



United States Department of the Interior

FISH AND WILDLIFE SERVICE

300 Westgate Center Drive
Hadley, MA 01035-9589



In Reply Refer To:
FWS/Region 5/ES-TE

FEB 07 2011

Ms. Bethany Cotton
Center for Biological Diversity
1601 Connecticut Ave., N.W., Suite 700
Washington, D.C. 20009-1063

Dear Ms. Cotton:

On January 13, 2011, we received your letter and petition for a rule designating critical habitat for the Delmarva Peninsula fox squirrel, (*Sciurus niger cinereus*), under the Endangered Species Act (ESA) and the Administrative Procedure Act (APA). The U.S. Fish and Wildlife Service (Service) listed this species in 1967 without designating critical habitat. Your letter states that "Under the Endangered Species Act, this petition to designate critical habitat for a species listed prior to the 1978 Endangered Species Act amendments is treated as a petition to revise critical habitat." We are unaware of any special provisions of the ESA that would consider a request to designate new critical habitat for a species listed prior to 1978 as if it was a petition to revise previously designated critical habitat. The Service has discretion as to whether to designate critical habitat for species, such as the Delmarva Peninsula fox squirrel, that were listed prior to the 1978 amendments to the ESA (Pub. L. 93-205, 87 Stat. 884 (1973), codified at 16 U.S.C. 1536).

Section 4(b)(3) of the ESA, allows any interested individual to petition the Service to list, delist, or reclassify species, or revise a listed species' critical habitat. Because the petition provisions of the ESA are limited to listing, delisting, and reclassifying species and revising critical habitat, your requested action is not petitionable under the ESA. However, we do consider your request to designate critical habitat as a petition under section 553(e) of the APA.

On August 4, 2010, the Service published a Federal Register (FR) notice initiating a 5-year review for the Delmarva Peninsula fox squirrel (75 FR 47025). The purpose of a 5-year review is to evaluate whether a species' current ESA endangered or threatened classification is still accurate. At the end of a 5-year review, the Service will make a recommendation as to whether a species should be reclassified from threatened to endangered or from endangered to threatened, or delisted. As part of a 5-year review analysis, the Service may also make recommendations for future actions, including the need for designating critical habitat.

Ms. Bethany Cotton

2

Therefore, when we complete the 5-year review analysis for the Delmarva Peninsula fox squirrel, we will assess the need for designating critical habitat. At that time, we will notify you of our plan for any future rulemaking, including the designation of critical habitat. Thank you for your submittal of information and interest in this species.

If you have any questions, please contact Martin Miller, Chief, Division of Endangered Species, at 413-253-8615.

Sincerely,

A handwritten signature in black ink, appearing to read 'Moriarty', enclosed within a large, hand-drawn oval.

Acting Marvin E. Moriarty
Regional Director

FWS:R5:ES-TE:KGifford:cc:01.25.11:x8619