



December 7, 2017

Ryan Zinke, Secretary
U.S. Department of the Interior
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Washington, D.C. 20240
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Greg Sheehan, Principal Deputy Director
U.S. Fish and Wildlife Service
Department of the Interior
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Sent VIA Certified and Electronic Mail

Re: Notice of Violations of the Endangered Species Act: Establishment of Agency Guidelines for “State Representation on Species Status Assessment Teams”

Dear Secretary Zinke and Principal Deputy Director Greg Sheehan,

The Center for Biological Diversity hereby provides notice, pursuant to Section 11(g) of the Endangered Species Act (“ESA” or “the Act”), that Principal Deputy Director Greg Sheehan’s “State Representation on Species Status Assessment Teams” Memorandum (“Memo”) violates the ESA and the Administrative Procedure Act (“APA”).¹

The ESA mandates that determinations of whether a species is endangered or threatened be made “solely on the basis of the best scientific and commercial data available” and the five enumerated factors.² This ensures the “remov[al] from the [listing] process of ... any factor not related to the biological status of the species.”³ The Memo subverts and violates this mandate by infusing the listing process with impermissible political considerations. The Memo also violates the ESA’s and APA’s notice and comment requirements.⁴

¹ 16 U.S.C. § 1540(g); *see attached*; 16 U.S.C. §§ 1531 *et seq.*; 5 U.S.C. §§ 500 *et seq.*

² 16 U.S.C. § 1533(a)(1)(A), (b)(1)(A).

³ H.R. Rep. No 97-567, 20, *reprinted in* 1982 U.S.C.C.A.N. 2,820.

⁴ 16 U.S.C. § 1533(h); 5 U.S.C. § 533.

I. Statutory Framework

The ESA, the world’s strongest biodiversity-protection law, *see Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 184 (1978), sets forth a comprehensive statutory and regulatory scheme designed to halt species’ trend toward extinction and to set them on the path to recovery and eventual delisting. But to receive the Act’s protections—like the mandate that FWS develop and implement a science-based “recovery plan” for each listed species, the affirmative duty to insure that federal actions are not likely to jeopardize endangered and threatened species’ continued existence, and the prohibition against the unlawful “take” of endangered wildlife—species must first be listed “endangered” or “threatened” by the Secretary of the Interior, or FWS, to which the Secretary has delegated the authority to administer the Act (for terrestrial species).

Thus, section 4(a) of the ESA requires FWS to list species as endangered or threatened “because of any of the following factors:

- A. the present or threatened destruction, modification, or curtailment of its habitat or range;
- B. overutilization for commercial, recreational, scientific, or educational purposes;
- C. disease or predation;
- D. the inadequacy of existing regulatory mechanisms; or
- E. other natural or manmade factors affecting its continued existence.”⁵

This determination must be based “solely on the basis of the best scientific and commercial data available.”⁶ Concurrently with listing a species as endangered or threatened, FWS must designate “critical habitat” for each endangered and threatened species.⁷ FWS must also develop and implement recovery plans for listed species, in accordance with section 4(f) of the Act.⁸

In implementing these and other requirements of section 4 of the Act, the ESA requires the Secretary to “publish in the Federal Register” any “agency guidelines” such as criteria for determining whether species are endangered or threatened and for responding to petitions submitted to FWS from the public to list species under the Act, a “ranking system” to help identify species in need of a status review, or a “system for developing and implementing, on a priority basis, recovery plans.”⁹ The notice-and-comment requirement found in section 4(h) applies to any agency guidelines or amendments of previously promulgated guidelines.¹⁰

⁵ 16 U.S.C. § 1533(a)(1).

⁶ *Id.* § 1533(b)(1)(A).

⁷ *Id.* § 1533(a)(3)(A)(i).

⁸ *Id.* § 1533(f).

⁹ *Id.* § 1533(h).

¹⁰ *Id.*

The APA similarly requires the Service to provide an opportunity for notice and comment on any proposed rulemaking in order to give “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation,” and “[a]fter consideration of the relevant matter presented, . . . [to] incorporate in the rules adopted a concise general statement of their basis and purpose.”¹¹

II. The Memo Violates the ESA and the APA.

Issued by Principal Deputy Director Greg Sheehan on October 13, 2017, and effective November 1, 2017, the Memo requires the Service to formally request “one member from the respective state fish and wildlife management agency(s) and one as designated by the respective Governor’s office(s).”¹² This requirement was established to further involve states in the development of Species Status Assessments (“SSA”).¹³

However, this requirement impermissibly injects political considerations through the SSA framework—a framework purported by FWS to be “an analytical approach” with the “foundational science” to inform “all [ESA] decisions” including listing and critical habitat determinations, section 7 consultations, section 6 grant allocations, habitat conservation planning under section 10, and any other permits and licenses in connection with FWS’s administration of the Act.¹⁴ Indeed, the SSA framework intersects with many reviews that must be based solely on the basis of the best available scientific and commercial data.

Yet FWS never published the Memo or any other guidelines related to SSAs in the Federal Register. Nor did FWS offer the public an opportunity to comment on FWS’s underlying policy considerations, even though these guidelines are sweeping in scope and would result with the all-too-certain outcome of institutionalizing political interference into what must be science-based determinations under the Act, *e.g.*, with recovery planning teams being weighted with political representatives from state governors’ office. FWS’s failure to provide the public—such as scientists, academics, law professors, biologists, non-governmental organizations, and attorneys—the opportunity to weigh in on these draconian policy choices is a clear-cut violation of section 4(h) of the ESA and the rulemaking provisions of the APA.¹⁵ Additionally, the Memo’s infusion of political considerations into scientific assessments is beyond the scope of authority delegated FWS to administer the ESA.

The Memo also amends the Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, an additional, independent basis for triggering

¹¹ 5 U.S.C. §553(a)-(d).

¹² *See attached.*

¹³ *Id.*

¹⁴ U.S. Fish & Wildlife Service, Species Status Assessment Framework Fact Sheet 1 (Aug. 2016).

¹⁵ 16 U.S.C. §1533(h); *see also* 5 U.S.C. § 533.

the notice-and-comment rulemaking provisions of section 4(h) of the ESA and the APA.¹⁶ Here too, FWS has failed to provide an opportunity for notice and comment, in violation of the notice-and-comment requirements of the ESA and APA. Consequently, FWS has undermined the ability of the interested public to advise FWS and provide factual and policy considerations in connection with FWS's apparent desire to establish more bureaucratic structure in connection with science-based determinations under the ESA.

III. Conclusion

As provided by the ESA citizen suit provision, if you do not act within 60 days to correct these violations, the Center for Biological Diversity will bring legal action and seek declaratory and injunctive relief as appropriate, as well as recovery of reasonable litigation costs pursuant to the ESA citizen suit provision and/or the Equal Access to Justice Act. If you would like to discuss these issues or believe that anything stated above is in error, please contact the undersigned.

We appreciate your prompt consideration of this letter and the issues raised herein.

Sincerely,

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¹⁶ See 81 Fed. Reg. 8663 (Feb. 22, 2016); 16 U.S.C. § 1533(h); 5 U.S.C. § 553.



United States Department of the Interior



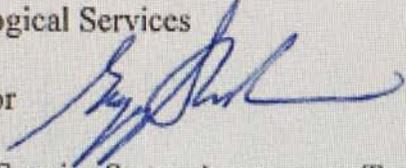
FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

OCT 13 2017

In Reply Refer To:
FWS/D/066708

Memorandum

To: Assistant Director, Ecological Services

From: Principal Deputy Director 

Subject: State Representation on Species Status Assessment Teams

The U.S. Fish and Wildlife Service (Service) developed the Species Status Assessment (SSA) framework as part of ongoing efforts to improve implementation of the Endangered Species Act (ESA). This assessment is based on the best available scientific and commercial information, which should include information from the states.

In addition, the Service's policy regarding the role of state fish and wildlife agencies in ESA activities requires the agency to coordinate, collaborate, and use the expertise of state agencies in developing the scientific foundation upon which the Service bases its determinations for listing actions. The input of states should include (but is not limited to) a solicitation of state data and research in addition to state personnel involvement in the development of SSAs.

To better implement these requirements, the Service will formally request at least two representatives from the state government on all SSA teams, subject to the affected states' willingness to participate. Each SSA team will request one member from the respective state fish and wildlife management agency(s) and one as designated by the respective Governor's office(s). This requirement is to be implemented in beginning with all new SSA's starting November 1, 2017.

Additionally, the Department of the Interior's Strategic Plan for Fiscal Years 2018-2022, as submitted to the Office of Management and Budget (OMB), supports this requirement in the target set for an Agency Priority Goal related to ESA implementation.