COMMITTEE ON LEGAL ISSUES PERTAINING TO ANIMALS

JANE HOFFMAN
CHAIR
55 WEST 14TH STREET, SUITE 8D
NEW YORK, NY 10011
Phone: (212) 243-5423
Fax: (212) 675-4534
jehoffman@earthlink.net

KELLEY WIND
SECRETARY
440 KENT AVE, APT 18A
BROOKLYN, NY 11211
Phone: (914) 381-6177
kdwind@yahoo.com

February 25, 2009

Ken Salazar, Secretary
United States Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Secretary Salazar:

The New York City Bar Association (the "Association"), founded in 1870, is a private, non-profit organization of more than 23,000 attorneys, judges and law professors, and is one of the oldest bar associations in the United States. The Association's Committee on Legal Issues Pertaining to Animals ("LIPTA") regularly addresses legal, regulatory, and policy issues on a local, state and national level affecting non-human animals, both wild and domestic. LIPTA welcomes this opportunity to submit specific recommendations to consider as you develop the USDI's policies relating to endangered species and their habitat.

There are several actions that the USDI can undertake to prevent or delay the extinction of endangered species and to ensure that their habitat is preserved. As explained in detail below, the Association respectfully makes the following recommendations:

1) Repeal the USDI Solicitor's memorandum to the Director of the U.S. Fish & Wildlife Service, dated March 16, 2007 – M-37013 and redefine "in danger of extinction throughout all or a significant portion of its range" to define "range" to include its historic as well as its current range;

2) Clarify the regulations to the Endangered Species Act of 1973, 16 U.S.C. §§1531-1540 ("ESA"), with respect to the definition of "critical habitat" by codifying the holding in the 9th Circuit case of *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*;

3) Revoke an amendment to 50 CFR § 402.02;

4) Amend the ESA and the Marine Mammal Protection Act with respect to situations where national defense or military purpose are allegedly involved, to require an evidentiary showing in order to permit an adverse impact upon or destruction of critical habitat; and

5) Reconsider decisions resulting in the delisting of animals from the list of threatened or endangered species; for example, amend 50 CFR in 73 FR 1014514-01 (2008 WL 503986, eff. March 28, 2008), which removed the Rocky Mountain grey wolf from such list.

1. Repeal the USDI Solicitor's memorandum to the Director of the U.S. Fish & Wildlife Service, dated March 16, 2007 – M-37013 and redefine "in danger of extinction throughout all or a significant portion of its range" to define "range" to include its historic as well as its current range.

Under the ESA, a species is "endangered" if it is "in danger of extinction in all or a significant portion of its range." (16 U.S.C. §1532(6)(2006)). The Solicitor General's March 16, 2007 Memorandum to the Director of the U.S. Fish & Wildlife Service opined that only the species' current range could be considered. The reasoning was that if the range was historic, the species was not endangered because it no longer existed there but was already extinct. According to this Memorandum, the ESA and the regulations thereunder were therefore inapplicable. Although the Memorandum is only precatory, it is influential. It contradicts the clear intent of Congress and relevant decisional law. Accordingly, we recommend its official revocation and the issuance of a clarifying memorandum to the effect that historic range must be considered.

First, Congress specifically enunciated its intent to accomplish restoration, where practicable, not just forestall extinction. 15 U. S. C. section 668dd authorized the Wildlife Refuge System in Alaska and, *inter alia,* provided for further coordination by the Secretary of the Interior of game preserves and wildlife management. Subdivision 2 of that statute provides: "The mission of the (Wildlife Refuge) System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." Such a purpose would be virtually impossible to accomplish were historic range to be ignored and extinction rewarded, which would be the effect of a literal application of the Memorandum.

Second, in deciding an appeal of a lawsuit to compel the listing of the flat-tailed horned lizard as threatened, *Defenders of Wildlife v. Norton,* 258 F3d 1136, 1145 (9th Cir. 2001), the Court stated, "We conclude, consistent with the Secretary's historical practice, that a species can be endangered 'throughout a significant portion of its range' if there are major geographical areas in which it was once viable but no longer is. ...Where, as here, it is apparent on the record, that the area in which the lizard is expected to survive is much smaller than the historic range, the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a 'significant portion of its range'" This Ninth Circuit decision has been followed by several Federal District Courts. (*See, e.g., Nat'l Wildlife Federation v. Norton*, 386 F. Supp. 2d 553 (D.Vt. 2005); *Defenders of Wildlife v. Secretary, U. S. Dept. of the Interior,* 354 F. Supp. 2d 1156 (D. Or. 2005); *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9 (D. D. C. 2002)).

2. Clarify the regulations to the ESA with respect to the definition of "critical habitat" by codifying the holding in the 9th Circuit case of *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service.*

The ESA prohibits development that destroys or adversely impacts upon the critical habitat of a threatened or endangered species. Destruction and adverse impact upon a critical habitat is defined in the Federal Regulations, 50 CFR § 402.02, as a "direct or indirect alteration that appreciably diminishes the value of critical habitat for both the recovery and survival of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for the determination of the habitat to be critical."

The Court found in *Gifford Pinchot Task Force* v. *U. S. Fish and Wildlife Serv.*, 378 F.3d 1079 (9th Cir. 2004), that, in deciding whether a modification is destructive or adverse, it must recognize that a species needs more critical habitat for recovery than for mere survival. The Court in *Gifford, supra,* therefore held, among other things, that the failure of the Fish and Wildlife Service to take that fact into account in issuing logging permits in areas inhabited by the threatened spotted owl was error, and the plaintiff environmental organizations had a partial victory in that case. This holding in *Gifford Pinchot*, while binding in the Ninth Circuit, is merely persuasive authority nationwide, and followed only in a few other circuits according to precedents cited in *Gifford Pinchot*.

Accordingly, it is recommended that the Federal Regulations be clarified by amending the definition of "critical habitat" in the Federal Regulations, 50 CFR § 402.02, in order to incorporate the *Gifford Pinchot* holding. Such amendment would state that any evaluation as to whether an impact is "adverse" must consider that such impact could significantly impede recovery of a species in violation of the intent of the ESA though not be sufficiently drastic as to completely destroy the habitat and cause the species' extinction. Such an amendment would have the advantage of clear nationwide application in its fulfillment of the Congressional intent to promote species' recovery, as well as prevent species' extinction.

3. Revoke an amendment to 50 CFR § 402.02.

We recommend that an amendment to the Federal Regulations be withdrawn in its entirety. The proposed amendment was first published and available for comment in the Federal Register at 73 Fed. Reg. 47868 on Aug. 15, 2008. It was enacted with only an environmental assessment and no environmental impact statement published and one major change on December 16, 2008. One of its most ill–advised proposals changed key definitions in 50 CFR § 402.02 applicable to the ESA. It amended the definition of "biological assessment", *i.e.*, .the documented information prepared by the Federal agency to determine if a proposed action will directly or indirectly destroy or adversely impact upon critical habitat of a threatened or endangered species, is incompatible with the intent of the ESA. The amendment states that no indirect adverse impact will be found unless it can be shown with reasonable certainty that the proposed action upon the critical habitat would be the essential cause of any destruction or adverse effect.

Such a heavy burden of proof in this proposed amendment to 50 CFR § 402.02 contradicts the "plain intent of Congress in enacting (the Endangered Species Act)…to halt and reverse the trend toward species extinction, whatever the cost." *T. V. A. v. Hill*, 437 U. S. 153,

184 (1978) (halting the construction of the Tellico dam, though it was approximately 80% completed, was necessary to preserve the critical habitat of the endangered snail darter fish). Further, there is no definition of "essential cause" and it is unclear whether it would be enough if the proposed action is a contributing cause. In fact, one can easily argue that the burden should be the opposite of the proposal—that an indirect adverse impact shall be found unless it can be shown with reasonable certainty that the proposed action upon the critical habitat would not be any cause of any destruction or adverse effect. In addition, the amendment, in an alleged effort to expedite the decision-making process, weakens the requirements for consultation, *e.g.*, in certain instances, the government agencies can decide that the adverse impact would be negligible without scientific consultation; time limits are set for responses; in the absence of a response, the person requesting an action in certain instances can assume approval.

Finally, on December 16, 2008, the final version of the amendment as enacted specifically eliminated any requirement that global warming could contribute to adverse impact on critical habitat. In publishing the amendments in the Federal Register, the USDI stated, *inter alia,* " there is no requirement to consult on greenhouse gas (GHG) emissions' and its contribution to global warming and associated impacts to listed species (e.g. polar bears)." (73 FR, *supra*, at 47872). While an environmental assessment of the proposed amendment had been prepared as required by the ESA, no environmental impact statement had been prepared and published. Consequently, the Natural Resources Defense Council, Earthjustice, and others commenced a lawsuit for declaratory and injunctive relief on the ground that it violates the ESA and the National Environmental Policy Act (42 U.S.C. 4321 §§ et. seq.). (*Natural Resources Defense Council et. al. v. United States Department of the Interior*, Civ. No. CO 8, U.S. Dist. Ct. N.D.Cal. 2008)). This further supports our recommendation that this regulation be revoked in its entirety.

4. Amend the ESA and the Marine Mammal Protection Act, with respect to situations where national defense or military purpose are allegedly involved, to require an evidentiary showing in order to permit an adverse impact upon or destruction of critical habitat.

The ESA and the Marine Mammal Protection Act permit "taking", *i.e.*, they permit adverse impact upon or destruction of critical habitat of an endangered or threatened species when such impact or destruction is necessary for national defense or a military purpose. (*See* 16 U.S.C. § 1531). However, the law should, but does not, presently require that, as a condition precedent to a taking, there should be an obligation to show evidence of an imminent threat to our national security and /or that the particular habitat is the only reasonable venue in which to test particular weapons or conduct military exercises.

There are federal precedents, relating to animals, where this kind of minimal showing is required before an action is permitted. Two precedents in federal statutes exist in the Animal Welfare Act ("AWA") and the ICCVAM (Interagency Coordinating Committee on the Validation of Alternative Methods). The AWA provides, *inter alia,* that the principal investigator of the research facility must consider alternatives to any procedure likely to produce pain or distress in an experimental animal. (7 U.S.C. § 2145(3)(B)). The ICCVAM states that one of its main goals is to "reduce, refine, or replace the use of animals in testing, where feasible." (42 U.S.C. § 285l-3(b)(5)). In this case, involving alleged national defense or military purpose, there should be a showing that alternatives were explored before the statutory military exemption to the destruction of critical habitat is invoked. A similar attempt to first seek alternatives to any weapons testing or other military activity that adversely impacts on critical habitat would

appropriately balance the issue of public safety against the impact on species and their environments.

5. Reconsider decisions resulting in the delisting of animals from the list of threatened or endangered species; for example, amend 50 CFR in 73 FR 1014514-01 (2008 WL 503986, eff. March 28, 2008), which removed the Rocky Mountain grey wolf from such list.

There are many issues that are species-specific and we have, in this letter , not studied such issues and have assumed that organizations that have specific expertise with respect to specific species will provide their advice to the new Administration. However, some species-specific issues nevertheless interface with the ESA and appear to be contrary to its mandate. The issue of delisting the Rocky Mountain grey wolf is such an example.

The Rocky Mountain grey wolf was removed from the list of threatened or endangered species, joining the three other subspecies of grey wolves (*canus lupus*) delisted in recent years. The original listing of these grey wolves was predicated upon evidence that they were on the verge of extinction. In the published amendment to the CFR in 73 FR 1014514-01, the Department of the Interior noted in Issue 9 that "Many pointed out that the states will manage the NRM (North Rocky Mountain) wolf population for fewer wolves than currently exist. Others recommend that we recognize that wolf numbers can fluctuate dramatically." In Response 9, the Department even conceded that "the delisted NRM DPS (Distinct Population Species) wolf population may be reduced from its current levels of around 1, 500 wolves after delisting."

In light such evidence, and the mandate of the ESA that careful consideration and extensive documentation support a decision that could impact on wildlife, we recommend that the USDI revisit this issue.

* * *

There are many important issues, bills, and court decisions relating to endangered species that have not been addressed in this memo, which is limited to a handful of issues on which we feel the USDI could take swift action. LIPTA welcomes the opportunity to work with the USDI and the Obama Administration on the vitally important issues discussed in this letter as well as any other issues relating to animals and their habitat. Please contact us if you have questions about our recommendations, would like more information, or would like to see further support for the matters we have raised above. You may reach the Committee on Legal Issues Pertaining to Animals by contacting Jane Hoffman, Committee Chair, at jehoffman@earthlink.net

Thank you very much for your attention and concern.

Sincerely,

Jane Hoffman

CC: Joseph I. Lieberman, Chairman, Private Sector and Consumer Solutions to Global Warming and Wildlife Protection
Senator John Barrasso, Ranking Member

Nick J. Rahall II, Chair, Committee on Natural Resources
Doc Hastings, Ranking Member

Madeleine Z. Bordallo, Guam, Chair, Subcommittee on Insular Affairs, Oceans and Wildlife
Henry E. Brown, Jr., Ranking Republican Member

Senator Charles E. Schumer
Senator Kirsten Gillibrand

New York Congressional Delegation