Draft Bush Administration Policies Put Species At Risk:
Many Proposals in Documents Leaked to *Salon* Would Undermine ESA

Documents leaked from within the Department of the Interior and published in *Salon* magazine indicate that the Bush Administration is considering major policy changes that would influence virtually every aspect of Endangered Species Act (ESA) administration. In general, the proposed changes, if enacted by rule, would dramatically alter implementation of the ESA.

The draft regulations include a number of significant changes to basic definitions in the Act. These definitional changes, which are detailed below, will in turn impact the way substantive provisions are implemented by defining the parameters for action.

We note that the administration now maintains that the leaked documents do not reflect the administration's current intentions, though they have not released any information on what regulatory changes or portions of them remain on the table. Thus, this memorandum only addresses the most significant changes that were contained in the *Salon* documents. Most of these changes would reduce protection for threatened and endangered species.

I. SETS HIGHER HURDLE FOR LISTING A SPECIES AS ENDANGERED OR THREATENED

The draft regulations significantly narrow the statutory definition of an "endangered species." Under the ESA, a species is considered "endangered" if it is in danger of extinction throughout all or a significant portion of its range. A species is considered threatened if it is likely to become an endangered species within the foreseeable future.

For a species to be found "in danger of extinction" under the Bush Administration proposal, it now would have to be—

a. Currently subject to threats;
b. Reasonably certain to lead to extirpation if left unmitigated;
c. Within 20 years or 10 generations (foreseeable future).

(new § 424.02). The definition of "threatened species" would be narrowed as well. For a species to be determined to be threatened it must be likely to become endangered within 20 years or 10 generations under a new proposed definition of "foreseeable future."

1. Redefines "Significant Portion of Its Range"

The Bush Administration proposes to define the phrase "significant portion of its range" to be the "portion of a species' current range in which the threats to the species can imperil the viability of the species as a whole, even if some portions of the range of the species are not directly subject to those threats." This definition would require a species to be endangered throughout its range in order to be listed anywhere in its range.

The Administration has repeatedly advanced this position in court, with limited success. Notably, this definition is contrary to the position staked out in the March 16, 2007 Solicitor's Opinion, so it is unclear whether this change is still under consideration.

2. Redefines "Range"

The draft regulations—like the recently released Solicitor's Opinion on "significant portion of its range"—define "range" to mean "the geographical area currently occupied by the species. By limiting ESA protection to a species' current range, this regulation rejects the Ninth Circuit's holding that a species can be considered endangered in a significant portion of its range "if there are major geographic areas in which it is no longer viable but once was." *Defenders of Wildlife v. Norton*, 258 F.3d at 1145. This redefinition appears to absolve the FWS of any duty to recover a species throughout its historic range. It also calls into question whether the FWS ever need restore or reintroduce a species to areas where it no longer exists.

Restoration of wolves in the Northern Rockies, for example, might not have occurred under this policy. When wolves were reintroduced to Yellowstone National Park and Idaho, they could be found only in Canada, Alaska, and Minnesota. The rest of the United States would not have been considered "current range" for the wolf; thus the species would not have qualified as endangered, despite its extirpation from most of the lower 48 states. Under this standard, grizzly bears, bald eagles, and many other species that are abundant in some areas but no longer found in large portions of their historic range might not warrant listing irrespective of the scientific basis for doing so. Looking ahead, the policy could even require that the Secretary of the Interior delist species in the portions of their range that are no longer occupied—a move that could compromise the recovery of many more listed species.

3. Redefines "Foreseeable Future"

Current regulations do not define the term "foreseeable future," but the FWS has traditionally used a 50-100 year horizon for considering threats to species. The Bush Administration documents are inconsistent but one proposed definition states that the term means "10 generations or 20 years, at the discretion of the Service, unless specified otherwise in a determination made pursuant to Section 4." (new § 424.02). Thus, the new regulation has the effect of reducing the number of species that would qualify as threatened by narrowing the time horizon for foreseeability.

II. LIMITS SECTION 7 CONSULTATION

The Bush Administration proposals strike at the heart of Section 7 by

a. redefining what constitutes an "action," and expressly limiting consultation to "discretionary" actions (new § 402.01);
b. allowing for alternative consultation agreements that would diminish or eliminate the role of the FWS entirely from the consultation process;
c. allowing ongoing activities to proceed even if consultation is reinitiated due to new information on impacts to species;
d. exempting landscape-level programs from reconsultation.

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1. Redefines "Jeopardize the continued existence of a species"

Under current regulations, the phrase "jeopardize the continued existence of a species" means to "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers or distribution of that species." 50 CFR § 402.02.

The proposed definition is "to engage in an action that appreciably increases the risk of extinction of any listed species, considered in context with the temporal and spatial nature of the effects, the status of the species, and the species' biology." (new § 402.02).

This new definition excludes all existing conditions that may affect the species' survival. Current activities posing a threat to a species—for example, dams, highways, existing land uses—are not to be considered in evaluating jeopardy; only the projects that "increase the risk" of extinction could lead to jeopardy. Significantly, the new definition also deletes any reference to recovery. An action that diminishes the likelihood of recovery but does not appreciably increase the risk of extinction would not jeopardize a species.

2. Redefines "Action"

The ESA requires consultation under Section 7 for "any action authorized, funded, or carried out by such agency." Current regulations define action as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies" and go on to list numerous examples. 50 CFR § 402.02.

Under the new definition an "action authorized, funded, or carried out" means "a specific and discrete affirmative determination on the part of a federal agency to authorize, fund, or carry out an activity." This would seem to exempt federal agencies from having to consult on or otherwise address ongoing actions—such as ORV use in some national parks—where there has not been as express affirmative determination to all the activity. (new § 402.02). Changes throughout the draft regulations make clear that Section 7 consultation only applies to discretionary actions.

The Administration also proposes defining the phrase "effects of the action" to mean, "as determined by the action agency, those changes from the environmental baseline which are reasonably certain to occur and have a *close causal connection*, either directly or indirectly, to the discretionary portions of the action subject to consultation. A close causal connection means that no more than one additional or intervening human-caused action is needed for the effect to occur." (new § 402.01).

3. Expands Use of Counterpart and Alternative Consultation Procedures

Current regulations allow consultation procedures to be superseded by joint counterpart regulations among the action agency, FWS and NMFS. Such regulations must be published in the Federal Register and subject to at least 60 days public comment. 50 CFR § 402.04

The draft regulations authorize consultation procedures to be superseded *by agreement* or by joint counterpart regulations. Specifically, the draft regulations allow that "other modified procedures for consultation may be implemented by agreements among the Service and federal agencies as long as the final procedures produce the functional equivalent of the required analysis set forth elsewhere in this part." Under the proposal, the Service "may enter into agreements with federal agencies to allow them to make determinations that actions are not likely

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to adversely affect listed species with no further consultation." (new § 402.04). These agreements allow agencies to review and approve their own projects with little or no FWS oversight.

Counterpart regulations will still require notice and 60 days public comment, but "agreements" entered into between the FWS and other agencies will only be subject to 30 days of public comment under the Administration plan.

4. Allows Activities to Continue During Reinitiation of Consultation

The draft regulations state that "[d]uring the course of any reinitiation of consultation, the existing biological opinion and incidental take statement remains valid and in effect until replaced by a new biological opinion and incidental take statement." (new § 402.16(b)). This would allow ongoing projects to continue even if information comes to light that suggests that current activities could jeopardize a listed species. This language appears contrary to the ESA's requirement in Section 7(d) that Federal agencies make "no irreversible or irretrievable commitment of resources with respect to agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate" Section 7(a)(2).

5. Exempts Landscape-Level Programs from Reconsultation

Lastly, the new regulations wholly exempt landscape-level programs, like National Forest plans, from reconsultation "when the Services have issued a biological opinion on programmatic planning documents until the agency revises the documents under its normal course of review." Individual actions within the program may still undergo consultation but the program itself will be exempt from further review.

III. WEAKENS AND DEVOLVES AUTHORITY TO PROHIBIT OR REGULATE TAKE

1. Weakens Protections for Threatened Species

The draft regulations would explicitly grant the Secretary discretion to decide whether to apply the prohibitions on take of threatened species in § 17.31 to any species under Interior's jurisdiction. (new § 424.18).

2. Redefines "Harass"

The proposal would make it more difficult to demonstrate harassment as a form of take because the term "harass" would be redefined to mean "a **persistent** intentional or negligent act or acts causing individuals **to abandon** normal behavioral patterns such as breeding, feeding, or sheltering, resulting in **significant adverse effects** on the survival, recruitment, or reproductive output of the affected individuals." (new § 17.3). The current definition includes the omission of acts and requires only that an act or omission creates the likelihood of injury, not causation of abandonment that results in significant adverse effects.

3. Narrows "Incidental Take"

The definition of "incidental take" would be narrowed so that it refers to "takings that are **caused by**, but are not the purpose of carrying out an otherwise lawful activity." (new § 402.02). The current definition does not require demonstration of causation. It refers to takings that "**result from**" such activities.

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4. Allows States to Regulate Take

As indicated below, states could enter into a "Full Authorities Cooperative Agreement" with the Secretary that would allow the state to regulate the taking of any resident endangered or threatened species under Section 6(g)(2) of the ESA. (new § 410.403).

IV. UNDERMINES EFFORTS TO RECOVER SPECIES

The goal of conservation and duty to conserve would no longer be synonymous with recovery. To the current definition of "conservation," the following language would be added:

- "Conservation is a process which contributes to improving the status of the species. Individual actions still may be considered conservation actions even though they do not result in the species being no longer in need of the protections of the Act." (new § 424.02).
- Creates a term, "conservation effort" for actions designed simply to eliminate or reduce threats or otherwise improve the status of a listed species. (new § 424.02).

The statutory language on recovery plan contents would be re-worded to remove statements that the goal of plan requirements is the conservation and survival of species. The proposal would also remove the term "recovery" and the language describing it as a goal from the reasons to delist a species. Lastly, the proposal would remove the terms "recovery" and "conservation" in other places throughout the rules.

V. CREATES NEW CRITICAL HABITAT EXEMPTIONS

1. Undermines Adverse Modification Standard

Current regulations define "adverse modification" of critical habitat to mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species…." This regulation protects all important features of a critical habitat area regardless of when those features developed. It also contains a mandate to consider habitat areas essential for both survival and recovery, which courts have held are two different standards. *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 78 F.3d 1059 (9th Cir. 2004), amended by 387 F.3d 968 (9th Cir. 2004)

The protection against adverse modification under the new definition only applies to a "discretionary action or discretionary portion of an action." The new definition deletes any reference to recovery, essentially overruling *Gifford Pinchot*, and only protects those features of critical habitat that existed at the time of designation. Improvements, restoration, or other changes to critical habitat would not be protected from adverse modification.[1]

[1] "Adversely modify means to engage in a discretionary action or discretionary portion of an action that significantly alters:
(a) The physical or biological features essential to the conservation of the species existing at the time of designation that were the basis of the critical habitat designation; and
(b) The designated critical habitat to such an extent as to preclude its ability to fulfill its role in the conservation of the species.
For unoccupied habitat, only subparagraph (b) applies.

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2. Expands "Not Prudent" Exception

The proposed regulations spell out when designation of critical habitat would be "not prudent."[2] Courts have held that the "not prudent" exception applies only when there is a risk that identifying habitat could lead to hunting or vandalism. The new regulations extend the exception to include species where "habitat is not a limiting factor, or threats are not habitat based." In other words, if the main threat to a species is pollution, disease, pesticides, disturbance, or some factor other than actual loss of habitat, the FWS need not designate critical habitat.

VI. EXPANDS STATE AUTHORITY TO MANAGE SPECIES

1. Permits States to Veto Species Reintroductions

Most troubling among the changes that apply to federal-state relations is language that states: "The Director shall not establish an experimental population or part thereof in any state without the concurrence of the Governor of the state. Failing such concurrence, the Secretary may establish such a population if the Secretary finds that it is essential to the continued existence of the species in the wild." (new § 17.81(c)(4)).

Reintroduction of wolves in Idaho would not have occurred had this regulation been in place, given the continued hostility of the state to wolves. More recently, the objection of the Governor of Arizona would have likely scuttled reintroduction of the Mexican gray wolf.

2. Allows Co-Management of ESA Programs by States

The Secretary would be given very broad discretion to grant states authority to share management for much of the endangered species program under the new regulations. The proposal would allow state agencies "to participate in a meaningful and timely manner as a [co-equal party] [partner] …in the development and implementation of every aspect of the Act while the Secretary retains final decisionmaking authority." (new § 410.401).

Under a "Full Authorities Cooperative Agreement," state agencies would be allowed to share any "Endangered Species Act functions which are not inconsistent with the requirements of the Endangered Species Act or any other Federal law. States, for example, may be given active roles in the development of Recovery Plans under Section 4(f) of the Endangered Species Act and in the Consultation process under Section 7 of the Endangered Species." (revised § 81.6). In particular, States could enter into a Full Authorities Cooperative Agreement with the Secretary that would allow the state to regulate the taking of any resident endangered or threatened species under Section 6(g)(2) of the ESA. (new § 410.403).

VII. EXPANDS USE OF SECTION 7/SECTION 10 TRADE-OFFS

1. Eliminates Consultation on Section 10 Permits

The proposal would eliminate Section 7 consultation on Section 10 permits (Habitat Conservation Plans (HCPs), Safe Harbor Agreements (SHAs), and Candidate Conservation Agreements with Assurances (CCAAs)). It would

[2] "(1) Pursuant to § 4(a)(3) a designation of critical habitat shall be considered not prudent when any of the following situations exist: (i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or (ii) Such designation of critical habitat would not be beneficial to the species because: (A) Habitat is not a limiting factor; or (B) Threats are not habitat-based; or (C) No areas meet the definition of critical habitat."

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establish "a rebuttable presumption that because the Secretary cannot issue a permit for activities that jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat, consultation under 50 CFR part 402 is not required for issuance of the permit." (new §§ 410.503, 410.603, 410.703).

2. Allows for Incidental Take Through Section 7

The draft regulations would allow authorization of incidental take through Section 7 rather than Section 10 in those instances in which "the Service and a private landowner enter into a management agreement on private lands for actions that will provide net benefits or have only minor effects." (new § 402.18)

3. Expands Assurances Under HCPs, SHAs, and CCAAs

Federal agencies would be allowed to "hold" assurances under HCPs, SHAs, and CCAAs for purposes of passing them on to non-Federal landowners. The proposal would allow these assurances to be provided to Federal agencies when they are administering a HCP, SHA, or CCAA for activities occurring on multiple non-Federal lands . . . for the purpose of transferring them to those non-Federal property owners who choose to participate in the HCP, SHA, or CCAA and related permit. (new §§ 410.506, 410.604, and 410.704).

VIII. PETITIONS

Petitions for listing species would have to conform to detailed standards and contain a wealth of sourced information and analysis. The FWS can return without review a petition to list that does not comply with all of the new requirements. (new § 424.14)

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