United States Department of the Interior

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IN REPLY REFER TO:

FWS/R1/AES

JUN 28 2007

To: Director, Fish and Wildlife Service
Washington, DC

From: Acting Regional Director, Region 1
Portland, Oregon

Subject: Review of Service Decisions under the Endangered Species Act Involving the Deputy Assistant Secretary, Fish and Wildlife and Parks, in Region 1 (2001-2006)

As requested, we have evaluated the involvement of Julie MacDonald, former Deputy Assistant Secretary (DAS) for Fish and Wildlife and Parks, in important decisions made by the U.S. Fish and Wildlife Service (Service) in Region 1 during the years 2001 to 2006. Specifically, we evaluated past Service decisions to determine if the DAS, in her oversight capacity as a Departmental official, modified the science and/or the Service's recommendation/position on final actions or decisions.

We focused on the important and controversial issues and decisions of 2001 through 2006. During that time period, the DAS had a wide range of oversight and reviewed and commented on numerous issues; however, we limited our review to identify only those actions where the DAS oversight resulted in an inappropriate change in science that may compromise actions taken in the future, or where the Service's recommendation/decision was changed based on a policy interpretation made by the DAS.

During the time period of this review, Region 1 began implementing structured decision making, particularly on the more controversial issues in the Region. We held panels with recognized experts and Service managers to develop sound, fully-informed decisions using the best science available. We used objective criteria to determine scientific expertise, and documented the panel's discussions in order to write recommendations that were sound and transparent. Assistant Secretary Manson was supportive of this approach, and we benefited from its application when defending our use of the science and our conclusions with the DAS.

The following represents a list of those actions where the Region believes the DAS oversight changed the Service's position.

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Marbled Murrelet (*Brachyramphus marmoratus*)
The Service conducted a 5-year review on this species in 2004. We used structured decision making for the 5-year review, working with experts on the marbled murrelet, and making a recommendation that fully considered the risks and uncertainties. The Service recommended that the listing status remain the same, and supported the listing as a distinct population segment (DPS). The Assistant Secretary and the DAS subsequently reversed Region 1's DPS determination, stating that the marbled murrelet in the lower 48 was not a DPS, because it did not satisfy the DPS policy's discreteness criteria, and thus was not a listable entity. Since this was based upon an interpretation of the DPS policy made by the Department, the Regional Director signed the 5-year review in support of the Department's position. The Office of the Solicitor review of the proposed delisting rule suggested that the conclusion reached by the Department on the 5-year review was based on an incorrect "discreteness" analysis under the DPS policy, as it compared current levels of legal protection in the United States (Endangered Species Act) and Canada (Species at Risk Act), rather than comparing the levels that would exist if the species were not listed in the United States.

Bull Trout (*Salvelinus confluentus*)
The Service voluntarily remanded a final rule designating critical habitat because of extensive exclusions made by the DAS, with little or no justification in the administrative record supporting those exclusions. On remand, the Service provided to the Department a rule that proposed a number of exclusions; however, we did not propose to exclude any Federal lands. The DAS became heavily involved, directing an approach that involved reviewing the existing management of Federal lands in support of the bull trout. Where special management for bull trout was practiced, we excluded those Federal lands based on a very small margin of benefits associated with the saving of administrative costs of conducting adverse modification analysis in future consultations. Provided the Department will continue to utilize this approach to critical habitat, we don't recommend redoing this rule. In addition, the rule is being litigated, and a decision is expected from the courts relatively soon and we expect exclusions of Federal lands to be addressed. Should the courts not support the approach to exclusions, this would have ramifications for future critical habitat rules, including marbled murrelet and northern spotted owl.

12 Species of Picture Wing Flies
The DAS gave direction that the critical habitat rule for these species consist of no more than 1 acre per species. The Service published the proposed rule based on that direction. We received numerous peer review comments questioning our methodology and lack of explanation for the approach. The DAS also provided comments on the rule, supporting the peer review comments and directing that we provide an adequate response to those comments in the final rule. Instead, we have chosen to re-propose the designation rule using scientifically based criteria prior to finalizing the rule.

Thank you for the opportunity to comment on this matter. If you have any questions, please contact Terry Rabot at 503-231-6151.