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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

COMMUNITY AND ECONOMIC
DEVELOPMENT DIVISION

April 1, 1982

The Honorable G. Ray Arnett
Assistant Secretary of the Interior
for Fish and Wildlife and Parks

Dear Mr. Arnett:

On July 2, 1979, we issued a report entitled "Endangered Species--A Controversial Issue Needing Resolution" (CED-79-65) that identified several program areas needing improvement. The report included recommendations to the Secretary of the Interior. The Endangered Species Act of 1973, as amended, expires on September 30, 1982.

We recently completed a review to determine the actions taken by the Department of the Interior in implementing the recommendations in our report. We found that the Department has taken actions on most of our earlier recommendations. The reported problems, recommended actions, and actions taken are discussed in the enclosure.

We found, however, that the Department has not completed action to finalize consultation regulations to (1) reflect changes in consultation requirements mandated by the 1978 and 1979 amendments to the act and (2) reflect our 1979 recommendation to include the minimum biological data needed to render biological opinions. This would permit any necessary data to be developed by other Federal agencies when they conduct biological assessments. (See p. 7 of the encl.)

We would appreciate being advised of Interior's position on the matters discussed in this letter. Copies of this letter are being sent to the Chairmen, Subcommittee on Fisheries, Wildlife Conservation and the Environment, House Committee on Merchant Marine and Fisheries, and the Subcommittee on Environmental Pollution, Senate Committee on Environment and Public Works; the Office of Management and Budget; other Department of the Interior officials; and other interested parties.

We appreciate the cooperation of your staff during our review. If you have any questions, please call me on 376-8212.

Sincerely yours,

Roy J. Kirk
Senior Group Director



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Enclosure

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REPORTED PROBLEMS AND ACTIONS TAKEN ON RECOMMENDATIONS
IN GAO'S JULY 2, 1979 REPORT ENTITLED "ENDANGERED SPECIES--
A CONTROVERSIAL ISSUE NEEDING RESOLUTION" (CED-79-65)

In our July 2, 1979, report, we identified several problems relating to the listing, consultation, and recovery processes and recommended corrective actions. This enclosure describes the problems, the recommended actions, and the actions taken by the Department.

LISTING PROCESS

The cornerstone of effective implementation of the Endangered Species Act is the process to determine which species should be listed as endangered or threatened and which listed species should be reclassified or removed from the lists (delisted). Listing is critically important because it sets in motion the act's other provisions, including the protective regulations, consultation requirements, and recovery efforts.

Listing policies and procedures

We reported that the Fish and Wildlife Service (FWS) had not consistently applied existing policies, procedures, and practices used to list species. We said that this could jeopardize the existence of some species while increasing conflicts with projects and programs.

We recommended that FWS apply the same policies and criteria to all biologically eligible species, including those whose listing may conflict with ongoing or planned projects and programs.

We found no indications that FWS is inconsistently applying policies, procedures, or practices in its listing process. However, as discussed in the following section, the listing rulemaking process has been slowed considerably.

Rulemaking procedures

We reported that FWS had not developed adequate procedures and time frames to process regulations for species status determinations. Each species listing, delisting, or reclassification must be published in the Federal Register. Tardiness in publishing final listing regulations had delayed protection for the species involved.

We recommended that FWS expedite the review and approval of draft rulemakings relating to species status determinations.

Our followup inquiries indicated that rulemaking procedures at Interior have not been expeditious because of confusion

between the Office of Endangered Species and the Office of the Solicitor about economic impact requirements for determinations of effects of rules. The problem appears to be an inconsistency between the economic analysis requirements of the Endangered Species Act and those of Executive Order 12291.

The statutory basis for listing a species is section 4(a)(1) of the Endangered Species Act, which states that the Secretary shall determine if a species is endangered or threatened because of any of five specific factors, none of which are economic considerations.

The Secretary is also required "to the maximum extent prudent" to specify any habitat of the species which is then considered to be critical. The Secretary is to consider the economic impact of specifying the habitat. This is one of only two instances in the act (the other relates to the exemption process) where economic impact is to be considered.

Executive Order 12291, dated February 17, 1981, requires all agencies, to the extent permitted by law, to prepare regulatory impact analyses to assess the potential costs and benefits of proposed rules. Before a proposed listing action rule (to list, change a species' status, or delist) can be processed through Interior, the Office of Endangered Species must prepare a determination of effects of rules to satisfy Executive Order 12291. The determination is also to comply with the Regulatory Flexibility Act of 1980 and the Paperwork Reduction Act.

The Office of Endangered Species prepares a determination of effects for each proposed listing action rule. This document is subsequently reviewed by various offices, including the Office of the Solicitor. The Office of Endangered Species, however, has not been very successful in obtaining the Office of the Solicitor's approval for its determination packages.

The following table shows determination of effects of rules prepared by the Office of Endangered Species during 1981 and Office of the Solicitor approvals.

	<u>Proposed listing</u>	<u>Proposed reclassification from endangered to threatened</u>	<u>Proposed delisting</u>
Determination of effects of rules proposed	38	3	5
Approved by Office of the Solicitor	8	1	5

The Office of the Solicitor reviewer told us that FWS-prepared determinations of effects of rules lack substantive information to comply with Executive Order 12291. On the other hand, Office of Endangered Species officials said that the Office of the Solicitor is requiring more than is necessary.

In a December 11, 1981, memorandum to FWS' Associate Director for Federal Assistance, the Chief, Office of Endangered Species, FWS, stated:

"The Office of Endangered Species has spent many months attempting to satisfy the demands of SOL [Office of the Solicitor] on Determination of Effects for listing. The efforts of OES [Office of Endangered Species] to be responsive to such comments are clearly documented. Notwithstanding these efforts, SOL is unwilling, unable, or incapable of establishing consistent standards which will satisfy their requirements."

In March 1982, the Associate Solicitor for Conservation and Wildlife, in a memorandum to the Director, FWS, issued criteria for determinations of effect for Endangered Species Act rulemakings. The memorandum pointed out that the essential criteria for a determination of effects are: (1) The expected effect of the rule on the economy and on small entities must be clearly indicated and (2) the basis for these findings must be summarized. The memorandum further translated these general criteria into more specific requirements.

This criteria should help to eliminate some of the confusion which existed between the Office of the Solicitor and the Office of Endangered Species about what constitutes an acceptable determination of effects for an endangered species rulemaking. The effect this criteria will have on the Office of Endangered Species producing determinations acceptable to the Office of the Solicitor remains to be seen.

Petitions from interested persons

We reported in 1979 that FWS had not established adequate procedures to identify, review, and act on species included in petitions from interested persons. As a result, some potentially endangered and threatened species had not been considered for listing.

We recommended that FWS develop adequate procedures to identify, review, and act on petitions to change the statuses of species.

FWS issued rules (50 CFR 424.14) on February 27, 1980, regarding listing endangered and threatened species and designating

critical habitat. The rule require FWS to determine whether substantial evidence has been presented in support of the measure recommended by the petitioner. Substantial evidence is defined as "that amount of evidence that would lead a reasonable person to conclude that the measure proposed in the petition is warranted." The regulation identifies factors FWS is to consider in making the determination and specifies procedures for processing the petition after the determination has been made.

Listing priority system

We reported that FWS had not implemented a priority system to serve as a guide in selecting candidate species for review and listing. Consequently, factors not directly related to biological vulnerability had received undue priority in listing decisions. These factors included availability of information, geographical and species preferences of the FWS biologists, personal preferences of Interior officials, and public pressures. We recommended that FWS implement a priority system based on degree of threat to select species for review and listing and that it allocate staff and funds accordingly.

In 1980 FWS developed a priority listing system as we recommended. In July 1981, FWS prepared proposed guidelines that established three factors in determining each candidate species' priority for listing: (1) an estimate of the degree of threat, (2) the taxonomic group (such as mammals or birds), and (3) a species/subspecies or population factor.

Under the revised guidelines, within any degree of threat, species in higher level taxonomic groups will receive priority consideration for listing. FWS-established priorities for listing species in taxonomic groups are as follows:

- Mammals
- Birds
- Fishes
- Reptiles
- Amphibians
- Vascular plants (plants having specialized tissues that conduct water and synthesized foods)
- Insects
- Mollusks
- Other plants
- Other invertebrates

Because the revised guidelines give priority to species of higher taxonomic status within a given degree of threat, a mammal subspecies, for example, could be listed before a bird species.

The August 1981 FWS Endangered Species Technical Bulletin reported that this system would probably preclude listing activities related to species lower than vascular plants during fiscal year 1982. The Bulletin explained that limited FWS resources and the large number of high threat vertebrates and vascular plants remaining to be listed are responsible for these limitations.

Staffing and funding resources for the listing process

We reported that FWS had not requested staff and funds for the listing process commensurate with its priority within the endangered species program. Only 18 of the 323 staff involved in the endangered species program as of October 1, 1978, were assigned primarily to the listing process. This limited both the number of listings in fiscal year 1978 and needed status surveys on listed and unlisted species.

We recommended that FWS fund the listing process commensurate with its priority, which should be the highest within the endangered species program.

Funding for the listing process increased from about 13 percent of the endangered species budget in fiscal year 1979 to 18 percent of the budget in fiscal year 1981. During 1981, the administration revised the priority to place a greater emphasis on endangered species recovery. Consequently, about 11 percent of the 1982 endangered species' budget was for listing.

Periodic review of listed species

We reported that FWS had not periodically reviewed listed species or established criteria to determine if their statuses had changed. Consequently, species which may have qualified for delisting or reclassification as threatened could have continued to be listed improperly, creating unnecessary conflicts that resulted in resources being spent needlessly for recovery efforts on these species.

We recommended that FWS promptly delist and reclassify listed species when their futures are reasonably secure or when their status has improved. We added that degree of threat should be the primary criterion used for reclassification.

The Congress amended the act in the 1978 to require the Secretary to review all listed species at least once every 5 years and determine whether any such species should be delisted or be reclassified from endangered to threatened or from threatened to endangered.

Interior has since implemented this periodic review process.

Information exchange system

We reported that FWS had not established a system to exchange information on listed, proposed, and candidate species among Federal agencies and the States. Rather, a hodgepodge network of Federal and State information systems had been developed, resulting in duplication of staff and financial resources.

We recommended that a system be established to exchange information on listed, proposed, and candidate species among Federal agencies and the States.

FWS agreed with our recommendation and plans to have a computerized information exchange system operational by September 30, 1983. The system is intended to make endangered species' natural history and technical data available on a national scale to Federal, State, and other users quickly.

CONSULTATION PROCESS

Federal agencies that determine that their activities may affect endangered or threatened species must consult with FWS to resolve any potential conflicts. After a Federal agency identifies an action that may affect a listed species or its habitat, the formal consultation process begins when the agency makes a written request to FWS for consultation. It ends when FWS issues a biological opinion on the action's impact on the species.

We reported that FWS had continually improved the consultation process; however, conflicts involving ongoing and planned projects and programs had not always been identified or resolved promptly. Improvements were needed to avoid unnecessary project delays and adverse impacts on endangered and threatened species and their critical habitats.

Interior agencies' consultation

We reported that some Interior agencies had not adequately reviewed their programs to identify potential conflicts and that potential conflicts identified had not always been promptly resolved.

We recommended that the Secretary of the Interior direct all Interior agencies to review projects and programs they administer to determine their impact on endangered and threatened species and monitor agency compliance and the consultation initiated to resolve the conflicts identified.

The Chief, Office of Endangered Species, told us that he is satisfied that all Interior agencies are making good faith efforts to comply with the act's consultation requirements.

Consultation regulations

We reported that some biological opinions, detailing how Federal projects and programs affected listed species and their critical habitats, had not been rendered expeditiously. FWS officials had told us that an inadequate number of staff and related problems and the failure of Federal agencies to provide information were responsible for these delays.

We recommended that FWS identify and include in the section 7 (consultation) regulations the minimum biological data required to render biological opinions so that any necessary data can be developed by other Federal agencies when they conduct biological assessments.

The section 7 regulations have not been revised since we issued our 1979 report and do not reflect either the 1978 or 1979 amendments. The Deputy Associate Director for Federal Assistance, FWS, told us that the Department has decided not to formally propose revised regulations until the results of Congressional deliberations to extend the Endangered Species Act beyond September 1982 are known.

Consultation administration

We reported that FWS had not developed adequate procedures to identify where consultations were occurring so that resources, including staff, could be allocated accordingly. We recommended that FWS develop procedures to accurately identify the number and complexity of consultations with other Federal agencies.

Each FWS regional office now submits a quarterly "Section 7 Consultation Log" to the Office of Endangered Species. This log shows the consulting agency, project, location, species involved, the consultation initiation date, and both formal and informal consultations.

In addition to the consultation log, the Office of Endangered Species receives a copy of each biological opinion developed in the field.

RECOVERING ENDANGERED OR THREATENED SPECIES

A goal of the endangered species program is to return a listed species to the point where it is no longer endangered or threatened, or to at least stabilize its status. We reported that for some species, listing and the protection provided, including strong

enforcement, were enough to expedite its recovery while for other species an abbreviated recovery plan requiring a simple action, such as a single land acquisition, was sufficient.

On the other hand, more involved plans were required for widespread species or groups of species whose status or habitats had deteriorated badly and whose recovery entailed numerous actions by more than one organization. Abbreviated plans could be prepared by a team, an FWS employee, or other knowledgeable individuals, while more involved plans were usually prepared by a team.

We reported that FWS had success in improving the status of species requiring simple actions, especially single land acquisitions. However, progress had been slow in effecting the recovery or stabilization of species requiring more involved plans. Further, approved FWS recovery plans had not resulted in any species being delisted and had resulted in only one species being reclassified from endangered to threatened at the time of our earlier review.

Recovery priority system

We reported that recovery planning and resource allocations were not guided by a priority system and recommended that FWS approve and implement the draft recovery priority system for recovery planning and resource allocation.

The Chief, Office of Endangered Species, told us that a recovery priority system, based on degree of threat, recovery potential, and species/subspecies determination, was adopted in 1979.

In November 1981, the recovery priority system was revised. The revised system is based on degree of threat, taxonomic status (these two factors are identical to the listing priority system factors), recovery potential (high and low) and a species/subspecies determination. The revised recovery system will therefore give a higher priority to a highly threatened mammal subspecies with a low recovery potential than a highly threatened bird species with a high recovery potential.

Recovery plans

We reported that few recovery plans had been developed and implemented. Recovery plans are needed to order priorities and identify additional actions deemed essential to the survival or recovery of species.

We recommended that FWS reassess the process of developing, approving, implementing, and evaluating recovery plans and take

actions necessary to make the process more timely and the plans more meaningful.

As of October 31, 1981, 44 recovery plans had been approved, compared with 18 approved plans 3 years earlier. The Chief, Office of Endangered Species told us that FWS recovery efforts had been revised to correct the previously identified problems. One revision has been the use of a phased recovery process which includes identifying significant, practical and short-term recovery actions and implementing these actions.

Land acquisition practices

FWS' land acquisition policies, dated August 8, 1977, state that land will be acquired only when other means of achieving program goals and objectives are no longer available and/or effective. All alternatives for protecting the habitat must be exhausted before resorting to acquisition.

We reported that funds had been obligated to acquire land when viable alternatives existed. The survival of some species had been threatened by the destruction or adverse modification of their habitats. To counter this, FWS had obligated funds to buy land to protect endangered and threatened species. However, funds continued to be obligated to acquire additional land for species whose degree of threat had diminished and/or when viable alternatives to Federal land acquisition existed. This had permitted the status of other species to become more precarious because essential habitat had not been obtained and had increased the number of Federal land acquisitions and corresponding funds expended.

FWS said that although FWS policy states that established program criteria will be used in deciding if lands or waters will be acquired for endangered and threatened species, the program criteria are intended to serve only as guides in the decision-making process and are not absolute prerequisites to acquisition.

The Chief, Office of Endangered Species, maintained FWS's previous position that program criteria are only flexible guidelines and that its land acquisitions have been consistent with the program criteria.

State participation

The act encourages States to establish and maintain adequate and active conservation programs for endangered and threatened species. Federal assistance is authorized on a two-thirds matching basis to States that meet certain criteria and have signed cooperative agreements with FWS.

We reported that in fiscal year 1978, about \$5.5 million was allocated to States for approved grant-in-aid projects but that as of October 1, 1978, only 22 States had entered into cooperative agreements. Consequently, State staff and resources, essential to preserve U.S. fish and wildlife from extinction, had not been committed to the Federal endangered species program. We recommended that FWS reassess what actions could be taken to increase State participation in the endangered species program.

By October 31, 1981, FWS had signed fish and wildlife cooperative agreements with 38 States. However, Federal grant funds for State projects were eliminated entirely from the the fiscal year 1982 budget and none have been proposed for fiscal year 1983. The effect this will have on State participation in the Federal endangered species program will depend partly on how much funding the States provide.

Enforcement and prosecution

We reported that although there had been some notable prosecutions and convictions under the act, improvements could further deter violations and increase protection for listed species. We also reported that FWS enforcement personnel had been unable to deter endangered species violations on Indian tribal lands because their authority on reservations had not been clearly defined.

We recommended that enforcement and prosecution under the act be strengthened by (1) implementing an automatic data processing system to assist in making management decisions, and (2) exploring with the Department of Justice how to increase the number of criminal cases prosecuted and to seek penalties commensurate with the violations. We also recommended that the Secretary direct the Solicitor to render an opinion immediately to resolve FWS enforcement personnel's jurisdictional authority on Indian tribal land.

FWS' Division of Law Enforcement expected to award a contract around March 1982 for an automatic data processing system called the Law Enforcement Management Information System. FWS expects to have the system fully operational around the start of fiscal year 1983. The system is to provide, among other things, a complete history of all cases undertaken by the division.

Further, in 1979, the Department of Justice established a Wildlife and Marine Resources Section in its Land and Natural Resources Division. The division's Assistant Attorney General told us that the section devotes a major part of its efforts to Endangered Species Act cases. Since 1979, the section has prosecuted or assisted in prosecuting about 70 Endangered Species Act cases, supervised over 140 forfeiture actions under the act, and defended 13 major civil cases.

The Wildlife and Marine Resources Section also advises FWS and other Federal agencies on matters which do not result in litigation. The section's acting chief told us that section attorneys work closely with FWS on violations of the act and have succeeded in impressing on U.S. attorneys and the courts the need to prosecute Endangered Species Act cases.

In September 1979 the Wildlife Law Enforcement Coordinating Committee was formed. Committee members are representatives of the Departments of Justice, Interior, Agriculture, Commerce and Treasury. The committee is to coordinate the member agencies' investigative activities. The committee head, the Chief of FWS' Division of Law Enforcement, told us that task forces are being formed to analyze particular issues such as the taking of listed species across U.S. borders.

In November 1981 the Congress enacted the Lacey Act Amendments of 1981 (Public Law 97-79) to provide stiffer criminal penalties for wildlife violations than the Endangered Species Act provides.

On the question of FWS' authority on Indian tribal lands, Interior's Solicitor rendered an opinion on November 4, 1980, that Indian hunting and fishing rights do not include the right to take species listed as threatened or endangered under the act. Interior's Assistant Solicitor for Fish and Wildlife told us that this opinion grants FWS enforcement personnel authority to enforce the act with respect to alleged violations by Indians both on and off tribal land.