

U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

January 26, 2012

The Honorable Dan Ashe
Director
U.S. Fish and Wildlife Service
1849 C Street N.W.
Washington, D.C. 20240

Dear Director Ashe,

The U.S. Fish and Wildlife Service (FWS) has recently proposed a draft policy¹ that outlines the procedures the FWS will use for deciding when it is appropriate to place declining animal and plant species on the list of endangered species under the Endangered Species Act (ESA).² I write to express my concerns that this policy has the potential to undermine several key provisions of the ESA by setting the bar for listing declining species at much too high a threshold. This draft policy is not consistent with the ESA's text, its legislative history, and ignores Congress' intent to afford our Nation's wildlife and plants with the benefit of the doubt when it comes to decisions regarding when species should be protected under the ESA.

The Endangered Species Act allows for the protection of a species when it is in danger of disappearing from "a significant portion of its range," not just when it is threatened with extinction globally.³ Under this draft policy, the FWS would only protect an imperiled animal or plant species when the decline within a significant portion of that species' geographic range implicates the "viability" of the species as a whole. In other words, the only parts of a species' range which matter are those portions that, if lost, would lead to the global extinction of that species. This proposed threshold for protecting species is simply too high under the ESA. It improperly collapses the entire inquiry regarding what portion of the geographic range is "significant" into the larger question of when a species is in danger of going extinct globally. In fact, this "viability" standard was expressly rejected by the Department of Interior during the previous administration because it set too high a threshold for protecting imperiled species.⁴

¹ Draft Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definition of "Endangered Species" and "Threatened Species." 76 Fed. Reg. 76,987 (Dec. 9, 2011).

² 16 U.S.C. § 1531 *et seq.*

³ 16 U.S.C. §§ 1532(6) & 1532(2).

⁴ Department of Interior M-Opinion 37013: The Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range." March 16, 2007. ("The the Secretary's discretion in defining 'significant' is not unlimited; he may not, for example, define 'significant' to require that a species is endangered only if the threats faced by a species in a portion of its range are so severe as to threaten the viability of the species as a whole.")

Under the standard proposed by the FWS, the bald eagle would never have been listed as an endangered species in the lower 48 States. Even during the worst era of DDT pesticide usage, healthy populations of eagles lived in Alaska meaning that, even if the eagle had completely disappeared from the lower 48 States, the “viability” of the species was never in doubt. Nevertheless, the FWS placed the bald eagle on the endangered species list in 1976 precisely because it had been virtually eliminated from the entire lower 48 States, a sufficient justification for protecting the species *in itself*.⁵ The ESA provides the FWS with the flexibility to list a species even when, as was the case with the bald eagle, some populations are healthy while others are declining. This flexibility is not predicated on a “clear line of demarcation” between various populations or subspecies,⁶ but instead is based on the desire for our Nation’s wildlife to be viable parts of our environment throughout their geographic range. This flexibility has allowed the FWS to protect and restore iconic species, such as the gray wolf, the grizzly bear, and the American alligator. But, the “viability” standard the FWS has proposed would hamstring the agency’s ability to protect species like these precisely when those species need ESA protection.

The goal of the Endangered Species Act is not merely to prevent the extinction of our Nation’s animals and plants. Instead, the goal of the ESA is to “return species to the point where they are viable components of their ecosystems.”⁷ As the Congress has explained, the goal of protecting ecosystems and restoring species to their historic range marked a “significant shift” away from previous federal attempts to protect wildlife, which only focused on the narrower goal of protecting those species facing “worldwide extinction.”⁸ If Congress had only wanted to prevent the extinction of species, then it could have sanctioned a living museum approach, in which as long as animals and plants existed somewhere in the world safe from the impacts of society, no further conservation actions would be required. Under this myopic approach, which the FWS appears to be embracing in its draft policy, Americans would have had to travel to the most remote parts of Alaska to view species like the bald eagle, grizzly bear, or the gray wolf.

Congress has long recognized that there is great value in recovering endangered species in their historic range so that as many Americans as possible have the opportunities to watch and enjoy these species, which provide important “esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”⁹ For example, the restoration of the gray wolf in Yellowstone has had significant ecological benefits, including reduced overgrazing of aspen groves, which created additional habitat for beavers, which in turn created more aquatic habitats for migratory songbirds.¹⁰ The restoration of the wolf has also generated significant economic benefits to Yellowstone’s regional economy. Each year, thousands of

⁵ The Bald Eagle was previously protected in 1967 under the Endangered Species Preservation Act of 1966, Public Law 86-669. The listing was revised by FWS in 1976 to list the bald eagle (*Haliaeetus leucocephalus*) as endangered within the conterminous 48 States. 41 Fed. Reg. 28,525 (July 12, 1976).

⁶ 41 Fed. Reg. 28,525 (July 12, 1976)

⁷ H.R. Rep. No. 95-1625, 95th Cong., 2nd Session. (1978)

⁸ H.R. Rep. No. 412, 93rd Cong., 1st Sess. 10 (1973).

⁹ 16 U.S.C. § 1531(a)(3)

¹⁰ Ripple, W. & Beschta, R. *Trophic cascades in Yellowstone: The first 15 years after wolf reintroduction*. Biological Conservation (Dec. 2011). www.cof.orst.edu/leopold/papers/RippleBeschtaYellowstone_BioConserv.pdf

tourists visit Yellowstone to view wolves, generating an additional \$35 million/year for the local economy.¹¹

The draft policy further ignores Congress' intent regarding the purpose of the ESA by refusing to consider the historic distribution of a species when making listing decisions about whether a species is in danger of extinction in a significant portion of its range. The goal of the ESA is to restore species so that they are again viable components of their ecosystems. To accomplish this goal, the FWS *must* consider the historic range of species when deciding which species to protect under the ESA. This does not mean that every single part of a species historic range must be protected or that an endangered species must be recovered everywhere it once lived, but it does mean that FWS cannot categorically ignore the historic range of every species that may still deserve protection under the ESA. Unfortunately, this draft policy does categorically reject analyzing the historic range of species by stating that FWS will only consider the "general geographical area within which that species can be found at the time FWS...makes any particular status determination."¹² This approach cannot be reconciled with the stated purpose of the Endangered Species Act: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."¹³ Ecosystems cannot be conserved without at least some consideration of which species historically were present within them.

This restriction would create a perverse incentive to delay the listing of a species under the ESA and leave our Nation's imperiled species in limbo. The Government Accountability Office has documented clear instances where improper political interference has resulted in delays in affording many species protection under the ESA.¹⁴ And, due to inadequate funding a large backlog has developed for species that require protection under the ESA. Some declining species have had to wait over 20 years for protection under the Act, during which time their geographic range has continued to shrink. This policy could make it even more tempting for future political appointees within the Department of Interior, as well as some members of Congress, to meddle with or defund the listing process because any delay in listing would invariably shrink the geographic range that a declining species currently occupies. If this political interference were to occur, the FWS would be unable to consider losses to a species' range that occurred as a result of these politically-motivated delays when making any final decision to protect a species.

To support this new draft policy, the FWS has asserted that since the legislative history on this issue is "not particularly conclusive,"¹⁵ the agency has significant discretion in developing a new policy. However, the legislative history of the ESA clearly shows that Congress intended the protection of the ESA to be afforded broadly to our Nation's wildlife and to give the benefit of the doubt to the species when it comes to decisions about when to protect

¹¹ Duffield et al. 2008. Wolf recovery in Yellowstone Park visitor attitudes, expenditures, and economic impacts. *Yellowstone Science*. 16(1):20–5. Available at: <http://www.georgewright.org/251duffield.pdf>

¹² Draft Policy, 76 Fed. Reg. 76,987, 76,996 (Dec. 9, 2011).

¹³ 16 U.S.C. § 1531(b)

¹⁴ GAO Report. Endangered Species Act Decision Making. GAO-08-688T (2008).

¹⁵ Draft Policy, 76 Fed. Reg. 76,987, 76,989 (Dec. 9, 2011).

species under the Act.¹⁶ The decision by the FWS to limit the protections of the ESA to only those situations where the global viability of the species is implicated, and the decision to ignore a species' historic range, are not consistent with the ESA, the intent of Congress, and the legislative history of the Act. The FWS must drop the viability standard in any final policy and instead use a precautionary, science-based standard for deciding when it is appropriate to protect a species under the ESA. And, the FWS must also devise a balanced, science-based approach for considering the historic range of declining species when making listing decisions as opposed to its categorical approach where the historic range of any animal or plant species is always ignored. The FWS should carefully re-consider the wisdom of any new policy that might limit the tools in its toolbox when it comes to the effective recovery of our Nation's endangered species.

If you have questions or concerns regarding information in this letter, please have your staff contact Dr. Ana Unruh-Cohen of the Natural Resources Committee Democratic Staff at 202-225-6065.

Sincerely,



Edward J. Markey
Ranking Member
Committee on Natural Resources

¹⁶ The 1973 House report explains that the ESA represents "the institutionalization of caution" when it comes to protecting declining and imperiled species. H.R. Rep. No. 412, 93rd Cong., 1st Sess. 5 (1973)