

National Endangered Species Act Reform Coalition

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Chip Murray
American Forest & Paper
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November 30, 2009

The Honorable Ken Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Suite 6156
Washington, DC 20240

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Samuel D. Hamilton
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U.S. Fish and Wildlife Service
1849 C Street, NW
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Washington, DC 20240

Kurt A. Johnson
National Climate Change Scientist
Office of the Science Advisor
US Fish and Wildlife Service
4401 N. Fairfax Drive, Room 700d
Arlington, VA 22203

Dear Secretary Salazar, Director Hamilton and Mr. Johnson:

The National Endangered Species Act Reform Coalition (“NESARC”) appreciates the opportunity to provide comments on the U.S. Fish and Wildlife Service’s (“FWS” or “Service”) draft Strategic Plan for Responding to Accelerating Climate Change (“Strategic Plan”). As part of the Strategic Plan and an accompanying 5-Year Action Plan, the Service is proposing to undertake several measures directly and indirectly implicating its administration of the Endangered Species Act (“ESA”). NESARC is the country’s only broad-based, national coalition dedicated solely to achieving improvements to the ESA. NESARC members include rural irrigators, municipalities, farmers, homebuilders, forest products, energy and mining companies, and many other individuals, organizations and businesses that are directly affected by the ESA. NESARC members remain keenly interested in identifying measures by which the administration of the ESA can be updated and improved and welcome the opportunity to have an open dialogue with the Service regarding improvements to the administration of the ESA that can, and should, be undertaken.

The Strategic Plan articulates a series of strategic goals and objectives for responses to climate change that FWS “believe[s] must be accomplished to sustain fish, wildlife and habitats nationally and internationally.” Further, FWS details in its 5-Year Plan a number of ESA-specific goals and actions. NESARC understands FWS’ concerns regarding the potential effects on fish and wildlife from climate change. However, it is equally important to act from a foundation of information where possible and to ensure the flexibility to adapt to changing conditions as our understanding of climate change increases. We especially appreciate FWS’ recognition of the importance of avoiding unilateral decisionmaking and instead engaging in dialogue with industry and other stakeholders, to ensure that relevant information and expertise are brought to bear in decisionmaking and subsequent actions. With respect to ESA-specific measures, NESARC has the following comments:

- **The Service must continue to recognize that the ESA and other existing environmental laws are not the appropriate mechanisms for regulating greenhouse gas emissions.** The Secretary of the Interior, other Administration officials and the Services¹ have consistently recognized that the ESA is not the appropriate statute by which to regulate greenhouse gas emissions. The FWS Strategic Plan and Action Items must be consistent with this policy. Various interests are pushing to use the ESA and other environmental statutes as leveraging mechanisms to impose limitations on the emission of greenhouse gases.² FWS should not bow to such attempts to diverge from the core purpose and programs of the ESA and other environmental laws and must maintain its recognition of the limitations inherent in climate change science.
- **Early engagement and full public input is needed with respect to any efforts to modify FWS policies, regulations, or laws.** The FWS Action Plan calls for recommendations and a later report on priorities for changes in the Service’s legal, regulatory and policy framework to address climate change adaptation (*Actions 1.7.1, 1.7.3 and 1.7.4*). It is imperative that the Service ensure that any such decisions to modify FWS policies, regulations or laws are not made in a vacuum. Meeting the bare minimum with procedural compliance with the Administrative Procedure Act’s notice and comment requirements is not sufficient. Consistent with the Administration’s commitment to openness, the Service must extend its efforts to a full discussion with stakeholders on potential improvements that could be made to

¹ See e.g., Statement of the Secretary of the Interior, Kenneth Salazar, Press Release, “*Salazar Retains Conservation Rule for Polar Bears, Underlines Need for Comprehensive Energy and Climate Change Legislation*” (May 8, 2009) (“...the Endangered Species Act is not the proper mechanism for controlling our nation’s carbon emissions.”); and Hearing Report, Statement of David Hayes, Deputy Secretary of the Interior to the Senate Committee on Energy and Natural Resources at p. 18 (Mar. 12, 2009) (“The Endangered Species Act is not well suited to deal with climate change which is a global phenomenon that has built up over decades.”).

² NESARC has provided extensive comments supporting the conclusion reached by the Department and Secretary Salazar, namely, that the ESA is not an appropriate mechanism to regulate greenhouse gas emissions. (See *August 3, 2009, NESARC Public Comments on Potential Improvements to the ESA Section 7 Consultation Process*, pp. 2-5; and *October 14, 2008, NESARC Comments on Notice of Proposed Rulemaking*, pp. 4-6.) Moreover, there is no scientific basis from which the Services can conclude that changes in the level of an individual’s greenhouse gas emissions, e.g., adding, expanding, or removing an individual facility such as a power plant or paper mill (in any location), or revising its permit requirements, will have a detectable effect on the ambient carbon dioxide (CO²) levels—much less an adverse effect on any listed species that may be within the project’s action area.

FWS regulations and policies—including those specifically implementing the ESA. Acting to modify FWS policies or regulations without such full and open solicitation of public input will ultimately undermine any efforts that may eventually be pursued.

- **Voluntary conservation activities and programs must be further encouraged.**

FWS must emphasize and more specifically address efforts to promote voluntary conservation activities as part of its Strategic Plan and 5-Year Action Plan. (*Engagement, Goal 6*). While FWS adopts a goal of engaging the public in collaborative conservation, it fails to fully carry through with this commitment in its 5-Year Action Plan. NESARC recommends that FWS include, within its 5-Year Action Plan, a separate section and targeted actions on ways to encourage and improve voluntary conservation activities. While such efforts are implicitly included in some of the FWS' planned activities, more focus and attention must be brought to these efforts.

NESARC supports the development of voluntary conservation activities and believes they are a key component to protecting and enhancing wildlife populations. To further this priority, FWS should remove unnecessary barriers to participation in voluntary conservation activities. Further, all FWS conservation efforts should take care not to block other productive land uses compatible with the conservation goals. Voluntary conservation efforts can play a key role in ensuring and improving species adaptability to changed conditions, which result from a variety of factors, including climate-related impacts. NESARC recently worked with a coalition of industry and environmental groups to ensure passage of tax incentives for species conservation efforts. The Endangered Species Recovery Act contained in the 2008 Farm Bill Reauthorization encouraged voluntary conservation efforts by providing tax incentives for endangered species recovery actions undertaken in association with agricultural operations. By entering into habitat protection agreements, agricultural operators will be incentivized to protect endangered species and their habitat. FWS should recognize that such programs can serve many of the purposes and goals laid out in the Strategic Plan and should work to ensure that the Administration fully implements the ESRA tax incentive and other similar programs.

- **Information gained from planned species vulnerability assessments and other data collection efforts should be made publicly available.** The Action Plan calls for increased risk and vulnerability assessments for fish and wildlife species, with an initial focus on threatened and endangered species, migratory birds, and inter-jurisdictional fish (*Action 1.4*). To the extent that FWS undertakes additional or more robust species vulnerability assessments, it must ensure that such data is made available to the public. In particular, notice of the initiation and completion of such vulnerability assessments should be issued to the public. The compiled information must be made readily available to the public and such data collection must be subject to the Data Quality Act.

As a caution, however, the mere collection of species vulnerability data should not immediately grant any imprimatur that such data automatically meets the threshold of

being the best available scientific information under the ESA. Rather, such data collection must stand on its own and fully comply with potentially more rigorous methodologies required for the best available scientific information in the context of ESA decisions on species listings, critical habitat designations or Section 7 consultations.

- **FWS climate change adaptation efforts must remain practically focused and maintain a balanced approach.** As FWS examines measures to ensure adaptability and protection of fish and wildlife resources, it also must take into account the costs and benefits of various measures, including impacts on agriculture, energy development and use, and the overall economies of impacted communities. FWS must continue to see a balanced approach to adaptation and mitigation efforts that works with stakeholders and avoids unilateral imposition of new constraints on resource use activities. Notably, “uncertainty” about climate change impacts should not become a basis for broadly fashioned and ultimately unfocused restrictions on resource-related actions. Rather, FWS should work to identify concrete issues for which specific adaptation activities can be identified. Further, implementation of such adaptation activities should take into consideration and minimize any adverse economic or social effects of such measures.
- **Efforts to implement the Strategic Plan and Action Plan should not distract or delay the FWS’ core responsibilities in administering the ESA in a timely and effective manner.** FWS has laid out a broad-ranging set of activities that it would like to undertake to address climate change threats. While some efforts may be appropriate and necessary, they cannot come at the expense of delaying FWS’ administration of its core activities. The FWS has long noted that the ESA already places significant time pressures and obligations on its resources. Further, FWS has many times found itself failing to meet statutory deadlines for actions under the ESA. Accordingly, it will be critical that the Service manage implementation of the Action items or overall Strategic Plan so it is in concert with, and does not draw any resources from, the timely and effective administration of the ESA.

NESARC greatly appreciates the opportunity to provide these comments to the Service and to initiate a further discussion on ways to improve the Strategic Plan and the associated 5-Year Action Plan. We hope that FWS will continue to collaborate with the public on such measures. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Chip Murray". The signature is fluid and cursive, with a long horizontal stroke at the end.

Chip Murray
Chairman