

Alaska Wilderness League, Center for Biological Diversity, Defenders of Wildlife,
Pacific Environment, Sierra Club **

February 19, 2008

Earl E. Devaney
Inspector General

Alan Boehm
Director, Program Integrity Division

U.S. Department of the Interior
Office of Inspector General
1849 C Street, N.W.
Mail Stop 5341
Washington, D.C. 20240

Re: U.S. Fish and Wildlife Service Director Dale Hall's decision to delay final
polar bear Endangered Species Act listing decision.

Dear Inspector General Devaney and Director Boehm,

We are writing to request that you investigate the action of U.S. Fish and Wildlife Service Director Dale Hall in delaying his legally-mandated Endangered Species Act (ESA) decision whether to list the polar bear under the ESA. Director Hall's delay not only violates the ESA, but we believe it also violates the FWS's new Scientific Code of Professional Conduct, which Director Hall himself signed into effectiveness on January 28, 2008. We also request that you take appropriate action in response, including making findings of misconduct, recommending personnel actions, or other remedies as you determine appropriate.

By his own admission, Director Hall advanced the new Code to bolster FWS's scientific integrity, which was diminished by inappropriate political influence in the ESA program from within the Interior Department. This inappropriate influence was exposed in a report from your office last year. That Director Hall signed the Code at the same time that he appeared to be in violation of its tenets with respect to the ESA program is cause for continued concern. An Inspector General investigation is thus particularly urgent in this context.

This letter includes background information to support this request. It begins with a summary of the factual and procedural background concerning the polar bear listing, outlines the new FWS Scientific Code of Professional Conduct, and reviews the role of the Inspector General in investigating alleged improprieties within Interior. Using uncontroverted facts, it then discusses how Director Hall violated the Code.

Factual and Procedural Background

Global warming has already severely and adversely affected the polar bear. Summarizing the various likely impacts of global warming on the polar bear, polar bears experts have come to the following sobering conclusion:

In contrast to many terrestrial and most marine species that may be able to shift northward as the climate warms, polar bears are constrained in that the very existence of their habitat is changing and there is limited scope for a northward shift in distribution. Due to the long generation time of polar bears and the current pace of climate warming, we believe it unlikely that polar bears will be able to respond in an evolutionary sense. Given the complexity of ecosystem dynamics, predictions are uncertain but we conclude that the future persistence of polar bears is tenuous.¹

Impacts predicted for the coming decades have already occurred, with 5 of the 19 populations now considered to be declining. The status of the polar bear has thus grown more dire, and, with it, the need for protection all the more compelling.

Responding to this situation, and the fact that FWS did not act to list the polar bear of its own accord, on February 16, 2005 the Center for Biological Diversity submitted a Petition to the Secretary of the Interior and FWS to list the polar bear under the Endangered Species Act. The Petition initiated the listing process which is conducted pursuant to strict timelines. An initial finding on the petition is due from FWS within 90 days of the petition, a proposed rule within 12 months of the petition if the FWS finds that the species meets the criteria for listing, and FWS must publish a final listing determination in the Federal Register within one year of publication of the proposed rule.²

In December 2005, ten months after the Petition was filed, the FWS had yet to make the first required “90-Day” finding. The Center for Biological Diversity, joined by the Natural Resources Defense Council (“NRDC”) and Greenpeace, sued the Department of Interior for failing to issue an initial finding on the Petition.

Spurred by this legal action, FWS made a positive initial finding in February, 2006, initiating both a public comment period and full status review for the species. The deadline for the second required finding on the Petition, due within 12 months of receipt of the petition, was only one week away at the time this first finding was made. The

¹ Derocher et al. (2004:172).

² See 16 U.S.C. § 1533.

lawsuit was ultimately settled with a consent decree setting a deadline of December 27, 2006 for the FWS to make the second determination.

On this last legal date of December 27, 2006, Secretary of Interior Dirk Kempthorne announced that the polar bear met the criteria for listing as “threatened,” and that the FWS would be publishing a proposed listing rule to that effect. The proposed rule was published in the Federal Register on January 9, 2007. The publication of the proposed rule triggered a January 9, 2008 statutory deadline for publication of the final listing determination.

On January 7, 2008, the FWS announced that the listing decision would be delayed.³ FWS did not invoke the only reasoning permissible under the ESA to delay such a decision – “that there is a substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination....”⁴

FWS Scientific Code of Professional Conduct

As noted above, on January 28, 2008 FWS Director Dale Hall signed the Scientific Code of Professional Conduct for the Service.⁵ The objectives of the Code embody foundational good-science principles:

> Increase awareness of the importance of scientific information and science as a method of discovery to maintain and enhance our effectiveness in fulfilling [FWS]

³ FWS Bulletin, Statement for Polar Bear Decision (January 7, 2008) (Attachment 1).

⁴ 16 U.S.C. 1533(c)(6)(B)(B)(i). Full scientific, factual and legal citations supporting the information in this section can be found in recent congressional testimony presented to the U.S. House Select Committee on Energy Independence and Global Warming, January 17, 2008 Hearing. See testimony of Kassie Siegel of the Center for Biological Diversity (<http://globalwarming.house.gov/tools/assets/files/0302.pdf>); Deborah Williams of Alaska Conservation Solutions (<http://globalwarming.house.gov/tools/assets/files/0303.pdf>); and Jamie Clark of Defenders of Wildlife (<http://globalwarming.house.gov/tools/assets/files/0303.pdf>). On January 30, 2008, the U.S. Senate Environment and Public Works Committee also held a hearing on the polar bear listing decision. See http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=abf44ef-802a-23ad-445f-e4d88bad74b1. The testimonies of Margaret Williams, World Wildlife Fund, and Andrew Wetzler, Natural Resources Defense Council, are available on that link, and also support the information presented in this section of the request letter.

⁵ <http://www.fws.gov/policy/212fw7.pdf>.

mission and in establishing credibility and value with the public and conservation community nationally and internationally.

> Assist [FWS] employees in performing their duties with excellence and professionalism and in avoiding misconduct or the perception of misconduct when performing [FWS] duties.

> Ensure, to the maximum extent possible, that information [FWS] produce[s] through scientific activities is reliable, objective, repeatable, and available.⁶

The Code applies to all FWS employees when they “engage in, supervise or manage, or apply the information resulting from scientific activities.”⁷ Among other things, and to the best of their abilities, FWS employees must:

- A. Act to advance science and produce the highest quality and most reliable scientific information for the Service.
- B. Comply fully with applicable laws, policies, and procedures regarding the development, conduct, application, and disclosure of science.
- C. Treat colleagues, other scientists and professional contacts, and the public respectfully.
- D. Place reliability and objectivity of scientific activities, reporting, and application of scientific results ahead of personal gain or allegiance to individuals and organizations.
- E. Acknowledge the ideas and work of others, take care to avoid misrepresentation, and respect the intellectual property rights of others.
- F. Neither hinder the scientific activities of others nor engage in dishonesty, fraud, deceit, misrepresentation, coercive manipulation, or other scientific or research misconduct.⁸

Finally, the Code includes provisions for Interior to make findings of misconduct against agency employees and to recommend appropriate action “in accordance with [FWS] human resources policy.”⁹

Background on Office of the Inspector General

As you know, the mission of the Office of Inspector General is to “promote excellence, integrity and accountability in the programs, operations, and management of the Department of the Interior.” The Office of the Inspector General accomplishes this

⁶ FWS Scientific Code Section 7.2.

⁷ FWS Scientific Code Section 7.3.B.

⁸ FWS Scientific Code Section 7.6.

⁹ FWS Scientific Code Section 7.11.

mission by conducting audits, investigations, evaluations, and reviews of Interior Department programs and operations.

The authority of the Inspector General is broad, and covers any “information, allegation or complaint which gives the appearance of fraud, waste, abuse or mismanagement in Departmental programs or operations, including serious matters that could compromise the Department’s mission or threaten the integrity of DOI programs.” Within the Office of the Inspector General is the Program Integrity Division, which “assesses and investigates a variety of programs and specific incidents to ensure the integrity of both DOI and OIG programs.” The responsibilities of this division include investigating allegations against senior officials (GS-15 and above).¹⁰

Director Hall Violated the Scientific Code

Concerned about the delay in FWS’s polar bear listing decision, the U.S. House Select Committee on Energy Independence and Global Warming and the U.S. Senate Committee on Environment and Public Works held hearings on January, 17 and January 30 2008 respectively. Director Hall was a witness at both of these hearings.¹¹

In response to questions at these hearings, Director Hall orally took responsibility for the decision to delay the polar bear listing beyond January 9, 2008.¹² In response to a question from Senator Boxer at the EPW Committee hearing about whether he complied with the ESA time limitations, Director Hall also acknowledged that he was “late under

¹⁰ The information in this section was taken from the website of the Interior Department Office of the Inspector General. <http://www.doioig.gov/>.

¹¹ U.S. House Select Committee on Energy Independence and Global Warming, On Thin Ice: The Future of the Polar Bear, January 17, 2008. <http://globalwarming.house.gov/pubs/pubs?id=0025>; U.S. Senate Committee on Public Works and the Environment, Examining Threats and Protections for the Polar Bear, January 30, 2008. http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=abffa4ef-802a-23ad-445f-e4d88bad74b1

¹² See e.g., Senate EPW hearing at minute 36:00; 41:00. The full Senate EPW hearing is available on an Archive Webcast at http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=abffa4ef-802a-23ad-445f-e4d88bad74b1 (visited February 11, 2008). References to the Senate hearing will include the time at which the referenced points were made during this Senate hearing as tracked by this webcast. The House Committee website only has excerpts of its hearing available.

the law”¹³ and that the delay was not due to the sole “substantial disagreement” exception allowed by the ESA for delaying a final listing decision.¹⁴

At the Senate hearing, Director Hall also touted his recent signing of the Scientific Code of Conduct. He stated that the Scientific Code was “personally important to me”¹⁵ and that it provides “standards that include me and FWS [and] that will be the basis for the [polar bear] decision.”¹⁶

It has now been three years since the Petition to list the polar bear was submitted on February 16, 2005. For each of the deadlines in the listing process, the FWS either missed the deadline or took its action on the last possible day for that decision. And the final decision itself was illegally delayed by Director Hall.

As a decision to be based solely on the basis of the best scientific and commercial information available,¹⁷ the Scientific Code clearly applies to the ESA listing decision. As noted above, Director Hall himself confirmed this at the Senate hearing.

Therefore, Director Hall’s decision to delay the polar bear listing decision, on its face and as supported by Director Hall’s own admissions, goes directly against the objectives of the Scientific Code to “establish[] credibility” with the public and conservation groups, and avoid “misconduct or the appearance of misconduct.”¹⁸ Director Hall would also appear to be in violation of the code that requires that he “[c]omply fully with applicable laws, policies, and procedures regarding the development, conduct, application, and disclosure of science”¹⁹ and the code that provides that scientific activities must be reviewed and applied “[i]n a timely manner.”²⁰

The Scientific Code provides that a violation is to be treated as “a finding of scientific or other misconduct” and that misconduct would lead to “action in accordance with [FWS] human resources policy.”²¹ The referenced human resources policy addresses “Disciplinary and Adverse Actions.”²²

¹³ Senate EPW hearing at minute 37:00.

¹⁴ Senate EPW hearing at minute 38:00; see also id at 1:17:00 to 1:20:00 (discussion about ESA legal requirements and exception to one year final listing decision).

¹⁵ Senate EPW hearing at minute 54:00.

¹⁶ Senate EPW hearing at minute 35:00.

¹⁷ See 16 U.S.C. 1533(b).

¹⁸ FWS Scientific Code Section 7.2.A and 7.2.B.

¹⁹ FWS Scientific Code Section 7.6.B.

²⁰ FWS Scientific Code Section 7.7.C(5).

²¹ FWS Scientific Code Section 7.11.

The integrity of this nation's endangered species protection program, already suffering, is at additional risk from Director Hall's decision. As discussed above, the Office of the Inspector General is appropriately authorized and positioned to investigate Director Hall's decision and to recommend appropriate punitive and remedial steps. Please do so.

Sincerely,

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²² 227 FW 2, <http://www.fws.gov/policy/227fw2.html> (visited February 11, 2008).

Cc:

ATTACHMENT 1

FWS Bulletin, Statement for Polar Bear Decision (January 7, 2008)



Office of Public Affairs
4401 N. Fairfax Drive, MS 330 ARL
Arlington, VA 22203

January 7, 2008
Fellows, 703/358-2285

Contact: Valerie

Statement for Polar Bear Decision

The U.S. Fish and Wildlife Service is working diligently to reach a final decision on the proposal to list the polar bear as a threatened species under the Endangered Species Act. We expect to provide a final recommendation to the Secretary of the Interior and finalize the decision within the next month.

When the polar bear was proposed for listing in January 2007, Secretary of the Interior Dirk Kempthorne directed the Service to work with the U.S. Geological Survey, the public and the scientific community to broaden our understanding of what is happening with the polar bear and to gather additional information to inform the final decision on whether the species warrants Federal protection under the ESA.

In September 2007, USGS scientists supplied new research findings to the Service updating population information on the Southern Bering Sea polar bear and providing additional data on sea ice trends and effects on polar bear populations throughout the species' range.

As a result of the new USGS research findings, the Service reopened and later extended a second comment period to allow the public time to review the information and respond. We received numerous comments on the USGS reports and have been working to analyze and respond to the information provided during the comment period. At the time we made the decision to reopen and to extend the comment period, the Director of the Service alerted the Department that the Service might need extra time to adequately evaluate and incorporate results from the comments received.

If you have further questions or would like to be included on the media distribution list when the final decision is announced, please email Valerie Fellows, Office of Public Affairs at <Valerie_Fellows@fws.gov>.