42 U.S.C. § 9613(j) and (k) (CERCLA). At the outset, be sure to determine whether a statute other than the APA applies in the case. In addition, regulations may govern how to assemble a record. See, e.g., 40 C.F.R. 300.800 -300.825 (CERCLA); 40 C.F.R. Part 24 (RCRA Corrective Action). See also FRAP Rules 16 and 17 (record on review or enforcement and filing of the record).

The purpose of this memorandum is to provide guidance to agencies in compiling the administrative record of agency decisions other than a formal rulemaking or an administrative adjudication. Optimally, an agency will compile the administrative record as documents and materials are generated or received in the course of the agency decision-making process. The record may be a contemporaneous record of the action. However, the administrative record may be compiled by the agency after litigation has been initiated. An agency employee should be designated to be responsible for compiling the administrative record. That individual will be responsible for certifying the administrative record to the court. S/he may keep a record of where s/he searched for the documents and materials and who was consulted in the process of compiling the administrative record.

It is critical for the agency to take great care in compiling a complete administrative record. If the agency fails to compile the whole administrative record, it may significantly impact our ability to defend and the court's ability to review a challenged agency decision.

1. General Principles for Compiling the Administrative Record

The administrative record consists of all documents and materials directly or indirectly

considered by the agency decision maker in making the challenged decision. It is not limited to documents and materials relevant only to the merits of the agency's decision. It includes documents and materials relevant to the process of making the agency's decision.

- # Include documents and materials whether they support or do not support the final agency decision.
- # Include documents and materials which were before or available to the decision-making office at the time the decision was made.
- # Include documents and materials that were considered by or relied upon by the agency.
- # Include documents and materials that were before the agency at the time of the challenged decision, even if they were not specifically considered by the final agency decision-maker.
- # Include privileged and non-privileged documents and materials. (See section 4).

2. Where To Find The Documents and Materials That Comprise The Administrative Record

The agency should identify an agency employee to be responsible for compiling the administrative record. The identified agency person should be responsible, careful, and prepared to provide an affidavit. S/he should keep a record of where s/he searched for documents and who was consulted in the process. S/he should conduct a thorough search for the purpose of compiling the whole record, including the following:

- # Contact all agency people, including program personnel and attorneys, involved in the final agency action and ask them to search their files and agency files for documents and materials related to the final agency action. Include agency people in field offices.
- # Contact agency units other than program personnel, such as congressional and correspondence components.
- # Where personnel involved in the final agency action are no longer employed by the agency, search the archives for documents and materials related to the final agency action. A former employee may be contacted for guidance as to where

to search.

- # Determine whether there are agency files relating to the final agency action. If there are such files, search those files.
- # If more than one agency was involved in the decision- making process, the lead agency should contact the other agencies to be sure the record contains all the documents and materials that were considered or relied on by the lead agency.
- # Search a public docket room to determine whether there are relevant documents or materials.

3 . What Documents and Materials To Include In The Administrative Record

a) Types of materials:

- # Documents that are to be included in the administrative record should not be limited to paper but should include other means of communication or ways of storing or presenting information, including e-mail, computer tapes and discs, microfilm and microfiche. See 36 C.F.R. Chapter XII, subchapter B (electronic records). The term should include data files, graphs, charts and handwritten notes. Do not include personal notes, meaning an individual's notes taken at a meeting or journals maintained by an individual, unless they are included in an agency file. An agency file is determined by agency control, possession and maintenance.

b) Kinds of Information:

- # Include all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, even though the final decision-maker did not actually review or know about the documents and materials.
- # Include policies, guidelines, directives and manuals.
- # Include articles and books. Be sensitive to copyright laws governing duplication.
- # Include factual information or data.

- # Include communications the agency received from other agencies and from the public, and any responses to those communications. Be aware that documents concerning meetings between an agency and OMB should be included but may qualify, either partially or fully, for the deliberative process privilege.
- # Include documents and materials that contain information that support or oppose the challenged agency decision.
- # Exclude documents and materials that were not in existence at the time of the agency decision.
- # As a general rule, do not include internal “working” drafts of documents that were or were not superseded by a more complete, edited version of the same document. Generally, include all draft documents that were circulated for comment either outside the agency or outside the author's immediate office, if changes in these documents reflect significant input into the decision-making process. Drafts, excluding "working" drafts, should be flagged for advice from the DOJ attorney or the Assistant United States Attorney (AUSA) on whether: 1) the draft was not an internal “working” draft; and 2) the draft reflects significant input into the decision-making process.
- # Include technical information, sampling results, survey information, engineering reports or studies.
- # Include decision documents.
- # Include minutes of meetings or transcripts thereof.
- # Include memorializations of telephone conversations and meetings, such as a memorandum or handwritten notes, unless they are personal notes.

4. How To Handle Privileged Documents and Materials

Generally, the administrative record includes privileged documents and materials and documents and materials that contain protected information. However, once the record is compiled privileged or protected documents and materials are redacted or removed from the record.

The agency should consult with the agency counsel and the DOJ attorney or the AUSA as to the type and the extent of the privilege(s) asserted. Be sensitive to the relevant privileges and prohibitions against disclosure, including, but not limited to, attorney-client, attorney work product, Privacy Act, deliberative or mental processes, executive, and confidential business information.

If documents and materials are determined to be privileged or protected, the index of record must identify the documents and materials, reflect that they are being withheld, and state on what basis they are being withheld.

5. How to Organize the Administrative Record

- # Organize the documents and materials in a logical and accessible way.
- # Organize the documents and materials in chronological order and/or by topic.
- # Documents and materials that do not fit into a chronological order may be separated by category, e.g., internal policies, guidelines or manuals.
- # After a DOJ attorney or an AUSA has had the opportunity to review the administrative record for completeness and organization, it may be useful to bates stamp or to number each item. A DOJ attorney or an AUSA may review the documents and materials the agency decided were not contained in the administrative record.
- # Prepare an index to the administrative record.
- # Index should identify each document and material by the bates stamp number or document number and a brief description of the document or material, e.g., “memorandum dated June 5, 1997 from Mary Smith to EPA Administrator Jones regarding June 6, 1997 meeting agenda.” If a document or material is being withheld based on a privilege or prohibition, state the privilege or prohibition.
- # The agency must certify the administrative record.¹ Certificate language should reflect how the agency person who was responsible for compiling the record has personal knowledge of the assembly of the administrative record. Attached are sample certificates. Neither a DOJ attorney nor an AUSA should certify the record to avoid having them be a possible witness in the case.
- # The DOJ attorney or the AUSA must consult the local rules of the court in which the matter is pending to determine how to file the administrative record with the court. If the local rules are silent on this issue, the DOJ attorney or the AUSA can address the issue with the parties and the court. For example, it may be appropriate to file only the index with the court and to provide the

parties with copies of the index and the opportunity to review the record or to file the parts of the record that the parties will rely on as grounds for their motions for summary judgment. The U.S. Attorney's Office in the jurisdiction in which the matter is pending should always be consulted.

¹ If the agency fails to certify the record, the government may not be able to file a motion for summary judgment.

6. Important For Court To Have The Whole Administrative Record

- # A court reviews the agency action based on the whole administrative record before the agency at the time the decision was made.
- # The whole administrative record allows the court to determine whether the agency's decision complied with the appropriate APA standard of review.
- # All agency findings and conclusion and the basis must appear in the record.
- # The administrative record is the agency's evidence that its decision and its decision-making comply with relevant statutory and regulatory requirements.
- # A court may remand the matter where the agency's reasoning for its decision is not contained in the administrative record,

7. Consequences of Incomplete Administrative Record

- # If record is incomplete, government may be permitted to complete the record but, by doing so, you also may raise questions about the completeness of the entire record.
- # If the court decides the record is not complete, it should remand the matter to the agency. However, it may allow extra-record discovery, including depositions of agency personnel, and may allow court testimony of agency personnel.
- # Generally, although it may vary from circuit to circuit, courts will allow discovery when a party has proffered sufficient evidence suggesting:
 - bad faith;
 - improprieties may have influenced the decision-maker; or
 - agency relied on substantial materials not included in the record.

A party must make a strong showing that one of these exceptions applies before a court will allow extra-record inquiry.

8. Supplementation of the record

- # When the administrative record fails to explain the agency's action, effectively frustrating judicial review, the court may allow the agency to supplement the record with affidavits or testimony.

- # Be aware once the government supplements with affidavits or testimony, opposing party might depose your witnesses and/or submit additional affidavits or testimony.

- # Be aware if agency counsel becomes a potential witness, it may be appropriate to screen the agency counsel from participation in the litigation. ABA Model Rule of Professional Responsibility 3.7.

Conclusion

When an agency must defend a final agency action before a court, it should take great care in preparing the administrative record for that decision. It is worth the effort and may avoid unnecessary and/or unfortunate litigation issues later on.

This memorandum provides only internal Department of Justice guidance. It does not create any rights, substantive or procedural, which are enforceable at law by any party. No limitations are hereby placed on otherwise lawful prerogatives of the Department of Justice or any other federal agency.

Attachments

Appendix K.

Sample Recovery Outlines



United States Department of the Interior

FISH AND WILDLIFE SERVICE
300 Westgate Center Drive
Hadley, MA 01035-9589



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MM.
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In Reply Refer To:
FWS/Region 5/ES-TE

MAR - 8 2001

To: Director (AES)
From: Acting Regional Director, Region 5
Subject: Atlantic Salmon Recovery Outline

The National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) Northeast Regional offices have completed the attached recovery outline for the recently listed Distinct Population Segment (DPS) of Atlantic salmon. Mark Minton, Atlantic salmon recovery specialist with NMFS, coordinated preparation of the document, with input from our Fisheries and Endangered Species divisions. The NMFS and FWS are now proceeding jointly with recovery planning for the DPS. If you have any questions, please call Paul Nickerson, Endangered Species Coordinator, at 413-253-8615.

Malarker

Attachment

**Recovery Outline for the Gulf of Maine
Distinct Population Segment (DPS) of Atlantic Salmon (*Salmo salar*)**

Species Name: Atlantic salmon (*Salmo salar*)

Date Listed: December 18, 2000

Listing Factors:

(1) The Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range

Demonstrated and potential impacts to Atlantic salmon habitat within the DPS watersheds result from the following causes: (1) water extraction; (2) sedimentation; (3) obstruction to passage including those caused by beaver, debris dams and poorly designed road crossings; (4) input of nutrients; (5) chronic exposure to herbicides, fungicides and pesticides; (6) elevated water temperatures from processing water discharges; and (7) removal of vegetation along streambanks.

(2) Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Under current fisheries regulations, no commercial or recreational harvest of DPS Atlantic salmon is allowed in state or federal waters in the US. Similarly, Canada, also prohibits all commercial harvest of Atlantic salmon off Labrador and Newfoundland. In 1999, Greenland signed a two-year agreement to limit the fishery in West Greenland to internal use only. DPS salmon are taken in low numbers by this fishery. Additionally, a small fishery exists off St. Pierre et Miquelon, a French territory off the coast of Newfoundland. Historically, the fishery has been very limited in scope.

(3) Disease or Predation

Infectious Salmon Anemia (ISA), a serious and untreatable fish disease, was detected in the Canadian aquaculture industry for the first time in 1996. ISA has been detected in aquaculture escapees and wild fish. The occurrence of the disease has moved progressively closer to the US. Some US net pen sites in Cobscook Bay are close enough to fall within the ISA positive "quarantine zones" in Canadian waters, raising concerns about the potential for this disease to infect US aquaculture and wild salmon stocks. Detection of a new disease, Salmon Swimbladder Sarcoma (SSSV), led to the destruction of Pleasant River broodstock. There has been a significant increase in predators including seals, striped bass and comorants. The threat from predation is determined to be significant because of low numbers of adult salmon.

(4) Inadequacy of Existing Regulatory Mechanisms

Threats continue from: water withdrawals, disease, potential aquaculture impacts. Existing regulatory mechanisms either lack the capacity or have not been implemented adequately to decrease or remove the threats to wild salmon.

(5) Other natural and Manmade Factors Affecting the Species Continued Existence

Aquaculture escapees have been detected annually in DPS rivers since 1990. The first sexually mature fish were documented in 1996. In recent years, escaped aquaculture fish account for 2% to 100% of the total salmon returns to some DPS rivers. Escaped farmed salmon have the potential to disrupt the redds of wild salmon; compete

with wild salmon for food and/or habitat; interbreed with wild salmon, leading to disruption of local adaptations, threatening stock viability and lowering recruitment leading to the extinction of wild salmon populations; transfer disease or parasites to wild salmon.

Marine survival rates continue to be low for U.S. stocks of Atlantic salmon, despite recent improvement in marine environmental conditions, which impedes the recovery of the DPS. Natural mortality in the marine environment can be attributed to stress, predation, starvation, disease, parasites and abiotic factors. Sea surface temperature is thought to be an important feature of the marine environment affecting Atlantic salmon survival. Scientists have concluded that a significant proportion of the variation in recruitment or return rate is attributed to post-smolt survival. It is theorized that the transition from freshwater to the marine environment accounts for a high proportion of the total at sea mortality. However, the factors responsible for reduced post-smolt survival are not well understood.

Population Trend: Decreasing

Recovery Priority Number: 2C

This ranking, determined in accordance with the Recovery Priority Criteria at 48 FR 51985, is based on a high degree of threat, a high potential for recovery and a taxonomic classification as a species.

Lead Region/Cooperating Regions:

The National Marine Fisheries Service (NMFS), Northeast Region and the United States Fish and Wildlife Service (FWS), Region 5 are the lead regions with responsibility for preparing and implementing a recovery plan for Atlantic salmon.

Land Ownership Patterns:

Rivers that support known persistent runs of naturally reproducing Atlantic salmon are located in the State of Maine in Washington, Waldo and Franklin Counties. Forestry is the dominant land use in the five downeast watersheds (Dennys, East Machias, Machias, Pleasant and Narraguagus). International Paper Corporation, a private forestry company, is the largest landowner within the five downeast watersheds. Georgia Pacific Corporation, a private forestry company, is a major landowner in the Dennys and East Machias river watersheds. There is a mix of private state, federal and tribal lands located within Washington County. The majority of land within the Cove Brook, Ducktrap and Sheepscot watersheds is privately owned. While conservation easements exist for portions of the riparian habitat located along all DPS rivers and tributaries, the majority of these lands are privately owned.

Key Threats:

Key threats include:

- Documented adult returns declined significantly in the 1980s and remain at critically low levels of abundance;
- Critically low adult returns make the DPS especially vulnerable and genetically susceptible to threats;
- Early Juvenile abundance has increased due to fry stocking but has not resulted in a corresponding increase in parr and smolt survival rate (suggests a factor or factors within the rivers that may be negatively impacting freshwater habitat);
- Excessive or unregulated water withdrawal remains a threat;
- Continuation of the take of Atlantic salmon of U.S. origin through a directed fishery such as the internal-use only fishery in Greenland and the small fishery that exists off St. Pierre et Micquelon, a French territory off the coast of Newfoundland pose a continuing threat;

- Threat of predation is significant today because of the low numbers of returning adults and dramatic increases in some predators;
- Concern for disease has increased due to the discovery and expansion of ISA and SSSV;
- Certain existing aquaculture practices, including the use of gamets from European origin Atlantic salmon and the escape of such fish from net pen and hatchery facilities.

These threats, which were key factors in the listing determination, continue to imperil the continued existence of Atlantic salmon and will be considered during the recovery planning process.

Scope of the Recovery Effort:

Species X Recovery Unit Multi-species Ecosystem International

Recovery Plan Preparation:

The NMFS, Northeast Region and the FWS, Region 5 will initiate the preparation of the recovery plan for the Gulf of Maine DPS of Atlantic salmon in early 2001. The Services will determine the scope of the plan and the appropriate level of public and private partners in the planning process (e.g., recovery team structure: technical team/implementation team, number of public meetings/hearings etc.). The ESA establishes an 18 month time frame for preparation of a draft recovery plan with the final plan due within 2 ½ years of the listing. Primary authorship of the Recovery Plan will be the responsibility of Service staff, though State partners will be heavily involved in all phases of the planning and implementation processes. Existing documents such as the State of Maine Atlantic Salmon Conservation Plan will aid considerably in the planning effort. Outreach by the Services to State, Federal and private partners will be central to the recovery effort.

Anticipated Recovery actions:

1. **Recovery Team**
 - a. The Services anticipate appointing a Recovery Team comprised of individuals capable of advising the Services on appropriate recovery population thresholds and short- and long-term actions necessary to recover Atlantic salmon
 - b. Prepare an outline of the recovery planning and implementation process
 - c. Establish scientifically-based recovery criteria seeking the advise of the Maine Atlantic Salmon Technical Advisory Committee and other species and management experts.
 - d. Provide opportunities for public input into the recovery planning process.
 - e. Evaluate and incorporate appropriate portions of existing management plans, including the Maine Conservation Plan, into the recovery process and recovery plan.
 - f. Develop and implement watershed specific recovery plans by working with state, local and private organizations including watershed councils and industry.
2. **Protect Atlantic salmon habitat using existing laws and conservation opportunities**
 - a. Work with state agencies to evaluate best management practices and existing regulatory programs to determine their adequacy in protecting Atlantic salmon and their habitat
 - b. Consult with federal action agencies to secure adequate protection for salmon and their habitat
 - c. Utilize Section 5 of the ESA to protect Atlantic salmon habitat through easements and/or acquisitions.
 - d. Assess the potential to develop an ESA Section 6 (c)(1) Cooperative Agreement with the State of Maine, Atlantic Salmon Commission to allow for them to compete for Federal funds to carry out the recovery of the species.

- e. Assess the potential use of and/or need for Habitat Conservation Planning (section 10(a)(1)(B)) for non-federal actions (i.e., agricultural practices) and affected parties (i.e., private landowners)
 - f. Identify, implement and evaluate habitat restoration strategies and approaches to restore degraded habitat for Atlantic salmon.
 - g. Identify and evaluate critical habitat (physical, chemical and biological) for all life stages of Atlantic salmon in freshwater, estuarine and marine environments.
3. **Stock enhancement and recovery efforts**
- a. Utilize fish cultural production techniques to enhance the recovery rate of wild populations, using breeding protocols designed to avoid negative impacts to the genetic structure of the DPS
4. **Population assessment and monitoring activities**
- a. Evaluate factors affecting estuarine and near-shore ocean survival of smolts and postsmolts
 - b. Evaluate factors affecting freshwater survival
 - c. Evaluate factors affecting smolt production of the Gulf of Maine distinct population segment of Atlantic salmon
 - d. Evaluate effectiveness of river-specific stocking efforts utilizing genetic techniques, tagging, tracking and other means
 - e. Develop a Population Viability Analysis (PVA) to evaluate the relative impact of mortality sources on long-term prospects for restoration and recovery of Atlantic salmon stocks to help establish recovery goals for each river and the DPS.
5. **Monitor and minimize threats posed by existing aquaculture operations**
- a. Work with state and federal agencies and industry to develop protocols and methods to minimize potential threats posed to wild salmon by aquaculture industry practices and facilities.
6. **Investigate and monitor the threat posed to Atlantic salmon by disease**
- a. Assist state, federal and private salmon culture entities in order to maintain and monitor the health of aquatic resources and to help ensure that wild and cultured salmon are not adversely impacted by the introduction of infectious agents.
 - b. Support research conducted by state, federal and private groups to gather biological data on infectious agents and their interactions with salmonid and non-salmonid hosts
 - c. Monitor emerging disease threats by monitoring disease events occurring in Atlantic salmon culture facilities in other countries to help identify potential problems and provide an opportunity to implement preventive measures
7. **Commercial fisheries beyond the jurisdiction of the United States**
- Pursue efforts through international fora such as NASCO, to reduce threats to Atlantic salmon posed by fisheries in Greenland and St. Pierre et Micqualon
8. **Determine extent of threat posed by predation (e.g., marine mammals, seabirds, fish)**
- a. Support research designed to assess the level of threats posed by interactions between wild salmon and potential predators (i.e., seals, cormorants, striped bass etc).
 - b. Pursue means to reduce any threats determined to be substantial.

9. Conduct education and outreach activities

- a. Establish webpage to provide information on the recovery plan process
- b. Conduct other outreach activities to the fullest extent possible within available resources such as hosting (public meetings, developing and presenting educational materials and programs for the schools and other groups), and participating in conferences addressing recovery of the Atlantic salmon.
- c. Insure that appropriate personnel in both Services are kept up to date as planning and implementation proceed.

Conclusion: The above actions are believed to be integral to the development and implementation of a recovery plan for Atlantic salmon. The recovery plan will likely incorporate these and other actions identified during the recovery planning process.

Approval:

MaParke
ACTING
Regional Director, Region 5
U.S. Fish and Wildlife Service

Regional Director, Northeast Region
National Marine Fisheries Service

REVISED RECOVERY OUTLINE (Version: May 30, 2001)
O`ahu `elepaio from Hawai`i

Species Name:

Common: O`ahu `elepaio Scientific: *Chasiempis sandwichensis ibidis*

Date Listed: May 18, 2000

Population Trend: Decreasing

Recovery Priority Number: 3

Lead Region/Field Office: 1/Honolulu

Land Ownership Pattern:

- **Federal:** Major parcels include U.S. Naval Magazine Pearl Harbor Lualualei Branch, U.S. Army Schofield Barracks, U.S. Army Mākua Military Reservation, U.S. Army Kawaiiloa Training Area, and U.S. Fish and Wildlife Service O`ahu Forest National Wildlife Refuge.
- **State of Hawai`i:** Major land parcels include Honolulu Watershed Forest Reserve (FR), Waimānalo FR, `Ewa FR, Waiāhole FR, Kaipapa`u FR, Nānākuli FR, Wai`anae Kai FR, Mokulē`ia FR, Mākua-Kea`au FR, Kuaokalā FR, Pūpūkea-Paumalū FR, Pahole Natural Area Reserve (NAR), Ka`ala NAR, Kahana Valley State Park, and Keāiwa Heaiau State Recreation Area.
- **City and County of Honolulu:** Major land parcels include upper Mākaha Valley and portions of Mānoa, Pālolo, and Wailupe valleys.
- **Private:** Major land owners include Kamehameha Schools (north Hālawa Valley, Kapakahi Gulch, Wai`alae Nui Ridge and Gulch), James Campbell Estate (Honouliuli Preserve), Samuel Damon Estate (Moanalua Valley), Waiāhole Irrigation and SMF Enterprises (Waianu and Waikāne Valleys), Queen`s Medical Center (Tripler Ridge and south Hālawa Valley), Bishop Museum (Kalauao Valley), James Pflueger (upper Pia Valley), Benjamin Cassiday (lower Pia Valley), Hawai`i Humane Society (Kūpaua Valley), and Joseph Paiko Trust (western Kuli`ou`ou Valley).

Scope of the Recovery Effort: Species/Multispecies. The revised Hawaiian Forest Bird Recovery Plan will include 19 listed species, 1 candidate species, and 1 species of concern, but the `elepaio is the only species on O`ahu for which recovery efforts beyond continued surveying are planned. The recovery goals, criteria, and actions specified in this revised recovery outline reflect the Hawaiian Forest Bird Recovery Team`s discussions through May 4, 2001.

Listing Factors/Current Threats:

- **Small Population Size** - The current population of O`ahu `elepaio is small, approximately 1,982 birds distributed in six core subpopulations and several smaller subpopulations (Table 1, Figure 1; VanderWerf *et al.* 2001). The only previous population estimate (200-500 birds; Ellis *et al.* 1992) was not accurate because little information was available when the estimate was made. The number of birds is divided about evenly between the Wai`anae Mountains in the west and the Ko`olau Mountains in the east, with three core subpopulations in each mountain range. At least seven tiny remnant subpopulations consisting entirely of males remain in both the Wai`anae and Ko`olau mountains (Table 1), but because there is no chance of reproduction and rescue by immigration is unlikely, these relicts probably will disappear in a few years as the last adults die.

The breeding population, about 1,774 birds, is less than the total population because of a male-biased sex ratio; only 84% of territorial males have mates in large populations ($n = 147$, E. VanderWerf unpubl. data), and many small, declining populations contain mostly males (Table 1). The genetically effective population size is probably even smaller than the breeding population because of the geographically fragmented distribution (Grant and Grant 1992). Natal dispersal distances in `elepaio are usually less than one kilometer (0.62 miles) and adults have high site fidelity (VanderWerf 1998), but most `elepaio populations on O`ahu are separated by many kilometers of unsuitable urban or agricultural land. There may be some exchange among subpopulations within each mountain range, but dispersal across the extensive pineapple fields that separate the Wai`anae and Ko`olau mountains is unlikely, and most subpopulations probably are isolated. The current distribution superficially appears to constitute a metapopulation (Hanski and Gilpin 1997), but this would be true only if dispersal occurred among subpopulations. There have been no observations of banded `elepaio moving among subpopulations. The genetic population structure is unknown.

- **Decline in Range** - Despite its adaptability and tolerance of disturbance, the O`ahu `elepaio has declined seriously and has disappeared from many areas where it was formerly common (Shallenberger 1977, Shallenberger and Vaughn 1978, Williams 1987, VanderWerf *et al.* 1997, VanderWerf *et al.* 2001). Before humans arrived, forest covered about 127,000 hectares (ha) on O`ahu (Figure 2; Hawai`i Heritage Program 1991), and it is likely that `elepaio once inhabited much of that area. `Elepaio are generalized in habitat selection and are able to forage and nest in a variety of plant species (Conant 1977, VanderWerf 1993, 1994, 1998). Reports by early naturalists indicate that the O`ahu `elepaio once had a “universal distribution” (Perkins 1903), occurred “from the sea to well up into the higher elevations” (Bryan 1905), and was “abundant in all parts of its range” (MacCaughy 1919).

The aggregate geographic area occupied by all current subpopulations is approximately 5,657 ha (13,792 ac; Table 1). The O`ahu `elepaio thus currently occupies only about 4% of its original prehistoric range, and its range has declined by roughly 96% since humans arrived in Hawai`i 1,600 years ago (Kirch 1982). In 1975, `elepaio inhabited approximately 20,900 ha

on O`ahu, almost four times the area of the current range (Figure 2, VanderWerf *et al.* 2001). The range of the O`ahu `elepaio has thus declined by roughly 75% in the last 25 years.

- **Reasons for Decline and Current Threats** - Much of the historical decline of the O`ahu `elepaio can be attributed to habitat loss, especially at low elevations. Fifty-six percent of the original prehistoric range has been developed for urban or agricultural use, and practically no `elepaio remain in developed areas (VanderWerf *et al.* 2001).

However, many areas of O`ahu that recently supported `elepaio and still contain apparently suitable forest habitat are currently unoccupied, demonstrating that habitat loss is not the only threat. More recent declines in O`ahu `elepaio populations are due to a combination of low adult survival and low reproductive success. Both annual adult survival and reproductive success are lower on O`ahu (0.76, 0.33, respectively) than in a large, stable `elepaio population at Hakalau Forest National Wildlife Refuge on Hawai`i Island (0.85, 0.62; VanderWerf 1998). The main cause of reduced adult survival on O`ahu appears to be diseases that are carried by the introduced southern house mosquito (*Culex quinquefasciatus*). Annual survival of birds with active avian pox (*Poxvirus avium*) lesions (60%) was lower than annual survival of healthy birds (80%; E. VanderWerf unpubl. data). Avian malaria (*Plasmodium relictum*) is a serious threat to many Hawaiian forest birds (Warner 1968, van Riper *et al.* 1986, Atkinson *et al.* 1995), but its effect on `elepaio has not been investigated.

The primary reason for low reproductive success is nest predation by the introduced black rat (*Rattus rattus*). An experiment in which automatic cameras were wired to artificial `elepaio nests containing quail eggs showed that a black rat was the predator in all 10 predation events documented (VanderWerf 2001). Control of rats with snap traps and diphacinone (an anticoagulant rodenticide) bait stations was effective at improving `elepaio reproductive success, resulting in a 76% increase in nest success and a 112% increase in fledglings per pair compared to control areas (VanderWerf 1999). Reproductive success of `elepaio is also affected by disease. Pairs in which at least one bird had pox lesions produced fewer fledglings than healthy pairs or those in which at least one bird had recovered from pox (E. VanderWerf, unpubl. data). Many birds with active pox infections did not even attempt to nest, and infected birds were sometimes deserted by their mate.

Recovery Goals:

The recovery goals listed below were developed by the Hawaiian Forest Bird Recovery Team for use in the draft revised Hawaiian Forest Bird Recovery Plan. Similar recovery goals are being used for all species covered by the Recovery Plan.

- 1) Restore populations of O`ahu `elepaio to levels that allow persistence despite demographic and environmental stochasticity and that permit natural ecological and evolutionary processes to occur.
- 2) Protect enough habitat to support these populations.
- 3) Identify and remove threats responsible for the decline of the O`ahu `elepaio.

Recovery Criteria:

The recovery criteria listed below were developed by the Hawaiian Forest Bird Recovery Team for use in the upcoming draft revised Hawaiian Forest Bird Recovery Plan. Criterion 1 was adapted to each species based on its particular life history and recovery needs; criteria 2 and 3 are the same for all species covered by the plan.

The O`ahu `elepaio can be downlisted from endangered to threatened when all 3 of the following have been achieved:

- 1) The six existing core subpopulations in Waikāne/Kahana, southern Ko`olau, central Ko`olau, Honouliuli/Lualualei, Schofield Barracks West Range, and Mākaha/Wai`anae Kai/Mākua, which represent the ecological, morphological, behavioral, and genetic diversity of the species, are viable (as defined in criterion 2 below); or these subpopulations function as viable metapopulations on both the windward and leeward sides of the Ko`olau and Wai`anae Mountains;
- 2) Either a) quantitative surveys show that the number of individuals in each population or metapopulation has been stable or increasing for 15 consecutive years, or b) demographic monitoring shows each population or metapopulation has an average intrinsic growth rate (λ) not less than 1.0 for at least 15 consecutive years; and total population size is not expected to decline by more than 20% within the next 15 consecutive years for any reason; and
- 3) Sufficient recovery habitat is protected and managed to achieve criteria 1 and 2 above, and the major threats that were responsible for the decline of the O`ahu `elepaio have been identified and controlled.

The O`ahu `elepaio can be delisted (removed from the endangered species list) when:

- Criterion 2 above has been achieved for at least 30 consecutive years; and
- Criteria 1 and 3 above are still true.

`Elepaio from different areas of O`ahu vary in appearance and behavior, and there also may be genetic variation. Birds from the wet windward (eastern) side of each mountain range are darker and more red in color than birds from the drier leeward side, and vocalizations are noticeably different in the Wai`anae and Ko`olau Mountains (E. VanderWerf, unpubl. data). The six core subpopulations listed in criterion 1 above are distributed throughout the island, and their recovery would preserve birds representing the known variation in the species. It is unlikely that each existing core subpopulation will be viable on its own, and a metapopulation composed of several subpopulations may be necessary in each portion of the island to preserve the species' variation.

Setting a criterion of demographic persistence highlights the need for monitoring, and helps ensure that threats have been adequately managed and that population increases are not transient. A λ value of 1.0 indicates no change in population size, a value greater than 1.0 indicates population growth. If populations are stable or increasing in the long-term despite periodic episodes of increased disease and predation, then the species can be considered recovered.

Research to date indicates that survival and reproduction of `elepaio fluctuate from year to year, probably due to variation in disease prevalence and predator (rodent) populations (VanderWerf 1999, unpubl. data). Epizootics of disease and irruptions in rodent populations appear to occur approximately once every five years (VanderWerf 1999), possibly in association with rainfall patterns, so the time frames for demographic recovery criteria likely coincide with either three (15 years for downlisting) or six (30 years for delisting) `elepaio population cycles.

Anticipated Recovery Actions

- **Appoint Recovery Team** - The Pacific Islands Fish and Wildlife Office has already assembled a Hawaiian Forest Bird Recovery Team that provides guidance on most listed forest birds in the State of Hawai`i, including the O`ahu `elepaio.
- **Prepare Recovery Plan** - The Hawaiian Forest Bird Recovery Team is in the process of revising the recovery plan for 21 Hawaiian forest bird species, including the O`ahu `elepaio. The O`ahu `elepaio was not included in the previous version of the recovery plan because it was not listed at that time; it is being added to the revised recovery plan. The Pacific Islands Fish and Wildlife Office plans to submit the revised recovery plan to the Regional Office by September 30, 2001.
- **Acquire Habitat** - The new O`ahu Forest National Wildlife Refuge protects 1,831 ha (4,525 ac) in the central Ko`olau Mountains that provides suitable forest habitat for `elepaio (USFWS 2000b). `Elepaio are not currently found on the refuge, but the area has high potential for recovery of `elepaio through reintroduction and predator control.
- **Recovery Habitat** - Draft recovery habitat for the O`ahu `elepaio has been identified for the revised Hawaiian Forest Bird Recovery Plan (Figure 2). Recovery habitat is defined as those areas that will allow for the long-term survival and recovery of the species.

`Elepaio are adaptable and able to forage and nest in a variety of forest types composed of both native and introduced species (Conant 1977, VanderWerf 1993, 1994, 1998). Nest site selection by `elepaio is non-specialized; nests have been found in seven native and 13 introduced plant species (E. VanderWerf, unpubl. data). Shallenberger and Vaughn (1978) found the highest relative abundance of `elepaio in forest dominated by introduced guava (*Psidium* sp.) and kukui (*Aleurites moluccana*) trees, but they were also found in the following forest types (in order of decreasing abundance): mixed native-exotic; tall exotic; koa (*Acacia koa*) dominant; mixed koa-`ōhi`a (*Metrosideros polymorpha*); low exotic; `ōhi`a dominant; and `ōhi`a scrub. VanderWerf *et al.* (1997) found that (1) forest structure was more important to `elepaio than plant species composition, (2) most `elepaio occurred in areas with a continuous forest canopy and a dense understory, and (3) population density was roughly twice as high in tall riparian vegetation in valleys than in scrubby vegetation on ridges. Suitable habitat for recovery of O`ahu `elepaio thus includes wet, mesic, and dry forest consisting of native and/or introduced plant species, but higher population density can be expected in closed canopy riparian forest.

The area currently occupied by the O`ahu `elepaio represents only about four percent of the species' original range, and the distribution has contracted into numerous small fragments (Figure 2). The remaining `elepaio subpopulations are small and isolated, comprising six core subpopulations that contain between 100 and 500 birds, and numerous small remnant subpopulations, most of which contain fewer than 10 birds (Table 1). Even if the threats responsible for the decline of the `elepaio were controlled, the existing subpopulations would be unlikely to persist because their small sizes make them vulnerable to extinction due to a variety of natural processes, including: reduced reproductive vigor caused by inbreeding depression; loss of genetic variability and evolutionary potential over time due to random genetic drift; stochastic fluctuations in population size and sex ratio; and catastrophes such as hurricanes (Lande 1988, IUCN 2000).

`Elepaio are highly territorial; each pair defends an area of a certain size, depending on the forest type and structure, resulting in a maximum population density or carrying capacity (VanderWerf 1998). Although `elepaio have declined and the range has contracted, density in the remaining core subpopulations is high, and much of the currently occupied land is at or near carrying capacity (VanderWerf *et al.* 1997, in press). Consequently, the currently occupied areas are too small to support `elepaio populations large enough to be considered safe from extinction. Complete recovery will require restoration of `elepaio in areas where they do not occur at present, through translocation, captive propagation and release, or natural dispersal. The draft recovery habitat therefore includes areas that currently are not occupied by `elepaio, but that still contain suitable forest.

`Elepaio are also relatively sedentary; adults have high fidelity to their territory and juveniles rarely disperse more than one km (0.62 mi) in search of a territory (VanderWerf 1998). Because the areas currently occupied by `elepaio are separated by many kilometers (Figure 1) and `elepaio are unlikely to disperse long distances, the existing subpopulations probably are isolated (VanderWerf *et al.* in press). The O`ahu `elepaio evolved in an environment with large areas of continuous forest habitat covering much of the island (Figure 2), and their dispersal behavior is not adapted to a fragmented landscape. In the past, subpopulations were less isolated and dispersal and genetic exchange among subpopulations probably were more frequent. Maintaining or restoring links among subpopulations by providing habitat for dispersal would increase the overall effective population size through meta-population interactions, thereby helping to alleviate the threats associated with small population size. In particular, enlargement of small subpopulations by expansion onto adjacent lands not only would increase the chances of their long-term survival, but also would improve connectivity among subpopulations by enhancing their value as "stepping stones" within the distribution of the entire population.

Based on the information provided above, the Hawaiian Forest Bird Recovery Team has drafted recovery habitat using the following criteria:

- (1) All areas that are currently occupied by the O`ahu `elepaio, excluding one very small,

isolated area at Hau`ula that contains only a single male (Figure 1; subpopulation Q).

(2) Addition of currently unoccupied lands needed for recovery of a viable population. Lands were considered to have greater recovery value and were given preference if they (a) provided more preferred forest types, (b) were more recently occupied, or (c) were contiguous and formed large blocks of suitable habitat and helped link existing subpopulations.

(3) Boundaries of draft recovery habitat units were determined by the extent of suitable forest, which in many areas coincided with the boundaries of State Forest Reserves, Natural Area Reserves, and other conservation lands. Urban and agricultural lands generally were not included because they did not contain suitable forest, but lower Wailupe Valley, which is zoned for urban use but has not been developed yet, was included because it contains suitable forest and is currently occupied by `elepaio.

The potential `elepaio population in the draft recovery habitat (10,104 birds) was estimated by multiplying the area of each recovery habitat unit by the current density of `elepaio in each part of the island (Table 2). These estimates are approximate, and the actual population in each unit may be larger if density can be increased beyond current levels, or lower if it proves difficult to establish dense populations in some currently unoccupied areas.

- **Rodent Control** - Rodent control has been an effective method of improving reproductive success of `elepaio in several areas (VanderWerf 1999, in press), and control programs should be continued and expanded. Ground-based methods of rodent control using snap traps and diphacinone bait stations have been effective on a small scale, but are labor intensive. Large-scale rodent control probably will be necessary for recovery of `elepaio, and this can be achieved more efficiently through aerial broadcast methods. Registration of aerial broadcast of diphacinone for rodent control with the U.S. Environmental Protection Agency should be actively pursued and supported.
- **Fencing and Feral Ungulate Control** - The actions of feral pigs and other ungulates may not be an important direct threat to the O`ahu `elepaio, but due to concerns about secondary poisoning and the threat to hunters it is possible that aerial broadcast of rodenticide may be feasible only in fenced areas that are considered free of feral pigs. Fencing and pig eradication are therefore an important part of the recovery strategy for `elepaio.
- **Research on Disease Resistance** - No areas of O`ahu are of sufficient elevation to be free from disease-carrying mosquitoes (Warner 1968), and all O`ahu `elepaio populations appear to be affected by disease (E. VanderWerf, unpubl data). Reducing mosquito numbers by removing breeding sites or treating them with larvicides would be extremely difficult due to the abundance of breeding sites (C. Atkinson and D. LaPointe, pers. commun.). The best method of reducing the threat from disease may be to investigate disease resistance and its genetic basis to identify birds for use in captive propagation and release.

- **Captive Propagation** - Captive propagation and/or rear and release of O`ahu `elepaio may become necessary if reproduction in the wild is insufficient to allow recovery, and would be especially valuable if genetically disease-resistant birds can be identified for use as breeding stock. Any attempts at captive propagation should use eggs taken from birds known to have recovered from pox or identified as resistant. If rat-free or disease-free refugia can be created by habitat management, translocation of wild birds or release of captive birds could be an effective means of re-establishing or augmenting populations in those areas.
- **Population Surveys and Monitoring** - To determine whether the overall recovery strategy is effective and whether the recovery criteria have been met it will be necessary to conduct range-wide population surveys and/or monitor demography. Standard survey routes should be established to determine distribution and measure population density. Surveys should be conducted at least once every five years to address whether the recovery criteria have been met, and annually if possible to more closely monitor population trends and fluctuations. Demographic monitoring will require mist-netting, banding, and resighting of birds to measure survival rate, nest searching and monitoring to measure reproductive success, and data analysis. Measurement of demographic parameters should follow methods used in VanderWerf (1999). Depending on what data is available, calculation of lambda values should follow Pulliam (1988), Pease and Grzybowski (1995), Caswell (1989), or another peer-reviewed method appropriate for measuring avian demography.
- **Consult and Work with Federal and State Agencies and Private Interests** - Rodent control using snap traps and diphacinone bait stations has been conducted by the Hawai`i State Division of Forestry and Wildlife in the Honolulu Watershed Forest Reserve since 1997, by the U.S. Army Environmental Division at Schofield Barracks West Range and Mākua Military Reservation since 1998, and by The Nature Conservancy of Hawai`i at Honouliuli Preserve since 2000. These groups are committed to continuing their rodent control programs in the future, and the Service is working with Kamehameha Schools to begin rodent control in North Hālawā Valley and Kapakahi Gulch.

Researchers at the University of Hawai`i are using blood samples collected during previous demographic research to investigate genetic population structure of O`ahu `elepaio, and hope to identify genetic markers associated with disease resistance (VanderWerf 1999).

The Zoological Society of San Diego has begun captive breeding of the Hawai`i `elepaio (*C. s. sandwichensis*) as a surrogate to develop techniques for a possible captive propagation or rear and release program for the O`ahu `elepaio.

Table 1. Estimated size and area of O`ahu `elepaio subpopulations. Data from VanderWerf *et al.* (2001). Letters in front of each population correspond to those on Figure 1.

Subpopulation	Total population size	Breeding population size	Area (ha)
Wai`anae Mountains			
A. southern Wai`anae (Honouliuli Preserve, Lualualei Naval Magazine)	458	418	1,170
B. Schofield Barracks West Range	340	310	532
C. Mākaha, Wai`anae Kai Valleys	123	112	459
D. Pahole, Kahanahāiki	18	4	256
E. Schofield Barracks South Range	6	0	20
F. Mākua Valley	7	2	49
G. Ka`ala Natural Area Reserve	3	0	21
H. Makaleha Gulch	2	0	7
I. Kuaokalā	3	2	14
J. Kaluakauila Gulch	1	0	6
Ko`olau Mountains			
K. southern Ko`olau (Pia, Wailupe, Kapakahi, Kuli`ou`ou, Wai`alae Nui)	475	432	1,063
L. Waikāne, Kahana Valleys	265	242	523
M. central Ko`olau (Moanalua, north and south Hālawa, `Aiea, Kalauao)	226	206	1,396
N. Pālolo Valley	46	42	78
O. Waihe`e Valley	5	4	32
P. Mānoa	2	0	19
Q. Hau`ula	1	0	4
R. Waianu Valley	1	0	8
TOTAL	1,982	1,774	5,657

Table 2. Area of recovery habitat units and potential `elepaio populations. Unit 4 is not currently occupied by `elepaio; the density used to estimate the potential `elepaio population of this unit is an average of the densities in the two nearest units, central and southern Ko`olau.

Recovery habitat unit	Area	`elepaio density in currently occupied parts of unit	Potential `elepaio population in unit
1. Northern Wai`anae Mountains	4,501 ha 11,122 ac	0.45 per ha 0.18 per ac	2,025
2. Southern Wai`anae Mountains	2,515 ha 6,215 ac	0.39 per ha 0.16 per ac	981
3. Central Ko`olau Mountains	14,840 ha 36,669 ac	0.33 per ha 0.14 per ac	4,897
4. Kalihi-Kapālama	800 ha 1,977 ac	0.39 per ha 0.16 per ac	312
5. Southern Ko`olau Mountains	4,197 ha 10,371 ac	0.45 per ha 0.18 per ac	1,889
All Units	26,853 ha 66,354 ac	0.38 per ha 0.15 per ac	10,104

Signature of Regional Director, U.S. Fish and Wildlife Service

Date

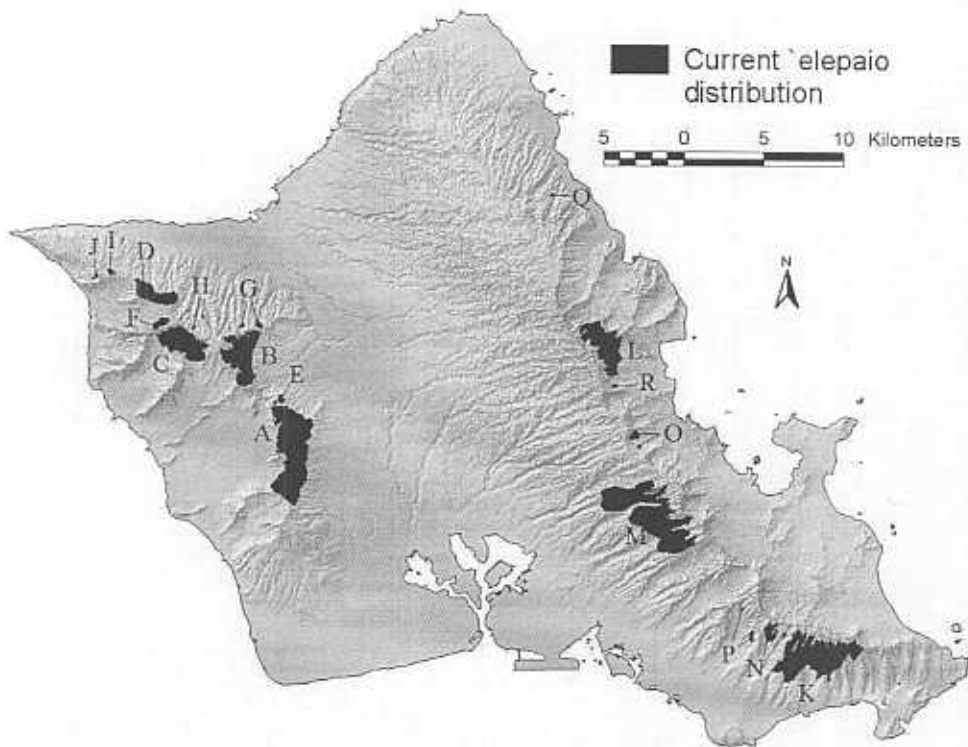


Figure 1. Current distribution of the O'ahu 'Elepaio. Subpopulations are identified by letters corresponding to those in Table 1.

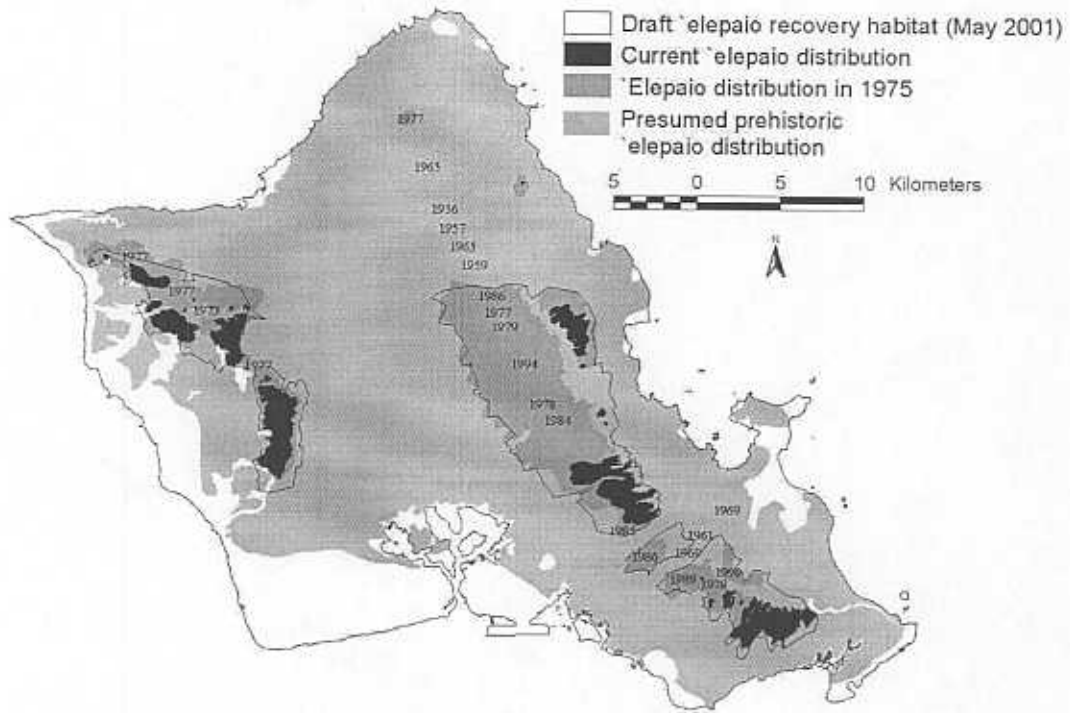


Figure 2. Current, recent historical (1975), and presumed prehistoric distributions of the O'ahu 'elepaio. Years indicate when 'elepaio were last observed in that area.

Appendix L.

Contractual Agreement for Drafting a Recovery Plan

to be inserted

Appendix M.

Memorandum of Understanding between
the Fish and Wildlife Service
and a Recovery Team

MEMORANDUM OF AGREEMENT
Between the
U.S. FISH AND WILDLIFE SERVICE
DEPARTMENT OF INTERIOR
and the
PRAIRIE BUSH CLOVER RECOVERY TEAM

I. Purpose

This Memorandum of Agreement between the U.S. Fish and Wildlife Service, Department of Interior, hereinafter referred to as the "Service" and the Prairie Bush Clover Recovery Team, hereinafter referred to as the "Team," is entered into under the authority of the Endangered Species Act of 1973 (16 U.S.C. 1531-1543; 87 STAT. 884), as amended.

This Agreement authorizes the expenditure of Service funds by the Team in support of the Team's planning, coordinating and implementation of species recovery efforts.

II. Scope of Work

A. The Service will:

1. Provide \$1,000 each fiscal year in support of the Team's cost of administration which includes clerical services, reproduction, envelopes, stamps, etc., and, in cases as determined by the Service, reimbursement for travel of Team members.

V. Special Provisions

Officials not to Benefit

No member or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise therefrom.

Liability

The Service will be liable for accident or injury to the extent provided under the Federal Tort Claims Act.

Funding Limitation

Funds are not available for support of the Team beyond the current fiscal year. The Service's fiscal obligation hereunder is contingent upon the yearly availability of funds as appropriated by Congress, from which payment for the purposes of this agreement can be made.

U. S. FISH AND WILDLIFE SERVICE

PRAIRIE BUSH CLOVER TEAM LEADER

Name

James C. Gritman
James C. Gritman
Acting Regional Director

Name

Willby Jones

Title

Title

Robert Munnich DNR

JUN 4 1986

Date

Date

June 9, 1986

Appendix N.

Information Quality Guidelines

NOAA Information Quality Guidelines

FWS Information Quality Guidelines

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION INFORMATION QUALITY GUIDELINES

September 30, 2002 —

PART I: BACKGROUND, MISSION, DEFINITIONS, AND SCOPE

BACKGROUND

Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554), hereinafter "Section 515," directs the Office of Management and Budget (OMB) to issue government-wide guidelines (OMB Guidelines—[PDF](#) or [text](#)) that "provide policy and procedural guidance to federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by federal agencies. "OMB complied by issuing guidelines which direct each federal agency to (A) issue its own guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by the agency; (B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information that does not comply with the OMB 515 Guidelines (Federal Register: February 22, 2002, Volume 67, Number 36, pp. 8452-8460, herein "OMB Guidelines") or the agency guidelines; and (C) report periodically to the Director of OMB on the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency and how such complaints were handled by the agency.

In compliance with OMB directives, the Department of Commerce (DOC) has issued Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Disseminated Information (available from <http://www.commerce.gov>).

This document implements Section 515 and fulfills the OMB and DOC information quality guidelines. It may be revised periodically, based on experience, evolving requirements of the National Oceanic and Atmospheric Administration (NOAA) and concerns expressed by the public. Covered information disseminated by NOAA will comply with all applicable OMB, DOC, and (these) NOAA Information Quality Guidelines.

In implementing these guidelines, NOAA acknowledges that ensuring the quality of information is an important management objective that takes its place alongside other NOAA objectives, such as ensuring the success of NOAA missions, observing budget and resource priorities and restraints, and providing useful information to the public. NOAA intends to implement these guidelines in a way that will achieve all these objectives in a harmonious way.

MISSION

NOAA's mission is to describe and predict changes in the Earth's environment, and conserve and manage wisely the Nation's coastal and marine resources to ensure sustainable economic opportunities. To accomplish this mission, NOAA:

- creates and disseminates reliable assessments and predictions of weather, climate, the space environment, and ocean and living marine resources;
- produces and assures access to nautical and geodetic products and services;
- implements integrated approaches to environmental management and ocean and

coastal resources development, protection and restoration for economic and social health, protection of essential fish habitat, maintains sustainable fisheries, and recovery of endangered and threatened species of fish and marine mammals;

- works to ensure access to sustained, reliable observations - from satellites to ships to radars to data buoys;
- develops public-private and international partnerships for the expansion and transfer of environmental knowledge and technologies; and
- invests in scientific research and the development of new technologies to improve current operations and prepare for the future.

DEFINITIONS

The definitions in this section apply throughout these Guidelines.

Quality is an encompassing term comprising utility, objectivity, and integrity. Therefore, the guidelines sometimes refer to these four statutory terms, collectively, as "quality."

Utility refers to the usefulness of the information to its intended users, including the public. In assessing the usefulness of information that the agency disseminates to the public, NOAA considers the uses of the information not only from its own perspective but also from the perspective of the public. As a result, when transparency of information is relevant for assessing the information's usefulness from the public's perspective, NOAA takes care to ensure that transparency has been addressed in its review of the information.

Objectivity consists of two distinct elements: presentation and substance. The presentation element includes whether disseminated information is presented in an accurate, clear, complete, and unbiased manner and in a proper context. The substance element involves a focus on ensuring accurate, reliable, and unbiased information. In a scientific, financial, or statistical context, the original and supporting data shall be generated, and the analytic results shall be developed, using sound statistical and research methods.

Integrity refers to security – the protection of information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification.

Information means any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms. This definition includes information that an agency disseminates from a web page, but does not include the provision of hyperlinks to information that others disseminate. This definition does not include opinions, where the agency's presentation makes it clear that what is being offered is someone's opinion rather than fact or the agency's views.

Government information means information created, collected, processed, disseminated, or disposed of by or for the Federal Government.

Information dissemination product means any books, paper, map, machine-readable material, audiovisual production, or other documentary material, regardless of physical form or characteristic, an agency disseminates to the public. This definition includes any

electronic document, CD-ROM, or web page.

Dissemination means agency initiated or sponsored distribution of information to the public. Dissemination does not include distribution limited to: government employees or agency contractors or grantees; intra- or inter-agency use or sharing of government information; and responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or other similar law. This definition also does not include distribution limited to: correspondence with individuals or persons, press releases, archival records, public filings, subpoenas or adjudicative processes.

Agency initiated distribution of information to the public refers to information that the Agency distributes or releases which reflects, represents, or forms any part of the support of the policies of the Agency. In addition, if the Agency, as an institution, distributes or releases information prepared by an outside party in a manner that reasonably suggests that the Agency agrees with the information, this would be considered Agency initiated distribution and hence Agency dissemination because of the appearance of having the information represent Agency views. By contrast, the Agency does not "initiate" the dissemination of information when an Agency scientist or grantee or contractor publishes and communicates his or her research findings in the same manner as his or her academic colleagues, even if the Agency retains ownership or other intellectual property rights because the Federal government paid for the research.

Agency sponsored distribution of information to the public refers to situations where the Agency has directed a third party to distribute or release information, or where the Agency has the authority to review and approve the information before release. By contrast, if the Agency simply provides funding to support research, and if the researcher (not the Agency) decides whether to distribute the results and – if the results are to be released – determines the content and presentation of the distribution, then the Agency has not "sponsored" the dissemination even though it has funded the research and even if the Agency retains ownership or other intellectual property rights because the Federal government paid for the research. Note that subsequent Agency dissemination of such information would require that the information adhere to the Agency's information quality guidelines even if it was initially covered by a disclaimer.

Influential, when used in the phrase "influential scientific, financial, or statistical information," means information which is expected to have a genuinely clear and substantial impact on major public policy and private sector decisions.

Reproducibility means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision. For information judged to have more (less) important impacts, the degree of imprecision that is tolerated is reduced (increased). With respect to analytic results, "capable of being substantially reproduced" means that independent analysis of the original or supporting data using identical methods would generate similar analytic results, subject to an acceptable degree of imprecision or error.

Transparency is not defined in the OMB Guidelines, but the Supplementary Information to the OMB Guidelines indicates (p. 8456) that "transparency" is at the heart of the reproducibility standard. The Guidelines state that "The purpose of the reproducibility standard is to cultivate a consistent agency commitment to transparency about how analytic results are generated: the specific data used, the various assumptions employed, the specific analytic methods applied, and the statistical procedures employed. If sufficient transparency is achieved on each of these matters, then an analytic result

should meet the reproducibility standard. In other words, transparency – and ultimately reproducibility – is a matter of showing how you got the results you got.

SCOPE

These guidelines cover information disseminated by NOAA on or after October 1, 2002, regardless of when the information was first disseminated, except that pre-dissemination review procedures shall apply only to information first disseminated on or after October 1, 2002.

Information Disseminated by NOAA and Covered by these Guidelines

NOAA disseminates a wide variety of information that is subject to the OMB Guidelines. This dissemination could occur through a variety of mechanisms, including analyses and assessments supporting a rulemaking. To facilitate development of information quality standards and procedures, NOAA's disseminated information is grouped into the following categories: 1) Original Data; 2) Synthesized Products; 3) Interpreted Products; 4) Hydrometeorological, Hazardous Chemical Spill, and Space Weather Warnings, Forecasts, and Advisories; 5) Natural Resource Plans; 6) Experimental Products; and 7) Corporate and General Information.

Original Data are data in their most basic useful form. These are data from individual times and locations that have not been summarized or processed to higher levels of analysis. While these data are often derived from other direct measurements (e.g., spectral signatures from a chemical analyzer, electronic signals from current meters), they represent properties of the environment. These data can be disseminated in both real time and retrospectively. Examples of original data include buoy data, survey data (e.g., living marine resource and hydrographic surveys), biological and chemical properties, weather observations, and satellite data.

Synthesized Products are those that have been developed through analysis of original data. This includes analysis through statistical methods; model interpolations, extrapolations, and simulations; and combinations of multiple sets of original data. While some scientific evaluation and judgment is needed, the methods of analysis are well documented and relatively routine. Examples of synthesized products include summaries of fisheries landings statistics, weather statistics, model outputs, data display through Geographical Information System techniques, and satellite-derived maps.

Interpreted Products are those that have been developed through interpretation of original data and synthesized products. In many cases, this information incorporates additional contextual and/or normative data, standards, or information that puts original data and synthesized products into larger spatial, temporal, or issue contexts. This information is subject to scientific interpretation, evaluation, and judgment. Examples of interpreted products include journal articles, scientific papers, technical reports, and production of and contributions to integrated assessments.

Hydrometeorological, Hazardous Chemical Spill, and Space Weather Warnings, Forecasts, and Advisories are time-critical interpretations of original data and synthesized products, prepared under tight time constraints and covering relatively short, discrete time periods. As such, these warnings, forecasts, and advisories represent the best possible information in given circumstances. They are subject to scientific interpretation, evaluation, and judgment. Some products in this category, such as weather forecasts, are routinely prepared. Other products, such as tornado warnings, hazardous chemical spill trajectories, and solar flare alerts, are of an urgent nature and are prepared for unique circumstances.

Natural Resource Plans are information products that are prescribed by law and have content, structure, and public review processes (where applicable) that are based upon published standards (e.g. , statutory or regulatory guidelines). These plans are a composite of several types of information (e.g. , scientific, management, stakeholder input, policy) from a variety of internal and external sources. Examples of Natural Resource Plans include fishery, protected resource, and sanctuary management plans and regulations, and natural resource restoration plans.

Experimental products are products that are experimental (in the sense that their quality has not yet been fully determined) in nature, or are products that are based in part on experimental capabilities or algorithms. Experimental products fall into two classes. They are either 1) disseminated for experimental use, evaluation or feedback, or 2) used in cases where, in the view of qualified scientists who are operating in an urgent situation in which the timely flow of vital information is crucial to human health, safety, or the environment, the danger to human health, safety, or the environment will be lessened if every tool available is used. Examples of experimental products include imagery or data from non-NOAA sources, algorithms currently being tested and evaluated, experimental climate forecasts, and satellite imagery processed with developmental algorithms for urgent needs (e.g. , wildfire detection).

Corporate or general information includes all non-scientific, non-financial, non-statistical information. Examples include program and organizational descriptions, brochures, pamphlets, education and outreach materials, newsletters, and other general descriptions of NOAA operations and capabilities.

Information Not Covered by these Guidelines

Information with distribution intended to be limited to government employees or agency contractors or grantees.

Information with distribution intended to be limited to intra- or inter-agency use or sharing of government information.

Responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or other similar law.

Information relating solely to correspondence with individuals or persons.

Press releases, fact sheets, press conferences or similar communications in any medium that announce, support the announcement or give public notice of information NOAA has disseminated elsewhere.

Archival records, including library holdings.

Archival information disseminated by NOAA before October 1, 2002, and still maintained by NOAA as archival material.

Public filings.

Responses to subpoenas or compulsory document productions.

Information limited to adjudicative processes, such as pleadings, including information developed during the conduct of any criminal or civil action or administrative enforcement action, investigation or audit against specific parties, or information distributed in documents limited to administrative action determining the rights and liabilities of specific

parties under applicable statutes and regulations.

Solicitations (e.g. , program announcements, requests for proposals).

Hyperlinks to information that others disseminate, as well as paper-based information from other sources referenced, but not approved or endorsed by NOAA.

Policy manuals and management information produced for the internal management and operations of NOAA, and not primarily intended for public dissemination.

Information presented to Congress as part of legislative or oversight processes, such as testimony of NOAA officials, and information or drafting assistance provided to Congress in connection with proposed or pending legislation, that is not simultaneously disseminated to the public. (However, information which would otherwise be covered by applicable guidelines is not exempted from compliance merely because also presented to Congress.)

Documents not authored by NOAA and not intended to represent NOAA's views, including information authored and distributed by NOAA grantees, as long as the documents are not disseminated by NOAA (see definition of "dissemination").

Research data, findings, reports and other materials published or otherwise distributed by employees or by NOAA contractors or grantees that are identified as not representing NOAA views.

Opinions where the presentation makes it clear that what is being offered is not the official view of NOAA.

PART II: INFORMATION QUALITY STANDARDS AND PRE-DISSEMINATION REVIEW

Information quality is composed of three elements — utility, integrity and objectivity. Quality will be ensured and established at levels appropriate to the nature and timeliness of the information to be disseminated. Information quality is an integral part of the pre-dissemination review of information disseminated by NOAA. Information quality is also integral to information collections conducted by NOAA, and is incorporated into the clearance process required by the Paperwork Reduction Act (PRA) to help improve the quality of information that NOAA collects and disseminates to the public. NOAA offices already are required to demonstrate in their PRA submissions to OMB the "practical utility" of a proposed collection of information that they plan to disseminate. Additionally, for all proposed collections of information that will be disseminated to the public, NOAA offices should demonstrate in their PRA clearance submissions to OMB that the proposed collection of information will result in information that will be collected, maintained, and used in a way consistent with applicable information quality guidelines.

As OMB has recognized ([OMB Guidelines](#), pp. 8452-8453), "information quality comes at a cost. "In this context, OMB directed that "agencies should weigh the costs (for example, including costs attributable to agency processing effort, respondent burden, maintenance of needed privacy, and assurances of suitable confidentiality) and the benefits of higher information quality in the development of information, and the level of quality to which the information disseminated will be held. "Therefore, in deciding the appropriate level of review and documentation for information disseminated by NOAA, the costs and benefits of using a higher quality standard or a more extensive review process will be considered. Where necessary, other compelling interests such as privacy and confidentiality

protections will be considered.

The utility and integrity standards below pertain to all categories of information disseminated by NOAA. Following the utility and integrity standards are objectivity standards for each of the specific categories of information disseminated by NOAA. It should be noted that in urgent situations that may pose an imminent threat to public health or welfare, the environment, the national economy, or homeland security, these standards may be waived temporarily.

Because most of the standards presented in this document reflect existing practice in NOAA, the present tense has been used when describing them; but regardless of tense used, a performance standard is intended.

UTILITY

Utility means that disseminated information is useful to its intended users. "Useful" means that the content of the information is helpful, beneficial, or serviceable to its intended users, or that the information supports the usefulness of other disseminated information by making it more accessible or easier to read, see, understand, obtain, or use. Where the usefulness of information will be enhanced by greater transparency, care is taken that sufficient background and detail are available, either with the disseminated information or through other means, to maximize the usefulness of the information. The level of such background and detail is commensurate with the importance of the particular information, balanced against the resources required, and is appropriate to the nature and timeliness of the information to be disseminated.

As a service organization, NOAA strives to continually improve the usefulness of its data and information products. A broad definition of NOAA's customers includes the American public, other federal agencies, state and local governments, academia, the private sector, recreational concerns, and many different national and international organizations. NOAA interacts with its customers through workshops, surveys, product reviews and other similar mechanisms to assess and improve the utility and accessibility of its products.

NOAA disseminates data products in a manner that allows them to be accessible and understandable to a broad range of users. NOAA meets the needs of its customers by disseminating information through a variety of media, which can include printed publications, diskettes or CD-ROM, the internet, and broadcast media. NOAA also utilizes standard data formats and consistent attribute naming and unit conventions to ensure that its information is accessible to a broad range of users with a variety of operating systems and data needs.

INTEGRITY

Prior to dissemination, NOAA information, independent of the specific intended distribution mechanism, is safeguarded from improper access, modification, or destruction, to a degree commensurate with the risk and magnitude of harm that could result from the loss, misuse, or unauthorized access to or modification of such information.

All electronic information disseminated by NOAA adheres to the standards set out in Appendix III, "Security of Automated Information Resources," OMB Circular A-130; the Computer Security Act; and the Government Information Systems Reform Act.

Confidentiality of data collected by NOAA is safeguarded under legislation such as the Privacy Act and Titles 13, 15, and 22 of the U.S. Code.

Additional protections are provided as appropriate by 50 CFR Part 600, Subpart E, Confidentiality of Statistics of the Magnuson-Stevens Fishery Conservation and Management Act, NOAA Administrative Order 216-100 – Protection of Confidential Fisheries Statistics.

OBJECTIVITY

Objectivity ensures that information is accurate, reliable, and unbiased, and that information products are presented in an accurate, clear, complete, and unbiased manner. In a scientific, financial, or statistical context, the original and supporting data are generated, and the analytic results are developed, using commonly accepted scientific, financial, and statistical methods.

Accuracy. Because NOAA deals largely in scientific information, that information reflects the inherent uncertainty of the scientific process. The concept of statistical variation is inseparable from every phase of the scientific process, from instrumentation to final analysis. Therefore, in assessing information for accuracy, the information is considered accurate if it is within an acceptable degree of imprecision or error appropriate to the particular kind of information at issue and otherwise meets commonly accepted scientific, financial, and statistical standards. This concept is inherent in the definition of "reproducibility" as used in the OMB Guidelines and adopted by NOAA. Therefore, original and supporting data which are within an acceptable degree of imprecision, or an analytic result which is within an acceptable degree of imprecision or error, is by definition within the agency standard and is therefore considered correct.

Influential Information. As noted in the Definitions above, influential information is that which is expected to have a genuinely clear and substantial impact on major public policy and private sector decisions. A clear and substantial impact is one that has a high probability of occurring. If it is merely arguable or a judgment call, then it would probably not be clear and substantial. The impact must be on a policy or decision that is in fact expected to occur, and there must be a link between the information and the impact that is expected to occur.

Without regard to whether the information is influential, NOAA strives for the highest level of transparency about data and methods for all categories of information in all its scientific activities, within ethical, feasibility, cost, and confidentiality constraints. This supports the development of consistently superior products and fosters better value to the public. It also facilitates the reproducibility of such information by qualified third parties.

Analysis of Risks to Human Health, Safety and the Environment. For influential information disseminated by federal agencies that constitutes assessment of risks to human health, safety or the environment, the OMB Guidelines direct the agencies to adopt or adapt as objectivity standards the principles of the Safe Drinking Water Act Amendments of 1996 (SDWA) respecting risk assessments.

Many of NOAA's environmental assessments do not constitute analysis of risks or do not lend themselves to the type of risk assessments contemplated by the SDWA principles. Some assessments of risk to humans and the environment, such as tornado or hurricane warnings, use best available science conducted in accordance with sound and objective scientific practices, but are made under exigent circumstances which do not allow for extended analysis. Some programs may be based upon existing statutory, regulatory, or other guidance that allows or requires the use of expert judgment, available data, and a mix of other qualitative and quantitative input, in order to achieve the ends of the

program at issue, but are not compatible with the precise SDWA risk assessment criteria.

There are some NOAA programs which are appropriate for application of risk assessment principles. When NOAA performs and disseminates influential risk assessments that are qualitative in nature, it will apply the following two objectivity standards, adapted from the SDWA principles:

1. To the degree that the agency action is based on science, NOAA will use (a) the best available science and supporting studies (including peer-reviewed science and supporting studies when available), conducted in accordance with sound and objective scientific practices, and (b) data collected by accepted methods or best available methods.
2. NOAA will ensure that disseminated information about risk effects is presented in a comprehensive, informative, and understandable manner.

In situations requiring influential risk assessments that are quantitative in nature, NOAA generally follows basic risk assessment principles, such as the National Academies of Science paradigm of 1983, as updated in 1994, which states that "Risk assessment is not a single process, but a systematic approach to organizing and analyzing scientific knowledge and information. "In doing so, NOAA applies risk assessment approaches, over a wide variety of hazards, using appropriate practices that are widely accepted among relevant scientific and technical communities.

When NOAA performs and disseminates influential risk assessments that are quantitative in nature, in addition to applying the two objectivity standards above, risk assessment documents made available to the public shall specify, to the extent practicable, the following information, adapted from the SDWA principles:

- Each ecosystem component, including population, addressed by any estimate of applicable risk effects;
- The expected or central estimate of risk for the specific ecosystem component, including population, affected;
- Each appropriate upper-bound and/or lower-bound estimate of risk;
- Data gaps and other significant uncertainties identified in the process of the risk assessment and the studies that would assist in reducing the uncertainties; and
- Additional studies known to the agency and not used in the risk estimate that support or fail to support the findings of the assessment and the rationale of why they were not used.

Third-party Information. Use of third-party information from both domestic and international sources, such as states, municipalities, agencies and private entities, is a common practice in NOAA. Collaboration on interjurisdictional studies and monitoring programs, incorporation of on-site observations into NOAA products, and utilization of global observation systems are just a few examples of when third-party information is used. NOAA's information quality guidelines are reality-based, i.e. , not intended to prevent use of reliable outside information or full utilization of the best scientific information available. Although third-party sources may not be directly subject to Section 515, information from such sources, when used by NOAA to develop information products or to form the basis of a decision or policy, must be of known quality and consistent with

NOAA's information quality guidelines. When such information is used, any limitations, assumptions, collection methods, or uncertainties concerning it will be taken into account and disclosed.

Confidential and proprietary data, and other supporting information which cannot be disclosed. Where confidentiality or other considerations preclude full transparency, then especially rigorous robustness checks will be applied. They may take many forms, ranging from the use of outside review panels to the use of an array of specific checks to ensure objectivity. The nature and a description of these checks will be disclosed upon request.

Objectivity Standards for Specific Information Categories

A. Original Data

Objectivity of original data is achieved by using sound quality control techniques.

Data are collected according to documented procedures or in a manner that reflects standard practices accepted by the relevant scientific and technical communities. Data collection methods, systems, instruments, training, and tools are designed to meet requirements of the target user and are validated before use. Instrumentation is calibrated using primary or secondary standards or fundamental engineering and scientific methods. NOAA's standard operating procedures (SOPs) are reviewed on a regular basis and modified as practices and procedures evolve. Deviations from current SOPs are documented and occur only if valid scientific reasons exist for such a deviation.

Original data undergo quality control prior to being used by the agency or disseminated outside of the agency. Quality control techniques can include, as appropriate:

- gross error checks for data that fall outside of physically realistic ranges (e.g. a minimum, maximum, or maximum change);
- comparisons made with other independent sources of the same measurement;
- examination of individual time series and statistical summaries;
- application of sensor drift coefficients determined by a comparison of pre- and post-deployment calibrations; and
- visual inspection of the data.

The quality control/quality assessment of NOAA data is an on-going process. A continuous effort to improve the quality of NOAA data provides for evolution and improvements in survey techniques, instrument performance and maintenance, and data processing.

NOAA strives for transparency regarding data collection procedures, level of quality, and limitations. NOAA includes metadata record descriptions and an explanation of the methods and quality controls to which original data are subjected when they are disseminated, or makes them available upon request. This additional information helps the user assess the suitability of the data for a particular task.

B. Synthesized Products

Objectivity of synthesized products is achieved using data of known quality, applying sound analytical techniques, and reviewing the products or processes used to create them before dissemination.

Data and information sources are identified or made available upon request.

NOAA uses data of known quality or from sources acceptable to the relevant scientific and technical communities in order to ensure that synthesized products are valid, credible and useful.

Synthesized products are created using methods that are either published in standard methods manuals, documented in accessible formats by the disseminating office, or generally accepted by the relevant scientific and technical communities.

NOAA reviews synthesized products or the procedures used to create them (e.g. statistical procedures, models, or other analysis tools) to ensure their validity.

- Synthesized products that are unique or not produced regularly are reviewed individually by internal and/or external experts.
- For regular production of routine syntheses, the processes for developing these products are reviewed by internal and/or external experts.

NOAA includes the methods by which synthesized products are created when they are disseminated or makes them available upon request.

C. Interpreted Products

Objectivity of interpreted products is achieved by using data of known quality or from sources acceptable to the relevant scientific and technical communities and reliable supporting products, applying sound analytical techniques, presenting the information in the proper context, and reviewing the products before dissemination.

Data and information sources are properly referenced or identified upon request.

Interpreted products are produced using methods that are documented in accessible formats by the disseminating office or generally accepted by the relevant scientific and technical communities.

NOAA puts its interpreted products in context. Additional information that demonstrates the quality and limitations of the interpreted products helps the user assess the suitability of the product for the user's application.

Interpreted products are reviewed. Since the production of interpreted products often involves expert judgment, evaluation, and interpretation, these products are reviewed by technically qualified individuals to ensure that they are valid, complete, unbiased, objective, and relevant. Peer reviews, ranging from internal peer review by staff who were not involved in the development of the product to formal, independent, external peer review, are conducted at a level commensurate with the importance of the interpreted product.

NOAA includes the methods by which interpreted products are created when they are disseminated or makes them available upon request.

D. Hydrometeorological, Hazardous Chemical Spill, and Space Weather Warnings, Forecasts, and Advisories

Objectivity of information in this category is achieved by using reliable data collection methods and sound analytical techniques and systems to ensure the highest possible level of accuracy given the time critical nature of the products. Due to time constraints, the

ability to review final products prior to dissemination is limited.

To the extent possible, NOAA uses data of known quality to provide the best possible information under tight time constraints.

Data and information sources are identified or made available upon request.

To the extent possible, information in this category is produced using methods and techniques that are documented in accessible formats by the responsible office or generally accepted by the relevant scientific and technical communities. Due to the time-critical nature of these products, individual best judgment may be introduced.

NOAA identifies and tracks performance as a mechanism for evaluating accuracy of warnings, forecasts, and advisories. Statistical analysis may be carried out for a subset of products for verification purposes.

E. Experimental Products

Experimental products are either:

- 1) disseminated for experimental use, evaluation or feedback, or
- 2) used in cases where, in the view of qualified scientists who are operating in an urgent situation in which the timely flow of vital information is crucial to human health, safety, or the environment, the danger to human health, safety, or the environment will be lessened if every tool available is used.

Objectivity of experimental products is achieved by using the best science and supporting studies available, in accordance with sound and objective scientific practices, evaluated in the relevant scientific and technical communities, and peer-reviewed where feasible.

Through an iterative process, provisional documentation of theory and methods are prepared, including the various assumptions employed, the specific analytic methods applied, the data used, and the statistical procedures employed. Results of initial tests are available where possible. The experimental products and capabilities documentation, along with any tests or evaluations, are repeatedly reviewed by the appropriate NOAA units. Such products are not moved into non-experimental categories until subjected to a full, thorough, and rigorous review.

Where experimental products are disseminated for experimental use, evaluation or feedback in the form of comment or criticism, the products are accompanied by explicit limitations on their quality or by an indicated degree of uncertainty.

Where experimental products are used by NOAA in support of other NOAA products in urgent situations where the timely flow of vital information is critical, they are used by qualified scientists in conjunction with accepted non-experimental scientific methods and tools, and taking into account all available information. Such experimental products and capabilities are used only after careful testing, evaluation, and review by NOAA experts, and then are approved for provisional use only by selected field offices or other NOAA components. This process is repeated as needed to ensure an acceptable and reliable level of quality.

F. Natural Resource Plans

Natural Resource Plans are information products that are prescribed by law and have content, structure, and public review processes (where applicable) that will be based upon published standards (e.g., statutory or regulatory guidelines).

Objectivity of Natural Resource Plans will be achieved by adhering to published standards,

using information of known quality or from sources acceptable to the relevant scientific and technical communities, presenting the information in the proper context, and reviewing the products before dissemination.

Natural Resource Plans (Plans) will be developed according to published standards. Links to the published standards for the Plans disseminated by NOAA are provided below.

Plans will be based on the best information available. Plans will be a composite of several types of information (e.g. , scientific, management, stakeholder input, policy) from a variety of internal and external sources. Plans will often be developed under legislatively-directed deadlines that constrain the ability to conduct new studies or gather additional data. Therefore, the best information available at the time will be used in the development of Plans.

Plans will be presented in an accurate, clear, complete and unbiased manner. Natural Resource Plans often rely upon scientific information, analyses and conclusions for the development of management policy. Clear distinctions will be drawn between policy choices and the supporting science upon which they are based. Supporting materials, information, data and analyses used within the Plan will be properly referenced to ensure transparency. Plans will be reviewed by technically qualified individuals to ensure that they are valid, complete, unbiased, objective, and relevant.

Review of Natural Resource Plans, ranging from internal review by staff who were not involved in the development of the product to formal, independent, external peer review, will be conducted at a level commensurate with the importance of the interpreted product and the constraints imposed by legally-enforceable deadlines.

References to Plan Guidelines

Fisheries Management Plans

Laws:

Sustainable Fisheries Act

<http://www.nmfs.noaa.gov/sfa>

Essential Fish Habitat Provisions

<http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat6.htm>

Guidance Documents:

Operational Guidelines for Fisheries Management Plan Process

http://www.nmfs.noaa.gov/sfa/domes_fish/GUIDELINES.PDF

Essential Fish Habitat Guidelines

<http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat9.htm>

National Standard Guidelines, 50 CFR Part 600, Subpart D.

Technical Guidance on the Use of the Precautionary Approach to Implementing National Standard 1 of the Magnuson-Stevens Fishery Conservation and Management Act, V.R. Restrepo et al. , NOAA Technical Memorandum NMFS-F/SPO-31, July 1998.

Associated Laws and Guidelines:

http://www.st.nmfs.gov/st1/econ/cia/laws_links.html

Protected Resource Plans

Laws:

Endangered Species Act

<http://endangered.fws.gov/policies/index.html#ESA>

Marine Mammal Protection Act

http://www.nmfs.noaa.gov/prot_res/laws/MMPA/MMPA.html

Guidance Documents:

<http://endangered.fws.gov/policies/index.html#ESA>

http://www.nmfs.noaa.gov/prot_res/PR3/recover_planning.html

National Marine Sanctuary Management Plans

Laws:

<http://www.sanctuaries.nos.noaa.gov/natprogram/nplegislation/nplegislation.html>

<http://www.sanctuaries.nos.noaa.gov/natprogram/npregulation/npregulation.html>

Guidance Document:

National Marine Sanctuary Management Plan handbook, Third Ed. , 16 U.S.C. §1434.

Natural Resource Damage Assessment and Restoration Plans

Laws:

<http://darp.noaa.gov/legislat.htm>

Guidance Document:

<http://www.darp.noaa.gov/publicat.htm#anchor96416>

G. Corporate and General Information

Corporate and general information disseminated by NOAA is presented in a clear, complete, and unbiased manner, and in a context that enhances usability to the intended audience. The sources of the disseminated information are identified to the extent possible, consistent with confidentiality, privacy, and security considerations and protections, and taking into account timely presentation, the medium of dissemination, and the importance of the information, balanced against the resources required and the time available.

Information disseminated by NOAA is reliable and accurate to an acceptable degree of error as determined by factors such as the importance of the information, the intended use, time sensitivity, expected degree of permanence, relation to the primary mission(s) of the disseminating office, and the context of the dissemination, balanced against the resources required and the time available. A body of information is considered to be reliable if experience shows it to be generally accurate. Accurate information, in the case of non-scientific, non-financial, non-statistical information, means information which is reasonably determined to be factually correct in the view of the disseminating office as of the time of dissemination.

Review of corporate and general information disseminated by NOAA is incorporated into the normal process of formulating the information. This review is at a level appropriate to the information, taking into account the information's importance, balanced against the resources required and the time available. Department operating units treat information quality as integral to every step of an agency's development of information, including creation, collection, maintenance, and dissemination.

Review can be accomplished in a number of ways, including but not limited to combinations of the following:

- a. Active personal review of information by supervisory and management layers,

either by reviewing each individual dissemination, or selected samples, or by any other reasonable method.

b. Use of quality check lists, charts, statistics, or other means of tracking quality, completeness, and usefulness.

c. Process design and monitoring to ensure that the process itself imposes checks on information quality.

d. Review during information preparation.

e. Use of management controls.

f. Any other method which serves to enhance the accuracy, reliability, and objectivity of the information.

.PART III. ADMINISTRATIVE CORRECTION MECHANISM

A. Overview and Definitions

1. Requests to correct information. Any affected person (see "Definitions" below) may request, where appropriate, timely correction of disseminated information that does not comply with applicable information quality guidelines. An affected person would submit a request for such action directly to:

NOAA Section 515 Officer
NOAA Executive Secretariat
Herbert C. Hoover Building – Room 5230
14th and Constitution Avenue, N.W. Washington, D.C. 20230

However, requests for correction received in compliance with the Department of Commerce guidelines and forwarded to NOAA by DOC will be considered as if submitted to the NOAA Section 515 Officer on the date received by the NOAA Executive Secretariat.

2. Appeals of denials of requests. Any person receiving an initial denial of a request to correct information may file an appeal of such denial, which must be received by the NOAA Section 515 Officer (address as in paragraph III.A.1. above) within 30 calendar days of the date of the denial of the request. The appeal must include a copy of the original request, any correspondence regarding the initial denial, and a statement of the reasons why the requester believes the initial denial was in error. No opportunity for personal appearance, oral argument, or hearing on appeal will be provided.

3. Burden of Proof. The burden of proof is on the requester to show both the necessity and type of correction sought. Information that is subjected to formal, independent, external peer review is presumed to be objective. The requestor has the burden of rebutting that presumption.

4. Definitions.

Affected person means an individual or entity that uses, benefits from, or is harmed by the disseminated information at issue.

Person means an individual, partnership, corporation, association, public or private organization, or governmental entity.

Responsible office means a sub-organization of NOAA responsible for carrying out specified substantive functions (i.e. , programs) that is designated to make the initial decision on a request for correction based on NOAA information quality standards.

Staff Office means the Office of Finance and Administration, the Office of the Under Secretary of Commerce for Oceans and Atmosphere/Administrator, the Office of Chief Information Officer and High Performance Computing and Communications, Office of Marine and Aviation Operations, or any other organizational unit in NOAA that is not contained in one of the NOAA Line Offices or in another larger Staff Office.

B. Procedures for Submission of Initial Requests for Correction

1. An initial request for correction of disseminated information must be made in writing and addressed to the NOAA Section 515 Officer (address as in paragraph III.A.1. above). The NOAA Section 515 Officer will transmit the written request to the responsible office. Any NOAA employee receiving a misdirected request should make reasonable efforts to forward the request to the NOAA Section 515 Officer, but the time for response does not commence until the NOAA Section 515 Officer receives the request. A request for correction of disseminated information will not support or extend any other legally prescribed deadline for a pending action.

2. No initial request for correction will be considered under these procedures concerning:

- a. a matter not involving "information," as that term is defined herein;
- b. information that has not actually been "disseminated," according to the definition of "dissemination" herein; or
- c. disseminated information the correction of which would serve no useful purpose. For example, correction of disseminated information would serve no useful purpose with respect to information that is not valid, used, or useful after a stated short period of time (such as a weather forecast). However, this would not preclude a request for correction alleging a recurring or systemic problem resulting in repeated similar or consistent errors.

Additionally, requests that are duplicative, repetitious, or frivolous may be rejected.

Any request rejected under this provision will nevertheless be accounted for in the Department's report to OMB.

3. At a minimum, to be considered proper, initial requests must include:

- a. the requester's name, current home or business address, and telephone number or electronic mail address (to assist with timely communication);
- b. a statement that the request for correction of information is submitted under Section 515 of Public Law 106-554 (to ensure correct and timely routing);
- c. an accurate citation to or description of the particular information disseminated which is the subject of the request, including: the date and source from which the requester obtained the information; the point and form of dissemination; an indication of which NOAA office or program disseminated the information (if known); and any other details that will assist NOAA in identifying the specific information which is the subject of the request and locating the responsible office;
- d. an explanation of how the requester is affected; and

e. a specific statement of how the information at issue fails to comply with applicable guidelines and why the requester believes that the information is not correct.

4. For any proper request (i.e. one including all the elements of paragraph III.B.3.) above, NOAA will attempt to communicate either a decision on the request, or a statement of the status of the request and an estimated decision date, within 60 calendar days after receipt of the request by the NOAA Section 515 Officer.

5. No action will be taken regarding a request not including all the elements of paragraph III.B.3. (including a request made by a person unaffected by the dissemination of the information), or a request that does not state a claim according to paragraph III.C.1. The submitter of any such request will be notified, usually within 60 calendar days, of this disposition, and, if possible, may amend the request as required and resubmit it. Whether resubmitted or not, such requests will be accounted for in the Department's annual report to OMB.

6. A proper request received concerning information disseminated as part of and during the pendency of the public comment period on a proposed rule, Natural Resource Plan ("plan"), or other action, including a request concerning the information forming the record of decision for such proposed rule, plan, or action, will be treated as a comment filed on that proposed rulemaking, plan, or action, and will be addressed in issuance of any final rule, plan, or action.

C. Action by the Responsible Office on Initial Requests for Correction

1. Upon receipt of a proper request, the head of the responsible office will make a preliminary determination whether the request states a claim. A request for correction states a claim if it reasonably demonstrates, on the strength of the assertions made in the request alone, and assuming they are true and correct, that the information disseminated was based on a misapplication or non-application of NOAA's applicable published information quality standards. In other words, to state a claim, a request for correction must actually allege that NOAA disseminated information that does not comply with applicable guidelines.

A determination that a request does not state a claim will be communicated, along with an explanation of the deficiencies, to the requester, usually within 60 calendar days of receipt. The request may be amended and resubmitted as indicated in paragraph III.B.5 above.

2. If a proper request is preliminarily determined to state a claim, the head of the responsible office will objectively investigate and analyze relevant material, in a manner consistent with established internal procedures, to determine whether the disseminated information complies with NOAA's information quality standards. The head of the responsible office will make an initial decision whether the information should be corrected and what, if any, corrective action should be taken. No opportunity for personal appearance, oral argument, or hearing is provided.

If NOAA determines that corrective action is appropriate, corrective measures may be taken through a number of forms, including but not limited to: personal contacts via letter or telephone, form letters, press releases or postings on the appropriate NOAA Web site to correct a widely disseminated error or to address a frequently raised request, or withdrawal of the information in question. The form of corrective action will be determined by the nature and timeliness of the information involved and such factors as the

significance of the error on the use of the information, and the magnitude of the error.

3. The head of the responsible office will communicate his/her initial decision or the status of the request to the requester, usually within 60 calendar days after it is received by the NOAA Section 515 Officer.

4. The initial decision or status update will contain the name and title of the person communicating the decision, the name of the NOAA Line or Staff Office of which the responsible office is a part, the name and title of the head of that Line or Staff Office, and a notice that the requester may appeal an initial denial, as in paragraph III.D.1. below, within 30 calendar days of the date of the initial denial.

Normally, the person handling the appeal (Appeal Official) will be the head of the Line or Staff Office of which the responsible office is a part. To ensure objectivity, any such Appeal Official will be at least one administrative level above the official who made the initial decision. If this is not possible within the NOAA Line or Staff Office of which the responsible office is a part, then the Appeal Official will be an official from another office which is at least one administrative level above the office of the official who made the initial decision. An initial denial will become a final decision if no appeal is filed within 30 calendar days.

D. Appeals from Initial Denial

1. An appeal from an initial denial must be made within 30 calendar days of the date of the initial decision and must be in writing and addressed to the NOAA Section 515 Officer (address as in paragraph III.A.1. above). An appeal of an initial denial must include:

- a. the requester's name, current home or business address, and telephone number or electronic mail address (in order to ensure timely communication);
- b. a copy of the original request and any correspondence regarding the initial denial; and
- c. a statement of the reasons why the requester believes the initial denial was in error.

2. Where an initial denial has been made concerning information that is part of the record of decision of a rulemaking, Natural Resource Plan, or other action identified in paragraph III.B.6., and an administrative appeal mechanism, such as a reconsideration process, exists, an appeal will be considered pursuant to that process.

3. The Appeal Official will decide whether the information should be corrected based on all the information presented in the appeal record. No opportunity for personal appearance, oral argument, or hearing on appeal is provided. The Appeal Official will communicate his/her decision to the requester usually within 60 calendar days after receipt by the NOAA Section 515 Officer.

U.S. Fish and Wildlife Service Information Quality Guidelines

Guidelines issued by the U.S. Fish and Wildlife Service (FWS) for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by FWS.

PART I INTRODUCTION AND PURPOSE

PART II BACKGROUND, TERMINOLOGY, AND APPLICABILITY

PART III INFORMATION QUALITY STANDARDS

PART IV INFORMATION QUALITY PROCEDURES

PART V LEGAL EFFECT

PART VI DEFINITIONS

PART I INTRODUCTION AND PURPOSE

The mission of the U.S. Fish and Wildlife Service (FWS) is working with others to conserve, protect, and enhance fish, wildlife and plants and their habitats for the continuing benefit of the American people. FWS is issuing these guidelines to establish FWS policy and procedures for reviewing, substantiating, and correcting the quality of information it disseminates, so that persons affected by distribution of information by FWS may seek and obtain, where appropriate, correction of information that they believe may be in error or otherwise not in compliance with the law.

PART II BACKGROUND, TERMINOLOGY, AND APPLICABILITY

In December 2000, Congress required Federal Agencies to publish their own guidelines for ensuring and maximizing the quality, objectivity, utility, and integrity of information that they disseminate to the public (44 U.S.C. 3502). The amended language is included in section 515(a) of the Treasury and General Government Appropriations Act of 2001 (P.L. 106-554, HR 5658.) The Office of Management and Budget (OMB) published guidelines in the Federal Register on February 22, 2002 (67 FR 8452), directing agencies to address the requirements of the law. The Department of the Interior announced adoption of the OMB guidance. In a May 2002 Federal Register notice, the Department of the Interior instructed bureaus to prepare separate guidelines on how they would apply the Act. This document provides guidance within the FWS and informs the public of FWS policies and procedures to conform with these requirements.

The guidelines supplement existing procedures for commenting on information or correcting information. The guidelines may be revised periodically to best address, ensure, and maximize information quality.

Factors such as homeland security, threats to public health, statutory or court-ordered deadlines, circumstances beyond our control, or other time constraints may limit or preclude applicability of these guidelines.

II-1 To whom do these guidelines apply?

These guidelines apply to all Service offices that disseminate information to the public.

II-2 When do these guidelines become effective?

These guidelines apply to information disseminated on or after October 1, 2002, regardless of when it was first disseminated. Archived records of information disseminated and subsequently archived are exempt from the Guidelines. Information disseminated prior to October 1, 2002, but not archived and still being used in a decision-making process is not exempt from these guidelines.

II-3 Do these guidelines change requirements of the public?

These guidelines do not impose new requirements or obligations on the public.

II-4 What do these guidelines cover?

These guidelines apply to all information disseminated by the agency to the public, including information initiated or sponsored by the agency, and information from outside parties that is disseminated by the agency in a manner that reasonably suggests that the agency endorses or agrees with the information. For the purpose of these guidelines, "information" includes any communication or representation of knowledge such as facts or data, in any medium or form. "Disseminated to the public" includes publication (electronic or written) to a community or audience. "Sponsored information" is information FWS initiates or sponsors for distribution to the public. As examples: FWS sponsors information disseminated to the public when FWS prepares and distributes information to support or represent the FWS's viewpoint, to formulate or support an FWS regulation, to distribute FWS guidance, or otherwise put forth a bureau decision or position. FWS sponsors information when information prepared or submitted by a third party is distributed by FWS in a manner that reasonably suggests that FWS endorses or agrees with it, or is using it to support the FWS's viewpoint.

II-5 Where are the terms in this guidance further defined?

The terms "quality, utility, objectivity, integrity, information, government information, information dissemination product, dissemination, influential, and reproducibility" are defined in Part VI. Where a different or modified definition of any of these terms is applicable in a specific context, or associated with a specific information category, that definition will be provided in the context to which it applies.

II-6 What information does not fall under these guidelines?

These guidelines apply only to information that FWS sponsors and disseminates to the public. Examples of information that would generally not meet these criteria are:

- Testimony and information presented to Congress as part of legislative or oversight processes,

including drafting assistance in connection with proposed or pending legislation, that is not simultaneously disseminated to the public;

- Internet hyperlinks to non-FWS sites;
- Opinions (where FWS presentation makes it clear that what is being offered is someone's opinion rather than fact or the views of FWS) are not FWS positions;
- Correspondence to and from an individual and FWS concerning the status of the individual's particular issue, permit, land or case is not considered information disseminated to the public;
- Archival records, including library holdings;
- Information distributed only to government employees or FWS contractors or grantees;
- Communications between Federal agencies, including management, personnel and organizational information, even if the information becomes public at some point;
- FWS responses to requests for agency records pursuant to the Freedom of Information Act (FOIA), the Privacy Act, the Federal Advisory Committee Act (FACA), or other similar laws;
- Solicitations (e.g., program announcements, requests for proposals);
- Press releases, fact sheets, press conferences or similar communications in any medium that announce, support the announcement or give public notice of information FWS has disseminated elsewhere;
- Distributions of information by outside parties unless FWS is using the outside party to disseminate the information on its behalf (and to clarify applicability of the guidelines, FWS will indicate whether distributions are initiated or sponsored by FWS by using disclaimers to explain the status of the information);
- Research by Federal employees and recipients of FWS grants, cooperative agreements, or contracts, where the researcher (and not FWS) decides whether and how to communicate and publish the research, does so in the same manner as his or her academic colleagues, and distributes the research in a manner that indicates that the research does not represent FWS's official position (for example, by including an appropriate disclaimer). Distribution of research in this manner is not subject to these guidelines even if FWS retains ownership or other intellectual property rights because the Federal Government paid for the research;
- Public filings including information submitted by applicants for a permit, license, approval, authorization, grant, or other benefit or permission; information submitted voluntarily as part of public comment during rulemaking;
- Dissemination intended to be limited to subpoenas or information for adjudicative processes, including ongoing criminal or civil action or administrative enforcement action, investigation, or audit;
- Forensic reports issued in connection with ongoing criminal investigations.

II-7 What happens if information is initially not covered by these guidelines, but FWS subsequently disseminates it to the public?

If a particular distribution of information is not covered by these guidelines, the guidelines may still apply to a subsequent distribution of the information in which FWS adopts, endorses or uses the information to formulate or support a regulation, guidance, or other decision or position.

II-8 How does FWS ensure the objectivity of information that is covered by these guidelines?

FWS strives for objectivity of information subject to these guidelines by presenting the information in an accurate, clear, complete, and unbiased manner. FWS is committed to ensure accurate, reliable, and unbiased information. All information disseminated to the public must be approved prior to its dissemination by an authorized representative of the appropriate program and/or Regional Office and must satisfy OMB, Departmental, and FWS guidelines. The approval process will include documentation of the specific information quality standards used in producing the information in a way that substantiates the quality, utility, objectivity, and integrity of the information in a manner that conforms to OMB and Departmental guidelines.

II-9 How does FWS ensure the objectivity and integrity of information that is covered by these guidelines?

Information is subject to security controls designed to ensure that it cannot be compromised or contaminated. These include quality review/quality control procedures, laboratory protocols, study protocols, peer review, and senior management oversight.

II-10 Who is the official responsible for FWS compliance with the guidelines?

The Assistant Director for External Affairs is the responsible official.

PART III INFORMATION QUALITY STANDARDS

To the greatest extent practicable and appropriate, information that FWS disseminates is internally reviewed for quality, including objectivity, utility and integrity, before such information is disseminated. FWS adopts as performance standards, the basic guidance (and definitions) published by OMB on February 22, 2002, and adopted by DOI in a Federal Register notice published May 24, 2002, and the DOI Final Notice.

III-1 How does FWS ensure and maximize the quality of disseminated information?

FWS ensures and maximizes the quality of information by using policies and procedures appropriate to the information product. These include senior management oversight and controls, peer review, communications, product review, surnaming, and error correction. Higher levels of scrutiny are applied to influential scientific, financial or statistical information, which must adhere to a higher standard of quality.

III-2 How does FWS define influential information for these guidelines?

"Influential" means scientific, financial or statistical information with a clear and substantial impact on important public policies or important private sector decisions. For example, FWS will generally consider the following classes of information to be influential: information disseminated in support of the Director's decisions or actions (e.g., rules, substantive notices, policy documents, studies, guidance), and issues that are highly controversial or have cross-agency interest or affect cross-agency policies.

III-3 How does FWS ensure and maximize the quality of "influential" information?

Offices that disseminate information to the public must ensure that influential information, such as analytic results, have a high degree of transparency regarding the source of the information, assumptions employed, analytical methods applied, and statistical procedures employed. Original and supporting information may not be subject to the high and specific degree of transparency required of analytic results, but FWS will apply relevant policies and procedures to achieve reproducibility to the extent practicable, given ethical,

feasibility, and confidentiality constraints. Peer review and public comment periods are key tools for ensuring information quality.

III-4 What is the context in which the information deemed “influential” will be changed?

FWS uses the best available information in making its decisions, from materials from stakeholders, the public, and the scientific community. The most recent or thorough information will be utilized where available. FWS will rely on older information where the conditions of the land and/or resources have not substantially changed over time or where collection of more recent information would not be justified by cost or anticipated yield and value.

III-5 Does FWS ensure and maximize the quality of information from external sources?

FWS will take steps to ensure that the quality and transparency of information provided by external sources, e.g., State and local governments, are sufficient for the intended use. Further consultation, cooperation and communication with States and other governments, the scientific and technical community and other external information providers are needed to address application of these guidelines to external sources.

PART IV INFORMATION QUALITY PROCEDURES

Each FWS office will incorporate the information quality principles outlined in these guidelines into existing review procedures as appropriate. Offices and Regions may develop unique and new procedures, as needed, to provide additional assurance that the information disseminated by or on behalf of their organizations is consistent with these guidelines. All FWS information (publications, reports, data, web pages, etc) must contain a contact name/office, address/email address, phone number.

The FWS website (www.fws.gov) will provide the primary means for affected persons to challenge the quality of disseminated information.

Affected persons may also file a complaint with FWS by mail at:

Correspondence Control Unit
Attention: Information Quality Complaint Processing
U.S. Fish and Wildlife Service
1849 C Street, NW, Mail Stop 3238-MIB
Washington, D.C. 20240

IV-1 Who may request a correction of information?

Any affected person or organization may request a correction of information from FWS pursuant to these guidelines. "Affected persons or organizations" are those who may use, be benefitted by, or be harmed by the disseminated information.

IV-2 What should be included in a request for correction of information?

A request for correction of information must include the following:

- Statement that the Request for Correction of Information is Submitted Under DOI/FWS Information Quality Guidelines.
- Requester Contact Information. The name, mailing address, telephone number, fax number, email address, and organizational affiliation (if any). Organizations submitting a request must identify an individual to serve as a contact.
- Description of Information to Correct. The name of the FWS publication, report, or data product; the date of issuance or other identifying information, such as the URL of the web page, and a detailed description that clearly identifies the specific information contained in that publication, report, or data production for which a correction is being sought.
- Explanation of Noncompliance with OMB, DOI, and/or FWS Information Quality Guidelines.
- Effect of the Alleged Error. Provide an explanation that describes how the alleged error harms or how a correction would benefit the requestor.
- Recommendation and justification for how the information should be corrected. State specifically how the information should be corrected and explain why the corrections should be made.
- Supporting Documentary Evidence. Provide any supporting documentary evidence, such as comparable data or research results on the same topic.

IV-3 Will FWS consider all requests for correction of information?

Yes. FWS will consider all requests submitted pursuant to these guidelines, and consider it for correction unless the request itself is deemed "frivolous," including those made in bad faith or without justification, deemed inconsequential or trivial, and for which a response would be duplicative of existing processes, unnecessary, or unduly burdensome on the Agency.

IV-4 What type of requests would be considered frivolous, duplicative, unnecessary, or unduly burdensome?

FWS may consider a request for correction (or complaint) frivolous if it could have been submitted as a timely comment in the rulemaking or other action but was submitted after the comment period. FWS may consider a request for correction frivolous if it is not from an "affected person" and for these guidelines "affected persons" are persons or organizations who may use, be benefitted by, or be harmed by the disseminated information, including persons who are seeking to address information about themselves as well as persons who use information. FWS may consider each complaint on its merit. Complaints may be dismissed by FWS if it is determined that the complaint is duplicative, burdensome, and disruptive if it was already subject to a separate process for information with a public comment process. For example, FWS rulemaking includes a comprehensive public comment process and imposes a legal obligation on FWS to respond to comments on all aspects of the action. These procedural safeguards can ensure a thorough response to comments on quality of information. The thorough consideration required by this process generally meets the needs of the request for correction of information process.

In the case of rulemakings and other public comment procedures, where FWS disseminates a study analysis, or other information prior to the final FWS action or information product, requests for correction will be considered prior to the final FWS action or information dissemination in those cases where FWS has determined that an earlier response would not unduly delay issuance of FWS action or information and the complainant has shown a reasonable likelihood of suffering actual harm from the agency's dissemination

if the FWS does not resolve the complaint prior to the final FWS action or information product.

If FWS cannot respond to a complaint in the response to comments for the action (for example, because the complaint is submitted too late to be considered along with other comments or because the complaint is not germane to the action), FWS at its discretion will consider whether a separate response to the complaint is appropriate.

IV-5 How will FWS respond to a request for correction of information?

All complaints about Service information quality standards will be tracked by the Service's Correspondence Control Unit (CCU), which will route complaints to the Program or Regional Office responsible for the information. CCU will notify the complainant of receipt of the complaint within 10 business days.

If a request for correction of information is appropriate for consideration, FWS will review the request within 45 business days from receipt of the complaint and issue a decision. FWS will send the results of this decision to the requester with an explanation for the decision. If the request requires more than 45 working days to resolve, the agency will inform the complainant that more time is required and indicate the reason why. If a request is approved, FWS will take corrective action. Corrective measures may include personal contacts via letter, form letters, press releases or postings on the FWS website to correct a widely disseminated error or address a frequently raised request. Corrective measures, where appropriate, will be designed to provide notice to affected persons of any corrections made.

IV-6 Will FWS reconsider its decision on a request for the correction of information?

Requesters of corrective actions who are dissatisfied with an FWS decision regarding their request may appeal the decision. Appeals for reconsideration must be submitted within 15 business days from the decision and should contain the following:

- Indication that the person is seeking an appeal of an FWS decision on a previously submitted request for a correction of information, including the date of the original submission and date of FWS decision;
- Indication of how the individual or organization is an "affected person" under the provisions of these guidelines;
- Name and contact information. Organizations submitting an appeal should identify an individual as a contact;
- Explanation of the disagreement with the FWS decision and, if possible, a recommendation of corrective action; and
- A copy of the original request for the correction of information.

IV-7 How does FWS process requests for reconsideration of FWS decisions?

Requests for reconsideration of FWS decisions will be logged and tracked by the FWS's Correspondence Control Unit. Appeals will be forwarded to the appropriate FWS program office or Region that has responsibility for the information in question. The Director of the Fish and Wildlife Service or his designated responsible Assistant or Regional Director will make the final decision on the appeal within 15 business days from receipt in FWS.

IV-8 What is the reporting requirement for oversight of these guidelines?

The Assistant Director for External Affairs will submit reports to the Department of the Interior for consolidated submission to OMB on an annual basis beginning January 1, 2004, and the report will include the number, nature and resolution of complaints received by FWS under the provisions of these guidelines.

PART V LEGAL EFFECT

These guidelines are intended only to improve the internal management of FWS relating to information quality. Nothing in these guidelines is intended to create any right or benefit, substantive or procedural, enforceable by law or equity by a party against the United States, its agencies, its offices, or another person. These guidelines do not provide any right to judicial review.

PART VI DEFINITIONS

VI-1. *Quality* is an encompassing term that includes utility, objectivity, and integrity. Therefore, the guidelines sometimes refer to these four statutory terms collectively as *quality*.

VI-2. *Utility* refers to the usefulness of the information to its intended users, including the public. In assessing the usefulness of information that we disseminate to the public, we need to reconsider the uses of the information not only from our perspective, but also from the perspective of the public. As a result, when transparency of information is relevant for assessing the information's usefulness from the public's perspective, we will take care to address that transparency in our review of the information.

VI-3. *Objectivity* involves two distinct elements: presentations and substance.

(a) *Objectivity* includes whether we disseminate information in an accurate, clear, complete, and unbiased manner. This involves whether the information is presented within a proper context. Sometimes, in disseminating certain types of information to the public, other information must also be disseminated in order to ensure an accurate, clear, complete, and unbiased presentation. Also, we will identify the sources of the disseminated information (to the extent possible, consistent with confidentiality protections) and include it in a specific financial, or statistical context so that the public can assess for itself whether there may be some reason to question the objectivity of the sources. Where appropriate, we will identify transparent documentation and error sources affecting data quality.

(b) In addition, objectivity involves a focus on ensuring accurate, reliable, and unbiased information. In a scientific, financial, or statistical context, we will analyze the original and supporting data and develop our results using sound statistical and research methods.

(1) If data and analytic results have been subjected to formal, independent, external peer review, we will generally presume that the information is of acceptable objectivity. However, a complainant may rebut this presumption based on a persuasive showing in a particular instance. If we use peer review to help satisfy the objectivity standard, the review process employed must meet the general criteria for competent and credible peer

review recommended by OMB's Office of Information and Regulatory Affairs (OIRA) to the President's Management Council (9/20/01) (http://www.whitehouse.gov/omb/inforeg/oira_review-process.html). OIRA recommends "that (a) peer reviewers be selected primarily on the basis of necessary technical expertise, (b) peer reviewers be expected to disclose to agencies prior technical/policy positions they may have taken on the issues at hand, (c) peer reviewers be expected to disclose to agencies their sources of personal and institutional funding (private or public sector), and (d) peer reviews be conducted in an open and rigorous manner."

(2) Since we are responsible for disseminating influential scientific, financial, and statistical information, we will include a high degree of transparency about data and methods to facilitate the reproducibility (the ability to reproduce the results) of such information by qualified third parties. To be considered influential, information must be based on objective and quantifiable data and constitute a principal basis for substantive policy positions adopted by FWS. It should also be noted that the definition applies to "information" itself, not to decisions that the information may support. Even if a decision or action by FWS is itself very important, a particular piece of information supporting it may or may not be "influential".

Original and supporting data will be subject to commonly accepted scientific, financial, or statistical standards. We will not require that all disseminated data be subjected to a reproducibility requirement. We may identify, in consultation with the relevant scientific and technical communities, those particular types of data that can practically be subjected to a reproducibility requirement, given ethical, feasibility, or confidentiality constraints. It is understood that reproducibility of data is an indication of transparency about research design and methods and thus a replication exercise (i.e. a new experiment, test of sample) that will not be required prior to each release of information.

With regard to analytical results, we will generally require sufficient transparency about data and methods that a qualified member of the public could undertake an independent reanalysis. These transparency standards apply to our analysis of data from a single study as well as to analyses that combine information from multiple studies.

Making the data and methods publicly available will assist us in determining whether

analytic results are reproducible. However, the objectivity standard does not override other compelling interests such as privacy, trade secrets, intellectual property, and other confidentiality protections.

In situations where public access to data and methods will not occur due to other compelling interests, we will apply especially rigorous checks to analytical results and documents what checks were undertaken. We will, however, disclose the specific data sources used, and the specific quantitative methods and assumptions we employed. We will define the type of checks, and the level of detail for documentation, given the nature and complexity of the issues. With regard to analysis of risks, human health, safety, and the environment, we will use or adapt the quality principles applied by Congress to risk information used and disseminated under the Safe Drinking Water Amendments of 1996 (42 U.S.C. 300g-1(b)(3)(A) & B)).

VI-4. *Integrity* refers to the security of information - protection of the information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification.

VI-5. *Information* means any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms. This definition includes information that an agency disseminates from a web page, but does not include the provision of hyperlinks to information that others disseminate. This definition does not include opinions, where our presentation makes it clear that what is being offered is someone's opinion rather than fact or the agency's views.

VI-6. *Government information* means information created, collected, processed, disseminated, or disposed of by or for the Federal Government.

VI-7. *Information dissemination product* means any books, paper, map, machine-readable material, audiovisual production, or other documentary material, regardless of physical form or characteristic, an agency disseminates to the public. This definition includes any electronic document, CD-ROM, or web page.

VI-8. *Dissemination* means agency initiated or sponsored distribution of information to the public [see 5 CFR 1320.3(d) for definition of "conduct or sponsor"]. Dissemination does not include distribution limited to government employees or agency contractors or grantees; intra- or inter-agency use or sharing of government information; and responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or other similar law. This definition also does not include distribution limited to correspondence with individuals or persons, press releases, archival records, public filings, subpoenas or adjudicative processes.

VI-9. *Influential*, when used in the phrase "influential scientific, financial, or statistical information," means that we can reasonably determine that dissemination of the information will have or does have a clear and

substantial impact on important private sector decisions. We are authorized to define "influential" in ways appropriate for us, given the nature and multiplicity of issues for which we are responsible.

VI-10. *Reproducible* means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision. For information judged to have more (less) important impacts, the degree of imprecision that is tolerated is reduced (increased). If we apply the reproducibility test to specific types of original or supporting data, the associated guidelines will provide relevant definitions of reproducibility (e.g. standards for replication of laboratory data). With respect to analytic results, capable of being substantially reproduced means that independent analysis of the original or supporting data using identical methods would demonstrate whether similar analytic results, subject to an acceptable degree of imprecision or error, could be generated.

Appendix O.

FWS National Outreach Strategy



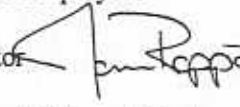
United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

In Reply Refer To:
FWS/PA

AUG - 8 1997

Memorandum

To: Service Employees
From: Director 
Subject: National Outreach Strategy

Communication is essential to the Fish and Wildlife Service's resource mission. Good communication builds understanding and helps the public make informed decisions about the future of fish and wildlife resources.

Over the past several years, it became clear to the Directorate that a sharper focus is needed for the Service's "outreach" efforts. This decision arose out of a growing awareness that the Service expends significant resources on "outreach," but that we are not presenting the public with a unified understanding of the U.S. Fish and Wildlife Service's conservation mission.

To strengthen and focus the Service's communication efforts, the Directorate has approved the National Outreach Strategy. The Strategy offers guidance to help clarify and unify our message and to make sure we are talking -- and listening -- to the audiences who will have the greatest influence on the future of fish and wildlife resources. It also provides specific guidance to help you prepare outreach plans now required for endangered species listings and all other significant Service actions.

The goals of the National Outreach Strategy are simple: to ensure that we are building relationships with partners and decisionmakers; to provide timely, accurate information about our decisions to concerned citizens; and to provide clear messages about how fish and wildlife conservation affects the quality of life for all Americans. The Strategy is also aimed at ensuring that we all communicate about the U.S. Fish and Wildlife Service when we conduct "outreach" for our individual programs and field stations.

By implementing the National Outreach Strategy, we will make more effective use of the time and money we devote to communication. Ultimately, the relationships we build and the public understanding we gain will help ensure a more secure future for America's fish and wildlife resources.

I hope each of you will read this document and begin to apply it in your daily work. The Service Directorate will continue to take the actions required to implement the National Outreach Strategy.

Executive Summary

This report describes a national communications strategy for the U.S. Fish and Wildlife Service.

A more unified, strategic communications program will help the Service accomplish its conservation mission for fish and wildlife. This strategy recommends actions that will make communications an integral part of our natural resource management program.

The Service needs to *focus its message* so that the agency speaks with one voice across the country. Employees can then build upon each other's communications efforts. The strategy recommends three basic messages that can be used to explain why the Service's work is important to the American people.

For any communications program to work, the Service must be perceived as a *credible source* of information, and its employees must be trusted as dedicated professionals who are *responsive to the public*. Building and maintaining this public trust should be an integral part of the Service's outreach program.

To achieve this, the strategy recommends that Service outreach efforts focus on building *strong relationships with key audiences at the local, regional, and national level*. It recommends that the Service prepare and carry out *outreach plans* for major decisions and announcements to make sure that the agency's message is clear and that concerned people are notified in a timely way.

The strategy recommends that the Service strengthen its communications program by building a stronger corps of *communications professionals* at key locations. It also recommends establishing a position for a National Outreach Coordinator at the Washington Office level to focus on building new partnerships and a more integrated Service outreach effort.

The strategy recommends that the Service continue its effort to strengthen its "corporate identity" by implementing the *uniform design standards* for publications and reviewing standards for uniforms and vehicles. It recommends *reviewing existing publications, audiovisuals, and exhibits* to determine the need for new or updated materials that can be used Servicewide. It also recommends making *better use of special events* to support specific messages, and using environmental education programs to support Service outreach goals.

Introduction: Using Communications to Carry Out Our Mission

As we approach the 21st century, the future of America's fish and wildlife is at a crossroads. Wildlife habitat continues to vanish in the face of development pressure, while our growing urban population has less direct connection with fish and wildlife than any previous generation. The public often responds emotionally to wildlife management and conservation issues. Professional fish and wildlife managers face new challenges that demand new approaches to the way we do business.

The U.S. Fish and Wildlife Service is America's voice for wildlife. It is our job to speak up for the wild creatures that cannot speak for themselves. To be effective, we must do so in a way that engenders public understanding and support.

Although the Service must manage many controversial issues, it also enjoys significant strengths: a dedicated workforce, and strong public interest in fish and wildlife.

To meet Service challenges and take advantage of its strengths, this plan recommends a more unified and strategic communications program that will help the Service carry out its resource conservation mission.

A great deal of effective and valuable outreach is already occurring within the U.S. Fish and Wildlife Service. Many employees are already implementing the actions recommended in this plan.

There are still many instances, however, when communications needs are not "built in" to planning for Service resource decisions.

In the past the Service has not devoted enough resources to communications to match the ability of our activities to generate controversy. And because the Service has such diverse responsibilities, existing outreach resources have been spread thin. Most outreach efforts have been conducted on an ad hoc basis to meet the needs of individual field stations, regions, or programs. While this has resulted in favorable results in some individual instances, its overall effect has been a "scattershot" approach to communications.

Former Director Mollie Beattie noted that this diversified, decentralized approach to outreach was not meeting critical Servicewide information needs during 1990's, and was unlikely to serve the agency or the public well in the 21st century.

"It's not a question of whether we're doing things right," she said, "but whether we are doing the right things."

Individual regions, field stations, and programs do have specific communication needs. The National Outreach Strategy is not intended to supplant these efforts, nor can any central strategy dictate the details of all regional, field, or program communication efforts.

Rather, the National Outreach Strategy is intended to provide guidance and focus for Service communication efforts. Its goal is to make sure we make the most effective use of our time and resources by focusing our message into something people can easily understand, and making sure we deliver that message to concerned people in a timely way.

The success of the National Outreach Strategy will depend on an effective *internal* communication program so that employees will understand and be able to carry out the plan. This internal component must include providing employees with factual information about Service policy and activities on major issues, so that even those who are not directly involved will be informed enough to explain issues to the public.

Goal

The goal of the National Outreach Strategy is to help U.S. Fish and Wildlife Service employees communicate more effectively, in order to improve the agency's ability to carry out its fish and wildlife conservation mission.

Through the National Outreach Strategy, the Service will:

- Define clear, consistent messages;
- Improve the consistency and timeliness of the information the Service provides to decisionmakers, community leaders, and the public;
- Improve relationships with key audiences and recognize the importance of the public as a participant in natural resource management;
- Unify employees to work toward common goals, while respecting the diversity of their responsibilities;
- Increase public awareness about what the Service does and how its conservation activities contribute to values that are important to the American people.

Effectively implemented, the National Outreach Strategy will:

- Improve service to the public;
- Strengthen the credibility and stature of the Service;
- Make it easier for employees to carry out their natural resource management responsibilities;
- Improve support for the agency's resource mission; and
- Build new partnerships.

What is "Outreach"?

"Outreach" in the U.S. Fish and Wildlife Service has become a generic term that means different things to different people.

Several years ago, a Service "white paper" defined "outreach" as "any effort designed to communicate information to, impart knowledge to, promote involvement by, or create behavioral change in the public regarding fish and wildlife resource issues."

This definition is strong in most respects, but leaves out the concept that effective communication is two-way: it involves listening, seeking out the views of stakeholders, noting the concerns of others, and changing Service actions when appropriate.

Thus, this strategy will adopt a version of the outreach definition used by Region 7:

Outreach is two-way communication between the U.S. Fish and Wildlife Service and the public to establish mutual understanding, promote involvement, and influence attitudes and actions, with the

goal of improving joint stewardship of our natural resources.

Outreach includes but is not limited to the following:

- Congressional relations
- Corporate relations
- News media relations
- Relations with constituent groups
- Community relations
- State and local government relations
- Relations with State wildlife agencies
- Environmental education and interpretive activities
- Public involvement
- Traditional public information activities such as speeches, open houses, etc.
- Information products, such as brochures, leaflets, exhibits, slide shows, videos, public service announcements, etc.

How Was the Strategy Developed?

The national outreach strategy arose from the concerns of former director Mollie Beattie, who noted that many of the issues that reach the Director's desk were communication issues as much as natural resource issues. She tasked the Assistant Director-External Affairs with coming up with a strategy that will help the Service develop and apply its outreach resources more effectively.

The Directorate discussed outreach at the June 1996 Directorate meeting (action items from that meeting are included in the Appendices to this document). Each Regional Director and Assistant Director was asked to designate a person to serve on a team that would develop the National Outreach Strategy. This team met in November 1996 to draft this strategy paper. Development of the draft included a review of earlier Service outreach policy documents, Regional outreach plans and handbooks, public opinion research, and information on State communication programs.

A draft of this document was shared with a larger group of Service employees (including some field project leaders, GARD's, divisions chiefs, public outreach specialists, and others) for comment before being presented to the Directorate in March 1997.

Responding to Changes in Technology and Public Attitudes

The Service faces a number of communication challenges that did not exist just 5 years ago.

For example, the internet now makes it possible for inaccurate information to spread and be picked up nationwide in a matter of minutes—a phenomenon that can, and has already, affected public perceptions about the Service.

Increased public distrust of government in general has made it more difficult for natural resource agencies to do their jobs. In the Service, endangered species listing and recovery efforts and acquisition and management of some refuges have been especially affected.

Core environmental programs have been the subject of intense political debate. At the same time, private groups have filed many lawsuits challenging actions by the Service and other resource agencies.

Such efforts increase the demand for information on how Service programs work. There is a higher level of public scrutiny and debate over activities that traditionally were not controversial.

The changes of the last few years make it more critical than ever for the Service to support its resource mission with a strong, coordinated communications program.

Overcoming Obstacles to Effective Outreach

There are many obstacles to effective outreach. In analyzing its own outreach efforts, Region 5 identified some of these, which also apply to Service outreach efforts nationwide:

- Lack of trained outreach/communication specialists;
- Lack of funding;
- Resistance to coordinating outreach efforts;
- Lack of consistency throughout the Region (Service);
- Lack of accountability;
- Multiple definitions of outreach (issues management vs. environmental education);
- Lack of clear messages; and
- Divergent views of which audiences to target.

In reviewing this document, Service employees identified a number of other obstacles, including a lack of understanding or awareness of the viewpoints of various segments of the public.

The actions recommended in this strategy will overcome these obstacles and create a stronger communications program. The major need for increased resources comes in employing professional communicators in a limited number of key positions, and in training our existing workforce.

What Does the Public Know About Us?

Effective communications must be based on an understanding of existing public knowledge and attitudes.

The Service has no public survey data on how well known the agency is or how much the public understands about our work. This deficiency hampers virtually every Service communications effort. The Service has not previously gathered this information because of restrictions on public surveys under the Paperwork Reduction Act.

Anecdotal evidence suggests that the Service is little known beyond a few basic constituent groups. Our own employees often note that the public confuses us with state wildlife agencies, BLM, National Park Service, Forest Service, and EPA. In analyzing results of its Congressional outreach efforts, Region 5 reported that many people they contacted did not know what the Service does.

Our own communications often don't help the public identify us. We often talk about our individual field stations, regions, or programs, without putting them into the larger context of

the U.S. Fish and Wildlife Service and its mission.

Some of our own employees view the notion of explaining how the Service contributes to important national values as "promoting the Service." They say the emphasis of Service communications should be on "promoting the resource."

Certainly one of our major communication goals is to convey why fish and wildlife conservation are important. But that message alone does not necessarily result in constituents who are ready to act to support or partner with U.S. Fish and Wildlife Service programs.

Usually when we are communicating, we are talking about specific things the Service is doing, or wants to do, to benefit the resource. For that information to be credible, its source—the U.S. Fish and Wildlife Service—must be credible. So employees do need to be concerned about public knowledge and perceptions of the Service. Wider public knowledge of what the Service does, and why we do it, will help the public make better informed decisions.

The Service already expends significant resources on education and outreach; by redirecting and focusing these efforts to become more strategic, we can reduce the need for specific funding increases for outreach. In any regard however, it is clear that the Service's current investment in communication is not adequate and does not match the level of public concern and political controversy that its programs are generating.

What We Learn From Public Opinion Research

While we have little information about how the public views the Service specifically, we do have public opinion research data about how Americans see the environment. This information provides critical background data that the Service must use to communicate with the public.

Data from several different polls conducted during the 1990's consistently show that Americans think protecting the environment is important, but most hold this belief for reasons that directly relate to human health and welfare. They also respond to the values of stewardship (preserving the environment for future generations or because it is God's creation). Arguments that species should be protected simply because they exist, or because they have an intrinsic right to be, are less likely to sway most people than reasons

associated with human health or stewardship.

People also respond best to a moderate, practical tone, because they feel many environmental issues in the past have been exaggerated. Service communications should avoid sensation and hyperbole. Surveys have found that absolute, strong language often backfires. Service communications should focus on how saving fish and wildlife and their habitats help *people* as well as fish and wildlife. A more complete explanation of the polling data can be found in Appendix III of this document.

In sum, Service employees need to remember to talk about the U.S. Fish and Wildlife Service, not just their Region or program, and they need to explain their work using simple, moderate, practical messages that people can relate to.

What Should the Service's Messages Be?

Americans today are bombarded by information. Because they can't possibly respond to all this information, they only respond to things they care about—and they may make that decision within just a few seconds. The Service needs to simplify its messages so the public can easily see why they should care and what they can do to help.

Every Service communication with the public should (1) establish that the U.S. Fish and Wildlife Service does the work being described, and (2) clearly explain how this work benefits people.

We want Americans to know three basic things about the U.S. Fish and Wildlife Service: who we are, what we do, and why we do it.

All Service programs and activities can be explained using one or more of the following messages.

- The U.S. Fish and Wildlife Service is a Federal agency whose mission, working with others, is to conserve fish and wildlife and their habitats.
- The Service helps protect a healthy environment for people, fish and wildlife.
- The Service helps Americans conserve and enjoy the outdoors.

These messages describe how we are different from other government agencies, and why our work is important to people.

The purpose of these basic messages is to encourage employees at all different locations to *build upon each other's work* by consistently repeating the same messages—reinforcing simple ideas about what the Service does and why we do it.

Using these consistent messages also will help employees think about what they need to communicate and simplify it into something that has meaning to people's deeply held values and beliefs.

The Service may also wish to develop a single "tagline" or slogan that can be used in association with the agency's name, and that reinforces the Service's mission using just a few short words.

How Do Employees Use The Messages?

Repetition and consistent use by Service employees across the nation is the key to success of this effort.

The messages can become the theme of a talk to a local organization; they can be used in fact sheets and brochures; they can be the basis of an interview with a local news reporter; they can be the headlines of an exhibit. Region 3 employees have already used the messages to help develop briefing papers and fact sheets for Congressional offices. These are just a few of the ways in which consistent messages can be used.

Service employees who are communicating with the public should take the time to explain, briefly, what the U.S. Fish and Wildlife Service does—and they can do so using these “messages” as their talking points. The specifics of their own program or activity can then be “stepped down” under one or more of these bullets. So, for example, Law Enforcement or Federal Aid activities can be described under “helping Americans conserve and enjoy the outdoors.” Employees who work in the contaminants, endangered species, or wetlands programs can explain how their work helps “protect a healthy environment for people, fish, and wildlife.” And so on for other Service programs.

Individual Service programs and activities *do* have a need for messages that are specific to their needs. These messages should be tied to resource priorities.

A number of Service programs—Federal Aid, Habitat Conservation, Migratory Birds, for example—are developing individual outreach strategies to meet their own needs. Similarly, specific activities such as wolf reintroduction into the Yellowstone ecosystem or the reintroduction of condors in Arizona, have their own unique communications needs.

These individual communication strategies can develop core messages that are specific to their own needs, while still reflecting the Service's overall messages. For example, a Federal Activities biologist can develop messages to explain how denial or approval of a federal permit will affect clean water (the healthy environment portion of the Service's message).

Outreach strategies for individual programs should be coordinated with each other and with External Affairs to make sure they are not sending competing or conflicting messages, and to ensure that they all communicate the U.S. Fish and Wildlife Service's mission—not just the mission of their own program. This coordination is crucial if we are to begin showing the American people how our individual programs and projects relate to a larger agency and conservation purpose.

Identifying Our Audience: Who Are We Talking To?

Most Service employees already know there is no single "public" with whom we must deal, but rather a variety of "publics" who have different concerns and interests. Broadly speaking, the Service's publics include State agencies and other wildlife professionals, conservation groups, sportsmen, educators, Congress, Native Americans, outdoor and environmental news media, the agricultural community, and many others.

A great deal of work has been done by Service Regions and programs to further identify and refine who these "publics" are. For example, the Refuge System's 100 on 100 campaign identifies five distinct external constituencies: Congress, corporate sponsors, communities, conservation groups, and communications media. Described as the "Five C's," these audiences are also relevant to the national outreach strategy.

Service employees should also be aware that studies show that people believe information received from peers and community authority figures (teachers, ministers, other experts) more than they do newspapers and sources outside the community. Service employees in each community need to identify these respected individuals and get to know them. The Service is supporting this effort through policies encouraging employees to join local organizations.

Identifying Our Audience II: Why are We Talking to Them?

The Service also needs a greater effort to address audiences systematically. The Service needs communication methods and tools to speak to its various publics individually. Development of these tools, and a systematic approach to identifying opportunities to address key audiences, is an effort that will take those two key ingredients—time and resources—to develop.

Our goal is to incite action. We are not looking for sympathy—we are looking for support!

That means our most important audiences are *decisionmakers* and *opinionleaders*. These could include local Congressmen and members of their staffs, county or city officials, State legislators, local business leaders, leaders of local conservation, sporting, and agricultural groups, members of the news media, affected landowners, and others. Each Service manager will want to know the key people on each issue in the local area.

The most effective use of our time and resources is to communicate with people like these—who can either broaden our audience and help us get information to the public, like the news media, or who can help determine whether our projects succeed.

Building Relationships and Establishing Credibility

The most important element of communication is building relationships with the people we are communicating with. It's better not to wait until we have a crisis before we call the county commissioners or the local paper. A neighbor who only comes to see you when they want to borrow a cup of sugar or your favorite hammer wears out the welcome mat pretty quickly. If we only talk to our "neighbors" when we have business to do, then we may not be in business for long.

Our jobs will be much easier if we have built a relationship with those key people early, so that by the time a difficult issue comes along they already know us and (hopefully) regard us as credible people they can work with.

The Director must lead this effort by holding regular meetings with representatives of Service constituent groups, members of Congress, and others. This effort should be further carried out by Regional Directors and GARD's, who should be certain to meet regularly with Governors, Congressional representatives, State directors, local and regional conservation group leaders, and many others.

Project leaders should also know the local Congressional representatives, leaders of community organizations, news reporters, counterparts in other natural resource agencies, and so on.

The Washington Office, Regions, and project leaders should have systematic plans for meeting with constituent groups. These relationships will tell us who can be most effective in helping to get a job done, what is likely to be our biggest obstacle, how we can work with the concerns of others, and what we will have to do to accomplish our resource priorities.

Many Service employees are still not comfortable with the idea that it is OK for them to contact Congressional district staffers, news reporters, and others. At the field level, project leaders determine who is responsible for Congressional contacts. The Service must provide additional guidance on these issues. In addition, Service managers must be evaluated and

rewarded for establishing strong relationships with key people in their areas. Building these relationships must be seen as critical to the Service's resource mission, rather than something that is secondary to our "real" work of fish and wildlife conservation.

The key to making these relationships work is our credibility as individuals, and as an agency. No communication program works if the source of the information is not considered an authority on the subject, or if the representatives of the agency are seen as unresponsive, uninterested, or unfair. Service employees must stand up for the resource, but in doing so they must demonstrate awareness of and concern for community interests. Once again, this is where it becomes important for the Service to have a clear message about why our work—particularly on a controversial issue—will benefit people as well as fish and wildlife.

The Service can build this credibility if employees:

- build relationships with key figures;
- establish their identity and credibility with the media;
- make the Service an integral part of the community in their areas;
- work to establish themselves as responsive public servants who listen to public concerns;
- identify Service employees who are experts in their fields, and make them available to represent the Service on key issues.

Building a Capability for Better Communications

Good relationships with key people will help us avoid the fire drills and crises that most of us are too familiar with. But inevitably, there are going to be bad days: your local Senator hates a new policy decision; a constituent group is suing you; the city paper has run an outrageous editorial; there is a disturbing wildlife die-off at a refuge—you name it. With its great variety of responsibilities and the public's keen interest in wildlife, the U.S. Fish and Wildlife Service on any given day is a communications crisis just waiting to happen.

To handle these situations, the U.S. Fish and Wildlife Service needs people who are trained in dealing with the news media and elected officials. Just as some situations require a skilled fisheries biologist or waterfowl manager, some situations need the skills of a communications professional.

Service managers must recognize that special skills are required to write and speak clearly and to deal with fast-breaking news. The Service needs experienced, trained communications professionals at selected key locations. This is especially important for field offices that are dealing with many controversial issues.

Some Service employees do not see value in working with the news media because they perceive that the media are interested only in controversy. A skilled and experienced professional communicator can identify and realize opportunities for the good news that the Service can and should be making every day.

Position descriptions for outreach jobs should require experience in news media or Congressional relations appropriate to the role in the organization. In selecting people for these jobs, the Service should wherever possible convene panels including public affairs or legislative specialists. Project leaders should consult with the ARD-EA about what sorts of qualifications are needed for particular outreach positions, and should involve the ARD-EA in reviewing the applicants.

Departmental regulations require the establishment of information-related and Congressional liaison positions, and the selection of individuals to fill these positions, to be approved by the Secretary's Office of Communications. These regulations are enforced for positions that involve significant interaction with the news media, whether or not they are classified as GS-1035 public affairs specialist positions. The Departmental clearance requirement has not generally been extended to refuge-based ORP positions. However, where these positions require significant news media or legislative outreach, they are subject to the clearance requirement.

The ARD-External Affairs will help project leaders obtain the required Departmental clearance for public outreach/public information positions. Historically the Department's Office of Communications has been very supportive of improving bureau communication resources through the hiring of qualified individuals for these positions.

A "No Surprises" Policy for Outreach

We can identify our message and target our audience, but we've got to get our message out in a timely way.

The Service's goal for communications should be a "no surprises" policy. Key Congressmen, local leaders, landowners, conservation groups, States and others do not like to be surprised by newspaper headlines announcing an important decision they knew nothing about.

A timely briefing or simple "heads up" about an upcoming decision can help avoid misunderstanding and build good will. However, such notifications must be carefully planned and timed so they do not result in premature news stories.

Each major Service decision or policy announcement should include planning for how and when outreach will be conducted, who needs to be contacted, what the message is, and who is responsible for carrying out the outreach. Such outreach plans are already prepared for endangered species listing decisions.

Both the Service and the public will be better served by this type of timely, coordinated, and planned communication on major issues.

Whose Job is Outreach?

Several employees who reviewed this document objected that hiring communications professionals would relieve other employees of the need to do outreach. "Outreach should be everybody's job," they observed.

Other Service employees counter that in the past, by making outreach everybody's job, it has become "no one's responsibility."

Outreach does indeed need to be part of everybody's job. The role of the communications professional is not only to promote positive stories and respond to crises, but also to provide advice, tools, and expertise to other employees to make our communications more

effective. Experience in several field offices has shown that the presence of an experienced public affairs officer can be of enormous help to project leaders. As one project leader explained, his office was trying to do communications before—they just weren't doing it very well. Bringing a public affairs specialist on staff improved the efficiency and effectiveness of the resources being devoted to communication.

Training programs to increase the communications skills of Service biologists and managers will continue to be encouraged. NCTC is building outreach into the project leader training scheduled to begin in 1998.

Where Does Education Fit Into "Outreach"?

Environmental and conservation education are important to the Service's long-term mission. In some communities, our environmental education programs are the most effective way to establish and improve community relations. Many strong education programs have been developed that are helpful to the agency's resource goals.

In the context of the Service's overall outreach/communications program, the education community is only one of the Service's publics. Education programs are not a substitute for effective relationships with decisionmakers and opinionleaders.

Education programs should be a part of a strategy to reach key community leaders, like teachers, school board members, elected officials, and the news media.

At many locations, it is more critical to use limited outreach resources to work with local leaders and the news media than to develop another environmental education curriculum. Service managers need to be sure they have a balance of these activities in their overall outreach programs. If limited resources dictate a choice between education programs and outreach to decisionmakers and opinion leaders, education programs should be a lower priority.

Education programs can and should support specific Service resource issues. For example, an education program could be used to explain reintroduction of an endangered species, or why a particular refuge needs to conduct prescribed burns.

Many of the education programs and curricula used by Service employees today do not mention the U.S. Fish and Wildlife Service and its mission. When that happens, Service employees should add some basic information about the Service for students, teachers, and parents.

Service managers can take advantage of the innate appeal of education programs to improve their outreach to key audiences, for example by inviting news media or local officials to join children learning about marsh life. Inviting the news media can broaden the audience for an education project beyond a single class or school to thousands or perhaps millions of people, who then are exposed to a positive image of what the Service is doing in their community.

In sum, to support the Service's outreach goals, environmental education programs should:

- include information about the Service and its mission;
- help build community relationships;
- support specific Service resource priorities;
- make the most effective use of Service resources (for example, teaching teachers);
- serve the needs of field stations; and
- reach the broadest possible audience.

Specific recommendations for improving the distribution and use of Service education resources should be made by the Service's National Conservation Training Center working in partnership with the Regions.

Toward a "Corporate Identity," or, Looks Count

National corporations know that looks count. They go to enormous expense to develop corporate logos, slogans, uniforms, and unified standards for their places of business.

To identify itself in the public mind, the U.S. Fish and Wildlife Service needs to move toward developing a visual identity.

This includes publications, exhibits, internet, signs, uniforms, and vehicles.

In addition, the Service's communication tools, such as brochures, internet, and audiovisuals, need to be reviewed and updated to ensure they are meeting the Service's communication needs.

Publications

The Service has many publications, videos, exhibits, and other outreach materials. Most of these materials have not been recently reviewed to determine whether they are effectively distributed, whether they meet the Service's communications needs, and whether the public actually likes them.

Service publications only recently began to have standard design and unified visual identity. To address this issue, in October 1996, a small group of Service design and publications staff met in Minneapolis. They have developed recommendations for a unified "look" for Service publications, and an implementation schedule for achieving that look. Their recommendations were presented to the Directorate in November. As a result, a unified design for Service publications has been adopted, and will be required for all new

publications. A unified "look" for Service publications will be a major step toward clarifying the Service's image and public identity.

In addition, the Service should review its communication tools and interview Washington and Regional staffs to determine needs for new or revised products. Incorporating its key messages, the Service should then develop these materials as available funding permits. The Service should review the distribution mechanisms for these products to ensure they are reaching their intended audiences, and should develop more effective mechanisms for evaluating the effectiveness of its communication tools.

The approval process for publications, audiovisuals, and exhibits should be reviewed to ensure that it is working efficiently and that new products conform to the unified design standard and support the messages about the Service's mission and the individual program messages to be developed later.

All employees should be notified of the availability of new products through the Service newsletter and other means.

Uniforms, Signs, and Vehicles

Efforts are well underway to upgrade signage at Service facilities. The Service recently has adopted policies concerning vehicles and uniforms that will also greatly strengthen our public image.

One "outreach" step that can be taken immediately, and easily, is for uniformed Service employees to wear their uniform whenever they will be filmed for news media,

documentaries, magazine articles, etc. This gives viewers and readers a visual cue that the employee being depicted works for the U.S. Fish and Wildlife Service.

Special Events

The Service also celebrates numerous special "days", "weeks" and events, such as National Wildlife Refuge Week, International Migratory Bird Day, National Fishing Week, National Hunting and Fishing Day, the Duck Stamp contest, and others. Many field stations also participate in local festivals. Some field stations with limited resources find it difficult to support many different events each year.

These special events can be excellent tools for promoting the Service's message, and in the future the Service may want to examine the possibility for identifying annual "themes" that each of these celebrations could reinforce. For example, the State of Missouri, noted for its conservation education programs, identifies four "themes" yearly which are promoted in its publications, magazine, and visitor facilities. The Service may wish to examine in greater depth which events it wants to focus its resources on, and determine whether it is feasible to establish annual themes for these events.

Making Outreach Work

Outreach must become an integral part of the Service's resource management program. For this to happen, it has to be somebody's responsibility.

Currently the Service has no one who is responsible, on a national level, for ensuring that all outreach programs are coordinated, that the Service is giving consistent and not conflicting messages, and that resources are being effectively used. Likewise, the Washington Office (and some Regions) have no mechanism for ensuring coordination of outreach programs among various divisions, programs, or field stations.

The Directorate has approved establishment of a National Outreach Coordinator, whose role will be to ensure the implementation of the national outreach strategy. The coordinator will:

- Lead a national outreach team that will assist in the following tasks;
- Develop a national outreach handbook to aid employees;
- Develop and carry out outreach partnerships with corporations and private groups to broaden the Service's audience;
- Ensure that outreach plans for major decisions are developed and carried out;
- Establish relationships with and identify opportunities to reach new audiences and key constituent groups;

- Complete development and testing of the core Service "slogan" or message;

- Assist Programs and Regions in identifying and developing needed communication products and activities that can be used Servicewide, so that the Service can get the most benefit from its limited outreach resources;

- Work with programs, regions, and the directorate to coordinate outreach for major national events;

- Work with programs and regions to develop specific "stepped down" messages that can be used consistently nationwide;

- Improve communication among Service employees about how they have used outreach effectively;

- Work with NCTC on outreach training programs; and

- Develop mechanisms for evaluating the effectiveness of Service communications.

Summary: How Do We Get There From Here?

To have an effective national communications program, the U.S. Fish and Wildlife Service needs to have:

- Policies and leadership to reinforce the importance of unified communications;
- Communication tools that make it easier for employees to do their jobs;

- Consistent messages that employees use in all communications;

- Strategies for making outreach work;

- Effective communications training for employees; and

- Professional communications staff to assist other employees.

Action Items

1. The Service directorate will adopt the national outreach strategy. The Director will issue a memorandum directing the Service to take the needed actions to implement the strategy, including:

- Using the basic Service messages;
- Including information about the Service and its mission in all external communication efforts;
- Developing and carrying out outreach plans for major decisions and actions;
- Building relationships with Service constituents;
- Requiring media and congressional experience for key field outreach positions;
- Involving the ARD-EA in the process of establishing and filling key field outreach positions.

(AEA: April 15, 1997)

2. The Service will establish and fill a position for a National Outreach Coordinator and will establish a national outreach team to help carry out the national outreach strategy. (AEA: June 1997)

3. The Service will continue to improve the way it presents itself to the public by:

- Adhering to the new publication design standards (AEA, Service Design Committee);
- Developing guidance designed to improve Service signage and uniform policy (FWS uniform and sign committees, AEA);
- Using the name "U.S. Fish and Wildlife Service" and, where possible, the Service logo, prominently in *all* communications intended for external audiences. (Service directorate).

4. The Service will complete the staffing of Regional External Affairs organizations and will proceed with hiring of professional communications staff in key hot spot areas to assist geographic/ecosystem managers. (RD's; ongoing)

5. The National Outreach Coordinator will work with the National Conservation and Training Center and Regional staffs to develop a national outreach handbook and to provide other appropriate outreach training for Service personnel. (AEA with NCTC and outreach team; June 1998)

6. Where education programs have been identified as a priority, they will (1) include information about the Service's mission; (2) make the most efficient use of Service resources and serve field station needs; (3) seek opportunities to help build community relations and reach the broadest possible audience. (Service Directorate, ongoing)

Appendix I: Background of the Service's Outreach Programs

The U.S. Fish and Wildlife Service has examined "outreach" on a number of occasions. In 1992 a team of Service employees put together a "white paper" called "Outreach in the U.S. Fish and Wildlife Service." This paper noted that "outreach" had become a commonly used term within the Service and attempted to provide information about and define the range of outreach activities.

This paper identified the various organizational units of the U.S. Fish and Wildlife Service responsible for conducting outreach activities, which were defined under four broad activities: public involvement, education, public affairs, and technical information.

The white paper was intended as a starting point for developing a coordinated outreach strategy. It resulted in a January 1993 "decision document" which recommended that the Service "strengthen its outreach programs by clarifying internal organizational responsibilities, providing technical guidance and training for its employees, and seeking additional resources in order to maximize the conservation of fish and wildlife resources through the actions of an informed and committed public."

The decision document found that the Service's outreach activities suffered from "a lack of organizational focus, program and technical guidance and training, and adequate resources". It said outreach is "the opportunity and responsibility of every element of the Service." This document recommended that:

1. National outreach strategies should be prepared by each program subactivity in parallel with the FY 1995 budget process and coordinated with the technical staff offices.
2. Washington-level staff offices should prepare multi-year strategic plans for youth programs, environmental education, interpretation, and public information, and
3. Regional directors should have ARDs prepare simple outreach action plans for each program subactivity.

This document also recommended preparation of an outreach budget initiative for FY 1995.

Several Regions have developed outreach strategies. A 1992 Region 1 Outreach Strategy, prepared by a cross program team, expressed concern that the Service's message and mission were being "usurped" by other agencies and noted the Service's "uncoordinated and randomly executed patterns of outreach behavior." The Region 1 strategy defined objectives intended to meet the following goals:

- Foster public awareness of the mission of the Service and the positive contribution it makes to quality of life—theirs and that of fish and wildlife—now and for future generations

- Differentiate the Service from other natural resources agencies on issues and benefits that are important to key publics.

- Develop and maintain better understanding of our key constituencies to improve our public service

- Improve the image of the Service and increase outreach efficiency by focusing and integrating efforts across program areas

- Build on positive work and relationships of Service programs to enhance the public perception of the Service

- Focus outreach efforts on improving and building long-term relationships with important constituencies to accomplish the Service mission.

It is worth noting that the same concerns and goals identified by Region 1 four years ago apply equally well to the Service's national concerns in 1996.

In June 1994, Region 5 formed a cross-program team of outreach specialists to establish a framework for outreach planning with the Region. The Region subsequently published "One Step at a Time: An Outreach Workbook" to help employees design, implement, and evaluate outreach efforts and to promote outreach as a management tool that can be used to address resource issues.

This document defined "outreach" as: "Communications; the image of the U.S. Fish and Wildlife Service that each employee projects every day." Both Region 1 and Region 5 documents stressed that "outreach" is part of every employee's responsibility.

In 1995, recognizing the need to improve the Service's communications with a variety of publics, including Congress, the Service instituted an "external affairs" organization in the Regions that paralleled the Washington Office structure. Assistant Regional Directors—External Affairs were responsible for relationships with both news media and elected officials, and Regions began the process of establishing positions within the external affairs organization for legislative specialists who would focus on building relationships with States, counties, and other elected officials and local district offices for members of Congress. One of the major purposes for this organization was to ensure that the Service had informed and involved these officials concerning its decisions.

Service program areas also have embraced outreach. Refuges has developed a "100 on 100" campaign to increase public awareness of the National Wildlife Refuge system by its 100th birthday. Habitat Conservation, Federal Aid, and Migratory Birds also are working on outreach strategies. The Endangered Species division now requires outreach plans to accompany all listing documents.

While the existence of these programs demonstrates the Service's recognition of the need for outreach, these efforts have not been coordinated with each other to create unified messages or to develop the foundation for an overall, national Service outreach strategy. The Service's communications program continues to be fragmented, with individual Regions, programs and field stations carrying out independent communication programs. Such an approach misses the opportunity for employees to build upon each other's work by reinforcing consistent messages.

Marketing

"Marketing" for name identification alone works for beer and peanut butter, but not for resolving complex issues or burnishing an already tarnished or nonexistent reputation.

Marketing often sounds like an easy solution, and the Service has listened to the views of a variety of marketing experts in the past few years. Most have reinforced the message that the Service must target its audiences but none have developed a comprehensive communications strategy for the Service. These discussions have helped Service employees think about communications as an important tool in resource conservation.

Appendix II: Action Items from the June 1996 Directorate Meeting

1. Develop and test a unified Service message that identifies who we are and helps the public feel positive about us, and which would be incorporated into everyday communications including environmental education, media relations, Congressional relations, and community relations.
2. Complete the reorganization of regional External Affairs programs by filling positions for Regional Congressional Affairs specialists.
3. Refocus our current outreach capability to make it more strategic. Develop a national outreach strategy that will provide a unified Service message and strategies for incorporation into all Service outreach efforts. Establish and fill a national outreach coordinator position under the AD-EA.
4. Build media and Congressional relations qualifications into outreach positions at field stations. Develop standard position descriptions for all new outreach positions. Review and revise existing outreach position descriptions to incorporate media and Congressional outreach. Issue guidance to employees to implement this recommendation.
5. Implement ARD-EA review of all field outreach position descriptions and participation in selection process for new outreach hires at field stations.
6. Emphasize building relationships with key community leaders, decisionmakers at all levels, and opinion leaders in the public and private sectors as a higher priority than publications and other product development in ongoing outreach efforts. Issue guidance to employees that implements this decision.
7. Establish a team including Service employees, corporate leaders with publishing experience, and others to review Service publications and make recommendations for improving them to present a unified Service image and message; to review existing management processes to ensure that Service products are strategic, cost effective and reflect the Service's priority message; and to recommend evaluation processes for determining their effectiveness in achieving Service communication goals.
8. As part of the national outreach strategy, build a stronger communications capability by establishing and filling one public affairs specialist position to assist each GARD and locating these positions in key field offices.
9. Regional directors should distribute a memorandum encouraging project managers and other Service staff to inform and educate local members of Congress and their staff about Service activities and policies.

Appendix III: Results of Public Opinion Research

Peter Hart and associates in July 1996 reported that voters cited the following as their main reasons for supporting environmental protection:

- Humankind's interdependence on the natural world for existence and survival.
- Preserving the environment for future generations.
- The irreplaceability of the Earth and its natural resources.

A survey in April 1996 by Beldon and Russonello Research and Communications, conducted for the Consultative Group on Biological Diversity, reported the following support for a variety of reasons to protect the environment:

- Wanting one's family to live in a healthy, pleasing environment (79%)
- Responsibility to leave the earth in good shape for future generations (71%)
- Respect for Nature as God's creation (67%)
- Appreciation for beauty of nature (63%)
- A desire for a balanced environment so that one "personally can have a productive, healthy life" (59%)
- A patriotic feeling of an "American wanting to protect the natural resources and beauty of this country" (58%)
- The belief that "all life found in nature has a right to exist" (55%, the value with the smallest appeal).

This survey recommended that communications:

- focus on saving habitat and/or ecosystems, rather than individual species;
- show how humans need and benefit from saving habitat and species;
- lay responsibility for the increased loss of habitat and species on human behavior;
- strike a practical tone (advocate stopping the destruction of things that help humans, and focusing on habitat; avoiding sensationalism, exaggeration, and calls to save everything.)

This survey found that public support is strongest for conservation measures that clearly support human needs (such as clean air or water) and that the public needs strong examples of how the action called for benefits them, in their community. Support for conservation weakens when other issues (such as the impact on the economy) come into play; or when people don't clearly perceive that the problem is caused by human behavior or that the species in question has any direct benefits to people. The argument that all species have value does not work very effectively for some insects, rodents, and other species perceived as potential pests.

Other polls (Times Mirror 1992) also found that the public's environmental concern contains a strong emphasis on protecting human health. The public is very concerned about water pollution, toxic waste dumps, shortages of good drinking water, air pollution, and local problems such as shortages of land fill space, Times Mirror reported.

Outreach Plan Checklist

Use this checklist to help think through and organize your outreach needs.

Assessment:

- State the problem and why action is necessary in one clear, concise sentence.
- Who does the problem, issue, or situation affect?
- How does the current problem, issue, or situation affect fish and wildlife resources?

Audience(s):

- Which publics (individuals or groups) can we reach that will have the most influence to make change?
- What are the concerns, expectations, perceptions, and biases of the audience(s)?
- Describe the target audience(s) in one clear, concise sentence.
- List the Service and Departmental officials who should be informed of the issue or situation before you begin your outreach activity.
- List all Congressional districts and other Federal, state, county, or city officials who need to be contacted about the issue.
- List local, regional, and (if appropriate) national news media who will be interested in the issue.
- List constituent groups who should be contacted. (Be sure to consider conservation groups, agricultural and business interests, Native Americans, trade organizations, etc.)

Goal:

- What is the desired outcome of the outreach activity?
- How do we want our audiences to feel or act as a result of our efforts?
- State the outreach goal in one clear, concise sentence.

Message:

- What do we want our audience(s) to know or understand?
- How can we use the Service's three basic messages to explain why this issue is important to people as well as wildlife?
- State the main message in one clear, concise sentence.

Tools:

- What outreach tools are most appropriate to achieving our goal?
- Has each audience been addressed?
- List the tools to be employed in this outreach effort.

Schedule:

- Is there a specific date (such as publication of a Federal Register notice) that this issue or situation is tied to?
- List the specific outreach activities needed for this issue (for example, briefings, public meetings, press conference, etc.)
- Develop a schedule that shows when each event must occur.

Implementation:

- What personnel, funds, and supplies are needed to implement this outreach effort?
- What internal and external partners can be involved in this endeavor?
- What resources will we provide, and what will be provided by our partners?
- List a budget for this effort.

Reality check:

- Does every item listed above contribute to achieving your goal? Can any step be improved?
- Evaluate the effectiveness of each step after it has occurred, and revise your plan accordingly.

Sample Outreach Plan Format

Use this sample format for documents requiring outreach plans. You can adapt or modify the format if you need to, as long as you include the information covered here.

Title
(Outreach Plan for the _____)

Issue:

(State the issue in one or two sentences.)

Basic Facts About The Issue:

(In bullets or *short* paragraphs, outline basic facts about the action and why it is needed.)

Communications Goals:

(In a few bullets, state what you want to see as the outcome of your communications effort. If appropriate, address how the action will affect people and include what the Service will do to address public concerns.)

Message:

(In one short sentence, state why this issue is important to people and wildlife. Whenever possible, say how the action contributes to a healthy, clean environment; to outdoor recreation; or to preservation of important American heritage and traditions.)

Interested Parties:

(Identify groups/individuals who will be most affected or are otherwise interested in this action.)

Key Date:

(If there is a specific date the action is tied to, such as a court action or Federal Register publication, fill it in.)

Materials Needed:

(List materials that need to be prepared, such as press release, fact sheets, speech, talking points, charts, maps, photos, video, etc. Identify who will prepare the materials.)

Strategy:

(Explain your strategy for communicating this information. Do you plan to hold a press conference, for example, accompanied by in-person briefings for concerned groups? Can the information be communicated simply by news release, or perhaps only phone calls to key people are really required?)

Action Plan:

- (Under "interested party," list who needs to be contacted. Include Members of Congress or their staffs; State and local officials; news reporters; business/agricultural leaders; and constituent groups. Include groups who disagree as well as those who support the action.)
- (Under "method of contact," indicate whether person will be contacted by phone, personal meeting, briefing, etc.)
- (Under "person responsible," indicate what FWS employee or cooperator will make the contact.)
- (Under "phone/fax" list appropriate numbers so you'll have them handy.)
- (Under "date" list date when the contact is to be made.)

Interested Party	Method of Contact	Action Plan		
		Person Responsible	Phone/Fax	Date

Appendix P.

Policy Regarding Controlled
Propagation of Species Listed Under
the Endangered Species Act

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments Due Date: October 20, 2000.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number and should be sent to: Joseph F. Lackey, Jr., OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, Q, Department of Housing and Urban Development, 451 Seventh Street, Southwest, Washington, DC 20410; e-

mail Wayne_Eddins@HUD.gov; telephone (202) 708-2374. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Eddins.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35). The Notice lists the following information: (1) the title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including

number of respondents, frequency, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the name and telephone number of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

This Notice also lists the following information:

Title of Proposal: HUD 2020 Partners.

OMB Approval Number: 2528-XXXX.

Form Numbers: None.

Description of the Need for the Information and its Proposed Use: The purpose is to survey the perceptions of HUD partner groups about HUD performance and changes in that HUD 2020 Management reforms.

Respondents: Business or other for-profit, Not-for-profit institutions, State, Local or Tribal Government.

Frequency of Submission: Biannually.

Reporting Burden:

Number of respondents	×	Frequency of response	×	Hours per response	Burden hours
2,418		1		0.25	605

Total Estimated Burden Hours: 605.
Status: New.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: September 13, 2000.

Wayne Eddins,

*Departmental Reports Management Officer,
Office of the Chief Information Officer.*

[FR Doc. 00-24103 Filed 9-19-00; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 1018-AG25

Policy Regarding Controlled Propagation of Species Listed Under the Endangered Species Act

AGENCIES: Fish and Wildlife Service, Interior; National Marine Fisheries Service, Commerce.

ACTION: Notice of policy.

SUMMARY: This policy, published jointly by the Fish and Wildlife Service (FWS) and the National Marine Fisheries

Service (NMFS), jointly referred to as the Services, addresses the role of controlled propagation in the conservation and recovery of species listed as endangered or threatened under the Endangered Species Act of 1973 (as amended) (Act). The policy provides guidance and establishes consistency for use of controlled propagation as a component of a listed species recovery strategy. This policy will help to ensure smooth transitions between various phases of conservation efforts such as propagation, reintroduction and monitoring, and foster efficient use of available funds. The policy supports the controlled propagation of listed species when recommended in an approved recovery plan or when necessary to prevent extinction of a species. Appropriate uses of controlled propagation include supporting recovery related research, maintaining refugia populations, providing plants or animals for reintroduction or augmentation of existing populations, and conserving species or populations at risk of imminent extinction or extirpation.

DATES: The final policy on controlled propagation is effective October 20, 2000.

ADDRESSES: You may view comments and materials received during the public comment period for the draft policy

document by appointment during normal business hours in Room 420, 4401 North Fairfax Drive, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: David Harrelson, Division of Endangered Species, U.S. Fish and Wildlife Service at the above address (703/358-2171) or by e-mail at David_Harrelson@fws.gov; or Marta Nammack, Office of Protected Resources, National Marine Fisheries Service (301/713-1401) or by e-mail at Marta.Nammack@noaa.gov.

SUPPLEMENTARY INFORMATION: The Endangered Species Act specifically charges us with the responsibility for identification, protection, management, and recovery of species of plants and animals in danger of extinction. Fulfilling this responsibility requires the protection and conservation of not only individual organisms and populations, but also the genetic and ecological resources that listed species represent. Long-term viability depends on maintaining genetic adaptability within each species. Species, as defined in section 3(15) of the Act, includes "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Though the Act emphasizes the restoration of listed species in their

natural habitats, section 3(3) of the Act recognizes propagation as a tool available to us to achieve this end. The controlled propagation of animals and plants in certain situations is an essential tool for the conservation and recovery of listed species. In the past, we have used controlled propagation to reverse population declines and to successfully return listed species to suitable habitat in the wild. To support the goal of restoring endangered and threatened animals and plants, we are obligated to develop sound policies based on the best available scientific and commercial information.

Summary of Comments and Recommendations

A draft policy on this subject was published on February 7, 1996 (61 FR 4716), and invited public comment. We received 47 comments. Twenty-four were from zoos, aquariums, botanical gardens, and conservation organizations, 3 from academic institutions, 6 from private individuals and business organizations, 2 from government organizations, and 12 from State natural resource agencies. Nearly all comments received were supportive of the policy and its goals. Comments that expressed concerns or criticisms were limited, though quite specific. We reviewed all comments received, and suggestions or clarifications have been incorporated into the final policy text. The following describes the major issues identified and our responses.

Issue: The draft policy, as published, would have a significant impact in terms of increased workload on the Services, zoological parks and aquariums, private organizations, and individual citizens.

Response: We acknowledge this concern and have modified the policy to reduce impacts to the zoo and aquarium community, botanical facilities, Federal fish hatcheries, and others who may be involved in propagation of listed species. As amended, this final policy is not expected to have a significant impact on organizations or individuals involved in propagation of listed species. The majority of zoological parks and aquaria that are involved in programs assisting the recovery of endangered and threatened animal species native to the United States are members of the American Zoo and Aquarium Association (AZA). The AZA has developed numerous strategies, protocols, and standards that address concerns associated with captive animal populations involved in conservation-based breeding programs. This final policy encourages the Services, and

others, to follow as may be practical, the protocols and standards of the AZA, and other appropriate organizations, for the controlled propagation of animal species. The Center for Plant Conservation (CPC) is similar to the AZA in that this organization consists of member botanical gardens and arboreta that are involved in preventing the extinction of native plants, including those federally listed as endangered or threatened. When practical, the Services and others are encouraged to use the protocols and standards of the CPC, and other appropriate organizations, when propagating listed plant species.

Those individuals or organizations that currently have permits to keep listed species are exempt from this policy for the duration of the permit unless the Regional Director (FWS) or Assistant Administrator (NMFS) determines otherwise. For example, a permit holder implementing activities recommended in an approved recovery plan is exempt and would not need to reapply for a new permit. We have made substantial efforts to avoid adverse impacts, economic or otherwise, in order that cooperative recovery partnership opportunities may be maintained or increased with qualified organizations and individuals.

Issue: The policy would apply to research activities identified in recovery plans in which controlled propagation or unintentional propagation may occur.

Response: Research identified in recovery plans, including research that may lead to development of a controlled propagation capacity, is not covered by this policy because the intent of such research is not the production of individuals for introduction into the wild. Should offspring that are the product of research efforts be proposed for introduction into the wild, such offspring and any proposed reintroductions will be subject to this policy.

Should circumstances arise in the course of implementing recovery activities, including research, in which application of this policy is deemed necessary for the benefit of the listed species, the decision to apply the policy will rest with the Regional Director or Assistant Administrator.

Research on species with short lifespans (e.g., 1 to 2 years) that requires maintenance of a captive population not intended for release to the wild is exempt from this policy. However, all activities involving reproduction of a listed U.S. species must meet the requirements of the Act, as well as any other legal and administrative obligations. All persons or institutions conducting approved activities

involving controlled propagation of listed species for purposes other than release in the wild will still be required to develop appropriate measures to address concerns identified under section E. 5. of this policy.

Issue: The policy would apply to foreign species being maintained and propagated in U.S. zoological and aquarium facilities or by private individuals.

Response: This policy only applies to species indigenous to the United States and its territories for which we have, or intend to prepare, recovery plans. We have exempted foreign species that are listed under the Act and being propagated or maintained in the United States for conservation purposes.

Issue: Requirements to develop genetics and reintroduction guidance documents for species being propagated for augmentation of existing populations or for the establishment of new populations in the wild are not practical.

Response: We recognize this concern and have modified the policy accordingly. In many instances there is insufficient biological knowledge of the listed species to develop detailed genetic management documents, and the requirement for these documents may unnecessarily burden conservation and recovery efforts. However, we strongly recommend development of these documents if adequate information is available. Furthermore, we reemphasize the recommendation in the draft policy that controlled propagation activities follow accepted standards, which include appropriate genetics management.

Issue: There are too many reporting requirements.

Response: We have reduced reporting requirements. However, we need to identify those listed species involved in controlled propagation programs, the level of production in these programs, and efforts to secure appropriate habitat for population augmentation, reintroduction, and recovery.

Issue: The requirement that controlled propagation be permitted only if indicated in an approved final recovery plan would place an unnecessary burden on Federal programs to revise existing recovery plans to meet this requirement.

Response: We do not agree. The recovery plans for most species for which controlled propagation is occurring have identified this action as a specific recovery task. Where controlled propagation is not identified as a task in the recovery plan, but has been subsequently determined to be necessary to the recovery of the species,

the plan would need to be amended or revised.

Required Determinations

1. Regulatory Planning and Review

In accordance with Executive Order 12866, this policy was submitted for review by the Office of Management and Budget. In accordance with the criteria set forth in Executive Order 12866, this policy is not a significant regulatory action. Under current and anticipated levels of activity, this policy will not result in an annual economic effect of \$100 million or more. Moreover, this policy will not adversely affect an economic sector, productivity, jobs, the environment, or other units of government. The controlled propagation policy does not pertain to commercial products or activities or anything traded in the marketplace.

2. Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*)

We certify that this policy will not have a significant economic effect on a substantial number of small entities. This policy does not apply to all species listed under the Act but only to those species native to the United States and its territories for which recovery plans exist or are expected to be developed. Furthermore, controlled propagation is restricted to those species for which such propagation is specifically recommended in an approved final recovery plan. Programs involving the controlled propagation of federally listed species are typically restricted to institutions such as the FWS's National Fish Hatcheries and Fish Technology Centers. Nongovernmental entities that may be involved in the controlled propagation of listed species are typically organizations with a high level of technical skill in the captive maintenance and breeding of plants and animals, such as zoos, aquaria, and botanical gardens. Rarely are academic institutions and even more infrequently, private individuals, involved in the controlled propagation of listed species for conservation and recovery purposes.

3. Small Business Regulatory Fairness Act (5 U.S.C. 804(2))

This is not a major rule under 5 U.S.C. 804(2). This policy will not have an annual effect on the economy of \$100 million or more, produce increases in costs or prices for consumers, individual industries or Federal, State or local government agencies, affect economic competitiveness, or economically impact geographic regions in the United States or its territories.

4. Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*)

This policy does not impose an unfunded mandate on any State, Tribal, or local government or the private sector of \$100 million or more per year.

5. Takings

In accordance with Executive Order 12630, this policy does not pose significant takings implications, and a takings implication assessment is not required. Implementation of this policy will not result in "take" of private property and will not alter the value of private property. Many reintroductions of propagated species occur exclusively on FWS, other Federal, or State lands, but reintroductions on private lands are not unknown. In such cases, the private entities work with the Services as willing partners to ensure the success of the reintroduction effort.

6. Federalism

In accordance with Executive Order 13132, this policy does not have sufficient federalism implications to warrant the preparation of a federalism assessment. It does not affect the structure or role of States, and will not have direct, substantial, or significant effects on States. Releases of propagated species typically occur on Federal or State lands. The States work with the Services as willing partners to ensure the success of reintroduction efforts.

7. Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor has determined that this policy does not unduly burden the judicial system. The final policy provides clear standards, simplifies procedures, reduces burden, and is clearly written such that litigation risk is minimized.

8. Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)

This policy does not contain any new information collection requirements for which Office of Management and Budget approval under the Paperwork Reduction Act is required. The OMB control number for the FWS is 1018-0094 and for NMFS is 0648-0230 and 0648-0402.

9. National Environmental Policy Act

We have analyzed this policy under the criteria of the National Environmental Policy Act of 1969 as amended, and have determined that the issuance of this policy is categorically excluded by the Department of the Interior in 516 DM 2, Appendix 1.10. The NMFS concurs with the Department

of the Interior's determination that the issuance of this policy qualifies for a categorical exclusion and satisfies the categorical exclusion criteria in the National Oceanic and Atmospheric Administration 216-6 Administrative Order, Environmental Review Procedure. No further NEPA documentation is required.

10. Government-to-Government Relationship With Tribes

Though no reintroductions of captive propagated federally endangered or threatened species have been undertaken, in accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951) and 512 DM 2, we recognize the potential for such actions in the future and the obligation to relate to federally recognized Tribes on a government-to-government basis.

References Cited

A complete list of all references cited in this final policy is available on request from the Washington Office of the Division of Endangered Species (see **ADDRESSES** section).

Authors. The primary authors of this policy are David Harrelson of the Fish and Wildlife Service's Division of Endangered Species, Mail Stop 420 ARLSQ, 1849 C Street, NW, Washington, DC 20240 (703/358-2171), and Marta Nammack of the National Marine Fisheries Service's Protected Species Management Division, 1335 East-West Highway, Silver Spring, Maryland 20910 (301/713-1401).

Policy Statement

A. What is the purpose of this policy? This policy provides guidance and establishes consistency with respect to Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS), jointly called the Services, activities in which the controlled propagation of a listed species, as the term "species" is defined in section 3(15) of the Act, is implemented as a component of the recovery strategy for a listed species. It supports and promotes coordination between various phases of controlled propagation efforts such as propagation technology development, propagation for release, population augmentation, reintroduction, and monitoring. This policy will also contribute to the efficient use of funding resources.

Guidance is provided regarding the use of controlled propagation for:

- Preventing the extinction of listed species, subspecies, or populations;

- Recovery-oriented scientific research, including, but not restricted to, developing propagation methods and technology, and other actions that are expected to result in a net benefit to the listed taxon. Use of surrogates, while applicable to the recovery of listed species, is exempt from the requirements of this policy;

- Maintaining genetic vigor and demographic diversity of listed species, subspecies, or populations;
- Maintaining refugia populations for nearly extinct animals or plants on a temporary basis until threats to a listed species' habitat are alleviated, or necessary habitat modifications are completed, or when potentially catastrophic events occur (*e.g.*, chemical spills, severe storms, fires, flooding);
- Providing individuals for establishing new, self-sustaining populations necessary for recovery of the listed species; and
- Supplementing or enhancing extant populations to facilitate recovery of the listed species.

B. *What is the scope of this policy?*

This policy applies to all pertinent organizational elements of both Services, notwithstanding those differences in administrative procedures and policies as noted. Exceptions to this policy appear in section F. This policy pertains to all efforts requiring permits under 50 CFR 17 subparts C and D, funded, authorized, or carried out by us that are conducted to propagate threatened or endangered species by:

- Establishing or maintaining refugia populations;
- Producing individuals for research and technology development needs;
- Producing individuals for supplementing extant populations; and
- Producing individuals for reintroduction to suitable habitat within the species' historic range.

C. *Why is this policy necessary?* The controlled propagation of animals and plants in certain situations is an essential tool for the conservation and recovery of listed species. In the past, we have used controlled propagation to reverse population declines and to successfully return listed species to suitable habitat in the wild.

Though controlled propagation has a supportive role in the recovery of some listed species, the intent of the Act is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." Controlled propagation is not a substitute for addressing factors responsible for an endangered or threatened species' decline. Therefore, our first priority is to recover wild populations in their

natural habitat wherever possible, without resorting to the use of controlled propagation. This position is fully consistent with the Act.

We recognize that genetic and ecological risks may be associated with introducing to the wild, animals and plants bred and reared in a controlled environment. When considering controlled propagation as a recovery option, the potential benefits and risks must be assessed and alternatives requiring less intervention objectively evaluated. If controlled propagation is identified as an appropriate strategy for the recovery of a listed species, it must be conducted in a manner that will, to the maximum extent possible, preserve the genetic and ecological distinctiveness of the listed species and minimize risks to existing wild populations.

We recognize that for many species, information available for detailed genetics conservation management or assessment of risks associated with reintroduction may be insufficient. Therefore, this policy does not specifically require written genetic management plans and ecological risk assessments to initiate or support controlled propagation programs. Additionally, acute conservation needs may legitimately outweigh delays that would be incurred by such a requirement. However, where sufficient biological and environmental information exists, and where conservation activities would not be unduly constrained, a formal assessment of ecological and genetic risks is strongly encouraged. Risks that must be evaluated in the planning of controlled propagation programs include the following specific examples:

- Removal of natural parental stock that may result in an increased risk of extinction by reducing the abundance of wild individuals and reducing genetic variability within naturally occurring populations;
- Equipment failures, human error, disease, and other potential catastrophic events that may cause the loss of some or all of the population being held or maintained in captivity or cultivation;
- The potential for an increased level of inbreeding or other adverse genetic effects within populations that may result from the enhancement of only a portion of the gene pool;
- Potential erosion of genetic differences between populations as a result of mixed stock transfers or supplementation;
- Exposure to novel selection regimes in controlled environments that may diminish a listed species' natural

capacity to survive and reproduce in the wild;

- Genetic introgression, which may diminish local adaptations of the naturally occurring population;
- Increased predation, competition for food, space, mates, or other factors that may displace naturally occurring individuals, or interfere with foraging, migratory, reproductive, or other essential behaviors; and
- Disease transmission.

Controlled propagation programs must be undertaken in a manner that minimizes potentially adverse impacts to existing wild populations of listed species, and we must conduct controlled propagation programs in a manner that avoids additional listing actions.

D. *What are the definitions for terms used in this policy?* The following definitions apply:

Controlled environment—A controlled environment is one manipulated for the purpose of producing or rearing progeny of the species in question, and of a design intended to prevent unplanned escape or entry of plants, animals, or gametes, embryos, seeds, propagules, or other potential reproductive products.

Controlled propagation—Among animals, it includes natural or artificial matings, fertilization of sex cells, transfer of embryos, development of offspring, and grow-out of individuals of a species when the species is intentionally confined or the mating is directly intended by human intervention.

The term also includes the human-induced propagation of plants from seeds, spores, callus tissue, divisions, cuttings, or other plant tissue, or through pollination in a controlled environment.

- Defined in the context of this policy, controlled propagation refers to the production of individuals, generally within a managed environment, for the purpose of supplementing or augmenting a wild population(s), or reintroduction to the wild to establish new populations.

Intercross—Any instance of interbreeding or genetic exchange between individuals of different species, subspecies, or distinct population segments of a vertebrate species.

Phenotype—The expression of the genetic makeup of an organism through physical characteristics that make up its appearance.

Recovery priority system—The system used for assigning recovery priorities to listed species and to recovery tasks. Recovery priority is based on the degree of threat, recovery potential, taxonomic

distinctness, and presence of an actual or imminent conflict between the species' conservation, adverse human activities, and other threats.

Rescue and salvage—These terms refer to extreme conditions wherein a species or population segment at risk of extinction is brought into a controlled environment (i.e., refugia) on a temporary or permanent basis.

Taxon—A formal group of organisms of any rank or formal scientific classification.

E. *What is our Policy?* This policy is intended to address candidate, proposed, and listed species indigenous to the United States and its territories for which the Services, have, or intend to prepare, recovery plans. This policy focuses primarily on those activities involving gamete transfer and subsequent development and grow-out of offspring in a laboratory, botanical facility, zoo, hatchery, aquarium, or similarly controlled environment. This policy also addresses activities related to or preceding controlled propagation activities such as:

- Obtaining and rearing offspring for research;
- Procuring broodstock for future controlled propagation and augmentation efforts; or
- Holding offspring for a substantial portion of their development or through a life-stage that experiences poor survival in the wild.

The goals of this policy include coordinating recovery actions specific to controlled propagation activities; maximizing benefits to the listed species from controlled propagation efforts; assuring that appropriate recovery measures other than controlled propagation and that other existing recovery priorities are considered in making controlled propagation decisions; and ensuring prudent use of funds.

Our policy is that the controlled propagation of threatened and endangered species will be:

1. Used as a recovery strategy only when other measures employed to maintain or improve a listed species' status in the wild have failed, are determined to be likely to fail, are shown to be ineffective in overcoming extant factors limiting recovery, or would be insufficient to achieve full recovery. All reasonable effort should be made to accomplish conservation measures that enable a listed species to recover in the wild, with or without intervention (e.g., artificial cavity provisioning), prior to implementing controlled propagation for reintroduction or supplementation.

2. Coordinated with conservation actions and other recovery measures, as appropriate or specified in recovery plans, that will contribute to, or otherwise support, the provision of secure and suitable habitat. Controlled propagation programs intended for reintroduction or augmentation must be coordinated with habitat management, restoration, and other species' recovery efforts.

3. Based on the specific recommendations of recovery strategies identified in approved recovery plans or supplements to approved recovery plans whenever practical. The recovery plan, in addressing controlled propagation, should clearly identify the necessity and role of this activity as a recovery strategy.

4. Based on specific consideration of the potential ecological and genetic effects of the removal of individuals for controlled propagation purposes on wild populations and the potential effects of introductions of artificially bred animals or plants on the receiving population and other resident species. Assessments of potential risks and benefits will be addressed, as required, through sections 7 and 10 of the Act and the National Environmental Policy Act (NEPA, 42 U.S.C. 4332) for proposed controlled propagation actions.

5. Based on sound scientific principles to conserve genetic variation and species integrity. Intercrossing will not be considered for use in controlled propagation programs unless recommended in an approved recovery plan; supported in an approved genetic management plan (if information is available to develop such a plan, and which may or may not be part of an approved recovery plan); implemented in a scientifically controlled and approved manner; and undertaken to compensate for a loss of genetic viability in listed taxa that have been genetically isolated in the wild as a result of human activity. Use of intercross individuals for species conservation will require the approval of the FWS Director or that of the NMFS Assistant Administrator, in accordance with all applicable policies.

6. Preceded, when practical, by the development of a genetics management plan based on accepted scientific principles and procedures. Controlled propagation protocols will follow accepted standards such as those employed by the American Zoo and Aquarium Association (AZA), the Center for Plant Conservation (CPC), and Federal agency protocols such as fish management guidelines to the extent practical. All efforts will be made by us and our cooperators to ensure that the genetic makeup of propagated

individuals is representative of that in free-ranging populations and that propagated individuals are behaviorally and physiologically suitable for introduction. Determination of biological "suitability" may include, but should not necessarily be limited to, analysis of geomorphological similarities of habitat, genetic similarity, phenotypic characteristics, stock histories, habitat use, and other ecological, biological, and behavioral indicators. All controlled propagation programs will address the issue of disposition of individuals found to be:

- (a) Unfit for introduction to the wild;
- (b) Unfit to serve as broodstock;
- (c) Surplus to program needs; or
- (d) Surplus to the recovery needs for the species (e.g., to preclude genetic and ecological swamping).

Controlled propagation activities should not be initiated without including consideration of these issues and obtaining required permits and other authorizations as necessary. Disposition of individuals surplus to program needs may include use for research or other appropriate purposes.

Programs involving the controlled propagation of listed species for research purposes identified in final recovery plans and in which progeny will not be reintroduced to the wild are exempt from this policy. Examples of exempt actions include research involving the determination of germination rates in plants and spawning success rates in fish. This exemption does not extend to the need for these activities to comply with any other applicable Federal or State permitting or regulatory requirements.

7. Conducted in a manner that takes all known precautions to prohibit the potential introduction or spread of diseases and parasites into controlled environments or suitable habitat.

8. Conducted in a manner that will prevent the escape or accidental introduction of individuals outside their historic range.

9. Conducted, when feasible, at more than one location in order to reduce the potential for catastrophic loss at a single facility when a substantial fraction of a species or important population segment is brought into captivity.

10. Coordinated, as appropriate, with organizations and qualified individuals both within and outside our agencies. We will cooperate with other Federal agencies and State, Tribal, and local governments.

11. Conducted in a manner that will meet our information needs and that will be in accordance with accepted protocols and standards. In the case of listed species for which traditional

studbooks or registrations are not practical, records of eggs, larvae, or other life-stages will be maintained.

12. With limited exceptions, implemented only after a commitment to funding is secured.

13. Prior to releases of propagated individuals, tied to development of a reintroduction plan, unless this information is already contained in an approved recovery plan, species survival plan, or equivalent document that has received the approval of the appropriate Service. Controlled propagation and reintroduction plans will identify measurable objectives and milestones for the proposed propagation and reintroduction effort. The controlled propagation and reintroduction plan should be based on strategies identified in the approved recovery plan. It should include protocols for health management, disease screening and disease-free certification, monitoring and evaluation of genetic, demographic, life-history, phenotypic, and behavioral characteristics, data collection, recordkeeping, and reporting as appropriate. On implementation, periodic evaluations must be made to assess project progress and consider new scientific information and the status of habitat conservation efforts.

14. Conducted in accordance with the regulations implementing the Endangered Species Act, Marine Mammal Protection Act, Animal Welfare Act, Lacey Act, Fish and Wildlife Act of 1956, and the Services' procedures relative to NEPA.

F. Does this policy allow any exceptions? Except as identified in this section, any exceptions to the above policy guidelines will require specific approval from the FWS Director or the NMFS Assistant Administrator on a case by case basis. The following circumstances have been anticipated and are exempted from this policy.

1. Pacific salmon are exempted from this policy. NMFS, as the lead Service for the recovery of listed Pacific salmon, has developed and will continue to use the interim policy (April 5, 1993, 58 FR 17573) addressing controlled propagation of these species. The NMFS interim artificial propagation policy more specifically addresses the biological needs of these species.

2. Cases where a listed species has an ephemeral reproductive stage or short (1–2 year) lifespan that necessitates controlled propagation to sustain the listed species in refugia, or to maintain a research population where there is no intent to release captive-bred individuals from that population into the wild, are exempt.

3. In the absence of an approved recovery plan, recommendations contained in recovery outlines, draft recovery plans, or made in writing by a recovery team may be used to justify controlled propagation as a necessary recovery measure for listed species in danger of imminent extinction or extirpation of critical populations. However, under such circumstances initiation of controlled propagation activities will require the Regional Director's or Assistant Administrator's approval.

4. Candidate and proposed species held in refugia, used in research, or used for the development of propagation technology that are subsequently listed as endangered or threatened are exempted from this policy. Any propagation program initiated with candidate or proposed species with the intent to produce individuals for release to the wild are not exempted and must comply with this policy.

5. Captive breeding of listed species that are not native to the United States or its territories or possessions, and producing individuals not addressed in an approved recovery plan and not intended for release within the United States or its territories or possessions, is exempt from this policy. However, such activities must comply with any other Federal and State laws, permit needs, or other requirements.

6. The temporary removal and holding of listed individuals, unless such actions intentionally involve reproduction other than for purposes of recovery-related research or as needed to maintain a refugia population is exempted.

7. The short-term holding or captive-rearing of wild-bred individuals obtained for later reintroduction, augmentation, or translocation efforts when controlled propagation does not take place or is not intended during the period of captive maintenance.

8. Actions involving cryopreservation or other methods of conserving biological materials, if not intended for near-term use in controlled propagation or the reintroduction into the wild of listed species, are exempt from this policy. When and if reintroduction to the wild requires the use of these materials, such activities would come under the scope of this policy.

9. Additional exceptions to this policy may be made on a case-by-case basis with the approval of the FWS Director or NMFS Assistant Administrator, as warranted.

Where conflicts may arise between this policy and programs carried out in furtherance of restoration goals or required by treaty, trust resources

obligations, or other legal mandate, we will, to the extent practical, make every effort to achieve solutions that are consistent with the requirements of the Act and this policy.

G. Who are our potential partners? We recognize the need for partnerships with other Federal agencies, States, Tribes, local governments, and private entities in the recovery of listed species. We will seek to develop partnerships with qualified cooperators for the purpose of propagating listed, proposed, and candidate species (as authorized under sections 6 and 2(a)(5) of the Act). Guidance for this activity is as follows:

1. The FWS Regional Directors or the NMFS Regional Administrators may explore opportunities for accomplishing controlled propagation and any associated research tasks with other Federal cooperators, FWS/NMFS facilities, State agencies, Tribes, zoological parks, aquaria, botanical gardens, academia, and other qualified parties at their discretion. We will select cooperators on the basis of scientific merits; technical capability; willingness to adhere to our policies, guidance, and protocols; and cost-effectiveness.

2. Regional Directors or Regional Administrators, depending on which agency has lead for the species, will be responsible for ensuring appropriate staff oversight of programs conducted by all cooperators to ensure adherence to necessary protocols, guidance, and permit conditions, and to coordinate reporting requirements.

H. What are the Federal agency responsibilities under this policy? This policy shall be implemented in accordance with the following guidelines:

1. The Regional Directors and Regional Administrators will ensure compliance with this policy for those species for which they have responsibility.

2. Regional Directors and Regional Administrators are responsible for recovery of listed species under their jurisdiction. Recovery actions for which Regional Directors and Regional Administrators have authority include establishment of refugia, initiation of necessary research or technology development, implementation of controlled propagation programs, and propagation research for listed species. When determining species' priority for inclusion in controlled propagation programs, we will consider the following:

(a) Whether or not a listed species' recovery plan outline, draft recovery plan, or final recovery plan identifies controlled propagation as an appropriate recovery strategy and what

priority this task is assigned within the overall recovery strategy.

(b) The availability and willingness of cooperators to contribute to recovery activities, including cost sharing.

3. In the event that the current recovery plan fails to identify the establishment of refugia, initiation of propagation research, or controlled propagation as recovery tasks as necessary to the recovery of the species, the recovery plan will be updated, amended, or revised as appropriate. Recovery plans not yet finalized will be amended to reflect the changed recovery requirements of the listed species and provide justifications as necessary.

4. Within 6 months of the effective date of this policy, FWS Regional Directors will identify all listed species for which they have the lead recovery responsibility that are (1) being held in refugia; (2) involved in pre-propagation research; and (3) are involved in controlled propagation programs. For species involved in controlled propagation programs, the level of production and the recovery purpose (e.g., augmentation of extant populations, establishment of new populations) will be identified. This information will be reported to the Assistant Director, Endangered Species, in the FWS Washington D.C. Office.

5. Continuation of those programs not in conformity with this policy 12 months following implementation of this policy will require the FWS Director's or NMFS Assistant Administrator's concurrence. The Regional Director and Regional Administrator will provide his or her recommendation to the Director or Assistant Administrator.

1. *Does the policy include annual reporting requirements?* For the FWS, annual reports based on fiscal years will be prepared by the responsible regional authority and submitted to the Director, through the Assistant Director, Endangered Species, not later than October 31st of each year. Reports will contain the following information for each species being maintained in refugia, in pre-propagation research, or under propagation:

- Recovery priority number;
- Policy criteria that are not met (if any);
- A brief description of the controlled propagation program, including objectives and status;
 - List of cooperators, if any;
 - Expenditures for the past fiscal year;
 - Prospects for, or obstacles to, achieving research, controlled propagation, or reintroduction objectives, and,

• A brief description of the status of wild populations, if any.

J. *What authorities support this policy?* The Endangered Species Act of 1973, as amended; Marine Mammal Protection Act of 1972, as amended; Animal Welfare Act; Lacey Act; Fish and Wildlife Act of 1956; and National Environmental Policy Act.

K. *What are the information collection requirements?* The permit application required for participation in the controlled propagation of species listed under the Act is FWS form #3-200-55 Interstate Commerce and Recovery and form #3-200-56 for incidental take. Applicants for NMFS research/enhancement permits or incidental take permits must meet certain criteria in their applications but there are no specific forms. We use these forms or applications to permit recovery actions that may be undertaken for scientific purposes, enhancement of propagation or survival, or for incidental taking. Whenever we ask the public to submit information, we must have authorization from the Office of Management and Budget. As part of the permitting process, we often ask the public to provide information such as filling out permit applications or submitting reports.

Information collection requirements under this policy are included under the Office of Management and Budget collection approval number 1018-0094 (FWS) and 0648-0230 (NMFS), which includes information collection for permits granted for interstate commerce and recovery and incidental take. The expiration date of this approval is February 28, 2001 (FWS), and October 31, 2001 (NMFS). The purpose of information collection is to identify performance of permitted tasks and make decisions, according to criteria established in various Federal wildlife and plant conservation statutes and described in 50 CFR 17.22(a)(1) and (3) and 17.32(a)(1) and (3) (FWS) and 50 CFR 222 (NMFS).

We have estimated that the time required by an applicant to complete FWS form 3-200-55 is 2 hours. Applications to NMFS for these permits are estimated to require 80 hours for completion. The information required is already known to the applicant and need only be entered on the application form. Summary information for endangered species permit applications will be published in the **Federal Register** as required by regulation. This notice is provided pursuant to section 10(c) of the Act and NEPA regulations (40 CFR 1506.6). The total burden hours for completing reporting requirements is also estimated at 2 hours for the FWS

and 80 hours for NMFS. No costs to applicants beyond the cost of hour burden described above are anticipated. Annual reports are generally required for permits for scientific research.

For organizations, businesses, or individuals operating as a business (i.e., permittee not covered by the Privacy Act), we request that such entities identify any information that should be considered privileged and confidential business information to allow us to meet our responsibilities under the Freedom of Information Act. Confidential business information must be clearly marked "Business Confidential" at the top of the first page and each succeeding page, and must be accompanied by a nonconfidential summary of the confidential information. Documents may be made available to the public under Department of the Interior Freedom of Information Act (FOIA) regulations in 43 CFR 2.13(c)(4), 43 CFR 2.15(d)(1)(I) and Department of Commerce 15 CFR 4. Documents and other information submitted with these applications are made available for public review, subject to the requirements of the Privacy Act and FOIA, by any party who submits a written request for a copy of such documents to the appropriate Service within 30 days of the date of publication of the notice.

Signed: August 4, 2000.

Jamie Rappaport Clark,
Director, U.S. Fish and Wildlife Service,
Department of the Interior.

Dated: August 18, 2000.

Penelope D. Dalton,
Assistant Administrator for Fisheries,
National Marine Fisheries Service.
[FR Doc. 00-23957 Filed 9-19-00; 8:45 am]
BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM-020-1040-HV; NMNM-102554]

A Direct Sale of Public Land to Richard Montoya of Santa Fe, NM

AGENCY: Bureau of Land Management (BLM), Interior.

ACTION: Notice of realty action.

SUMMARY: The following public land has been found suitable for direct sale under Section 203 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2750, 43 U.S.C. 1713) and at no less than the estimated fair market value. The land will not be offered for sale until at least 60 days after the date of this notice.

Appendix Q.

Example Implementation Schedule

Hibiscadelphus distans

Recovery Plan Implementation Schedule for *Hibiscadelphus distans*

April, 1996

PRIOR- ITY #	TASK #	TASK DESCRIPTION	TASK DURA- TION (YRS)	RESPONSIBLE PARTY	TOTAL COST	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY2003	FY 2004	FY2005	FY2006	FY2007
1	1111	Maintain exclosures.	O	DOFAW*	110	5	5	5	10	5	5	5	5	5	5	5	10
				FWES	56	2	2	2	10	2	2	2	2	2	2	2	2
1	1112	Improve methods and control feral goats.	O	DOFAW*	165	6	15	15	15	15	15	6	6	6	6	6	6
				FWES	135	4	15	15	15	15	4	4	4	4	4	4	4
1	112	Control erosion and landslides.	O	DOFAW*	46	5	5	2	2	2	2	2	2	2	2	2	2
				FWES	40	2	2	2	2	2	2	2	2	2	2	2	2
1	113	Improve methods and control alien plants.	O	DOFAW*	152	5	12	11	11	11	11	11	11	11	11	11	4
				FWES	134	5	12	10	10	10	10	10	10	10	10	10	3
				NBS	100	0	10	10	10	10	10	10	10	10	10	10	0
1	114	Improve methods and control insect predators.	C	DOFAW*	81	1.5	7.5	7.5	7.5	7.5	7.5	7.5	7.5	7.5	7.5	7.5	0.5
				FWES	80.5	1	7.5	7.5	7.5	7.5	7.5	7.5	7.5	7.5	7.5	7.5	0.5
				NBS	100	0	10	10	10	10	10	10	10	10	10	10	0
1	115	Develop and implement disease monitoring protocol.	C	DOFAW*	10	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
				FWES	10	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	
				NBS	50	0	5	5	5	5	5	5	5	5	5	0	
1	116	Control and minimize human disturbance.	C	DOFAW*	40	2	2	2	2	2	2	2	2	2	2	2	
				FWES	40	2	2	2	2	2	2	2	2	2	2	2	
1	12	Conduct surveys.	2	DOFAW*	20		10	10									
				FWES	20		10	10									
				NTBG	4		2	2									
1	13	Protect and manage new populations.	C	DOFAW*	208			51.5	31.5	30	10	10	10	10	5	5	5
				FWES	134			40.5	20.5	20	5	5	5	5	5	3	3
NEED 1 (Protect and stabilize)					1735.5	41.5	135	221	172	157	122	102	102	102	95	95	55

Recovery Plan Implementation Schedule for *Hibiscadelphus distans*

April, 1996

PRIOR- ITY #	TASK #	TASK DESCRIPTION	TASK DURA- TION (YRS)	TASK RESPONSIBLE		TOTAL COST	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	
				PARTY															
1	21	Evaluate genetic diversity and select stock for augmenting/establishing.	5	DOFAW*	43	13	13	13	2	2									
				FWES	23	7	7	7	1	1									
				NTBG	23	7	7	7	1	1									
1	22	Determine appropriate introduction techniques.	5	DOFAW*	14	3	3	3	3	2									
				FWES	9	2	2	2	2	1									
				NTBG	9	2	2	2	2	1									
1	23	Propagate seedlings for outplanting.	15	DOFAW*	45	3	3	3	3	3	3	3	3	3	3	3	3	3	
				FWES	30	2	2	2	2	2	2	2	2	2	2	2	2	2	
				NTBG	30	2	2	2	2	2	2	2	2	2	2	2	2	2	
1	24	Augment existing populations.	10	DOFAW*	5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5		
				FWES	5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5			
				NTBG	2.5	0.5	0.5	0.5	0.5	0.5									
1	25	Locate habitat for two additional populations.	2	DOFAW*	6			3	3										
				FWES	6			3	3										
				NTBG	1			0.5	0.5										
1	26	Protect and manage new sites.	3	DOFAW*	33					11.5	11.5	10							
				FWES	33					11.5	11.5	10							
1	27	Establish new populations through outplanting.	10	DOFAW*	0					TBD									
				FWES	0					TBD									
				NTBG	0					TBD									
1	28	Control threats to the new populations.	C	DOFAW*	0						TBD								
				FWES	0							TBD							
		NEED 2 (Increase and diversify populations)			317.5	42.5	42.5	49	26	39.5	31	28	8	8	8	7	7		

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Recovery Plan Implementation Schedule for *Hibiscadelphus distans*

April, 1996

PRIOR- ITY #	TASK #	TASK DESCRIPTION	TASK DURA- TION (YRS)	TASK RESPONSIBLE		TOTAL COST	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY2003	FY 2004	FY2005	FY2006	FY2007		
				PARTY																
2	31	Investigate the ecology of <i>Hibiscadelphus distans</i> .	10	NBS*	100		10	10	10	10	10	10	10	10	10	10	10			
				FWES	70		7	7	7	7	7	7	7	7	7	7	7	7		
				DOFAW	70		7	7	7	7	7	7	7	7	7	7	7	7	7	
2	32	Determine the effects of introduced birds.	10	NBS*	100		10	10	10	10	10	10	10	10	10	10	10			
				FWES	50		5	5	5	5	5	5	5	5	5	5	5	5		
				DOFAW	50		5	5	5	5	5	5	5	5	5	5	5	5	5	
2	41	Map, tag, and monitor all wild plants.	C	DOFAW*	40	2	2	2	2	2	2	2	2	2	2	2	2	2	2	
				FWES	10	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
2	42	Map, tag, and monitor all transplants.	C	DOFAW*	40	2	2	2	2	2	2	2	2	2	2	2	2	2	2	
				FWES	10	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
		NEED 3 (Conduct research and monitor)			540	5	49	49	49	49	49	49	49	49	49	49	49	5		
3	51	Determine number of populations and individuals needed for survival.	3	FWES*	60												20	20	20	
				NBS	30													10	10	10
				DOFAW	30													10	10	10
3	52	Revise recovery objectives, if necessary.	1	FWES*	0															
				DOFAW	0															
		Need 4 (Validate recovery objectives)			120															
		TOTAL COST			2713	89	226.5	319	247	245.5	202	179	159	159	152	151	67			

Appendix R.

Peer Review Documents

Sample Peer Review Letter

Notes on Peer Reviews

Peer Review Checklist

SAMPLE PEER REVIEW LETTER

In Reply Refer To:
FWS/Region 5/ES-TE

Dr. Ted Bradley
George Mason University
Department of Biology
Fairfax, Virginia 22030-4444

Dear Dr. Bradley:

Enclosed is a Sensitive Joint-Vetch (*Aeschynomene virginica*) Draft Recovery Plan. The U.S. Fish and Wildlife Service seeks your scientific review of this document, to assist us in making recovery decisions based upon the best scientific and commercial data available in accordance with the Endangered Species Act of 1973. We request that you direct your review to two key aspects of the plan: (1) issues and assumptions relating to the biological information in the plan's Introduction, and (2) scientific data regarding the proposed recovery activities in the plan's Recovery section.

In addition to seeking independent scientific review, we are distributing this draft recovery plan to Federal and State agencies and the interested public for their review. The review period will end on December 2, 1994, at which time we will incorporate comments we have received into a final plan, which is anticipated for approval in mid-1995.

We appreciate any time you can give to reviewing the plan, and we will be most interested in any comments you provide. Please forward your comments to Ms. Cindy Schulz of our Virginia Field Office, Mid-County Center, U.S. Route 17, P.O. Box 480, White Marsh, Virginia 23183. If you have any questions, you may contact her at 804-693-6694.

Sincerely,

Endangered Species Coordinator

Enclosure

Broad scope of review: Meffe et al. (1998) identify “demonstrated competence in the subject” as an important qualification of an “independent reviewer.” Recovery plans, however, commonly integrate analyses ranging from assessment of specific threats to a species, to the role of demographic factors on population viability, to reserve design. Given this array of scientific questions, it is often a formidable challenge to find individual scientists who can respond to all salient issues in a recovery plan. Multiple-species plans compound the complexities of review.

Along this same line, a challenge to peer review of some recovery plans is their length: recovery plans may exceed 100 pages, and some are much longer. In addition, many plans include a great deal of nonscientific legal and policy language.

In seeking more focused reviews, a number of considerations come into play. Any perception that the FWS & NMFS’ are compromising reviewer independence must be avoided; separate reviews for a multiplicity of issues require close coordination; and identifying separate reviewers for specific issues may intensify the fundamental challenge of recruiting independent reviewers when many experts are already engaged in recovery planning activities.

Maintaining high information standards in the face of scientific uncertainties: Although recovery actions involve principles common to a wider range of scientific work, an awareness of the legal and administrative requirements that circumscribe recovery planning is critical to providing useful reviews. Peer review in this context not only requires careful evaluation of existing data, it also entails consideration of major scientific uncertainties (NRC 1995).

Most scientists appreciate the implications of Type I versus Type II errors in evaluation of scientific data but may not be as well versed in the legal imperative of making decisions and taking actions that often involve large uncertainties. This may lead scientists and other experts to the cautious conclusion that, for instance, not enough information is available to either support or oppose a recovery recommendation. The ESA, however, does not give agencies the latitude to delay such determinations nor does it relieve them from fully justifying a decision based on the best available information; for instance, the ESA requires that recovery plans include objective, measurable recovery criteria regardless of the level of available scientific information.

Those experts who work directly with Service biologists (e.g., on recovery teams) are afforded opportunities to understand the intricacies of the law and its application to a particular species. Independent reviewers, by definition, lack this interaction, although some may have ESA experience through involvement with other species. Lack of familiarity with ESA requirements may give rise to otherwise perceptive comments that are “outside the scope of agency discretion”-- a counterproductive effort for both the reviewer and the agency.

One aspect of this problem deserves special consideration. Reviewers, particularly active researchers, are often predisposed to offer recommendations regarding study needs for the subject

species. Although these insights are often highly germane to species conservation, it is important that they be clearly distinguished from any evaluation as to whether the best available data have been appropriately considered in the listing or planning process.

Time and funding constraints: Policy requirements constrain the allotted time and other logistics of independent reviews. Recovery planning does not have legally mandated deadlines, but Departmental policy (FWS-NMFS 1994b) requires completion of most recovery plans within 2.5 years following listing.

Within this time, independent peer review must be conducted concurrently with the public comment period mandated by the ESA, with a minimum comment period of 30 days for draft recovery plans. Although comment periods can be extended and/or short review periods can be ameliorated somewhat by narrowing the topics for review, the problem is intractable to the extent that knowledgeable reviewers often bear heavy time commitments. On the other hand, it is inherently illogical to provide a leisurely schedule for review of documents pertaining to the protection of imperiled species.

Monetary compensation has been suggested as a means to assure timely and responsive independent peer review (e.g., Meffe et al. 1998); however, agency funding for peer review could further strap endangered species budgets. Furthermore, monetary compensation to reviewers may create perceived conflicts of interest.

Use of interim reviews: Meffe et al. (1998) make the point that peer review is most constructive when it is fully integrated into the decision making process. This typically takes the form of early, informal reviews conducted “before positions become set and considerable time and effort are invested in elaborating plans;” Departmental policy supports this approach under the rubric of “special reviews” (FWS-NMFS 1994a). Intermediate reviews are especially valuable when decisions build upon each other. A population viability analysis, for example, may underpin recovery targets that, in turn, become fundamental to reserve design.

Interim peer reviews are a challenge to implement, however, in the time frame set out by policy for recovery planning. It may also be problematic to impose on busy scientists for repeated reviews, and lack of timely response to past requests for independent review of draft plans may pose a disincentive to expand the number of reviews.

PEER REVIEW CHECKLIST FOR CONDUCTING A PEER REVIEW

Instructions: This checklist is based on the Agency's Peer Review Handbook and the October 2000 Region 5 Order "U.S. EPA Region 5 Improved Policies and Procedures: Peer Review, Records Management, and Work Product Authorization of Scientific and Technical Work Products" which constitute Region 5's standard operating procedures for peer review. If you have any questions about peer review or need clarification when completing this checklist, please refer to the Handbook, available via the internet at <http://www.epa.gov/ord/spc/2peerrev.htm>. Pages 2-4 of the Handbook contain useful flowcharts and cross references to specific sections of the Handbook that are applicable to this checklist. You are also encouraged to consult with your Division or Office Peer Review Coordinator. The Division/Office Peer Review Coordinators will periodically request information from this checklist in order to update the National Peer Review Database.

1. Title of Work Product: _____

2. Product Description: _____

3. Project Manager: _____
Name, Organization and Phone Number

4. Up-front Considerations for Planning the Peer Review: _____ *Check the box when item is completed*

a) The Div/Office Director has chosen a peer review leader for the project.

(Note: The project manager and peer review leader can be the same person.)

Name of Peer Review Leader: _____

Phone Number: _____

Organization: _____

b) The peer review leader has obtained appropriate peer review training before conducting the peer review.

c) Key questions and issues have been identified to include in the charge to the peer reviewers.

d) The Div/Office Records Coordinator has been consulted to insure that all the files, including electronic records, will be created, maintained, retained, and disposed of appropriately and in accordance with Div/Office and Agency procedures.

e) A formal peer review record or file has been established, and provisions have been made to store any electronic records associated with the work product and peer review.

Location of Record/File: _____

Provisions for Electronic Records: _____

Check the box when item is
completed or circle the
appropriate answer
(NA = not applicable)

- f) There is a source of adequate funding to pay for external peer review if external peer review is necessary and funding is needed. *(Note: Contracts can be used for peer review services. However, special management controls are required to ensure proper use of these contracts. See Section 3.6 of the Handbook for details.)* NA
 Source of Funding: _____
- g) Resource limitations may restrict the peer review. *(If "yes" was selected, a limited peer review might be considered. However, only in very rare circumstances should resource limitations restrict peer review. Peer review must be planned for as part of a project's budget.)* Yes No
- h) Amount of time needed for peer review(s) has been allotted given existing constraints of potential peer reviewers, deadline for the final work product, logistics for the peer review, etc.
 Length of Time Needed: _____
5. **Develop the Charge to the Peer Reviewers:**
- a) A clear, focused charge has been formulated that identifies recognized issues, asks specific questions, and invites comments or assistance.
- b) The charge has been included in the peer review record.
6. **Select the Peer Review Mechanism:**
- a) The work product is novel, complex, controversial, or has great cost implications. *(If the answer is "yes" to any of the above, serious thought should be given to conducting an external peer review. If the answer is "no" to all of the above, internal peer review is probably sufficient.)* Yes No
- b) A determination has been made regarding which components or stages of the work product will be peer reviewed. *(Note: Generally, peer review is recommended for each stage of a product's development.)*
 Components to be peer reviewed: _____
-
- c) A peer review mechanism (e.g., internal, external or a combination of both) has been chosen for the work product or stages of the work product. Mechanism: _____
- d) The work product either: 1) has been, or is being, generated as part of administrative or civil enforcement activities by U.S. EPA, or 2) likely will be used in the future to support administrative or civil enforcement activities by U.S. EPA. *(If the answer is "yes" to either item above, then the Office of Regional Council (ORC) must be consulted if the Peer Review Leader believes an external peer review is needed or is preferable. ORC concurrence should be obtained.)* Yes No

Check the box when
item is completed,
or circle yes or no
Yes No

- e) The work product is going to be peer reviewed via a refereed, scientific journal. *(If the answer is "yes," the work product still should be considered for peer review because journal peer review may not cover issues and concerns that the Agency would want peer reviewed in order to support an Agency action.)*
- f) Logistics for conducting the peer review (e.g., written comments will be received by mail, or will be collected at a meeting) have been included in the peer review record.
- g) The Div/Off Director has concurred with the recommended method of peer review.
Date of Div/Off Director Concurrence: _____
- h) The concurrence of the Div/Off Director has been included in the peer review record.
- 7. Determine the Specific Time Line for the Peer Review:**
- a) A start date for the peer review has been selected.
Start Date: _____
- b) The amount of time the peer reviewers will be given to conduct the peer review has been determined.
Number of Days for Review: _____
- c) A due date for comments from the reviewers has been selected.
Due Date: _____
- d) The amount of time necessary to incorporate comments from the peer reviewers into the work product has been determined.
Number of Days for Revision: _____
- e) A deadline for final completion of the work product has been determined.
Due Date: _____
- 8. Select the Peer Reviewers:**
- a) Advice was sought in developing a list of potential peer reviewer candidates who are independent of the work product and have appropriate scientific and technical expertise.
- b) The expertise required for the peer review has been determined.
- c) In reviewing the candidates, a balance and a broad enough spectrum of expertise were considered.
- d) In reviewing the candidates, any potential conflicts of interest were considered.

Check the box when
item is completed

- e) The peer reviewers have been selected and the process for selecting the reviewers, including inquiries and resolution of potential conflicts of interest, has been documented and included in the peer review record/file. *(Note: Conflict of Interest Inquiry Forms are available from the Regional and Div/Off Peer Review Coordinators.)*
- 9. Obtain and Transmit Materials for Peer Review:**
- a) Instructions have been given to the peer reviewers which ask for written comments in a specified format by the specified deadline that are responsive to the charge.
- b) The peer reviewers have been provided with the essential documents, data, and information to conduct their review.
- Date Peer Reviewers Given Charge/Materials: _____
- c) The peer reviewers have been instructed not to disclose draft work products to the public.
- d) The peer review record/file contains all the materials given to the peer reviewers.
- 10. Conduct the Peer Review:**
- a) Written comments have been received from all peer reviewers.
- Date all comments were received: _____
- b) All clarification or additional information necessary from the peer reviewers is received.
- c) The validity and objectivity of the comments have been evaluated.
- d) Appropriate experts/staff/managers have been consulted on the potential impacts of the comments on the final work product, the project schedule, and budget.
- e) The peer review comments have been included in the peer review record/file.
- 11. Consider the Peer Review Comments:**
- a) Decisions have been made regarding which comments are accepted and will be incorporated into the final work product, and which comments will not be incorporated.
- b) A memo or other written record has been prepared which responds to the peer review comments and specifies acceptance or, where thought appropriate, rebuttal and non-acceptance.
- c) The Div/Off Director has concurred with the decisions and written record on how to incorporate the peer reviewers comments in the work product and on which comments will not be incorporated.
- Date of Div/Off Director concurrence: _____
-

Check the box when
item is completed,
or circle yes or no

- d) The concurrence of the Div/Off Director has been included in the peer review record/file.
- e) The memo or written record documenting how comments were handled and how the work product was revised has been included in the peer review record/file.
- f) The work product has been revised to incorporate the acceptable comments.
- g) The peer review performed during the process of developing the work product has been summarized and included in the work product.
- h) It is necessary to send the revised work product back to the peer reviewers. (If the answer is "yes," proceed to item #11i. If the answer is no, proceed to item #12.) Yes No
- i) Additional comments are received, evaluated, and incorporated into the work product, and placed in the peer review record.
- 12. Consider Other Comments:**
- a) Prior to finalization, the document needs additional internal and/or external programmatic review. (If the answer is "yes," go to #12b. If the answer is "no," proceed to #13.) Yes No
- b) Written comments by programmatic reviewers have been received.
- c) Final decisions have been made regarding which comments are accepted and will be incorporated into the final work product, and which ones will not be incorporated.
- d) A memo or other written record has been prepared which responds to the programmatic review comments and specifies acceptance or, where thought appropriate, rebuttal and non-acceptance.
- e) Div/Off Director has concurred with the decisions and written record on how to incorporate the programmatic comments.
Date of Div/Off Director concurrence: _____
- f) The memo or written record has been included in the peer review record/file.
- g) The work product has been revised to incorporate the acceptable programmatic comments.
- 13. Finalize Work Product and Close Out Peer Review:**
- a) The work product has been completed.
- b) The Div/Off Director has approved the work product.
Date of Div/Off Director Approval: _____
- c) The Div/Off Director approval has been included in the peer review record/file.

- Check the box when
item is completed, or
circle yes or no*
- | | Yes | No |
|---|--------------------------|--------------------------|
| d) The Div/Off Director has judged the work product to be sufficiently controversial, of significant enough interest to outside parties, or of wide enough distribution, such that it should also be authorized by the Regional Administrator (RA), or the Deputy RA (DRA). <i>(If the answer is "yes," proceed to #13e. If the answer is "no," proceed to #13f.)</i> | <input type="checkbox"/> | <input type="checkbox"/> |
| e) The RA or DRA has authorized the work product.
Date of RA or DRA Authorization: _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| f) The final work product has been included in the peer review record/file. | <input type="checkbox"/> | <input type="checkbox"/> |
|
14. Publication and Release of Reports: | | |
| a) The Div/Off Director has approved publication or release of the work product. | <input type="checkbox"/> | <input type="checkbox"/> |
| b) The written approval by the Div/Off Director has been included in the peer review record/file. | <input type="checkbox"/> | <input type="checkbox"/> |
| c) The Div/Off Director has judged the work product to be sufficiently controversial, of significant enough interest to outside parties or of wide enough distribution, such that its distribution or release should also be authorized by the RA or DRA. <i>If the answer is "yes," proceed to #14d. If the answer is "no," proceed to #15. (Note: The Div/Off Director's decision to elevate to the RA or DRA can be made concurrently with item #13d.)</i> | Yes | No |
| d) The RA or DRA has authorized distribution or release of the work product.
Date of RA or DRA Authorization: _____ | <input type="checkbox"/> | <input type="checkbox"/> |
|
15. Retention of Peer Review Files and Records: | | |
| a) The Div/Off official procedures for administrative records and the Agency's record retention schedules have been examined to determine how long the peer review record/file, including electronic records, should be retained. <i>(Note: The required time of retention for final reports and supporting data varies depending upon the nature of the report, however, final reports which are mission related or have an EPA number and receive external distribution are generally permanent federal records.)</i> | <input type="checkbox"/> | <input type="checkbox"/> |
| b) The Div/Off Records Officer or the Regional Records Officer has been consulted to help determine how long the peer review record/file, including electronic records, should be retained. | <input type="checkbox"/> | <input type="checkbox"/> |
-

*Check the box when
item is completed*

- c) A location for the completed peer review record/file has been identified, and provisions have been made to retain electronic records associated with the work product and peer review.
- (Note: This can be the same location and provisions as identified in #4e.)*
 Location of Record/File: _____
 Provisions for Electronic Records: _____
- d) Someone has been assigned the responsibility for maintaining the record/file and electronic records, and ensuring that they are either archived or destroyed appropriately. *(Note: This can be the same person as identified in #4a.)*
- Contact Name and Phone No: _____
 Organization: _____

16. Closeout of Checklist:

- a) Items #1-15 of checklist have been completed.

 Signature of Peer Review Leader and Date Signed

- b) A copy of the completed checklist has been given to the Div/Off Peer Review Coordinator.

 Signature of Div/Off Peer Review Coordinator and Date Signed

- c) The completed checklist has been included in official peer review record/file.

- d) The work product has been moved from Peer Review Work Product List B to List A in the National Peer Review Database.
- Date Product moved to List A: _____

Appendix S.

NMFS and FWS Listing Priority Guidelines

6/15/90

National Oceanic and Atmospheric Administration

[Docket No. 71015-0067]

Endangered and Threatened Species; Listing and Recovery Priority Guidelines

AGENCY: National Marine Fisheries Service (NOAA Fisheries), NOAA, Commerce.

ACTION: Notice.

SUMMARY: NOAA Fisheries issues guidelines for assigning priorities to species for listing, delisting, and reclassification as endangered and threatened under the Endangered Species Act of 1973 (Act) and for developing and implementing recovery plans for species that are listed under the Act.

FOR FURTHER INFORMATION CONTACT: Patricia Montanio, Protected Species Management Division, Office of Protected Resources and Habitat Programs, National Marine Fisheries Service, 1335 East West Highway, Silver Spring, MD 20910, (301/427-2322).

SUPPLEMENTARY INFORMATION:

Background

For those species under the jurisdiction of the Secretary of Commerce, section 4(a) of the Act requires NOAA Fisheries to determine whether any species of wildlife or plant should be: (1) Listed as an endangered or threatened species (listing); (2) changed in status from threatened to endangered or changed in status from endangered to threatened (reclassification); or (3) removed from the list (delisting). Section 4(h) of the Act requires that NOAA Fisheries establish agency guidelines which include a priority ranking system for listing, reclassification, or delisting.

Section 4(f) of the Act requires NOAA Fisheries to develop and implement recovery plans for the conservation and survival of all endangered or threatened species, unless such a plan will not promote the conservation of the species. In general, listed species which occur entirely outside U.S. jurisdiction are not likely to benefit from recovery plans. Foreign species are more likely to benefit from bilateral or multilateral agreements under section 8 of the Act

and other forms of international cooperative efforts. Section 4(f) of the Act also requires NOAA Fisheries to give priority to those endangered or threatened species (without regard to taxonomic classification) most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic activity. Section 4(h) of the Act requires that NOAA Fisheries establish a system for developing and implementing recovery plans on a priority basis.

The assignment of priorities to listing, reclassification, delisting, and recovery actions will allow NOAA Fisheries to use the limited resources available to implement the Act in the most effective way. On May 30, 1989, NOAA Fisheries published proposed guidelines in the *Federal Register* (54 FR 22925) and requested comments. No comments were received from the public. NOAA Fisheries issues these final guidelines with only slight modifications from the proposal based on internal reviews.

These guidelines are based primarily on guidelines published by the U.S. Fish and Wildlife Service (FWS) on September 21, 1983 (48 FR 43098). NOAA Fisheries believes that, to the extent practical, both agencies should follow similar priority guidelines for listing, reclassification, delisting and recovery. To the extent possible, NOAA Fisheries has adopted the priority guidelines in use by FWS. However, due to the smaller number of listed species and the anticipated smaller number of candidate species under NOAA Fisheries jurisdiction, NOAA Fisheries believes that fewer priority categories are necessary and the FWS guidelines have been modified accordingly.

These priority systems are guidelines and should not be interpreted as inflexible frameworks for making final decisions on funding or on performance of tasks. They will be given considerable weight by the agency in making decisions; however, the agency will also evaluate the cost-effectiveness of funding and tasks and take advantage of opportunities. For example, the agency may be able to conduct a relatively low priority item in conjunction with an ongoing activity at little cost.

A. Listing, Reclassification, and Delisting Priorities

1. Listing and Reclassification From Threatened to Endangered

In considering species to be listed or reclassified from threatened to

endangered, two criteria will be evaluated to establish four priority categories as shown in Table 1.

TABLE 1.—PRIORITIES FOR LISTING OR RECLASSIFICATION FROM THREATENED TO ENDANGERED

Magnitude of threat	Immediacy of threat	Priority
High	Imminent	1
	Non-imminent	2
Low to Moderate	Imminent	3
	Non-imminent	4

The first criterion, magnitude of threat, gives a higher listing priority to species facing the greatest threats to their continued existence. Species facing threats of low to moderate magnitude will be given a lower priority. The second criterion, immediacy of threat, gives a higher listing priority to species facing actual threats than to those species facing threats to which they are intrinsically vulnerable, but which are not currently active.

2. Delisting and Reclassification From Endangered to Threatened

NOAA Fisheries currently reviews listed species at least every five years in accordance with section 4(c)(2) of the Act to determine whether any listed species qualify for reclassification or removal from the list. When a species warrants reclassification or delisting, priority for developing regulations will be assigned according to the guidelines given in Table 2. Two criteria will be evaluated to establish six priority categories.

TABLE 2.—PRIORITIES FOR DELISTING AND RECLASSIFICATION FROM ENDANGERED TO THREATENED

Management impact	Petition status	Priority
High	Petitioned action	1
	Unpetitioned action	2
Moderate	Petitioned action	3
	Unpetitioned action	4
Low	Petitioned action	5
	Unpetitioned action	6

The priorities established in Table 2 are not intended to direct or mandate decisions regarding a species' reclassification or removal from the list. The priority system is intended only to set priorities for developing rules for species that no longer satisfy the listing criteria for their particular designation under the Act. The decision regarding whether a species will be retained on

the list, and in which category, will be based on the factors contained in section 4(a)(1) of the Act and 50 CFR 424.11.

The first consideration of the system outlined in Table 2 accounts for the management impact entailed by a species' inclusion on the list. Management impact is the extent of protective actions, including restrictions on human activities, which must be taken to protect and recover a listed species. If the current listing is no longer accurate, continuing protective management actions could divert resources from species more in need of conservation and recovery efforts, or impose an unnecessary restriction on the public. Because the Act mandates timely response to petitions, the system also considers whether NOAA Fisheries has been petitioned to remove a species from the list or to reclassify a species from endangered to threatened. Higher priority will be given to petitioned actions than to unpetitioned actions that are classified at the same level of management impact.

There is no direct relationship between the systems outlined in Tables 1 and 2. Although the same statutory criteria apply in making listing and delisting determinations, the considerations for setting listing and delisting priorities are quite different. Candidate species facing immediate, critical threats will be given a higher priority for listing than species being considered for delisting. Likewise, a delisting proposal for a recovered species that would eliminate unwarranted utilization of limited resources may, in appropriate instances, take precedence over listing proposals for species not facing immediate, critical threats.

B. Recovery Plan Preparation and Implementation Priorities

The recovery priority system will be used as a guide for recovery plan development, recovery task implementation and resource allocation. It consists of two parts—species recovery priority and recovery task priority. Species recovery priority will be used for recovery plan development. Recovery task priority, together with species recovery priority, will be used to set priorities for funding and performance of individual recovery tasks as explained below.

1. Species Recovery Priority

Species recovery priority is based on three criteria—magnitude of threat, recovery potential and conflict. These criteria are arranged in a matrix yielding

twelve species recovery priority numbers (Table 3).

TABLE 3.—SPECIES RECOVERY PRIORITY

Magnitude of threat	Recovery potential	Conflict	Priority
High	High	Conflict	1
		No conflict	2
	Low to moderate	Conflict	3
Moderate	Low to High moderate	No conflict	4
		Conflict	5
	Low to moderate	No conflict	6
		Conflict	7
Low	High	No conflict	8
		Conflict	9
	Low to moderate	No conflict	10
		Conflict	11
		No conflict	12

The first criterion, magnitude of threat, is divided into three categories: High, moderate, and low. The high category means extinction is almost certain in the immediate future because of a rapid population decline or habitat destruction. Moderate means the species will not face extinction if recovery is temporarily held off, although there is a continuing population decline or threat to its habitat. Taxa in the low category are rare, or are facing a population decline which may be a short-term, self-correcting fluctuation, or the impacts of threats to the species' habitat are not fully known.

The second criterion, recovery potential, assures that resources are used in the most cost effective manner within each magnitude of threat ranking. Priority for preparing and implementing recovery plans would go to species with the greatest potential for success. Recovery potential is based on how well biological and ecological limiting factors and threats to the species' existence are understood, and the extent of management actions needed. A species has a high recovery potential if the limiting factors and threats to the species are well understood and the needed management actions are known and have a high probability of success. A species has a low to moderate recovery potential if the limiting factors or threats to the species are poorly understood or if the needed management actions are not known, are cost-prohibitive or are experimental with an uncertain probability of success.

The third criterion, conflict, reflects the Act's requirement that recovery priority be given to those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic

activity. Thus, species judged as being in conflict with such activities will be given higher priority for recovery plan development and implementation than non-conflict species within the same magnitude of threat/recovery potential ranking. Species in conflict with construction or other developmental projects or other forms of economic activity would be identified in large part through consultations conducted with Federal agencies under section 7 of the Act.

2. Recovery Task Priority

Recovery plans will identify specific tasks that are needed for the recovery of a listed species. NOAA Fisheries will assign tasks priorities of 1 to 3 based on the criteria set forth in Table 4.

TABLE 4.—RECOVERY TASK PRIORITY.

Priority	Type of task
1	An action that must be taken to prevent extinction or to identify those actions necessary to prevent extinction.
2	An action that must be taken to prevent a significant decline in population numbers, habitat quality, or other significant negative impacts short of extinction.
3	All other actions necessary to provide for full recovery of the species.

It should be noted that even the highest priority tasks within a plan are not given a Priority 1 ranking unless they are actions necessary to prevent a species from becoming extinct or to identify those actions necessary to prevent extinction. Therefore, some plans will not have any Priority 1 tasks. In general, Priority 1 tasks only apply to a species facing a high magnitude of threat (species recovery priority 1-4).

When the task priorities (Table 4) are combined with the species recovery priority (Table 3), the most critical activities for each listed species can be identified and evaluated against other species recovery actions. This system recognizes the need to work toward the recovery of all listed species, not simply those facing the highest magnitude of threat. In general, NOAA Fisheries intends that Priority 1 tasks will be addressed before Priority 2 tasks and Priority 2 tasks before Priority 3 tasks. Within each task priority, species recovery priority will be used to further rank tasks. For example, a Priority 1 task for a species with a recovery priority of 4 would rank higher than a priority 2 task for a species with a

recovery priority of 1; and, a Priority 1 task for a species with a recovery priority of 2 would rank higher than a Priority 1 task for a species with a recovery priority of 4. For tasks with the same priority ranking, the Assistant Administrator will determine the appropriate allocation of available resources.

C. Recovery Plans

As recovery plans are developed for each species, specific recovery tasks are identified and prioritized according to the criteria discussed above. As new information warrants, these plans, including tasks and priorities, will be reviewed and revised. In addition, funding and implementation of the tasks identified in recovery plans will be tracked in order to aid in effective management of the recovery program.

NOAA Fisheries believes that periodic review and updating of plans and tracking of recovery efforts are important elements of a successful recovery program. Information from tracking and implementing recovery actions and other sources will be used to review plans and revise them as necessary. These and other elements of NOAA's recovery planning process will be discussed in more detail in Recovery Planning Guidelines that the agency is developing.

Classification

The General Counsel of the Department of Commerce certified to the Small Business Administration that these guidelines would not have a significant economic impact on a substantial number of small entities because they do not direct or mandate decisions on a species' listing, reclassification or delisting. Rather, they set up priorities for later decisions as to agency review of species, recovery plan development and recovery task implementation. As a result, a regulatory flexibility analysis was not prepared.

Dated: June 8, 1990.

William W. Fox, Jr.,
Assistant Administrator for Fisheries,
National Oceanic and Atmospheric
Administration.

[FR Doc. 90-13895 Filed 6-14-90; 8:45 am]

BILLING CODE 3510-22-M

Appendix T.

Notices of Availability of Draft Recovery
Plans for Review and Comment

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of the Draft Recovery Plan for the Star Cactus (*Astrophytum asterias*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces the availability for public review of the Draft Recovery Plan for the Star Cactus (*Astrophytum asterias*). The star cactus is known to occur on one private land site in Starr County, Texas. Additional populations may be found in Tamaulipas, Mexico. The Service solicits review and comment from the public on this draft plan.

DATES: The comment period for this Draft Recovery Plan closes November 18, 2002. Comments on the Draft Recovery Plan must be received by the closing date.

ADDRESSES: Persons wishing to review the Draft Recovery Plan can obtain a copy from the U.S. Fish and Wildlife Service, Corpus Christi Ecological Services Field Office, c/o TAMUCC, 6300 Ocean Drive, Box 338, Corpus Christi, Texas, 78412. Comments and materials concerning this Draft Recovery Plan may be sent to "Field Supervisor" at the address above.

FOR FURTHER INFORMATION CONTACT: Loretta Pressly, Corpus Christi Ecological Services Field Office, at the above address; telephone (361) 994-9005, facsimile (361) 994-8262.

SUPPLEMENTARY INFORMATION:

Background

The star cactus (*Astrophytum asterias*) was listed as endangered on October 18, 1993, under authority of the Endangered Species Act of 1973, as amended. The threats facing the survival and recovery of this species include: habitat destruction through conversion of native habitat to agricultural land and increased urbanization; competition with exotic invasive species; genetic vulnerability due to low population numbers; and collecting pressures for cactus trade. The Draft

Recovery Plan includes information about the species and provides objectives and actions needed to downlist, then delist the species. Recovery activities designed to achieve these objectives include; protecting known populations; searching for additional populations; performing outreach activities to educate the general public on the need for protection; establishing additional populations through reintroduction in the known range of the plant. Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of the Service's endangered species program. To help guide the recovery effort, the Service is working to prepare recovery plans for most of the listed species native to the United States. Recovery plans describe actions considered necessary for conservation of species, establish criteria for downlisting or delisting them, and estimate time and cost for implementing the recovery measures needed. The Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 et seq.) requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act, as amended in 1988, requires that public notice and an opportunity for public review and comment be provided during recovery plan development. The Service will consider all information presented during a public comment period prior to approval of each new or revised recovery plan. The Service and other Federal agencies will also take these comments into account in the course of implementing recovery plans. The Star Cactus Draft Recovery Plan is being submitted for technical and agency review. After consideration of comments received during the review period, the recovery plan will be submitted for final approval.

Public Comments Solicited

The Service solicits written comments on the recovery plan described. All comments received by the date specified above will be considered prior to approval of the recovery plan.

Authority

The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: September 10, 2002.
Bryan Arroyo,
Acting Regional Director, Region 2.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Availability of Draft Recovery Plan for Coastal Plants of the Northern San Francisco Peninsula for Review and Comment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces the availability for public review of the Draft Recovery Plan for Coastal Plants of the Northern San Francisco Peninsula. This recovery plan includes the endangered San Francisco lessingia (*Lessingia germanorum*) and Raven's manzanita (*Arctostaphylos hookeri* ssp. *ravenii*). The portion of the plan dealing with Raven's manzanita is a revision of the 1984 Raven's Manzanita Recovery Plan. Additional species of concern that will benefit from recovery actions taken for these plants are also discussed in the draft recovery plan. The draft plan includes recovery criteria and measures for San Francisco lessingia and Raven's manzanita.

DATES: Comments on the draft recovery plan must be received on or before March 4, 2002.

ADDRESSES: Copies of the draft recovery plan are available for inspection, by appointment, during normal business hours at the following location: U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, W-2605, Sacramento, California (telephone (916) 414-6600). Requests for copies of the draft recovery plan and written comments and materials regarding this plan should be addressed to Wayne S. White, Field Supervisor, Ecological Services, at the above Sacramento address. The draft recovery plan is also available on the World Wide Web at <http://www.r1.fws.gov/es/endsp.htm>.

FOR FURTHER INFORMATION CONTACT: Carmen Thomas, Fish and Wildlife Biologist, at the above Sacramento address.

SUPPLEMENTARY INFORMATION:

Background

Restoring endangered or threatened animals and plants to the point where they are again secure, self-sustaining members of their ecosystems is a primary goal of the Service's endangered species program. To help guide the recovery effort, the Service is working to prepare recovery plans for most of the listed species native to the United States. Recovery plans describe actions considered necessary for the conservation of the species, establish criteria for downlisting

or delisting listed species, and estimate time and cost for implementing the recovery measures needed.

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (Act), requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act as amended in 1988 requires that public notice and an opportunity for public review and comment be provided during recovery plan development. The Service will consider all information presented during the public comment period prior to approval of each new or revised recovery plan. Substantive technical comments will result in changes to the plan. Substantive comments regarding recovery plan implementation may not necessarily result in changes to the recovery plan, but will be forwarded to appropriate Federal or other entities so that they can take these comments into account during the course of implementing recovery actions. Individual responses to comments will not be provided.

San Francisco lessingia and Raven's manzanita are restricted to the San Francisco peninsula in San Francisco County, California. San Francisco lessingia, an annual herb in the aster family, is restricted to coastal sand deposits. Raven's manzanita is a rare evergreen creeping shrub in the heath family which was historically restricted to few scattered serpentine outcrops. Habitat loss, adverse alteration of ecological processes, and invasion of non-native plant species threaten San Francisco lessingia. Raven's manzanita has also been threatened by habitat loss; at present it is threatened primarily by invasion of non-native vegetation and secondarily by disease organisms and poor reproductive success. The draft plan also makes reference to several other federally listed species which are ecologically associated with San Francisco lessingia and Raven's manzanita, but which are treated comprehensively in other recovery plans. These species are beach layia (*Layia carnosa*), Presidio clarkia (*Clarkia franciscana*), Marin dwarf-flax (*Hesperolinon congestum*), Myrtle's silverspot butterfly (*Speyere zerene myrtleae*), and bay checkerspot butterfly (*Euphydryas editha bayensis*). In addition, 16 plant species of concern and 17 plant species of local or regional conservation significance are considered in this recovery plan.

The draft recovery plan stresses re-establishing dynamic, persistent populations of San Francisco lessingia and Raven's manzanita within plant communities which have been restored to be as "self-sustaining" as possible within urban wildland reserves. Specific recovery actions for San Francisco lessingia focus on the restoration and management of large, dynamic mosaics of coastal dune areas supporting shifting populations within the species' narrow historic range. Recovery of Raven's manzanita will include, but will not be limited to, the strategy of the 1984 Raven's Manzanita Recovery Plan, which emphasized the stabilization of the single remaining genetic individual. The draft plan also seeks to re-establish multiple sexually reproducing populations of Raven's manzanita in association with its historically associated species of local serpentine outcrops. The objectives of this recovery plan are to delist San Francisco lessingia and to downlist Raven's manzanita through implementation of a variety of recovery measures including: (1) Protection and restoration of a series of ecological reserves (often with mixed recreational and conservation park land uses); (2) promotion of population increases of San Francisco lessingia and Raven's manzanita within these sites, or reintroduction of them to restored sites; (3) management of protected sites, especially the extensive eradication or suppression of invasive dominant non-native vegetation; (4) research; and (5) public participation, outreach, and education.

Public Comments Solicited

The Service solicits written comments on the recovery plan described. All comments received by the date specified above will be considered prior to approval of this plan.

Authority

The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: November 20, 2001.
Steve Thompson,
Acting California/Nevada Operations Manager, U.S. Fish and Wildlife
Service, Sacramento, California.



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Bishop Henry Whipple Federal Building
1 Federal Drive
Fort Snelling, MN 55111-4056

IN REPLY REFER TO:

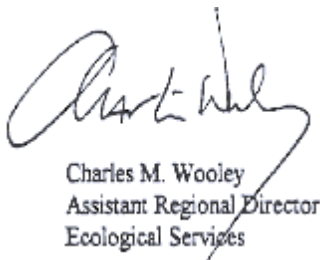
FWS/AES/ESO

Notice of Availability of the Technical/Agency Draft Hine's Emerald Dragonfly (*Somatochlora hineana*) Recovery Plan for Review and Comment

The U.S. Fish and Wildlife Service (Service) invites your review of the enclosed draft of the recovery plan for the Hine's emerald dragonfly (*Somatochlora hineana*). The Service solicits any corrections or suggestions you or your agency or group may offer and will carefully consider your comments. Your review is important to the Service and must be received by September 13, 1999, as indicated in the enclosed *Federal Register* notice dated July 13, 1999. Please send your comments to the Field Supervisor, Chicago, Illinois, Field Office, U.S. Fish and Wildlife Service, 1000 Hart Road, Suite 180, Barrington, Illinois 60010.

The Service seeks to ensure that the best biological and commercial data, scientifically accurate analyses of those data, and reviews of recognized experts are used in its recovery plans. It seeks to demonstrate to the public, other agencies and interests, conservation organizations, and to units within the Service that the best data, scientific analyses, and reviews of affected or involved parties were considered in developing the document.

If you have questions or wish to discuss this draft, please contact John Rogner, Field Supervisor (847/381-2253, extension 212), or Louise Clemency, Endangered Species Coordinator (extension 215), located at the Chicago, Illinois, Field Office.



Charles M. Wooley
Assistant Regional Director
Ecological Services

Thank you for your time and effort in providing your valuable assistance.

Enclosures

DRAFT

Press Release

Contact: Paul McKenzie 573-876-1911, ext. 206
E-mail: Paul_McKenzie@mail.fws.gov

**Indiana Bat Agency Draft Revised Recovery Plan
Available for Review**

The U.S. Fish and Wildlife Service (Service) announces the availability of the agency draft revised recovery plan for the endangered Indiana bat (*Myotis sodalis*). The Service is seeking comments on the draft plan from all interested parties. Comments will be accepted through *[ESO-TE will provide the date, once received from the Office of the Federal Register]*.

"The agency draft revised plan identifies research needs that will help pinpoint the causes of decline for the Indiana bat, allowing development of strategies to help restore its populations," said William Hartwig, Regional Director for the Service.

The Indiana bat was listed as endangered in 1967 under the precursor to the Federal Endangered Species Act. Major threats to the bat are believed to be human disturbance of hibernating bats, as well as lack of access by bats to hibernation caves. Other threats are under study.

The Service approved the Indiana Bat Recovery Plan in 1983. Biologists have noted a 60 percent decline in Indiana bat numbers from the 1960s through the mid-1990s. The Indiana Bat Recovery Team, comprised of Federal and state biologists and other bat experts, has developed a draft revised plan based on the bat's current status. The agency draft plan incorporates comments solicited by the Recovery Team from bat experts and state agency personnel.

Recovery plans are developed for federally endangered or threatened species and are used as a blueprint for agencies to guide them toward restoring and recovering a species. The goal is to bring populations to a point that protection of the Endangered Species Act is no longer necessary.

Indiana bats are currently found in 26 states in the eastern U.S. They feed exclusively on flying insects, hibernate in caves or mines in the winter, and maintain maternity colonies in trees during the summer. Known bat numbers in the mid-1990s were estimated at 353,000, which is thought to be a decline of 60 percent from 1960s numbers.

Copies of the Indiana Bat Agency Draft Revised Recovery Plan may be purchased from the Fish and Wildlife Reference Service, 5430 Grosvenor Lane, Suite 110, Bethesda, Maryland 20814 (telephone: 301-492-6403 or 800-582-3421), or may be obtained from the Service's website at www.fws.gov/r3pao/bat.pdf. Comments on the draft plan must be received by *[ESO-TE will insert date]* and should be addressed to: Field Supervisor, U.S. Fish and Wildlife Service, 608

East Cherry Street, Room 200, Columbia, Missouri 65201. Access to the Service's Region 3 HomePage at www.fws.gov/r3pao/eco_serv/endangrd/index.html will provide facts and a photo of the Indiana bat. The revised Indiana bat recovery plan will be prepared once the Service has considered the comments received on the agency draft revised plan.

The U.S. Fish and Wildlife Service is the principal Federal agency responsible for conserving, protecting, and enhancing fish and wildlife and their habitats for the continuing benefit of the American people. The Service manages the 93-million-acre National Wildlife Refuge System comprised of more than 500 national wildlife refuges, thousands of small wetlands, and other special management areas. It also operates 66 national fish hatcheries and 78 ecological services field stations.

The agency enforces Federal wildlife laws, administers the Endangered Species Act, manages migratory bird populations, restores nationally significant fisheries, conserves and restores wildlife habitat such as wetlands, and helps foreign governments with their conservation efforts. It also oversees the Federal Aid program that distributes hundreds of millions of dollars in excise taxes on fishing and hunting equipment to state wildlife agencies.

For further information about the programs and activities of the U.S. Fish and Wildlife Service in the Great Lakes-Big Rivers Region, please visit our HomePage at: <http://www.fws.gov/r3pao/>.

Appendix U.

Notice of Availability of a Final Recovery Plan

that the participant suffers from a physical or mental disability resulting in the permanent inability of the participant to perform the service or other activities which would be necessary to comply with the obligation.

(d) In determining whether to waive or suspend any or all of the service or payment obligations of a participant as imposing an undue hardship and being against equity and good conscience, the Secretary, on the basis of information and documentation as may be required, will consider:

(1) The participant's present financial resources and obligations;

(2) The participant's estimated future financial resources and obligations; and

(3) The extent to which the participant has problems of a personal nature, such as a physical or mental disability or terminal illness in the immediate family, which so intrude on the participant's present and future ability to perform as to raise a presumption that the individual will be unable to perform the obligation incurred.

§ 68d.14 When can a GR-LRP payment obligation be discharged in bankruptcy?

Any payment obligation incurred under § 68d.12 may be discharged in bankruptcy under Title 11 of the United States Code only if such discharge is granted after the expiration of the five-year period beginning on the first date that payment is required and only if the bankruptcy court finds that a non-discharge of the obligation would be unconscionable.

§ 68d.15 Additional conditions.

When a shortage of funds exists, participants may be funded only partially, as determined by the Secretary. However, once a GR-LRP contract has been signed by both parties, the Secretary will obligate such funds as necessary to ensure that sufficient funds will be available to pay benefits for the duration of the period of obligated service unless, by mutual written agreement between the Secretary and the participant, specified otherwise. Benefits will be paid on a quarterly basis after each service period unless specified otherwise by mutual written agreement between the Secretary and the participant. The Secretary may impose additional conditions as deemed necessary.

§ 68d.16 What other regulations and statutes apply?

Several other regulations and statutes apply to this part. These include, but are not necessarily limited to:

(a) Debt Collection Act of 1982, Public Law 97-365, as amended (5 U.S.C. 5514);

(b) Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*);

(c) Federal Debt Collection Procedures Act of 1990, Public Law 101-647 (28 U.S.C. 1); and

(d) Privacy Act of 1974 (5 U.S.C. 552a).

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Notice of Availability of a Final Recovery Plan for the Howell's Spectacular Thelypody (*Thelypodium howellii* ssp. *spectabilis*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of a final recovery plan for the Howell's spectacular thelypody (*Thelypodium howellii* ssp. *spectabilis*; thelypody). This threatened plant, a member of the mustard family, occurs on fewer than 12 small sites located within 100 acres of private lands near North Powder and Haines in eastern Oregon (Baker and Union Counties). The thelypody occurs in mesic, alkaline meadow habitats and all remaining populations occur within or directly adjacent to agricultural fields or urban areas. Actions needed for recovery include permanent protection of remaining populations and habitat, and management to provide for naturally reproducing populations that have stable or increasing trends.

ADDRESSES: Recovery plans that have been approved by the U.S. Fish and Wildlife Service are available on the World Wide Web at <http://www.r1.fws.gov/ecoservices/Endangered/recovery/default.htm>. Recovery plans may also be obtained from: Fish and Wildlife Reference Service, 5430 Grosvenor Lane, Suite 110, Bethesda, Maryland 20814, (301) 429-6403 or 1-800-582-3421. The fee for the plan varies depending on the number of pages of the plan.

FOR FURTHER INFORMATION CONTACT: Johnna Roy, Wildlife Biologist, U.S. Fish and Wildlife Service, Snake River Fish and Wildlife Office, 1387 South Vinnell Way, Boise, ID 83709; phone (208) 378-5243.

SUPPLEMENTARY INFORMATION:

Background

Recovery of endangered or threatened animals and plants is a primary goal of the our endangered species program. A species is considered recovered when the species' ecosystem is restored and/or threats to the species are removed so that self-sustaining and self-regulating populations of the species can be supported as persistent members of native biotic communities. Recovery plans describe actions considered necessary for the conservation of the species, establish criteria for downlisting or delisting listed species, and estimate time and cost for implementing the measures needed for recovery.

The Endangered Species Act of 1973, as amended in 1988 (Act) (16 U.S.C. 1531 *et seq.*), requires that recovery plans be developed for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act requires that during recovery plan development, we provide public notice and an opportunity for public review and comment. Information presented during the comment period has been considered in the preparation of the final recovery plan, and is summarized in an appendix to the recovery plan. We will forward substantive comments regarding recovery plan implementation to appropriate Federal or other entities so that they can take these comments into account during the course of implementing recovery actions.

The thelypody was listed as a threatened species on June 25, 1999. This taxon is endemic to the Baker-Powder River Valley in eastern Oregon. It is currently found in five populations in Baker and Union Counties, Oregon. It formerly also occurred in the Willow Creek Valley in Malheur County. The species grows in alkaline meadows in valley bottoms, usually in and around shrubs such as greasewood or rabbitbrush. The plants are threatened by habitat modification such as grazing during spring and early summer, trampling, urban development, and competition from non-native plants.

The objective of this plan is to provide a framework for the recovery of the thelypody so that protection by the Act is no longer necessary. As recovery criteria are met, the status of the species will be reviewed and it will be considered for removal from the List of Endangered and Threatened Wildlife (50 CFR part 17). The Howell's spectacular thelypody will be considered for delisting when: (1) At least five stable or increasing thelypody

populations are distributed throughout its extant or historic range and populations must be naturally reproducing with stable or increasing trends for 10 years; (2) all five populations are located on permanently protected sites; (3) management plans have been developed and implemented for each site that specifically provide for

the protection of thelypody and its habitat; and (4) a post-delisting monitoring plan is in place that will monitor the status of thelypody for at least 5 years at each site once it has been delisted.

Authority: The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533 (f).

Dated: June 3, 2002.

Rowand W. Gould,

Regional Director, Region 1, U.S. Fish and Wildlife Service.

[FR Doc. 02-19624 Filed 8-2-02; 8:45 am]

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Appendix V. Linking Threats to Recovery Actions (Table and Tip sheet).

LISTING FACTOR	THREAT	RECOVERY CRITERIA	TASK NUMBERS
A	Agricultural development and associated hydrologic alterations	1, 3	Identify and control threats, discourage conversion of habitat, protect and restore floodplain hydrology, conduct research, secure funding for recovery actions (see Tasks 1.6, 1.6.4, 1.6.5, 3, 6)
A	Road construction and maintenance	1,3	Identify and control threats, manage herbicide use, conduct research (see Tasks 1.6, 1.6.6, 3)
C	Livestock grazing	1,3	Manage livestock grazing , fence livestock areas, conduct research, secure funding for recovery actions (see Tasks 1.6.1, 1.6.2, 3)
D	State ESA does not provide protection for plants on private lands and all thelypody populations are found on private lands	2, 3, 4	Survey and prioritize sites for protection, protect sites in the interim, and secure permanent protection through easements and acquisition, identify and protect unoccupied habitat sites, conduct research, secure funding for recovery actions (see Tasks 1.1, 1.2, 1.3, 1.4, 1.5, 2, 3, 3.1, 3.3, 4, 5, 6)
E	Herbicide use	1,3	Identify and control threats, manage herbicide use conduct research, secure funding for recovery actions (see Tasks 1.6, 1.6.6, 3)
E	Competition form non-native plants species	1,3,4	Identify and control threats, control non-native species invasion, conduct research, secure funding for recovery actions (see Tasks 1.6, 1.6.3, 3, 3.4, 6)
E	Naturally occurring events (drought/fire)	1,4	Conduct research, see Task 3

Listing Factors:

- A. The Present or Threatened Destruction, Modification, or Curtailment Of Its Habitat or Range
- B. Overutilization for Commercial, Recreational, Scientific, Educational Purposes (not a factor)
- C. Disease or Predation
- D. The Inadequacy of Existing Regulatory Mechanisms
- E. Other Natural or Manmade Factors Affecting Its Continued Existence

Recovery Criteria:

1. At least five stable or increasing thelypody populations are distributed throughout its extant or historic range. Populations must be naturally reproducing with stable or increasing trends for 10 years. 2. All five populations are located on permanently protected sites. Permanently protected sites are either owned by a State or Federal agency or a private conservation organization, or protected by a permanent conservation easement that commits present and future landowners to the conservation of the species.

3. Management plans have been developed and implemented for each site that specifically provide for the protection of the thelypody and its habitat.. A post-delisting monitoring plan is in place that will monitor the status of the thelypody for at least 5 years at each site.