

Congress of the United States

Washington, DC 20515

April 18, 2007

The Honorable Dirk Kempthorne, Secretary
Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Dear Secretary Kempthorne:

We are concerned about draft Endangered Species Act (ESA) regulations that were recently made public through an apparent internal leak in the US Department of the Interior. We understand that this document is not final or ready for public consumption. However, it raises Congressional concerns about the possibility that the Department of Interior may attempt to make significant changes to the statute without Congressional involvement.

As you know, Congress considered controversial statutory changes to the ESA a few years ago. In reviewing these proposed regulations, we notice that a number of the same changes, which were not passed into law by Congress, are being considered for regulatory changes within the US Fish and Wildlife Service (USFWS). Nearly every aspect of the law would be affected by this proposal, including endangered species recovery, consultation, listing, critical habitat, and cooperation with the states.

We object to any administrative attempt to rewrite the ESA, and we believe a number of proposals in the draft regulations rise to the level of statutory changes. Specifically, the draft regulations:

1. Change the criteria for determining a species to be “threatened” so that it must be endangered or extinct or within an arbitrarily shortened time period. In order for a species to be considered “endangered” or “threatened”, it requires that the species would have to be in danger throughout its entire range, unlike current regulations.

Currently, a species is considered “endangered” if it is in danger of extinction throughout all or a significant portion of its range. The term “threatened species” means any species likely to become endangered within the foreseeable future throughout all or a significant portion of its range. “Range” includes both currently occupied and historic range of a species. The draft regulations would change this to include only areas currently occupied by the species. They would also change the definition of “foreseeable future” to mean 20 years or 10 generations, which does not adequately take into consideration the biology of individual species as intended by Congress. For example, 10 generations is a short time for butterfly species living only a few weeks and 20 years is much too long a time period to use to measure their decline and effectively prevent its extinction.

2. Allow the USFWS to avoid designating “critical habitat” for a listed species if it is not specifically in danger from habitat loss.

Under current law, the USFWS must designate critical habitat for a species when it is listed, with narrow exceptions. The protection of habitat for a species ensures that it is available when the species is once again in sufficient numbers to be “recovered”—or no longer in need of protection under the ESA. This change specifically rejects the intent of Congress in requiring the establishment of critical habitat under the ESA.

3. Virtually remove the requirement that federal agencies consult with the USFWS when taking action that may “jeopardize the continued existence” of listed species or “destroy or adversely modify” habitat critical to listed species;

The Endangered Species Act prohibits federal agencies from jeopardizing the continued existence of listed species or causing “destruction or adverse modification” of critical habitat areas. Currently, agencies must receive from the USFWS a finding of “no adverse modification” to critical habitat or “no jeopardy to the continued existence of the species” -- or instructions on how to modify the agency action. The USFWS determines which agency actions, under these requirements, must be mitigated or modified. Under the draft regulations, the acting agency is responsible only for the impact on listed species of actions over which it believes it has legal discretion and which are known to actually harm the listed species. The acting agency would be solely responsible for making these determinations and would need only enter into agreements with other agencies (not necessarily the USFWS) to meet the consultation obligation. This effectively nullifies the Congressional intent for the consultation process under ESA.

4. Lower the standard that indicates when a federal agency action is jeopardizing the continued existence of a listed species, so that the action can be modified; and

The ESA and current regulations do not allow actions of federal agencies to jeopardize the continued existence or recovery of a listed species. The draft regulations change this to allow such actions to continue unless they “appreciably increase the risk of extinction.” The draft regulations also remove the regulatory definition of “recovery” altogether. This represents a dramatic change in the current standard.

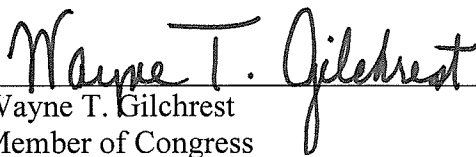
5. Delegate significant federal authority to the states.

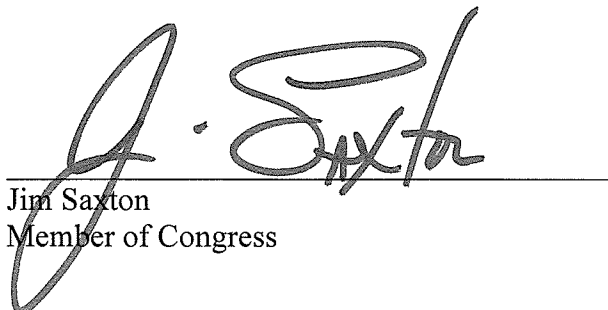
The draft regulations establish that states may request and may be given the lead role in almost every aspect of the Act, including, but not limited to, Section 4, Section 7, and Section 10. While states are essential partners in the conservation of endangered species, the ESA does not permit such significant delegation of federal authority to states. Should this proposed authority be fully implemented at the state level, the protection of rare and wide-ranging species would be subjected to a patchwork of authorities. Species and habitats are not confined within political boundaries.

The Endangered Species Act is a landmark conservation law that has provided a critical safety net for species on the brink of extinction. Any broad changes to the ESA, which is a cornerstone of conservation in America—must have the full deliberation of the United States Congress.

As always, we look forward to continuing to work with you to increase funding and improve implementation of the Endangered Species Act.

Sincerely,


Wayne T. Gilchrest
Member of Congress


Jim Saxton
Member of Congress