United States Department of the Interior

FISH AND WILDLIFE SERVICE

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Memorandum

To: Director

From: ACTING Regional Director, Region 2

Subject: Region 2 Decisions Influenced by Julie MacDonald

We are providing the following assessment in response to your request for a review of all Region 2 decisions in which former Deputy Assistant Secretary (DAS) Julie MacDonald was involved. Specifically, we were asked to evaluate past decisions for instances where the DAS may have influenced the scientific analysis resulting in a change in the outcome of the decision. We developed a list of all rules and findings made in this Region between 2001 and 2007 and, in consultation with our Field Offices, examined the record to determine which actions may have been influenced by the DAS and the nature of her influence. We then reviewed all actions with substantial intervention by the DAS with two criteria in mind: (1) the administrative record shows that there was a definitively different outcome because of intervention by the DAS contradicting the science; and/or (2) whether the change in outcome resulted in a substantial change to the conservation of the species.

We have identified the following action that may meet the criteria detailed above:

Mexican Garter Snake; Not Warranted 12-Month Finding (September 26, 2006; 71 FR 56228)

Background: The administrative record documents that the Arizona Field Office drafted a 12-month finding that the species warranted listing, but that listing was precluded by higher listing priorities. The Regional Office agreed with that determination and sent a draft finding of warranted, but precluded to the Washington Office. It is clear from the administrative record that the DAS was involved in changes to drafts of the finding and that the determination was changed to being not warranted. However, the magnitude of her involvement in changing the outcome is not clear.

The significant portion of the range analysis in the finding was published before the Solicitor issued a memorandum opinion explaining the legal interpretation of what the term significant portion of the range means with respect to the Endangered Species Act (Act). The analysis in the finding does not comply with the Service's current position.

Recommendation: Because the definitively different outcome may have been due to intervention by the DAS contradicting the science and the significant portion of the range discussion is now inconsistent with the Solicitor's opinion, we recommend that the Service voluntarily revisit our determination of not warranted.

Other Decisions Reviewed

For the actions listed below, we believe that the administrative record shows that the DAS provided input or direction with respect to policy or economic issues. However, the change in outcome did not result in a substantial change to the conservation of the species. Further, remanding the actions would not be an efficient use of staff time and resources as it would not benefit the conservation of the species.

Comal Springs invertebrates proposed designation of critical habitat. The DAS made a policy decision to eliminate subterranean waters from critical habitat designation because they lacked the primary constituent elements necessary for the species. That action removed approximately 400 acres from critical habitat designation that were in the draft proposed rule. However, activities with a federal nexus that are conducted in areas outside the designated critical habitat may still affect critical habitat, subject to consultation requirements under section 7 of the Act, including actions that may occur within the Edwards Aquifer.

Southwestern willow flycatcher proposed designation of critical habitat. Scientific information indicates that almost all southwestern willow flycatchers return to re-establish breeding territories in habitat within 25 miles from their previous breeding or nascent location. The DAS made a policy decision to define dispersal distance as the maximum distance the majority of individual birds disperse and directed the Service to apply that definition in designating critical habitat. As a consequence, the Service reduced the extent of critical habitat from within 25 miles to within 18 miles of large breeding populations. We do not believe that this has affected recovery efforts for the bird.

Spikedace and loach minnow proposed designation of critical habitat. The DAS made a policy decision to define occupied habitat for the two fish as occupied within the previous ten years, which reduced the area of critical habitat that was proposed and eventually designated. We do not believe that this has affected our recovery efforts for the fish.