



Union of Concerned Scientists

Citizens and Scientists for Environmental Solutions

**Written Testimony of Francesca T. Grifo, Ph.D.
Senior Scientist with the Union of Concerned Scientists
Scientific Integrity Program**

**Before the Committee on Natural Resources
U.S. House of Representatives**

**Hearing on “The Danger of Deception: Do Endangered Species Have a Chance?”
May 21, 2008**

This testimony is presented by Dr. Francesca Grifo, Senior Scientist with the Union of Concerned Scientists (UCS), a leading science-based nonprofit working for a healthy environment and a better world. The full testimony is submitted for the record. Dr. Grifo will summarize her statement for the Committee on the problem of political interference in the work of federal government scientists. This written testimony contains a critique of the ethics policies of the Fish and Wildlife Service (FWS), evidence of a concerted effort by political appointees to interfere with the legally mandated process of listing endangered species, examples of interference in legally mandated endangered species actions, an overview of the problem of political interference in science, an updated summary of documented abuses of science in Endangered Species Act (ESA) decisions, and recommended government reforms needed to restore scientific integrity to the federal policy making process.

Chairman Rahall, Ranking Member Young, and Members of the Committee, the Union of Concerned Scientists appreciates the opportunity to testify today on an extremely important issue – the federal government’s implementation of the Endangered Species Act and whether the science used to implement the law has been compromised.

One of the great strengths of the Endangered Species Act is its foundation in robust scientific principles and its reliance on the best available science. Objective scientific information and methods should be used in listing species, the habitat needs of endangered species should be “scientifically well-informed” and the Endangered Species Act standard of “best available science” must rely on “impartial scientific experts.”

Unfortunately, time and time again, when scientific knowledge has appeared to be in conflict with its political goals, the current administration has manipulated the process through which science enters into its decisions. At many federal agencies and departments, including the Department of Interior (DOI), this has been accomplished by placing people who are professionally unqualified or who have clear conflicts of interest in official posts; by censoring and suppressing reports by the government’s own scientists, and by actually omitting or distorting scientific data.

I. Introduction

Politicization of the science surrounding the Endangered Species Act undermines its implementation and enforcement. The manipulation and suppression of this science is pervasive and is not limited to one aspect of the execution of the Act, but rather it is rampant from the first steps of the listing process to the creation of recovery plans of critically endangered species. In addition, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) have failed to establish a transparent means of implementing the Act nor one subject to a clear code of ethics. Instead, the agencies allow political appointees within and without the conservation agencies to interfere with individual species decisions and propagate policies that reduce the role of science in endangered species decision making.

The Endangered Species Act is a strong and significant environmental law, but its implementation is wearing thin under the assault of political pressures. This failure to insulate science based decision making from political considerations frequently lands FWS and NMFS in court, on the losing side of litigation. Decision-making occurs out of the view of the public, and out of reach of open government laws like the Freedom of Information Act.

While it is imperative that we continue to uncover instances where endangered species science has been manipulated, edited, overruled, or ignored in its entirety, it is equally important to determine what policies exist or existed in the DOI and Department of Commerce to allow such interference to take place. Listing under the ESA is based solely on science; critical habitat and recovery plans can include economic and other concerns, but shouldn't be allowed to completely outweigh scientific conservation goals. With 80 FWS and NMFS decisions (Appendix I) under review because of political interference, this process of investigation of possibly illegal decisions has already begun. Unfortunately, FWS in its current capacity cannot be relied upon to initiate these reviews themselves, as they only found 7 decisions to review. Systemic problems are more difficult to detect from the outside, and more difficult to root out. However, we are hopeful that with clear, unambiguous ethics policies, a renewed commitment to transparent decision making, and a working environment free of interference and intimidation from high level political appointees, the career scientists and managers of the conservation agencies will be able to identify and correct the processes that have lead to the current abysmal situation.

This testimony includes our analysis of the beginnings and failings of ethical reform at the DOI and FWS (page 1), problems with listing species under the ESA both at the anecdotal level and the procedural level, a discussion of the inherent flaws in the 90-day review policy (page 4) the problems in the implementation of the Act after listing, highlighting the recent case of the right whale, (page 9) and a discussion of the economic consequences of politically influenced decisions, and policies that may reduce species protections (page 12). In conclusion we present our recommendations for how this can be remedied (page 13).

II. Ethics at the Department of the Interior (DOI) and FWS

Many of the problems with the implementation of the ESA stem from political appointees manipulating or overruling the science behind ESA decision-making. A strong ethics policy should address this problem, together with greater accountability, more transparency, and a retaliation-free environment for reporting political interference. Recent ethics policies at DOI and FWS attempt to achieving this goal, with varying degrees of success.

Secretary Kempthorne's Ethics Reform

In June 2007, Department of Interior Secretary Dirk Kempthorne unveiled a 10-point ethics plan designed to transform the FWS into "a model of an ethical workplace."¹ A month later, Kempthorne quietly scaled back the scope and utility of one of the central pillars of his plan, the Conduct Accountability Board.² Jurisdiction of the Board was limited to cases involving "Executive Level" employees - less than 1% of the Interior workforce – and the Board was only allowed to review matters referred to it by the Deputy Secretary and Chief of Staff.

This means that if former Deputy Secretary Steven Griles, now serving time in federal prison for obstruction of justice related to his unethical connections to Jack Abramoff,³ was still at Interior he could have determined whether his conduct would be eligible for Board review. Griles was the subject of an Inspector General investigation probing Griles' arrangement of meetings between former clients in the oil and gas industry and Interior Officials. Inspector General Earl E. Devaney expressed outrage before the

¹ Kempthorne, Dirk. Memorandum to All Employees. Subject: Promoting Ethics, the Public Interest, and Respectful Behavior. June 27, 2007. Hosted online by Public Employees for Environmental Responsibility (PEER) at http://www.peer.org/docs/doi/07_03_07_doi_ethics_directive.pdf

² Kempthorne, Dirk. Amendment No. 1 to Order No. 3268. Subject: Creation of the Conduct Accountability Board at the Department of the Interior. July 25, 2007. Hosted online by PEER at http://www.peer.org/docs/doi/07_17_12_cab_scope.pdf

³ Department of Justice. Former Interior Deputy Secretary Steven Griles Sentenced to 10 Months in Prison for Obstructing U.S. Senate Investigation into Abramoff Corruption Scandal. June 26, 2007. Available online at http://www.justice.gov/opa/pr/2007/June/07_crm_455.html

House Government Reform subcommittee on energy on Sept 13, 2006 that 23 of 25 potential ethical violations he had uncovered were dismissed, and then-Secretary of Interior Gale Norton decided not to act on the remaining two allegations.⁴ As for the general ethics of the DOI's leadership, Mr. Devaney charged, "Simply stated, short of a crime, anything goes at the highest levels of the Department of the Interior."⁵

It is unclear what functionality, if any, the Conduct Accountability Board retains. The first chair of the Board, Mark Linbaugh, then-assistant secretary for water and science, resigned 16 days after his appointment to chair in order work for the Ferguson Group as a water lobbyist for industry.⁶ Kempthorne had also identified Linbaugh as one of the Department officials charged to review the ethics issues raised by the Inspector General's report on Julie MacDonald. The IG determined that MacDonald, former Assistant Secretary of Fish, Wildlife, and Parks, had been "heavily involved with editing, commenting on, and reshaping the Endangered Species Program's scientific reports from the field" and had "disclosed nonpublic information to private sector sources."⁷ Interior Deputy Secretary Lynn Scarlett refused to condemn MacDonald's actions in testimony on May 9, 2007 before this committee; she instead said that MacDonald "strived to do what she thought was her duty to ensure quality product."⁸

The Department of Interior clearly needs an ethical conduct board to review the actions of its high level appointees, and it also needs to send a stronger message that, at every level of its leadership, it will adhere to strong ethical standards. It also needs to open the charge of the Board to review allegations from all-comers, not just two high ranking officials.

FWS Code of Scientific Conduct

Fish and Wildlife Service Director Dale Hall also took steps towards ethical reform at his agency. In late January 2008, Hall released a Scientific Code of Professional Conduct that covers FWS employees.⁹ While a positive first step, we believe this code has many shortfalls. The code does not encourage transparency. There is no way for scientists to express their difference of opinion on a regulatory decision. The code also does not create protections for scientists who express concerns about interference in science, or an outlet for them to do so anonymously without fear of reprisal.

We are particularly concerned about two sections of the code. Section 7.7 (F) states that employees, should "Strive to understand and accurately interpret, report, and apply scientific information to support management decisions affecting fish and wildlife and their habitats."¹⁰ There are several documented cases of political interference where scientists were forced to manipulate their data to support pre-determined management decisions. For example, FOIA documents show that Benjamin Tuggle, regional director of the FWS Southwestern office, and Ren Lohofener, former assistant director for the Endangered Species Program in the FWS Washington D.C. Office, "reached a policy call" that the southwestern bald eagle did not meet the requirements under the ESA to be listed as a distinct population segment, or DPS.¹¹ In order to support this decision, FWS scientists were instructed during a meeting that the "answer has to be that it's not a DPS" and "now we need to find an analysis that

⁴ Andrews, Edmund L. Interior Official Assails Agency for Ethics Slide. *The New York Times*. September 14, 2006.

⁵ *Ibid.*

⁶ Wyden, Ron. Press Release: Wyden Asks Secretary Kempthorne for Answers on Interior Ethics Concerns. July 19, 2007. Available online at <http://wyden.senate.gov/newsroom/record.cfm?id=279869&>

⁷ Department of the Interior Office of the Inspector General. Investigative Report On Allegations Against Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife, and Parks. Available online at http://wyden.senate.gov/DOI_IG_Report.pdf

⁸ Scarlett, Lynn. Committee on Natural Resources hearing transcript. Hearing entitled: Endangered Species Act Implementation: Science or Politics? May 9, 2007.

⁹ Hall, Dale. Scientific Code of Professional Conduct. Jan 30, 2008. Available online at <http://www.fws.gov/science/>

¹⁰ *Ibid.*

¹¹ Union of Concerned Scientists. FWS Decrees the Southwestern Bald Eagle is Safe, in Spite of Science. FOIA documents on the southwestern bald eagle all obtained by the Center for Biological Diversity and generously shared with UCS. Available online at http://www.ucsusa.org/scientific_integrity/interference/fws-decrees-southwestern-bald-eagle-safe.html

works."¹² We are concerned that the implementation of this clause in the ethics policy could further systemize situations like that of the bald eagle decision.

Section 7.9(C) states that "Employees must... Be forthright and honest about the scientific foundation used for possible policy options and the uncertainties associated with any resulting prediction of consequences for fish and wildlife and their habitats."¹³ Exaggerating scientific uncertainty is a common approach for political opposition to a science-based rule, so while we wholeheartedly agree that employees should be fully honest about scientific uncertainty, they should also be fully protected from the misinterpretation of this uncertainty.

While the concerns above are all serious issues that should be addressed, the principal problem with this code of conduct is that it doesn't cover the leadership at the Interior Department. In a mid-January 2008 meeting between Deputy Secretary Lynn Scarlett and several conservation organizations, Scarlett stated that the Interior Department could not create an overarching scientific code of ethics because the agencies varied too widely in their mission and procedures for decision making.¹⁴ The Department should be able to agree on a basic set of ethics to guide how science is used to inform decisions. We encourage the Interior Department as a whole to adopt a policy like the FWS Scientific Code of Professional Conduct, taking note of our concerns. If it is truly impossible for Interior to adopt a uniform ethics code, then it should formally agree to abide by and be subject to the ethics codes of its individual agencies in its dealings with them.

III. Problems with Listing

On May 14, 2008, Department of Interior Secretary Dirk Kempthorne, acting under a court ordered deadline, listed the polar bear as threatened under the Endangered Species Act.¹⁵ Until that day, Kempthorne had gone two years and five days without listing a single domestic species, the longest drought in listing in the history of the ESA.¹⁶

The implementation of the listing process for the Endangered Species Act is broken. While we do not have a clear picture for why the listing process has been so effectively severed, we believe it is a combination of individual actions against species and a biased policy on evaluating petitions that discriminates against listing. The following cases support this idea, but a thorough examination of the full policies and procedures governing listing is needed to ensure that imperiled species received the protections guaranteed to them by the ESA.

An Unfair Policy on 90-Day Petitions

The FWS policy on conducting reviews of citizen petitions for ESA protection of species is biased towards denying listing, likely raises the standard that a petition must meet higher than is required by the Act and federal regulations, and prevents a full picture of the "best available scientific and commercial data" from being used in this first and critical stage towards listing. Through documents, many highly redacted, obtained via the Freedom of Information Act, UCS establishes that the implementation of the 90-day petition review process is open to political interference from high ranking officials in the FWS and DOI, and is likely part of the reason that the listing process ground to a halt for two full years.

An overview of the rules governing listing - Two listing pathways were established for imperiled species in Endangered Species Act – a discretionary pathway where FWS can initiate the listing process either by placing a species on the candidate list or by issuing a proposed listing rule, and a pathway for action

¹² *Ibid.*

¹³ Hall, Dale. Scientific Code of Professional Conduct. Jan 30, 2008. Available online at <http://www.fws.gov/science/>

¹⁴ Meeting between Deputy Secretary Lynn Scarlett and conservation groups, including UCS. Jan 14, 2008.

¹⁵ Kempthorne, Dirk. Secretary Kempthorne Announces Decision to Protect Polar Bears under Endangered Species Act. May 14, 2008. Available online at http://www.fws.gov/home/feature/2008/polarbear012308/pdf/DOI_polar_bears_news_release.pdf

¹⁶ Center for Biological Diversity. Bush Sets New Record in Refusing to Protect Endangered Species. May 9, 2008. Available online at http://www.biologicaldiversity.org/news/press_releases/2008/esa-listing-05-09-2008.html

by the public. The listing record clearly shows that citizen petitions, and the court settlements enforcing their timetables, are the primary entry point to the endangered species list. The Service, for whatever reasons or constraints, rarely initiates its own reviews.

The first stage of the citizen-initiated listing pathway is the 90-day period, where the FWS determines whether or not to do a full-scale review of the species for listing. This process is determined by Sect 4(b)(3)(A) of the Endangered Species Act, which states,

“To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 533(e) of title 5, United States Code, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned.”¹⁷

The standard for substantial information within the Code of Federal Regulations (CFR) is “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.”¹⁸ Petitioners are not required to prove that a listing is warranted, only to demonstrate the reliability of the information they present supporting the action advocated by the petition.

The FWS interpretation of listing rules - Through the narrow glimpse available through FOIA documents, the FWS policy for reviewing 90-day petitions interprets the Act and its accompanying regulations in such a way that the petition listing route is effectively closed. FWS internal memos (Appendix II) show that their policy (which updated policies from 1995, but which we have been informed has been since slightly modified) interprets the Act to mean that, “it is the responsibility of the petitioner to provide substantial scientific or commercial information to support the petitioned action.”¹⁹ The Service, in its implementation of this clause, requires the petition to be both legally and scientifically comprehensive, a standard which the average citizen or even the average environmental group cannot easily meet.

In fact, FWS policy *explicitly prevents* its scientists from using information they already have within their own files to support a citizen’s petition. A memo obtained through FOIA entitled “Policy on 90-Day Petition Findings Under the Endangered Species Act” emailed to the regional directors on 11/08/2006 by Chris Nolin (chief of the division of conservation and classification at the Fish and Wildlife Service) says, in the section discussing the scope of information to be considered, that information in FWS files is only to be used to

“...evaluate the reliability of the information contained within the petition... The information within the Service’s files is not to be used to augment a “weak” petition. If we have information independent of that provided in the petition that is sufficient to support a change in the species’ listing status, it is the Service’s responsibility to utilize our internal candidate, listing, and delisting priorities and processes.” (Emphasis in original).²⁰

Again, FWS rarely initiates its own review of species, so refusing to continue a 90-day petition in the face of Service data suggesting that the species needs review is the least protective option FWS could take.

FWS formalized the attitude that Service information should only be used to discredit a listing petition, and not augment it in such a way that imperiled species would quickly receive protections, by creating a new procedure for the review process, known as the 90-day petition outline and table. The

¹⁷ The Endangered Species Act. Available online at <http://www.fws.gov/endangered/pdfs/ESAall.pdf>

¹⁸ 50 CFR 424.14(b)

¹⁹ Memorandum from the Director. Policy on 90-Day Petition Findings Under the Endangered Species Act. Sent to the Region heads by Chris Nolin on November 8, 2006. Obtained via FOIA by UCS. Appendix II.

²⁰ *Ibid.*

new procedure, which FWS has told UCS was only used during 2005 and 2006, was requested by the office of the Assistant Secretary of Fish, Wildlife, and Parks as an early-warning system to allow them to “discuss any issues early in the process.”²¹

FWS scientists now had to prepare a 1-2 pages summary and an attached table detailing specifically each claim made in the petition, the information in the petition to support each claim, and if there was information in the Service’s files to *refute* the petition. In fact, one column of the table explicitly calls for FWS information to refute the petition; there is no corresponding column for supporting information, and FWS scientists were explicitly told they could not use any.²² This outline and table were due at the Washington Office at least 2 months before the petition analysis was completed, so that the Washington Office could forward this report up the Assistant Director's level.²³

Specific flaws in the current interpretation - The FWS 90 day policy is fundamentally flawed for the following reasons:

1. *The policy does not allow the use of the best available science.* Listing decisions are required by the Act to be based on the best available science. The 90-day petition is the first step towards listing. Selective use of data in the review of a species is inherently not using the best available scientific data.
2. *Scientific data in Service files is used in a biased manner which favors denying protections.* Only allowing information from Service files to be used to refute a petition, not support a petition, is an uneven use of the taxpayer-funded science of the FWS. FWS files may contain the critical information suggesting that a species requires immediate protections, but the FWS policy prevents its employees from using this information in conjunction with the review already underway to make sure threatened and endangered species get their protections in a timely fashion. Instead, the policy requires Service employees to use their information to start a separate internal review, a process which rarely happens. Also, since the issue at hand is the protection of species threatened with extinction, bureaucratic delays due to uneven policies can and surely will result in the unnecessary extinctions.
3. *The FWS policy lacks transparency.* UCS requested the 90 day tables and the policies regarding the 90 day process in a FOIA request on November 28, 2007. Six months later, we still only have a partial response. In what we have received, FWS has redacted all of the “Service conclusion” portions of the table which would allow you to see the effects of their selective use of scientific data. FWS claims that their conclusions are predecisional. This response is inconsistent with FWS's response to a FOIA request by the Center for Biological Diversity (CBD) regarding the southwestern bald eagle, in which no parts of the 90-day table were redacted.
4. *The policy likely raises the burden of proof higher than is required by the Act or the CFR.* According to the Act and the CFR, the petitioner has to provide substantial information that the petitioned action is warranted. They do not have to present an air-tight case that the species is warranted for the petitioned action – that is the threshold for the 12-month process. The CFR says they have to present enough information that a “reasonable person” would believe the action to be warranted. While we cannot tell the precise effects of the use of selective data because of the redactions in our FOIA, the table provided to the CBD for the bald eagle shows that 34 of their points were rated “substantial” while 4 points were rated “information in dispute”. FWS subsequently denied Bald Eagle petition, but a court has since ordered a 12 month review of this subpopulation because of evidence that the scientists were forced to manipulate their findings to support a predetermined policy position.
5. *FWS scientists are not allowed to use their full expertise.* Hamstringing the ability of taxpayer-funded scientists with unfair restrictions on the use of data does a great disservice to the scientists,

²¹ Email from Michelle Morgan. Subject: New petition outline. May 2, 2005. Obtained via FOIA by UCS. Available from UCS upon request.

²² Previous two references, and also: Listing meeting notes (regarding the southwestern bald eagle). May 16, 2005. Obtained via FOIA by the Center for Biological Diversity. All bald eagle FOIAs referred to in this testimony obtained by CBD. Available online at http://www.biologicaldiversity.org/news/press_releases/desert-bald-eagle-05-17-2007.html

²³ Memorandum from the Director. Policy on 90-Day Petition Findings Under the Endangered Species Act. Sent to the Region heads by Chris Nolin on November 8, 2006. Obtained via FOIA by UCS. Appendix II.

the imperiled species, and the public. From what we can tell from the redacted 90-day tables provided to us, FWS are not always adhering to the restrictions in the FWS policy, and we applaud them for their efforts.

6. *The policy opens up the review process to political appointees.* The inclusion of the 90-day table and outline to the review process was done so explicitly at the request of the the Office of Fish, Wildlife and Parks. Internal emails show that conversations with the Assistant Secretary's office were the catalyst for the inclusion of the column for information which refutes, never supports, the petition. The Assistant Secretary's office has, through its former deputy assistant secretary Julie MacDonald, a documented history of manipulating, distorting, and suppressing endangered species science, and overturning the listing decisions of FWS scientists by executive fiat. It is not a stretch to assume that the 90-day outline and table were a part of the inappropriate interference of this office. While FWS says that the table is no longer being used in the petition process, we do not know if it has been replaced with something else, or if FWS has taken steps to insulate its scientists from the unacceptable manipulation of high level political appointees.

Individual Examples of Political Interference in Listing Decisions

In species after species, scientific data has been minimized, edited, or overruled to deny ESA protections to imperiled species. Among the species whose listing decisions have been subject to political interference are the greater sage grouse, Gunnison sage grouse, Gunnison's prairie dog, white tailed prairie dog, Mexican garter snake, southwestern bald eagle, Preble's meadow jumping mouse, Sacramento splittail, California tiger salamander, roundtail chub, *Tabernaemontana rotensis* (a rare island tree), fluvial arctic grayling, and the Pierson's milkvetch. Most of these are now under investigation by either FWS, the Department of Interior IG, the Government Accountability Office, or the courts. We will highlight a few cases (See Appendix I for more examples):

Gunnison's prairie dog – This species was on track for a positive 90-day finding as of Jan 19, 2006. But a short email saying “Per Julie please make the pd [prairie dog] finding negative” overruled the scientists at FWS and the best available science on this species. When FWS announced it would review eight species decisions impacted by Julie MacDonald, it did not include this species in the list that they would revisit. Senator Wyden has since request an IG investigation including this prairie dog.²⁴

Greater sage grouse – Julie MacDonald criticized scientific studies showing widespread threats to this species. MacDonald heavily edited the biologist's findings and the species received a 12-month not-warranted finding. This finding has since been struck down in court due to the direct political interference overriding the use of best available science.²⁵

An unclear future

Two full years and a handful of days, from May 9 2006 to May 14, 2008, passed in which Secretary Kempthorne failed to list a single domestic species.²⁶ This was not due to a lack of species – 280 species await protections on the candidate list,²⁷ and our FOIA reveals that 52 90-day petitions and 34 12-month reviews were denied between 2002 and 2007.²⁸ With over 80 species decisions from a similar time period under various public, court, congressional, IG, or GAO reviews because of

²⁴ Union of Concerned Scientists. Systematic Interference with Science at Interior Department Exposed: Gunnison's Prairie Dog. Available online at http://www.ucsusa.org/scientific_integrity/interference/endangered-species-act-interference.html

²⁵ Union of Concerned Scientists. Systematic Interference with Science at Interior Department Exposed: Greater Sage Grouse. Available online at http://www.ucsusa.org/scientific_integrity/interference/endangered-species-act-interference.html#

²⁶ Center for Biological Diversity. Bush Sets New Record in Refusing to Protect Endangered Species. May 9, 2008. Available online at http://www.biologicaldiversity.org/news/press_releases/2008/esa-listing-05-09-2008.html

²⁷ Department of the Interior. 72 FR 69034.

²⁸ UCS. FOIA into use of the 90-day table. Available upon request.

inappropriate interference for political or economic reasons,²⁹ our faith that those petition denials were done in a fair and scientifically accurate process is greatly eroded.

IV. Problems with Implementation after listing

Listing is not the only area of Endangered Species Act implementation that is under assault from political interference. The pieces of the Act intended to ensure species' recovery – critical habitat and recovery plans – are subject to interference via delay, manipulation of science, biased cost-benefit analyses, and more. We highlight here a few blatant cases of politicization.

Right Whale interference

Political interference in endangered species decisions is not limited to the FWS and DOI. A new investigation by the Union of Concerned Scientists reveals unprecedented interference with a proposed rule intended to minimize losses of the critically endangered Northern Atlantic right whale. Documents show that five executive branch offices – The Office of Management and Budget, the Council on Environmental Quality, the Office of Science and Technology Policy, the Council of Economic Advisers, and the Office of the Vice President – have all been involved in blocking the National Marine Fisheries Service from issuing the rule to protect whales from fatal collisions with ships.

The right whale is critically endangered - Only about 300 right whales remain on the east coast, and their numbers are threatened by fatal collisions with ships and entanglement in fishing gear.³⁰ Ship strikes have caused at least 19 right whale deaths since 1986, with more suspected but unconfirmed.³¹ According to NMFS, “no mortality or serious injury for this [whale] can be considered insignificant” and that the death of even a single whale, particularly a breeding female, “may contribute to the extinction of the species.”³²

As part of its efforts to protect the remaining individuals of the species, NMFS proposed a rule to implement a 10-knot speed limit around 16 Atlantic ports and coastal areas during the seasons of right whale feeding, migrating, and reproducing.³³ After an extensive, thorough, and transparent four years of drafting, NMFS sent its final rule to OMB for review on Feb 20, 2007.³⁴

OMB delays the rule - Under the executive order authorizing the OMB to review regulations, OMB must complete its rule within 120 days – 90 days plus a 30 day extension.³⁵ The date of this hearing, May 21, 2008, will mark 456 days since the rule was sent to OMB.

White House repeatedly attacks the science underlying the rule - Internal documents obtained by UCS from anonymous sources show that offices within the White House have repeatedly challenged and attempted to discredit the scientific work of NMFS scientists with the goal of altering the rule.

1. *The Office of the Vice President claims NMFS has “no data”*. In private communication, UCS has been told that the OVP has repeatedly challenged NOAA/NMFS conclusion that slowing ships, even ships of extremely large size, will reduce whale mortality. This is supported by the documents obtained by UCS. One document dated October 2007 shows NMFS employees replying to unfounded attacks from the Office of the Vice President:

²⁹ Appendix I

³⁰ NOAA Fisheries – Office of Protected Resources. North Atlantic Right Whales (*Eubaleana glacialis*) webpage. http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/rightwhale_northatlantic.htm

³¹ NOAA. Proposed Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales. 71 FR 36299, 36300. June 26, 2006.

³² Stock Assessment, 12. NOAA. Advanced Notice of Proposed Rulemaking for Right Whale Ship Strike Reduction. 69 FR 30857. June 1, 2004.

³³ NOAA. Proposed Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales. 71 FR 36299, 36300. June 26, 2006.

³⁴ Office of Information and Regulatory Affairs (OIRA). EO 12866 Regulatory Review – Search results for Department of Commerce. <http://www.reginfo.gov/public/do/eoPackageMain>

³⁵ Executive Order No. 12866. 58 FR 51734. Oct 4, 1993.

“OVP staff wonders what evidence NOAA has of whales surviving a collision with a 'large ship.' OVP staff contends that we have no evidence (i.e., hard data) that lowering the speeds of “large ships will actually make a difference.”³⁶

NOAA's reply indicated this was not the first time they had to defend against these allegations:

“Several types of statistical analysis (provided earlier) of the ship strike records and theoretical physics (provided earlier and appearing in peer-reviewed literature) indicated that vessel speed is a critical variable in reducing the severity of a ship strike.” “The size parameter is not statistically significant in the models which incorporate it, while speed is significant in all the models that included it” “Accordingly, these theoretical exercises provide no basis to overturn our previous conclusion that imposing a speed limit on large vessels would be beneficial to whales.”³⁷

2. *The Council of Economic Advisers conducts a biased analysis.* After a meeting on July 10, 2007 involving NOAA, DOC, OMB, OSTP, OVP, and CEA to discuss the right whale ship speed rule, CEA announced it would “investigate the reliability of analysis in the published literature on which NOAA is basing its position.”³⁸ UCS has obtained a copy of that analysis, which can be seen in Appendix III in a side by side comparison to the NOAA analysis.³⁹ NOAA helped CEA construct the database of ship strike records; CEA also solicited information directly from academic researchers. Christopher Taggart of Delhousie University and Amy Knowlton of the New England Aquarium were both asked for data and analysis by CEA.⁴⁰

For its analysis, CEA's staff, which has no expertise in either the right whale or scientific biometrical modeling, re-coded a non-random selection of datapoints, and concluded that the relationship between whale mortality and ship speed is not as strong as is suggested by career NOAA scientists and independent, peer-reviewed publications. CEA also questioned the choice of 10 knots as a speed limit.⁴¹

NOAA responded to the CEA analysis in a document obtained from an anonymous source. In this document, NOAA says:

“NOAA has reviewed CEA's analysis and finds it is a biased sensitivity analysis. “Furthermore, this analysis is unlike any formal sensitivity analysis NMFS biometricians are familiar with.” “The basic facts remain that (1) there is a direct relationship between speed and death/serious injury, and (2) at vessel speeds at or below 10 knots the probability of death/serious injury is greatly reduced.”⁴²

3. *NOAA and NMFS scientists have been assailed by attempts to undermine their science.* Through private communications, leaked documents, public records and anonymous mailings, UCS has determined that NOAA scientists have been constantly challenged by industry, White House agencies, and other departments within the federal government.

³⁶ NOAA. Response to the Office of the Vice President – Ship Strike Rulemaking. Oct 2007. Available online at <http://oversight.house.gov/documents/20080430104427.pdf>

³⁷ *Ibid.*

³⁸ NOAA. Response to Council of Economic Advisers' (CEA) Analysis of Vessel Speed vs. Whale Ship Strikes. July 31, 2007. Available online at <http://oversight.house.gov/documents/20080430104427.pdf>

³⁹ Appendix III. Side by side comparison of NMFS analysis of right whale mortality vs ship speed with the CEA analysis of the same thing.

⁴⁰ Private communication with Dr. Amy Knowlton and Dr. Christopher Taggart.

⁴¹ NOAA. Response to Council of Economic Advisers' (CEA) Analysis of Vessel Speed vs. Whale Ship Strikes. July 31, 2007. Available online at <http://oversight.house.gov/documents/20080430104427.pdf>

⁴² *Ibid.*

- As yet another challenge to the NOAA research, OSTP contracted a scientist from Woods Hole Oceanographic Institute to conduct yet another study on ship speed and right whale mortality. UCS has been unable to find a copy of this report, and the scientist has signed a confidentiality agreement.⁴³
- The World Shipping Council, and industry group, has been pressuring OMB to dismiss or seriously alter the rule. The shipping community is not united in this attitude, as the Chamber of Shipping of America supports the rule with minor exemptions.⁴⁴
- NOAA fielded at least one other round of questions from the White House, this time questioning calf birth data, the impact force required to kill a whale, and the decision of 30 nautical miles as the radius around points of concern. NOAA responded to these questions on Nov 20, 2007.⁴⁵
- The Maritime Administration, a branch of the Department of Transportation, has repeatedly challenged the rulemaking in internal, private meetings.⁴⁶

It is wholly inappropriate for White House agencies to attempt to manipulate right whale science - The case of the right whale speed rule displays political interference in science at its worst. NOAA scientists have done absolutely everything required of them in the rulemaking, conducting an open and stakeholder-accessible process based on the best available science. Unfortunately, we have no idea if their staunch defense of their rule has been successful, both because the rule is delayed and because the current executive branch review of the rule is completely opaque.

Uncovering this story took time and patience, as the good scientists at NOAA wrestled both wanting the political interference to be exposed and fearing for retaliation against themselves and the rule itself. However, through anonymous documentation, it is now clear that White House agencies have conducted two separate studies attempting to inject artificial uncertainty into the relationship between ship speed and whale mortality; one of these studies was biased and did not follow accepted, peer-reviewed practices for analysis. The Office of the Vice President has boldly doubted the conclusions of the NOAA scientists, and the OMB has delayed the rule for a year and three months.

Political interference in other species protections

Besides the right whale, many other species have suffered from political interference reducing their chances at recovery. Among them are the arroyo toad, bull trout, California red-legged frog, Canada lynx, three invertebrates living in Comal Springs, the gulf sturgeon, loach minnow, Northern spotted owl, Preble's meadow jumping mouse, Santa Ana sucker, southwestern willow flycatcher, spikedace, and the Topeka shiner.⁴⁷ Many of these are under investigation (Appendix I). We will highlight two of these cases – the spotted owl shows high level interference in a recovery plan, and the bull trout shows a common practice of manipulating a cost-benefit analysis to significantly reduce critical habitat.

Spotted Owl - High ranking officials from the DOI, FWS, and the other federal land agencies intervened in the recovery plan for the northern spotted owl, compromising the science-based protections in order to reduce barriers to increased logging in old-growth forests.⁴⁸ According to peer review by scientists, the draft Northern Spotted Owl Recovery Plan⁴⁹ prepared in 2007 by FWS is a hodgepodge of deliberately

⁴³ Private communication.

⁴⁴ Office of Management and Budget. Public Comments webpage for NOAA.
<http://www.whitehouse.gov/omb/oir/0648/comments.html>

⁴⁵ NOAA. Responses to 16 November Questions from the White House on Right Whale Ship Strike Reduction Final Rule. November 20, 2007. Available online at
<http://oversight.house.gov/documents/20080430104534.pdf>

⁴⁶ Private communication.

⁴⁷ Appendix I.

⁴⁸ DellaSala, Dominick. Written testimony for the House Natural Resources Committee Hearing entitled "Endangered Species Act Implementation: Science or Politics?" May 9, 2007.
<http://www.nccsp.org/files/land/spottedowltestimonydds.pdf>

⁴⁹ FWS. Draft Recovery Plan for the Northern Spotted Owl: Merged Options 1 and 2. April 2007. Available

misrepresented or selectively applied science that downplays the importance of habitat loss.⁵⁰ It also includes a second management option, forced upon the recovery team by senior officials, that eliminates fixed protected areas for the bird.

Bull trout - Officials at the FWS censored an analysis of the economics of protecting the bull trout, a threatened trout species in the Pacific Northwest, publishing only the costs associated with protecting the species and deleting the report's section analyzing the economic benefits. Furthermore, while the benefits of protecting the bull trout were deleted from the economic analysis, the costs associated with this species' protection were inflated.⁵¹ An exaggerated cost analysis and a deleted benefits analysis essentially give the FWS the economic justification, under the ESA, to disregard scientific information when designating critical habitat for the endangered bull trout.

Economic Consequences

Political interference in science not only delays or prevents much needed protections for imperiled species; it can also have drastic economic consequences. For example, in two scientifically compromised decisions, FWS and NMFS determined that water use plans in California would not harm several species of endangered fish, including the delta smelt, winter and spring run Chinook salmon, and Central Valley Steelhead. Federal courts later confirmed the allegations that politics overruled science and struck these decisions down, demanding they be rewritten. However, implementation of water use plans had already begun to move forward based on these illegal decisions.⁵²

The costs, both economic and ecological, of these decisions are innumerable and far-reaching. California is experiencing severe drops in populations in many fish species and the salmon fishery in the Sacramento system has crashed, along with several other species in the Delta. The federal government has been asked for \$150 million in disaster relief for the fishing industry, and the recreational fishing industry (a \$4.8 billion industry supporting 41,000 jobs) and recreational boating (\$60 million in sales in 2006) will be hit hard.⁵³ Additional costs, yet undetermined, will be incurred by agriculture and the urban water industries as water deliveries to urban and farming areas are cut dramatically in an attempt to bring these species back from the brink. Had the FWS and NMFS used the best available science and determined that the proposed water delivery options would jeopardize these species in the first place, the region might not be in the critical situation it finds itself in now.

New Policies of Concern

On March 16, 2007, the Interior Office of the Solicitor issued a memorandum reexamining what the ESA means when it defines an "endangered species" as one which is "in danger of extinction throughout all or a significant portion of its range."⁵⁴ The conclusion of this memo finds that the range of a species is limited to that area where it currently exists, and should not include any range in which the species historically existed but has since been extirpated. This conclusion will likely impact both listing and the protection of listed species. Many endangered species live in habitats of severely reduced size due to urban encroachment or pollution. If FWS rules that species have no right to their historic range,

online at

http://www.fws.gov/pacific/ecoservices/endangered/recovery/documents/DraftRecoveryPlanNorthernSpottedOwlWEB_000.pdf

⁵⁰ FWS. N. Spotted Owl Draft Recovery Plan peer reviews. See in particular the Society for Conservation Biology (North American Section) and American Ornithologist's Union review.

<http://www.fws.gov/pacific/ecoservices/endangered/recovery/peer.html>

⁵¹ FWS press release, "Draft Economic Analysis of Critical Habitat Proposal for Bull Trout in the Columbia and Klamath River Basins Released for Public Comment," April 5, 2004. Available online at <http://news.fws.gov/newsreleases/r6/E6CD3A83-F8FD-484C-8523CF328EC43D93.html>.

⁵² Endangered Species Coalition. Political Interference and the Loss of Salmon: How Federal Biological Opinions Affected the Salmon Fishing Closure. Available upon request.

⁵³ Pool, Richard. Testimony before the Subcommittee on Fisheries, Wildlife and Oceans. May 15, 2008.

Available online at http://resourcescommittee.house.gov/images/Documents/20080515/testimony_pool.pdf

⁵⁴ Department of the Interior Office of the Solicitor. Subject: The Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range." March 16, 2007. Available online at <http://www.doi.gov/solicitor/M37013.pdf>

many will be left in situations where they simply cannot recover to the point where they can be removed from the endangered species list.

In addition, simultaneous to the listing of the polar bear, Secretary Kempthorne announced that DOI would be issuing another solicitor's opinion narrowing the scope of possible protective actions for the polar bear.⁵⁵ The press release also stated that “the Department will propose common sense modifications to the existing regulatory language.” Modifications to the regulatory language of the ESA have been attempted before which would have significantly reduced the effectiveness of the Act. Congress must remain vigilant as to what these new regulatory changes will be to ensure that the Act continues to function as the premier defense against extinction.

V. Recommendations - Systemic Problems Require Systemic Solutions

The problem of political interference in science will not be solved by a new Administration or the resignation of additional political appointees. There will always be pressure on elected officials from special interests—to weaken environmental laws. For that reason the Union of Concerned Scientists urges this committee to enact systemic reforms:

Ethics at the DOI

- Secretary Kempthorne must fully implement the 10-point ethics plan he unveiled over a year ago. We have not been able to discern the extent to which it has been implemented or modified but they do not appear to be extensive. The Conduct Accountability board appears to be particularly flawed and dysfunctional and in need of reform such as a broader charge. The DOI should also create a Scientific Code of Professional Conduct similar to the FWS and do this with scientific community input.

Ensuring Agency Independence

- While the Office of Management and Budget and other White House offices play important roles in coordinating and overseeing the regulatory process, those roles should not include second-guessing or editing the science underlying ESA decisions.

Transparency in Scientific Decisions

Scientists at the FWS recommended more transparency in the decision-making process. Said one FWS biologist, “Plac[e] much more scrutiny on the decision-making process between the draft scientific document and the final decision. The work is great until it hits the supervisory chain, and then things are dropped, changed, altered (usually without written record) and then finalized with dismissive responses to concerns.”

To ensure the work of federal scientists will not be subject to political manipulation, the Department of Interior should increase transparency in the decision-making process to expose manipulation of science and make other political appointees think twice before altering or distorting scientific documents. We make the following recommendations:

- The DOI should publish a statement explaining the scientific rationale for each listing decision (positive or negative) and recovery plan. The statement should justify and defend how FWS staff reconcile scientific and economic data to make the final decision. The statement must include the scientific documentation that went into the decision and the names of the FWS employees and officers involved in the process.
- If FWS scientists have significant concerns with or criticisms of the decision, they must also be able to submit a statement explaining their disagreement. This would provide them with an opportunity to make their concerns public and provide FWS with an opportunity to explain how they have addressed the concerns or why they are not significant.
- DOI should establish a formal and independent scientific review board for agency policies and decisions.

⁵⁵ Kempthorne, Dirk. Secretary Kempthorne Announces Decision to Protect Polar Bears under Endangered Species Act. May 14, 2008. Available online at http://www.fws.gov/home/feature/2008/polarbear012308/pdf/DOI_polar_bears_news_release.pdf

Scientific Freedoms

Scientists should be allowed basic freedoms to carry out their work and keep up with advances in their field. One FWS scientist recommended, “Encourag[ing] scientists to keep abreast of scientific information (e.g. Membership in professional societies, pay for them to attend prof[essional] meetings) and allowing scientists to do their job-make sure they can focus on getting the science right before they are bombarded with the social, political and economic angles that come with each issue.”

- DOI scientists should be free to publish their tax-payer funded research in peer-reviewed journals and other scientific publications and be able to make oral presentations at professional society meetings. The only exception should be if the publication or presentation of the research is subject to Federal export control, national security, or is proprietary information.
- DOI scientists should be encouraged to actively participate in relevant scientific association meetings including serving on their boards or as officers. These activities should not be viewed as a conflict of interest.

Scientific Communication

Open communication among scientists is one of the pillars of the scientific method. For society to fully reap the benefits of scientific advances, information must also flow freely among scientists, policy makers, and the general public. The federal government must respect the constitutional right of scientists to speak about any subject, including policy-related matters and those outside their area of expertise, so long as the scientists make it clear that they do so in their private capacity, and such communications do not unreasonably take from agency time and resources.

- DOI should adopt media and communication policies that ensure tax-payer funded scientific research is open and accessible to Congress, the media, and the public. The policy should:
 - Affirm that scientists and other staff have the fundamental right to express their personal views, provided they specify that they are not speaking on behalf of, or as a representative of, the agency but rather in their private capacity.
 - Create an internal disclosure system to allow for the confidential reporting and meaningful resolution of inappropriate alterations, conduct, or conflicts of interest that arise with regard to media communications.
 - Include provisions to actively train staff and post employee rights to scientific freedom in all workplaces and public areas.

Whistleblower Rights

In the past, scientists who have attempted to disclose political interference with science have been found ineligible for whistleblower protection. Whistleblower protections for scientists who report abuse of science would help ensure that basic scientific freedoms of federal scientists are respected.

- The Conference Committee reconciling the Whistleblower Enhancement Act, must retain the House provision which would give federal scientists the right to expose political interference in their research without fear of retribution. It’s time for the Conference Committee to act to protect scientists.
- DOI scientists who provide information or assist in an investigation regarding manipulation or suppression of scientific research should be given adequate protection from retaliation.
- DOI should fully investigate any retaliatory actions against a scientist who expresses their concerns within or outside of the agency.

Immediate Actions

There are several immediate actions that the Interior Department and Congress should take to prevent political interference in science and reinforce the scientific foundation of the Endangered Species Act:

- Interior Department Secretary Dirk Kempthorne should send a clear message to all political appointees that substituting opinions for science is unacceptable.
- In light of the demonstrated pervasiveness of political interference in Endangered Species Act decisions during the past several years, the Interior Department should engage in a systematic review

of all Bush administration decisions to ensure that the science behind those decisions was not altered or distorted. At the very least, Secretary Kempthorne should require an immediate reevaluation of all the decisions where political interference has been exposed.

- Secretary Kempthorne must demonstrate that the 90 day review is protective of species. Listing decisions must be based on best available scientific and commercial data. Secretary Kempthorne must insure that all the information the FWS has is included – not just the information that would not support a listing.
- Given the number of recent attempts to undermine the scientific underpinnings of the Endangered Species Act by members of Congress and political appointees, congressional committees of jurisdiction must act to safeguard the role of science in protecting highly imperiled species.

We look forward to working with the 110th Congress on comprehensive bipartisan legislation and other reforms to restore scientific integrity to federal policymaking.

Appendix I: 80 Species with Allegations of Political Interference

| Species | Decision |
|--|--------------------|
| Alameda whipsnake | Critical Habitat |
| Antillean manatee | 5 year review |
| Arkansas river shiner | Critical Habitat |
| Arroyo toad | Critical Habitat |
| Braken bat cave meshweaver | Critical Habitat |
| Buena Vista Lake ornate shrew | Critical Habitat |
| Bull Trout | Critical Habitat |
| California least tern | 5 Year Review |
| California red-legged frog | Critical Habitat |
| Canada Lynx | Critical Habitat |
| Cape Sable seaside sparrow | Critical Habitat |
| Caribbean brown pelican | 5 Year Review |
| Central California tiger salamander | Critical Habitat |
| Coachella valley milkvetch | Critical Habitat |
| Cokendolpher cave harvestman | Critical Habitat |
| Comal Springs dryopid beetle | Critical Habitat |
| Comal Springs riffle beetle | Critical Habitat |
| Delta Smelt | Biological Opinion |
| Eastern brown pelican | 5 Year Review |
| Florida manatee | 5 Year Review |
| Florida Panther | Recovery Plan |
| Gila chub | Critical Habitat |
| Government Canyon bat cave meshweaver | Critical Habitat |
| Government Canyon bat cave spider | Critical Habitat |
| Greater Sage Grouse | 12 Month Finding |
| Gulf sturgeon, critical habitat | Critical Habitat |
| Gunnison Sage Grouse | 90-Day Finding |
| Gunnison's Prairie Dog | 90-Day Finding |
| Hawaiian picture wing flies (12 species) | Critical Habitat |
| Helotes mold beetle | Critical Habitat |
| Kootenai River Sturgeon | |
| Koster's tryonia snail | Critical Habitat |
| Lane Mountain milkvetch | Critical Habitat |
| Least tern | Biological Opinion |
| Loach minnow | Critical Habitat |
| Madla cave meshweaver | Critical Habitat |
| Marbled murrelet | 5 Year Review |
| Marbled murrelet | Critical Habitat |
| Mexican garter snake | 12 Month Finding |
| Montana fluvial arctic grayling | 12 Month Finding |

| Species | Decision |
|--|--------------------|
| Monterey Spineflower | Critical Habitat |
| Munz's onion | Critical Habitat |
| Noel's amphipod | Critical Habitat |
| Northern Spotted Owl | Recovery Plan |
| Northern Spotted Owl | Critical Habitat |
| Pallid Sturgeon | Biological Opinion |
| Peck's cave amphipod | Critical Habitat |
| Pecos assiminea snail | Critical Habitat |
| Peirson's milkvetch | 12 Month Finding |
| Piping plover | Critical Habitat |
| Preble's meadow jumping mouse | Critical Habitat |
| Preble's meadow jumping mouse | 12 Month Finding |
| Quino checkerspot butterfly | Critical Habitat |
| Rhadine infernalis ground beetle | Critical Habitat |
| Riverside fairy shrimp | Critical Habitat |
| Robber baron cave spider | Critical Habitat |
| Robust Spineflower | Critical Habitat |
| Roswell springsnail | Critical Habitat |
| Roundtail chub | 90-Day Finding |
| Sacramento splittail | 12 Month Finding |
| Sacramento splittail | Critical Habitat |
| Salmon + Steelhead | |
| San Jacinto crownscale | Critical Habitat |
| Santa ana sucker | Critical Habitat |
| Santa Barbara salamander | 90-Day Finding |
| Santa Cruz tarplant | Critical Habitat |
| Sonoma California tiger salamander | Critical Habitat |
| Southwestern bald eagle | 90-Day Finding |
| Southwestern willow flycatcher | Critical Habitat |
| Spikedace | Critical Habitat |
| Spreading navarretia | Critical Habitat |
| Tabernaemontana rotensis | 12 Month Finding |
| Thread-leaved brodiaea | Critical Habitat |
| Topeka shiner | Critical Habitat |
| Trumpeter Swan | |
| vernal pool species | Critical Habitat |
| West Virginia northern flying squirrel | 5 Year Review |
| Western snowy plover | Critical Habitat |
| White tailed prairie dog | 90-Day Finding |
| Willowy monardella | Critical Habitat |

Appendix II: Policy on 90-Day Petition Findings Under the Endangered Species Act, 11/8/06



Chris Nolin/ARL/R9/FWS/DOI

11/08/2006 05:21 PM

To kurt_johnson@fws.gov@FWS, Nancy Green/ARL/R9/FWS/DOI@FWS, Douglas Krofta/ARL/R9/FWS/DOI@FWS, Melanie

cc

bcc

Subject State information and 90-day findings

Hi folks,

We have received a couple of adverse decisions recently on our practice of asking states for information about species in order to conduct 90-day findings. At this point we advise you to avoid gathering information from states specifically for a 90-day finding. We encourage you to regularly update the information in your files about candidate species and other species of concern. Information in our files resulting from routine data gathering should be usable although the courts have not yet ruled on that issue.

Attached is the most recent draft of the 90-day finding guidance, which now addresses this issue.

Also, a few people have noted that I need to remind everyone that the 1996 petition management guidance has been invalidated by the courts and should no longer be followed.

Thanks!



90-day petition guidance with OEL edits.doc

Chris Nolin
Endangered Species
US Fish & Wildlife Service
4401 No. Fairfax Dr. Room 420
Arlington, VA 22203
703-358-2171

In Reply Refer To:
FWS/AES/DCC 023855

Memorandum

To: Regional Director, Regions 1, 2, 3, 4, 5, 6, and 7
California Nevada Operations Office Manager

From: Director

Subject: Policy on 90-Day Petition Findings Under the Endangered Species Act

This guidance is a further explanation of previous Director's memoranda dated July 19, 1995, and rescinds the Director's memorandum dated November 30, 1995. The July 1995 memorandum announces the discontinuance of category 2 and new definition of candidate. It also establishes policy to ensure proper management of the petition process.

The July 1995 Director's memorandum states that the test at the 90-day stage of whether a petition will be judged as presenting substantial information will be whether that information is verified and whether that information supports the petition action. The November 1995 Director's memorandum elaborates on the July memorandum by further stating that a substantial finding should be made when the Service deems that adequate and reliable information has been presented *or* (emphasis added) is available that would lead a reasonable person to believe that the petitioned action may be warranted.

The petition process is the means whereby the public provides us information supporting the addition or removal of species from the lists and we respond. It is imperative that the Service manages the petition process to produce accurate findings swiftly as the petition process is an important avenue for identifying species which may be in need of protection.

Section 4(b)(3)(A) of the Endangered Species Act (Act) states that at the 90-day stage of the petition process, we shall "...make a finding as to whether *the petition* (emphasis added) presents substantial scientific or commercial information indicating that the petitioned action may be warranted." Thus it is the responsibility of the petitioner to provide substantial scientific or commercial information to support the petitioned action.

In the last two years, the Service has made substantial progress on the existing petition backlog. As we make progress on the backlog and receive petitions in the future, we will continue to prioritize petitions as follows. The highest priority is to address petitions to list or delist, our second priority is to address petitions to reclassify as threatened or endangered, and our lowest priority will be to address petitions to revise critical habitat. **Response to comment**

Recommend maintaining priorities as stated above so that the Service addresses revisions to critical habitat as its lowest priority.]

It is the Service's responsibility to evaluate whether the scientific and commercial information provided by the petitioner is substantial. The Service's implementing regulations at 50 CFR 424.14(b) state that "the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." The regulations define "substantial information" as "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." A "substantial" finding can only be made by the Service if the information presented in the petition is relevant to demonstrating that one or more of the five statutory listing factors threaten or endanger the species in question.

By applying the process and standard of analysis presented in this guidance, the Service should meet the statutory deadline of 90 days for petitions that are reviewed.

90-day Finding Evaluation

The ESA's implementing regulations describe what the Service should consider when evaluating the petition. Does the petition:

- 1) clearly indicate the petitioned action and gives the scientific and common name of the species involved?
- 2) contain detailed narrative justification for the petitioned action based on available information, past and present numbers and distribution of the species involved and any threats faced by the species?
- 3) provide information regarding the status of the species over all or a significant portion of its range?
- 4) include appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps?

Once these tests are determined to be met, the Service must evaluate whether the information presented is substantial. That is, does the information support a plausible argument for the petitioned action. Arriving at a 90-day finding involves the following steps:

Determining what information is provided in the petition to support each of the 5 factors.

[Response to Comment: Recommend including summary outline as an attachment to this guidance memo and discuss its use in the section titled, Procedures for Preparing the 90-day Finding]

Once the information provided by the petition is identified readily available information sources should be identified and reviewed as part of evaluating the information contained in the petition.

2) After evaluation of the information, the reviewer should remove any unreliable information from consideration; determine the extent to which any of the reliable information in the petition is refuted by other reliable information; and determine whether the reliable information in the petition is substantial.

Regional Offices shall use the attached table at the end of this guidance memo in the 90-day analysis as it helps to organize the petitioner's claims and the extent to which the petitioner meets the statutory standard and forms the initial basis of our determination and our administrative record for our final action. .

1. Scope of Information to be considered

The first step is to determine which readily available information sources should be reviewed. The Service must review all information submitted with the petition, including the petitioner's supporting documentation and information cited within the petition or included within the petition's bibliography. In addition the Service should review additional readily available information within the Service's files for the purpose of evaluating the reliability of the information contained within the petition (see Reliability of Information and Evaluation of Information below). The information within the Service's files is not to be used to augment a "weak" petition. If we have information independent of that provided in the petition that is sufficient to support a change in the species' listing status, it is the Service's responsibility to utilize our internal candidate, listing, and delisting priorities and processes.

[Response to Comment: We specifically want to constrain the process to the language in the Act, which places the burden of providing information clearly on the petitioner.]

What is readily available information in the Service's files? "Readily available" does not include an exhaustive literature search or solicitation of information. The petitioner is not required to provide reprints of articles cited within the petition, although the Service can request this information from the petitioner. Reference sources not typically carried by major libraries or posted on the Web, such as some foreign journals, and any not provided by the petitioner soon after requested by the Service are not considered "available" and will not be used in the evaluation. A database upon which we depend to store locational information as part of our files is considered "readily available".

Once the available information determined to be necessary for the review is obtained, the petitioner's claims and supporting information are further evaluated for reliability. Any readily available information we use in making our determination should also be included in the attached summary outline. Where cited information was not available, it should be so noted.

2. Reliability of Information

The second step is an examination of the reliability of the information contained within the petition. Among the most reliable sources of information are papers published in the peer-reviewed scientific literature. Information provided by individuals with demonstrated specific expertise in the relevant subject area can also generally be considered reliable. Published

documents of state and federal agencies are also generally considered reliable. Anecdotal information or information from sources without established records of subject-matter experience and expertise must be independently corroborated to be considered reliable.

An individual item of information will fall into one of two categories: 1) unreliable information which is not considered further; or 2) reliable information, either supporting or not supporting the petition, which is further evaluated. If we consider the information to be unreliable, we need to summarize this information in the 90-day finding and why it was determined to be unreliable.

[Comment: Recommend deleting text as we do not make a conclusion about whether each item of information provided by the petitioner is substantial, but rather if it is reliable or not. We make a substantial determination upon evaluation of all the reliable claims presented in the petition.]

3. Evaluation of Information

The evaluation of information used to support a petition is the third step and must take into account all the information identified in the petition including any readily available information (defined in Step 1 above) within the Service's files that either supports or refutes information submitted by the petitioner. In the case where the conclusions drawn by the petitioner are shown to be based on a misinterpretation or flawed analysis of reliable information because that information was incomplete, outdated, unclear, or out of context, those conclusions, interpretations and analyses are considered inaccurate or faulty. When such misinterpretation occurs it is important to document the basis for the determination that the analysis is faulty.

It is possible for reliable information or data to be contradicted by other reliable information or data. This is sometimes true even with peer-reviewed information. If the issue has not been resolved in the literature, the Service should determine the extent to which the reliability of the information differs by taking into consideration the age of the information, whether study results have been duplicated, whether the information is based on new, potentially more reliable technology or methodology, and other factors. The number of publications supporting a conclusion may or may not be an important factor in determining relative reliabilities of information. If the reliable yet contradictory information (information provided by the petitioner and within Service files) is not reconciled through this examination, this does not mean that the contradictory information is invalid, but indicates that further analysis should be undertaken as part of a status review for the 12-month finding. Review at this stage may also result in information that is found reliable, but reduced in its value (ie. Reduced our understanding of the quality of the scientific methods or results). **[Response to Comment: We recommend maintaining the process for determining whether or not to proceed with a 12 month finding/status review through the petition finding process. The Service will only proceed with a 12 month finding/status review if it makes a determination that the petition presents substantial scientific or commercial information.]**

After the evaluation of information there could be three results for each item of information presented by the petition: a) refuted information, which is no longer considered; or b) reliable, information supporting the petition, which is further evaluated in the substantiality test.

[Response to Comment: Recommended revision to paragraph in response to comment]

4. Is the Information Substantial?

The final step is to determine whether the reliable information (information in the category under Step 3 b above) contained within the petition is substantial. The regulations define “substantial information” as “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” Substantial information is more than a “mere scintilla” of information. Substantial information in support of the petition does more than raise a suspicion that the petitioned action may be warranted.

“Substantial information” refers to the value (quality of scientific methods and results) of the information and is not necessarily measured in terms of the number or aggregate size of publications or reports. The substantiality test is applied only to the reliable, unrefuted information supporting the petition. The substantiality test does not involve “weighing” the information in support of the petition against contrary information. A substantial petition is one where the petitioner has made a plausible argument and has provided reliable information to support that argument.

Listable Entity Evaluation

The first consideration when evaluating a petition is to determine if the petitioned species is actually a listable entity for which we could take action. The evaluation of the taxonomic status or validity of a potential distinct vertebrate population segment also centers on the reliability of the information (and the extent to which the information is refuted by readily available information), and then whether the information reaches the “substantial information” threshold. It is not the Service’s purview to determine the ultimate appropriate taxonomic status of species in a 90-day petition evaluation, but rather to evaluate information submitted by the petitioners and readily available within our files to determine whether that information indicates that the petitioned entity may be a “listable entity” under the Act (i.e., a species, a subspecies, or a distinct vertebrate population segment). If the petitioned entity is widely recognized as a valid taxonomic entity, then the petitioned entity is likely a listable entity. However, if the petitioned entity is not widely recognized but the petitioner presents reliable, unrefuted information that the petitioned entity may be a listable entity (substantial information), we will evaluate the rest of the petitioner’s claims in terms of the petitioned entity. If the petition is subsequently found to be substantial, we will include an evaluation of the taxonomic status as part of our status review in preparation of the 12-month finding. For delisting petitions asserting an invalid listed entity, the Service should evaluate the reliability of information included in the petition and the extent to which it is refuted, and then whether the information reaches the “substantial information” standard.

Procedures for Preparing the 90-day Finding

Briefing Statement for the Director - When initiating a 90-day review of a petition (either listing or delisting) prepare a 1-2 page briefing statement and the attached summary outline for the

Director describing the current evaluation of the petition. This briefing statement will be provided to the Washington Office prior to completing the petition review, but after all the applicable data has been identified, at a minimum, this should at least two months prior to the due date of the 90-day finding, as an initial step in the review of the petition (see attached template as a guide). The Washington Office will work with the Regions and Field Offices to add these petition briefing statements to the schedule for delivery to the Assistant Director's Office.

Finding – The 90-day finding document should focus on the information that supports the petitioned action and should discuss how the petition was evaluated using the process described above. A 90-day finding should be organized in terms of whether the proposed entity qualifies for protection under the Act and by the five factors based on the information that supports each factor.

The 90-day “substantial” finding explains why the information presented in the petition was reliable, and why it leads the Service to determine that it is substantial (that amount of reliable and substantial information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted). The information analyzed in the 90-day finding should be clearly identified or described as to whether it originated from the petition or was available in Service files. A “substantial” 90-day finding does not need to include a point-by-point review of the petitioner’s claims since a thorough evaluation of the status of the species under the five factors will be completed in our status review and subsequent 12-month finding.

A “not substantial” 90-day finding explains why the information presented in the petition was not substantial, or why it leads the Service to determine that it does not support a determination that the proposed entity qualifies for protection under the Act. For each of the five factors, we are to identify the information provided by the petitioner that supports the petitioned action. We are then to separately identify the information readily available in our files that may determine the petitioner’s information to be unreliable or refute the information. The discussion relating to each of the five factors should contain a concluding paragraph connecting the information provided by the petitioner, the information in our files, and our conclusion regarding the information’s reliability and the extent to which it is refuted. After the discussion of information under all of the five factors, there should be a conclusion section that applies the substantiality standard and articulates the actual finding. Not substantial findings for petitions to list or delist based on an assertion of an invalid listable entity do not need to be organized in terms of the five factors.

Petition Supplements

When a petitioner, subsequent to filing a petition with the Service, submits additional information relevant to the petitioned action and requests that the Service consider that information in making its 90-day finding, the Service will treat the new information, together with the initial petition, as a resubmitted petition filed on the date the additional information is

received. In such a case, the Service will consider the initial petition to be withdrawn by the petitioner, but will use any information in the initial petition in its finding.

Attachments

cc: 3238-MIB-FWS/Directorate Reading File
3242-MIB-FWS/AES RF
420-ARLSQ-FWS/BL (Marj Nelson, Adam Zerrenner)
420-ARLSQ-FWS/DCC RF

FWS/DCC:AZerrenner:jma:703/358-2105:1/24:06

REVISED:MNelson:jma:3/9/06:

S:/BL/Staff/Zerrenner/90-day petition guidance_8_3_06

The following table will be used by Regional Offices to guide the 90-day finding analysis. The table presents specific threats to the species as described in the petition, the references cited in the petition, our evaluation of the information in those citations, and our evaluation of that information against information in our files.

| <i>Petition claims for Factor A. The present or threatened destruction, modification, or curtailment of its habitat or range</i> | Petition information source | How does the Information contained in that source support the claim | Is there information that refutes the petitioners claim | Is the petition claim reliable or not (circle one) reliable not reliable |
|--|-----------------------------|---|---|--|
| | | | | reliable not reliable |
| <i>Petition claims for Factor B. Overutilization for commercial, sporting, scientific, or education purposes</i> | Petition information source | Information contained in that source | Information in Service files | reliable not reliable |
| | | | | reliable not reliable |
| <i>Petition claims for Factor C. Disease or predation</i> | Petition information source | Information contained in that source | Information in Service files | Service conclusion regarding petition claim reliable not reliable |
| | | | | reliable not reliable |
| <i>Petition claims for Factor D. The inadequacy of existing regulatory mechanisms</i> | Petition information source | Information contained in that source | Information in Service files | Service conclusion regarding petition claim reliable not reliable |
| | | | | reliable not reliable |
| | | | | reliable not reliable |
| | | | | Service conclusion regarding petition claim reliable not reliable |
| | | | | reliable not reliable |
| | | | | reliable |

| | Petition information source | Information contained in that source | Information in Service files | not reliable |
|---|-----------------------------|--------------------------------------|------------------------------|---|
| <i>Petition claims for Factor E. Other natural or manmade factors affecting their continued existence</i> | | | | Service conclusion regarding petition claim reliable not reliable |
| | | | | reliable not reliable |

Appendix III: Relationship Between Ship Speed and Whale Mortality

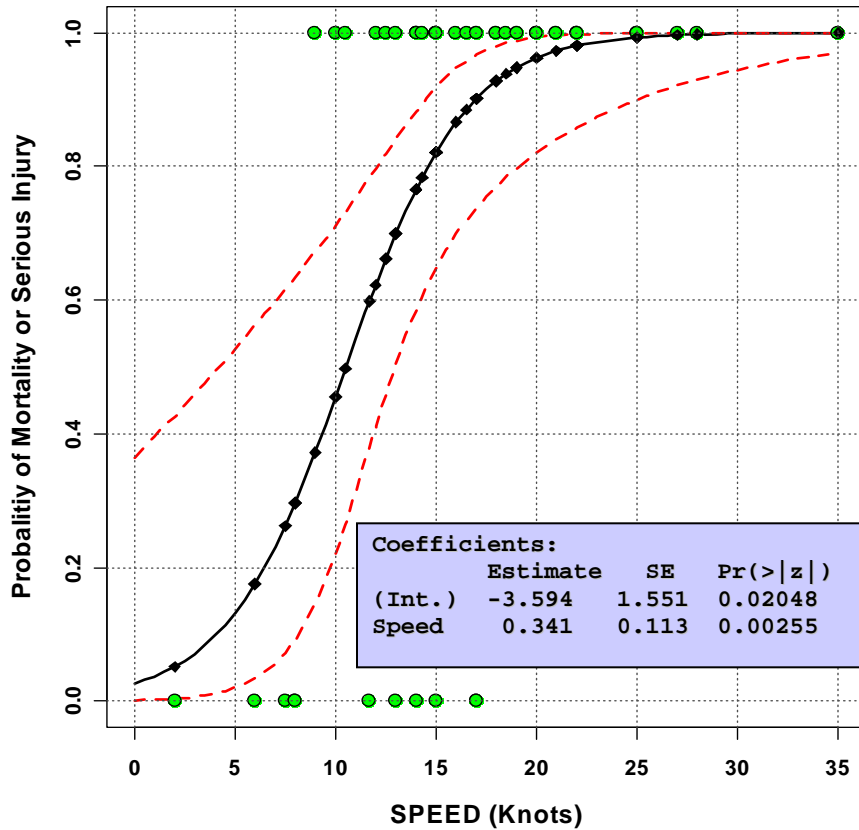


Figure 1 (left). Calculations by NOAA scientists Richard Pace and Gregory Silber show that the probability of whale death or serious injury increases rapidly with increasing ship speed. NOAA predicts a 90% chance of death or serious injury in whales struck by ships traveling at 17 knots, but only a 50% chance at 10.5 knots.

Figure 2 (bottom). Council of Economic Advisers staff concluded that the relationship between whale mortality and ship speed is not as strong as is suggested by career NOAA scientists and independent, peer-reviewed publications. A NOAA review described this analysis as “biased.”

