TESTIMONY OF JAMIE RAPPAPORT CLARK
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BEFORE THE
UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
HEARING ON
BUSH ADMINISTRATION ENVIRONMENTAL RECORD AT
DEPARTMENT OF THE INTERIOR AND ENVIRONMENTAL PROTECTION AGENCY
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Madam Chairwoman and members of the Committee, I am Jamie Rappaport Clark, Executive Vice President of Defenders of Wildlife. Founded in 1947, Defenders of Wildlife has over 1.1 million members and supporters across the nation and is dedicated to the protection and restoration of wild animals and plants in their natural communities.

Prior to coming to Defenders of Wildlife, I worked for the federal government for almost 20 years, both at the Department of Defense and the Department of the Interior. I served as Director of the U.S. Fish and Wildlife Service from 1997 to 2001. Thus, I have seen the Endangered Species Act from different perspectives: that of a federal agency employee working to comply with the law; that of a federal agency head charged with key responsibilities in overseeing and implementing the law; and now that of a conservation organization leader working to ensure that the law meets its promise of conserving threatened and endangered plants and wildlife.

The common lesson I have drawn from all of these experiences with the Endangered Species Act is that 35 years ago Congress and this nation put in place the world's most farsighted and important protection for imperiled wildlife and plant species and the ecosystems on which they depend. For more than three decades, the Endangered Species Act has helped rescue hundreds of species from the catastrophic permanence of extinction. But the even greater achievement of the Endangered Species Act has been the efforts it has prompted to recover species to the point at which they no longer need its protections.

It is because of the act that we have wolves in Yellowstone, manatees in Florida and sea otters in California. We can marvel at the sight of bald eagles in the lower 48 states and other magnificent creatures like the whooping crane, the American alligator and California condors largely because of the Endangered Species Act. Beyond rescuing these and other treasures, this landmark law protects many less well-known and seemingly insignificant plants and animals that have everyday value for humans because they play crucial roles in their ecosystems that help sustain all life on Earth.

A 35-Year Bipartisan Legacy of Protection -- Abandoned and Undermined

Unfortunately, during the last eight years the Bush administration has largely abandoned, and in many cases has actively undermined, our longstanding bipartisan commitment to protect imperiled species.

The Bush administration has slowly starved Endangered Species Act programs of critical funding. For example, the administration's fiscal year 2009 request for the Fish and Wildlife Service's core endangered species program was at least 33 percent ($71.5 million) below the minimum level needed. The consistent and continuing failure by the administration over the last eight years to request adequate resources in the budgets it presented to Congress has meant that the number of Fish and Wildlife Service endangered species program biologists has dropped by at least 30 percent since the end of Fiscal Year 2001.

Similarly, the administration has done its best to erase the "Thin Green Line" of defense held by the Fish and Wildlife Service Office of Law Enforcement that is responsible for enforcing federal wildlife laws and international treaties, including, importantly, upholding the Endangered Species Act and investigating crimes involving threatened and endangered animals and plants. Numbers of all-important special agents have plummeted to a 30 year low, down from a high of 238 in 2002 to 184 in 2008, a 23 percent loss and nearly 30 percent below the authorized number of 261.

The record of the Bush administration amply demonstrates that it decided to slow-walk the listing of species under the Endangered Species Act. Fewer listings of endangered and threatened species have occurred under this administration than in any previous eight-year period, and there are more than 280 species that are currently candidates for protection. These species are ones that the Fish and Wildlife Service already has determined warrant initiation of the listing process. The net result of the administration's policies has been to thwart protection for hundreds of species deserving protection under the act. Species such as jaguars, wolverines and pygmy owls have had Endangered Species Act protections denied or removed by the Bush administration on the dubious and illegal grounds that those species are found in Canada or Mexico and, consequently, protecting them in our own country is not necessary.

The Bush administration also has hamstrung recovery of many species by making decisions based on political agendas rather than scientific data. The Interior Department's Office of Inspector General found that former Deputy Assistant Secretary of the Interior for Fish and Wildlife and Parks Julie MacDonald was " heavily involved with editing, commenting on, and reshaping the Endangered Species Program's scientific reports from the field." Three months later, the Fish and Wildlife Service ended up identifying eight decisions in which it found Deputy Assistant Secretary MacDonald's involvement might have been inappropriate.

In addition, the Government Accountability Office (GAO) testified on May 21, 2008, before the House Natural Resources Committee that administration officials other than Deputy Assistant Secretary MacDonald may have inappropriately influenced endangered species decisions. According to the GAO, if the Fish and Wildlife Service had used broader criteria to investigate the extent of political interference in endangered species programs, then they would have likely found additional decisions that warranted review and possible revision. Perhaps more troubling even than these findings is that the GAO found the continual questioning of biologists by political appointees about

their scientific reasoning eventually taught the biologists to anticipate what might be approved and to write their decisions accordingly.

The scope and magnitude of political interference revealed by the Interior Department's Office of Inspector General and the GAO interviews is unprecedented in my experience, but no longer surprising given the unrelenting hostility the Bush administration has shown to the conservation of endangered species. Last year, documents leaked to the press revealed that the administration was considering sweeping changes to the rules that implement the Endangered Species Act. Many of these changes bore striking resemblance to provisions in the failed legislative attempt by former Representative Richard Pombo to dismantle the Endangered Species Act.

While Interior Department officials back peddled as a result of the uproar by Congress and the American people that accompanied the discovery that the administration might be contemplating a massive re-write of the Endangered Species Act by administrative means, the regulatory proposals published last month demonstrate that the administration never abandoned its efforts to weaken the act.

The Bush administration regulatory revisions exposed last year and its August 15, 2008, proposed rule changes have much in common. Both sets of proposals would reduce the scope of Section 7 consultation under the Endangered Species Act, reduce the role of the Fish and Wildlife Service and National Marine Fisheries Service in the act's implementation, and weaken the substantive standards that apply to federal agency actions under the law.

The Section 7 consultation requirements are the heart of the protections of the Endangered Species Act. By requiring federal agencies to work with the Fish and Wildlife Service or National Marine Fisheries Service to insure that an agency's actions do not jeopardize the existence of a species or adversely change or destroy habitat critical to a species, the Act's consultation requirement provides an essential safety net for imperiled plants and animals.

Consultation under Section 7 may be either "informal" or "formal." For actions that "may affect" listed species or designated critical habitat, informal consultation allows federal agencies sponsoring the actions to assess, in conjunction with one of the Services, whether formal consultation is required. Formal consultation is required unless the action agency finds, with the written concurrence of one of the Services, that the proposed action "is not likely to adversely affect" the species or habitat. This finding can be made only if all of the reasonably expected effects of the proposed action will be beneficial, insignificant, or discountable. In those cases in which one of the Services is unable to agree with a federal agency that an activity is not likely to adversely affect listed species, the Service and the action agency may use the informal consultation process to work together to gather further information or to identify modifications to the activity that will avoid adverse effects.

Informal consultation provides more than just expert review and an opportunity for information sharing. It also can aid in recovery. Informal consultations can lead to recommendations for project modifications, providing crucial safeguards for listed species. Experts in the Services familiar with recovery plans may identify actions benefiting listed species that can be carried out on or near the project site, including habitat protection, modification or improvement.

Over the years, the Section 7 process of informal consultation between the Fish and Wildlife Service or National Marine Fisheries Service and other federal agencies has been one of the act's most successful provisions in reconciling species conservation needs with other objectives. For example, progress towards the conservation of species such as the grizzly bear and piping plover would have been virtually inconceivable without the beneficial influence of Section 7. Yet, the net effect of last month's proposed changes will almost certainly be to make species recovery less likely rather than more likely.

Removes Crucial Safeguards for Imperiled Wildlife and Habitat

The Bush administration's August 15th proposal allows a federal agency to avoid Section 7 consultation if the agency unilaterally decides that an action it sponsors is not anticipated to result in death, harm or other "take" of a threatened or endangered species, and that the action has inconsequential, uncertain, unlikely or beneficial effects. The determination of whether take or other effects will occur often is not readily apparent, and requires in-depth knowledge of the affected species' "essential behavioral patterns, including breeding, feeding or sheltering."

Current rules allow federal agencies to make such determinations, but the agencies must obtain the concurrence of the Fish and Wildlife Service or National Marine Fisheries Service. Frequently, this requirement for concurrence by one of the Services has led to a better understanding of an activity's effects, through the collection and analysis of additional information to assess whether take is likely. Under the administration's proposal, however, independent species experts at one of the Services would no longer review federal agency judgments about the effects of actions that it sponsors.

The administration's proposed framework lets the fox guard the chicken coop. Action agencies often have their own institutional biases and priorities that may not be consistent with conservation of threatened and endangered species. Indeed, many federal agencies lack expertise in species conservation and may not even have biologists or botanists on staff. There is no evidence provided in the proposed rule to support the claim that other federal agencies are willing and able to effectively review species impacts without input from the Fish and Wildlife Service or National Marine Fisheries Service.

These changes will almost certainly result in more species being put in jeopardy. Unfortunately, the proposed changes follow an all too familiar pattern by the administration. The so-called "joint counterpart regulations," which were published in 2003 to streamline the Section 7 consultation process for logging and thinning projects on public lands under the National Fire Plan, provide an instructive example. They allow the Forest Service and Bureau of Land Management to self-consult on impacts to listed species rather than obtain concurrence from Fish and Wildlife Service or National Marine Fisheries Service. Unlike the Bush administration's latest proposed rule, however, the National Fire Plan counterpart regulations required a training program for Forest Service and BLM staff who make determinations on species impacts and established a program by which the Services would periodically monitor action agency performance. These minimal safeguards clearly have been insufficient. A recent Fish and Wildlife Service and National Marine Fisheries Service review of self-consultation under the Fire Plan counterpart regulations found that the Forest Service and BLM failed to properly account for species impacts in their unilateral consultations 62 percent of the time.

The dismal results of the National Fire Plan experiment hardly warrant abandonment of training and monitoring requirements or expansion of the approach to all federal agencies. Yet the latest proposal by the Bush administration would do just that by providing no safeguards whatsoever. The proposal contains no requirements for federal agencies to make determinations based on the judgment of qualified biologists, to provide documentation to support the determinations, or to provide any notice or opportunity to the Fish and Wildlife Service or National Marine Fisheries Service to review the documentation and determination.

While the federal action agency would theoretically still be liable if take occurs, under the August 15th proposed rule, it would take a citizen suit against the agency to impose that liability. Citizens and courts would be forced to provide the independent checks and balances now provided by Fish and Wildlife Service and National Marine Fisheries Service experts. This could spur an increase in litigation, which in turn would raise costs and delay many valuable federal projects. Moreover, the threat of liability does not necessarily guarantee sound decision making in itself. Absent review by the Fish and Wildlife Service or National Marine Fisheries Service, agencies may act in good faith in evaluating species impacts and still make an erroneous decision that could cause irreversible harm to wildlife. The possibility of liability will do little in such circumstances to ensure adequate species protections, unless the agency decides affirmatively to request independent expert review by one of the Services.

Under the Bush administration's August 15th proposed rule, a federal action agency may voluntarily request informal consultation with, and concurrence by, the Fish and Wildlife Service or National Marine Fisheries Service on its determination that an activity is not likely to adversely affect a threatened or endangered species. The proposal, however, ties the hands of the Services in the process by imposing an arbitrary 60-day limit (subject to a possible extension of 60 days) on completion of the informal consultation; otherwise, the project can move forward regardless of the impacts on listed species. This proposal will increase the likelihood that harmful agency actions could slip through unchecked by Endangered Species Act consultation safeguards.

Allowing federal agencies to decide for themselves, without checking with wildlife biologists at the U.S. Fish and Wildlife Service or National Marine Fisheries Service, whether their projects will harm endangered species represents a step backwards not only for endangered wildlife conservation, but also for federal agencies trying to move their projects forward.
The proposed regulations are an open invitation for agencies to cut corners and take advantage of the changes to push through damaging projects. Without any reporting requirement or ability to know what is happening across the range of a species, it will be almost impossible to monitor the condition of a species over time.

Shifting the full responsibility for determining the effects federal actions will have on threatened or endangered species to the federal agencies proposing those actions, when those agencies have potentially conflicting missions and priorities, will clearly undermine progress towards species recovery. It would be much more effective and efficient to appropriately fund and staff the existing wildlife agencies and programs to ensure they can carry out Section 7 consultations in a timely and responsible manner.

Narrows Consideration of Impacts Due to Federal Actions

The Bush administration also is proposing to drastically narrow the consideration of impacts of federal actions even when consultation occurs. In announcing the August 15th proposal to change implementation of Section 7, Interior Secretary Kempthorne made clear that the revisions were intended to put off limits any consideration of the impacts of greenhouse gas emissions on polar bears or other wildlife affected by global warming. In the words of the proposal: "This regulation would enforce the Services' current view that there is no requirement to consult on greenhouse gas (GHG) emissions' contribution to global warming and its associated impacts on listed species (e.g., polar bears)."

The administration purports to address what it views as the "problem" of consultation dealing with global warming impacts on species. In fact, the proposed changes would illegally sweep under the rug any consideration of the very real threat global warming poses to polar bears and other wildlife by barring evaluation of impacts and possible solutions across the board. Moreover, these changes go well beyond global warming. The proposed changes are sweeping and potentially harmful to all listed species and their habitats... They would make it far more difficult to address all types of cumulative impacts on wildlife. They would allow endangered species and their habitat to be quietly destroyed a little bit at a time, even if the destruction eventually adds up to losing the species altogether.

The administration's proposal narrowly defines what effects of an action are subject to review under the Endangered Species Act. Specifically, the definitions of "effects of the action" and "cumulative impacts" in the proposed rule limit application of Section 7 consultation to those federal agency actions that are an "essential cause" of the effects and for which there is "clear and substantial information" that they "are reasonably certain to occur." The proposal's new concept of essential causation would eliminate consultation for federal actions that contribute to an effect on a species, perhaps even substantially, if the effect would otherwise occur to some extent without the federal action. Consideration of global warming impacts on species is thus simplified to the point of absurdity: Actions that contribute to the extent, duration or severity of global warming would escape review entirely under the Endangered Species Act as long as global warming would otherwise occur to some extent.

Indeed, the preamble to the rule singles out greenhouse gas emissions as an example of an effect that would not be evaluated under Section 7 because, in the Bush administration's view, (1) there is not clear and substantial information that the effects of the emissions are an essential cause of effects to polar bears by polar ice cap melting, and (2) even if it is an effect covered by Section 7, the proposal states that the Section 7 consultation requirements do not apply if the "effects are not capable of being meaningfully identified or detected in a manner that permits evaluation." The preamble asserts that this is the case with greenhouse gas pollution.

Mounting scientific evidence confirms that greenhouse gas emissions are a significant cause of adverse effects on wildlife, including the recently listed polar bear. Although the precise impact of a particular project's emissions may be presently unknowable, the administration's proposal essentially eliminates any meaningful consideration of the cumulative impacts of this pollution. Global warming clearly poses new challenges for regulatory efforts to protect threatened and endangered species, but the administration's response to these challenges—ignoring the potential impact of greenhouse gases on wildlife altogether—is myopic and misguided. The proposal signals that the Bush

administration not only refuses to take action to address the impacts of global warming on polar bears and other listed wildlife, it also wants to prevent future administrations from doing so.

Disguises a Radical New Interpretation of the Law as Clerical Edits

On August 5, 2008, the Bush administration unleashed an attack on the Endangered Species Act that is more subtle, but no less harmful, than the changes proposed to Section 7 just ten days later. By very quietly proposing changes to column headings and descriptions in the official "Lists of Endangered and Threatened Wildlife and Plants" found in the regulations implementing the Endangered Species Act, the administration is trying to disguise a radical new interpretation of the law as minor clerical edits.

In its rulemaking, the administration inaccurately claims that none of the proposed changes are regulatory in nature, and that the changes are simply intended to rename and reorganize the columns in the lists to clarify the types of information being presented, update the regulations to include current practices and standards, and ensure that the regulations and lists are easy for the public to understand.

The practical effect of the proposed format revisions, however, would be to codify the legal conclusions of a Solicitor's Opinion dated March 16, 2007, and put into force significant and substantive changes to the long-settled understanding of how the Endangered Species Act applies to species that have been designated as "endangered" or "threatened." The Solicitor's opinion reversed more than three decades of administrative practice and understanding, without any opportunity for public input.

The 2007 opinion concluded that any entity eligible for listing under the Endangered Species Act (i.e., a species, subspecies, or vertebrate "distinct population segment") may be given the protection of the Act only in some places and not in others. Prior to the Solicitor's opinion, the consistent and unvarying administrative practice for nearly 35 years was that any taxon that met the act's definition of an "endangered species" or a "threatened species" received the act's protection wherever it occurred. The opinion reversed this settled understanding.

The Bush administration's proposed revisions effectuate the Solicitor's novel interpretation of the law by making subtle, but important changes in two sentences explaining the "historic range" column in the official species lists. Significantly, neither of the changes is explained, or even acknowledged, in the preamble to the proposed rule. Instead, they are buried in the text of the actual revised regulations, where they are easily overlooked.

In the past, the first sentence explaining the "historic range" column (and its precursor) has always stated that the column "does not imply any limitation on the application of the prohibitions of the Act." The administration now, however, proposes for the first time to revise this sentence to make clear that it should not be inferred from the "historic range" column that the act's prohibitions actually apply to any species listed.

The second sentence explaining the "historic range" column (and its precursor) has always made it clear that the act applies to every individual organism of a species wherever it may occur by stating, "Such prohibitions apply to all individuals of the species wherever found." The administration's

August 5th proposed regulations would change this sentence by inserting without explanation the word "listed" so that the act would apply "to all individuals of the listed species wherever found."

The unrevealed significance of this seemingly innocuous change is that the term "listed species" has a meaning in the proposed rule that is very different from the meaning of "species" in the current regulations. Under current regulations and longstanding practice, Endangered Species Act prohibitions apply to every individual organism of any taxon on the endangered or threatened species list wherever it occurs. In contrast, the only individual organisms of any taxon that would be protected by the act under the Bush administration's proposal would be those that occur in the geographic area designated in a new "where listed" column. This substantive and significant revision to the official lists of what is protected under the Endangered Species Act seems calculated to reinforce the Solicitor's radical new interpretation of the law. The practical effect for protection of any species designated as threatened or endangered in the future will be to exclude individual organisms, populations, and entire portions of a species range from protection under the Endangered Species Act.

Eleventh-hour Proposals That Should Be Stopped by Congress

The Bush administration's eleventh-hour proposals with less than 120 days left in office are clearly an effort to secure dramatic changes to the Endangered Species Act that the administration and its allies have been unable to achieve through legislation. The proposed re-write of Section 7 consultation attempts to eviscerate one of the most important provisions of the Endangered Species Act, while the proposed changes to the lists of threatened and endangered species tries to lay a foundation for vastly reducing the amount of habitat protected for threatened and endangered species.

Taken together, the two proposals dramatically alter the way the Endangered Species Act works without adequate public debate or consideration by Congress. They are anything but narrow or minor in scope. Instead, they are a dangerous assault on America's living heritage that could affect us for generations to come.

Two years ago, former Representative Richard Pombo authored legislation that included some of the same concepts that now can be found in the Bush administration's proposals, such as federal agency self-consultation and deadlines that place the burden of delay on listed species protection.

The Senate wisely refused to consider those radical changes to the Endangered Species Act. Congress should stop these proposals once again.

Thank you for considering my testimony. I'll be happy to answer questions.