# United States Department of the Interior

FISH AND WILDLIFE SERVICE

California/Nevada Operations Office
2800 Cottage Way, Suite W-2606
Sacramento, CA 95825

JUN 29 2007

To: Director

From: Manager, California-Nevada Operations Office

Subject: Review of Service Decisions under the Endangered Species Act Involving the Deputy Assistant Secretary, Fish, Wildlife, and Parks, in California and Nevada, 2001 - 2006

On May 17, 2007, you asked CNO Ecological Services (ES) project leaders to evaluate the involvement of the Deputy Assistant Secretary, Fish, Wildlife, and Parks (DAS) in the important Endangered Species Act (Act) decisions made by the Service in CNO during the years 2001 through 2006. Specifically, you asked us to evaluate past Service decisions to determine if the DAS, in her oversight capacity as a high-ranking Departmental official, influenced or modified our position on the scientific basis for our final actions or decisions.

This request was discussed with CNO regional staff and field office project leaders (PLs). The Assistant Manager (AM) had follow up conference calls with PLs on May 31, 2007, and on June 6, 2007, and he received responses from all CNO ES field stations. This memorandum summarizes the results of this review, and the source documents are on file in CNO.

Summary of Findings and Recommendations

Consistent with the findings of the Inspector General, we found that the DAS did actively attempt to influence our scientific rationale and conclusions on multiple occasions. But we found in the majority of cases that the DAS input did not lead to inappropriate changes to our scientific conclusions or recommendations. We made the following specific findings and recommendations:

- The DAS influenced the application of science in the following critical habitat rules: arroyo toad and California red-legged frog. *We recommend reevaluating arroyo toad and California red-legged frog critical habitat designations as appropriate.*
- The DAS may have influenced the application of science in the bull trout and southwestern willow flycatcher critical habitat rules. *We recommend coordinating with Regions 1 and 6 on bull trout critical habitat, and with Region 2 on southwestern willow flycatcher critical habitat, to make a determination if revisiting CH is necessary and appropriate for these species.*
- The DAS was heavily engaged in two biological opinion processes at the Carlsbad Fish and Wildlife Office (CFWO) in 2001-2003. Although she intervened from the perspective of the applicant to reduce the level of impact avoidance or conservation ultimately required as part of

the action, she did not unduly influence the final biological opinion of the Service. *Therefore, we do not recommend revisiting these biological opinions.*

In contrast to her involvement in scientific issues, the DAS's involvement did lead to many changes in draft critical habitat rules due to her application of Department policies and Secretarial discretion, especially section 3(5)(a) and 4(b)(2) exclusions and interpretations of statute language (e.g., "occupied at the time of listing"). However, the Service conducted the statutorily required "extinction analysis" for any critical habitat rules that contained such exclusions, and all were found to be consistent with the requirements of the Act.

It is our understanding that these exclusion policies and other interpretations are, for the most part, still current policy within the Department. Therefore, we do not recommend revisiting any of these critical habitat decisions unless the Department formally revises these policy positions and directs us to reevaluate previously completed critical habitat rules.

Conclusion

As the above summary indicated, we believe it is necessary to distinguish between Service work products that may have been influenced by the DAS due to her scientific opinion on a particular issue, compared to those Service work products that were changed due to the DAS's interpretation of policy or statute. Our review revealed that Service employees did a good job in considering the DAS's scientific, legal, and policy input during the rule-making and biological opinion processes. With the few exceptions noted above, the vast majority of any modifications made to Service work products were made as a consequence of the Department's policy discretion and not as a result of the Service deferring to the scientific opinion of the DAS.

Thank you for the opportunity to conduct this review.