

March 10, 2010

Secretary of Interior Ken Salazar
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Secretary of Commerce Gary Locke
Department of Commerce
1401 Constitution Avenue, N.W.
Washington, DC 20230

Re: Critical Habitat, Recovery and the Definition of “Adverse Modification”

Dear Secretaries Salazar and Locke:

We are writing to you concerning potential changes to the regulatory definition of “adverse modification” of critical habitat and to encourage you to adopt a definition that strengthens protection for our Nation’s endangered species. In particular, we encourage you to adopt a definition that recognizes that areas designated as critical habitat are essential to the conservation of threatened and endangered species and thus degradation of any area of critical habitat constitutes adverse modification. More generally, we urge you to maintain and strengthen the Endangered Species Act consultation process for all listed species and their habitats.

Under the current regulations developed in 1986, destruction or adverse modification of critical habitat is defined as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival *and* recovery of a listed species” (50 CFR 402.02). This definition has been rejected by the courts because it collapsed the statutory standard for federal agencies to avoid destroying or adversely modifying critical habitat with their duty to avoid jeopardizing the continued existence of species by requiring that adverse modification diminish both recovery and survival of species. *Gifford Pinchot Task Force v. United State Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004); *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001). The Ninth Circuit in *Gifford Pinchot* could not have been plainer, concluding that the regulation “finds that adverse modification to critical habitat can only occur when there is so much critical habitat lost that a species’ very survival is threatened,” which would “drastically narrow the scope of protection commanded by Congress under the ESA.” The court further added:

To define ‘destruction or adverse modification’ of critical habitat to occur only when there is appreciable diminishment of the value of the critical habitat for both survival *and* conservation fails to provide protection of habitat when necessary only for species’ recovery. The narrowing construction implemented by the regulation is regrettably, but blatantly, contradictory to Congress’ express command. Where Congress in its statutory language required “or,” the agency in

its regulatory definition substituted “and.” This is not merely a technical glitch, but rather a failure of the regulation to implement Congressional will.

Gifford Pinchot Task Force, 378 F.3d at 1070. Given the court’s conclusion, it is clear that a new definition must be promulgated consistent with the statute. We suggest the following: “a direct or indirect alteration that appreciably diminishes the value of any portion of any area of designated critical habitat for either the survival or recovery of a listed species.” We further ask that you clarify that “appreciably diminishes” be defined as any action that would destroy or degrade any primary constituent element such that the habitat would be, measurably or perceptibly, of less value to the species.

This definition both replaces “and” with “or” in response to the appellate courts’ determination that requiring adverse modification to affect both the survival and recovery of endangered species is illegal, and clarifies that adverse modification does not have to diminish the value of all critical habitat for a species, but rather “any area.” This latter clarification is necessary to avoid piecemeal destruction of critical habitat by precluding the argument that destruction of any particular area will not diminish the value of critical habitat as a whole. In sum, critical habitat brings significant benefits to the recovery process of listed species, clarifies vital primary constituent elements of affected ecosystems, and fosters more enlightened conservation cooperation.

Thank you for your careful consideration of this matter.

Sincerely,



Noah Greenwald
William J. Snape, III
Center for Biological Diversity

Also on behalf of:

Oceana
Biodiversity Conservation Alliance
Conservation Northwest
International Fund for Animal Welfare
Siskiyou Project
Gulf Restoration Network
Greenpeace, Inc.
RESTORE: The North Woods
Union of Concerned Scientists
Environmental Protection Information Center
Klamath Forest Alliance
Endangered Species Coalition

International Marine Mammal Project, Earth Island Institute
Turtle Island Restoration Network
Sierra Club
Center for Native Ecosystems
Sustainable Futures
Republicans for Environmental Protection
Friends of the Earth
WCL Program on International and Comparative Law
The Humane Society of the United States
The Xerxes Society of Invertebrate Conservation
Sierra Forest Legacy
Western Watersheds Project
Spirit of the Sage Council
Western Nebraska Resources Council
Pacific Coast Federation of Fishermen's Associations
Western Environmental Law Center
Klamath-Siskiyou Wildlands Center
Cascadia Wildlands
American Rivers
Animal Welfare Institute
Friends of the Clearwater
Born Free USA
Tucson Audubon Society
Sky Island Alliance
Coalition for Sonoran Desert Protection
Grand Canyon Trust
Friends of Ironwood Forest
Friends of Whitehaven Park
Public Employees for Environmental Responsibility
Mount Graham Coalition
Arizona Mining Reform Coalition
Center for Plant Conservation
National Audubon Society
Earthjustice
Alabama Rivers Alliance
Chesapeake Bay Foundation
National Center for Conservation Science and Policy