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(<http://www.regulations.gov>.)

The following comments augment those sent today by The Wilderness Society, Friends of the Blackwater, et al. They are similar to, but contain a considerably extended discussion of the Service's failure to abide by or use the recovery plan delisting criteria.

The West Virginia Northern Flying Squirrel Delisting Proposal Violates the Species Recovery Plan and the Endangered Species Act Requirement to Base Delisting Decisions on Objective, Measurable Recovery Criteria

The WVNFS delisting proposal is the clearest crystallization to date of a heretofore background effort by the Bush administration to dispense with recovery plans by arguing that objective, measurable, concrete delisting criteria should be overridden by the five non-criteria-based listing factors. We refer to this as the No Recovery Plan Theory (NRPT). In keeping with the White House approach to conservation, NRPT maximizes bureaucratic discretion and minimizes objective scientific standards. It also violates a well established legal canon that when Congress establishes two distinct legal provisions, the administration can not collapse one into the other. Federal courts and the Interior Solicitor have recently taken the administration to task for doing exactly this in collapsing the Endangered Species Act's "significant portion of range" provision into the "all of range" provision.

The WVNFS squirrel presents an excellent factual circumstance to challenge the No Recovery Plan Theory because 1) the recovery plan was amended as recently as 2001, 2) the Service has not and can not demonstrate that the recovery criteria are scientifically inadequate, 3) the recovery plan's requirement of population stability is bedrock of conservation biology and can not credibly be replaced by an unscientific concept of "persistence," and 4) the recovery plan's requirement of perpetual habitat protection is a bedrock of conservation biology and can not be credibly replaced by an ill-defined approach which ignores the well-established threat of global warming and the demonstrated intent of private and government land owners to continue destroying WVNFS habitat. In short, the Service's intent to use the WVNFS to launch the NRPT

is ill-conceived and will result in a legal challenge resulting not only in the squirrel's continued listing, but the dismantling of the theory.

We strongly recommend that the final delisting decision drop the NRPT and instead base the decision on whether the recovery plan criteria have been met. Additionally, it should convene the recovery team to review the current delisting criteria. If the team determines the criteria should be altered, the Service should revise the recovery plan. That is the proper and rational way to proceed.

The 5-year review and the delisting proposal differ in their justification for dispensing with the recovery plan. The former asserts ("argues" would be too strong a word) that the recovery plan is somehow inadequate and out-of-date. Perhaps because it realized that there is no basis for this assertion, the latter presents an alternative argument that the Service is free to delist based on a five factor listing analysis regardless of whether the recovery criteria have been determined to be invalid. This is the No Recovery Plan Theory. We show the inadequacy of both approaches below.

The WVNFS recovery plan was approved in 1990. It includes the following recovery criteria:

Downlisting:

1. populations are stable or expanding at greater than or equal to 80% of Geographic Recovery Areas (GRAs) for 10 years
2. Sufficient life history information is available to permit effective management
3. GRAs are managed for squirrels in perpetuity

Delisting:

4. the existence of the high elevation forests on which the squirrels depend is not threatened by disease, pollution, or other systematic threats such as global warming¹

The WVNFS GRAs identified at the time the recovery plan was written were Stuart Knob area (Randolph County, WV), Cheat Bridge area (Pocahontas and Randolph Counties, WV), Cranberry area (Greenbrier, Pocahontas, Randolph, and Webster Counties, WV), Blackwater Falls area (Tucker County, WV), and the Spruce Knob/Laurel Fork area (Pendleton and Randolph Counties, and Highland County, VA).² Since then, two new populations have been discovered (KSF/MWERF and Gauley Mountain). It is unclear whether these two new areas have been officially "designated" as GRAs, but they are indisputably being managed as such (see

¹ Global warming is not expressly mentioned in this recovery criteria, but elsewhere the plan states "Even without human intervention, small, relict populations might suffer disproportionately from...climatic and vegetational processes associated with post-Wisconsin changes in mountain environments. However, habitat destruction, fragmentation, or alteration associated with clearing of forests, introduced insect pests, mineral extraction, recreational other development, pollution (heavy metals, pesticides, acid rain), the potential for global warming outweigh any known natural threats to the species or its habitat." (p. 12)

² Note that the 5-year review and listing proposal erroneously state that the recovery plan designated the GRAs. The plan, however, states on page 19 that the five GRAs already exist.

the 2001 recovery plan amendment and the 2000 Monongahela National Forest Biological Assessment).

The recovery plan was amended in 2001 to incorporate new information on the species habitat association and distribution and to improve management of on the Monongahela National Forest which contains 90% of the species habitat. The 2001 amendment did not indicate any inadequacies of the recovery plan not fixed by the amendment. It did not alter the recovery criteria, quite the opposite, it sought to improve management to better attain the criteria. The amendment expressed confidence that the plan as amended is the best available science to recover the WVNFS. We here quote from the amendment at length in order to demonstrate these points:

“The U.S. Fish and Wildlife Service's West Virginia Field Office (Service) has worked closely with the Monongahela National Forest (MNF) and the West Virginia Division of Natural Resources (WVDNR) to develop a Programmatic Biological Assessment of the MNF's existing Land and Resource Management Plan... With regard to the endangered West Virginia northern flying squirrel (WVNFS), *Glaucomys sabrinus fuscus*, the MNF contains greater than 90% of the known habitat within its range... During the course of the MNF consultation, the Service recommended the development of new habitat identification and management guidelines to be adopted for the WVNFS, resulting in this amendment to Appendix A of the 1990 Appalachian Northern Flying Squirrels (*Glaucomys sabrinus fuscus*, *Glaucomys sabrinus coloratus*) Recovery Plan... These guidelines are based on an increased knowledge of the ecological requirements and associates of the WVNFS. They are intended to enable the MNF and other Federal land stewards to fulfill both their affirmative conservation responsibilities under Section 7(a)(1) and their consultation responsibilities under Section 7(a)(2) of the Endangered Species Act, thus promoting more effective recovery of this endangered species on Federal lands...

In 1985, when the WVNFS was listed as endangered, only ten specimens were known from West Virginia in Randolph and Pocahontas counties, and two specimens were known from Highland County, Virginia. At the time the Recovery Plan was completed, approximately 187 squirrels had been captured in six West Virginia counties: Tucker, Randolph, Pendleton, Pocahontas, Webster, and Greenbrier. As of 2001, over 1,000 WVNFS have been captured, including a small number of recaptures, in West Virginia in the same general six-county area. In addition, a total of ten specimens of the WVNFS have been captured on the Allegheny Mountain just over the West Virginia state line in Highland County, Virginia, primarily on the George Washington-Jefferson National Forest.

Consequently, we now have a much better understanding of the WVNFS's habitat and distribution. Although the general understanding of preferred habitat of the WVNFS has not changed significantly, we now know that the relative abundance of the conifer component can be small and, in some cases, totally confined to the understory. Additionally, the minimum elevation at which the WVNFS was known to occur, originally set at 3,300 feet above mean sea level (MSL), has changed. The WVNFS is now known to occupy mixed northern

hardwood-hemlock stands at approximately 2,640 feet MSL along the North Fork of the Blackwater River near the northern end of the squirrel's range. This implies that elevation is only one indicator, and that local climate, soil, and aspect are also strong influences on the presence and maintenance of the preferred habitat...In addition to new data regarding WVNFS habitat preferences, a number of concerns have emerged with the 1990 management guidelines for the WVNFS. A central concern is that the burden of proof was placed on live trapping and/or the placement and monitoring of nest boxes to determine if potential habitat is occupied. The Service, WDNR, MNF, and the Recovery Team agree, based on the data gathered over the past 10 years, that this approach may not have protected WVNFS habitat to the fullest extent possible...These new guidelines will aid in recovery of the WVNFS by protecting suitable habitat even if not known to be presently occupied, particularly on the MNF and for other Federal projects.

...Monitoring for the WVNFS as described in the 1990 Recovery Plan is still an essential task, especially on the MNF, and will continue. Rather than focusing limited resources on project clearance, however, greater emphasis will be placed on larger "geographical recovery areas," or GRAs, to monitor populations and further refine habitat definitions. The MNF and the WVDNR should continue monitoring population trends using nest boxes in GRAs and other selected areas." (unnecessary references and acronyms omitted)

The 5-year review states that the recovery plan is out of date because 1) it was developed over 15 years ago, 2) the criteria are not based on the threats to the species, 3) the criteria are directed largely toward maintaining populations and protecting habitat within designated GRAs, 4) "new light" has been shed on the "appropriateness of the GRA nomenclature" for the WVNFS, and 5) New information has also become available with reference to the plan's threat-based recovery criteria. (5-year review at 4-5).

Point #1—that the plan is old—is irrelevant and contradicted by other Service documents. The age of a plan does not in itself determine its quality. The Service must explain what the problem is in biological terms, not presume it from the sheer age. The Service provides no explanation because the assertion is patently false: the 2001 amendment changed management to address threats on 90% of the species habitat and express confidence that the change would result in the recovery of the species (see amendment quotes and discussion above). Thus the updated plan is less than six years old. The Service itself admits that both the 1990 plan and 2001 amendment were "deemed objective, measurable, and adequate" (5-year review at 4). The Service can not simply change its mind in order to ignore the delisting criteria which have not been met. It must provide a legally and scientifically adequate rationale. The absence of explanation makes the assertion arbitrary and capricious.

Point #2—that the recovery criteria are not threat based—is both irrelevant and incorrect. The Endangered Species Act does not require that recovery criteria be threat based, it says simply that recovery plans must include "(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species; (ii) objective, measurable criteria which, when met, would result in a determination, in accordance

with the provisions of this section, that the species be removed from the list; and (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal." (4(f)(1(B))). It is patently illegal for the Service to establish new standards for recovery plans which contradict the Endangered Species Act.

Furthermore, the 1990 plan and 2001 amendment thoroughly address the threats to the species and establish recovery criteria which require the abatement of those threats. The only threat not fully fleshed out by the recovery plan is global warming is only mentioned. However, even this threat would have to be abated to attain recovery criteria #5. The patently falsity of the 5-year review's critique is manifest by its own admission that:

- "habitat-related threats are addressed in the delisting criterion and threats abatement can be inferred to some extent from meeting the population- and habitat-based downlisting criteria" (5-year review at 5)
- "(t)he 2001 recovery plan amendment and the 2004 amendment to the MNF Land and Resource Management Plan significantly removed the threat of habitat loss (via logging) across much of the squirrel's range." (5-year review at 12)
- "With regard to active conservation of the squirrel, numerous conservation actions have been implemented since 1985 by land stewards, biologists, and conservation groups. These include research and recovery actions specified in the 1990 recovery plan and 2001 recovery plan update for *G.s. fuscus*..." (5-year review at 19)
- "the 2001 amendment included an update to Appendix A, Guidelines for Habitat Identification and Management for the WVNFS. Implementation of the amended Appendix A Guidelines by the Monongahela National Forest (MNF) effectively abated the main threat to the squirrel (i.e., habitat loss from timber management) throughout the majority of its range, by eliminating adverse impacts on all suitable habitat on the MNF without having to prove WVNFS presence" (proposal at 75925).

How is it possible that the primary threats to the species across much its range were addressed by implementing the recovery plan if the recovery plan supposedly doesn't address the threats? The entire argument of the delisting proposal and five year review on this point is patently false and self-contradictory.

Point #3—that recovery objectives attempt to stabilize population within the GRAs—is incomplete at best. What does the Service intend to say by this cryptic sentence? Is it the Service's position that the populations should not be stabilized with at least 80% of five GRAs identified in 1990 and the two identified since then? We can only guess because the Service provides no explanation as to why the "stable on 80%" criteria is inadequate. This will be especially hard to explain since the delisting proposal goes to great length to justify delisting based on the alleged "persistence" of the species within the seven relict areas where it is known. Doesn't this affirm the recovery plans orientation toward the seven GRAs?

The 5-year review does state that "Additionally, the current known range of the species is much more widespread than the GRAs designated in the recovery plan." (5-year review at 6). In fact,

the recovery plan identifies five GRAs whereas today the species is known from seven areas. But this increase was expressly anticipated by the plan: “Additional GRAs may be defined as further survey data are accumulated.” (5-year review at 17). And the 2001 amendment refers to all seven population centers. The stability criterion is expressed in terms of a percentage (80%) instead of a number precisely so it does not become outdate with the expected discovery of new population centers. It is incumbent upon the Service to explain its disagreement with the criteria. If there is no disagreement that at least 80% of the population centers should have stable or increasing populations, there is no problem with the recovery plan.

Point #4—new light shed on GRA nomenclature—is also undeveloped. What is this “new light”? How does a change in GRA nomenclature invalidate the recovery plan? There is no explanation of this decidedly obscure assertion. The only allusion to what might be called “nomenclature” we can find in the 5-year review is the following:

“Although the 1990 recovery plan treated the southwestern Virginia *Glaucomys sabrinus* population as *G.s. coloratus* for management purposes, both the plan and the information that has become available since then leaves the taxonomy of this population as an open question. This uncertainty is only germane to the ESA status of *G.s. fuscus* if the MRNRA populations play a critical role in assuring the persistence of this subspecies” (5-year review at 8).

But this paragraphs states that the recovery plan and recent information agree on the taxonomic uncertainty and that both the plan and current conservation strategy defer incorporation the zone of uncertainty into planning for the WVNFS until more information is available. The Service’s assertion is contradicted by its own explanation.

Point #5—“new information has become available” about the “plan's threat-based recovery criteria”—is obscure. What is this new information? Neither the delisting proposal nor the 5-year review demonstrate that there is any significant new knowledge about the species threats or management needs since 2001. And how can there be new information about the plan’s threat-based criteria when the Service in the same paragraph asserts that there are no threat-based criteria? This argument must be explained in the final listing rule. As presented here, it is inscrutable.

It is quite evident that is nothing inadequate with the recovery criteria in the plan. The delisting proposal and 5-year review certainly do not demonstrate any inadequacies. To the contrary, its justification for designating the species as recovered follows the same general logic as the plan: the population is healthy, the species life history is sufficiently known to be managed, the habitat is currently protected, the habitat will be protected into the foreseeable future. Furthermore, the delisting proposal and 5-year review repeatedly state that these have been accomplished by implementing the plan.

It is no accident that while the Service tries to imply difference where none exists, it purposefully refuses to identify the three clearest and most important differences between the recovery plan and the delisting proposal. The recovery plan requires that 80% of the GRAs have a stable or

increasing population for at least ten years. This would prevent delisting because there are no data indicating whether the WVNFS is stable, increasing or decreasing. While not alerting reader that it is violating this provision of the recovery plan, the Service substitutes the demographically meaningless and undefined concept of “persistence”. Secondly, the recovery plan requires that all GRAs be managed for the species in perpetuity. The delisting proposal admits that they are being managed under a multiple-use mandate that will result in continued logging of important squirrel habitat. And thirdly, the recovery plan requires that high elevation forests be protected in perpetuity, while the delisting proposal notes that they may be completely destroyed by global warming.

It is clear that the recovery plan criteria have not been met. The Service is unable to demonstrate that the species is stable or improving over a ten year period on at least 80% of the GRAs or population centers. It is unable to demonstrate that the high elevation forests and GRAs are protected in perpetuity. The only difference between the delisting analysis and the recovery plan is that the delisting proposal does away with all quantified, concrete, object criteria, replacing it with a generalized discussion of listing factors which is not based on any clear criteria at all. It is clear beyond a shadow of a doubt that the Service has dumped the recovery plan because, and only because, the plan stands in the way of its predetermined desire to delist the WVNFS.

The Service attempt to justify its No Recovery Plan Theory as such:

“the recovery criteria do not specifically address the five listing factors. The recovery plan does not, therefore, provide an explicit reference point for determining the appropriate legal status of *G.s. fuscus* based either on alleviating the specific factors that resulted in its initial listing as an endangered species or on addressing new risk factors that may have emerged since listing...Therefore, this review focuses on the five-factor analysis that compares current conditions to known conditions at the time of listing.” (5-year review at 5-6).

“Consequently, the recovery plan does not provide an explicit reference point for determining the appropriate legal status of the WVNFS based either on alleviating the specific factors that resulted in its initial listing as an endangered species or on addressing new risk factors that may have emerged since listing.” (proposal at 75925)

The Service would have us believe that the Endangered Species Act has two different delisting provisions—recovery plan criteria and the five listing factors—and that the latter somehow trumps the former and thus the Service can (or even must) ignore the recovery plan. If this ridiculous construction were true it would beg several questions: why did Congress create two separate delisting provisions? Why did Congress require recovery plans to establish concrete, objective, quantified recovery criteria if those criteria are actually to have no role in delisting decisions? If the listing factors are actually the fundamental delisting factors, why does the ESA solely describe them as “listing” factors not “delisting” factors and why does it expressly place delisting criteria in a completely separate provision?

The No Recovery Plan Theory can not stand. It violates the legal cannon that the administration can not collapse one legal provision into, or interpret them to contradict each other. In fact, the delisting criteria work, rather than compete with the listing factors. The listing factors do not contain objective, measurable criteria because they apply to all imperiled species. There is no conceivable objective, measurable criteria which would establish a single listing threshold for all species. Once the species is listed, however, the Service is required to establish species-specific, objective, measurable listing criteria. Then when the Service considers the five listing factors in a delisting analysis, it must do so in light of the recovery criteria. In other words, the five factors are applied differently to listed and unlisted species. They are applied to the latter sans recovery criteria because by definition, not such criteria exist. They are applied to listed species through the lens of the recovery criteria because those criteria were expressly created to determine whether a species is recovered or not.

The Service implies, but does not quite state, and certainly does not in any manner explain, that the recovery criteria in the WVNFS recovery plan are not applicable to the five listing factor. This is nonsense, they are clearly applicable. The Service has simply chosen not to apply them because doing so would reveal that the species is not recovered. Instead, it presents a vague five factor analysis which is not based on any criteria at all.

Here is simple description of how the recovery criteria apply to the listing factors:

Listing Factors	Recovery Criteria
A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range	#1 is the population stable or increasing in at least 80% of GRAs (and population centers) for 10 years? #3 are the GRAs and population centers protected from threatened destruction and modification? #4 are the species high elevation forests safe from threatened destruction and modification?
B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes	#1 do commercial, recreational, scientific or educational uses threaten to prevent the species from being stable or increasing in at least 80% of GRAs for at least ten years?
C. Disease or Predation	#1 do disease and predation threaten to prevent the species from being stable or increasing in at least 80% of GRAs for at least ten years? #3 does disease threaten to destroy the habitat contained within GRAs? #4 does disease threaten to destroy the species' high elevation forests?
D. Inadequacy of Existing Regulatory Mechanisms	#2 is the species life history sufficiently well understood to establish adequate management plans? #3 are the GRAs (and population centers) adequately managed to assure the species health in perpetuity? #4 are existing management plans sufficient to ensure the species high elevation forests will exist in perpetuity?
E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species	The proposal lists competition, parasites, forest pests, acid rain, and global warming. Competition and parasites are measured by criteria #1 and #2 (are the sufficient to prevent the species from being stable or increasing in at least 80% of GRAs for at least ten years? Do we know enough about the species life history to effectively mange these threats?). Pests, acid rain, and global warming are measured by criteria #3 and #4 (do they threaten the GRAs? Do they threaten the high elevation forests?)

In regard to the factor E, the proposal admits and applies the recovery criteria: “delisting criterion within the 1990 recovery plan addressed potential threats, such as forest pests (see Factor A), acid rain, and climate change, to the existence of the high elevation forests on which the squirrels (*G. s. fuscus* and *G. s. coloratus*) depend.” (Proposal at 75929). It falsely (see out section on global warming) concludes that the criteria met, but it at least applied the criteria. Indeed, with expressly stating so, the listing proposal very clearly apply criteria #2 (life history sufficiently known to manage threats), #3 (GRAs and population centers protected), and #4 (high elevation forests protected) to all the listing factors. The only criterion it steadfastly refuses to apply is the population viability factor? Why is this factor singled out for exclusion? Because it hasn’t been met. This is the definition of arbitrary and capricious decision making; especially since the proposal provides absolutely no explanation of why the population viability criterion is wrong or inadequate. It is simply ignored.

In closing, the Service’s assertion that it can ignore the recovery criteria as a matter of law is false. Its assertion that the criteria are “out of date” is never explained and is contradicted by the clear language of the 2001 amendment and the discussion in the proposal and 5-year review showing that implementation of the plan supposedly brought the species to the point of recovery. Its assertion that the recovery criteria can not be applied to the five listing factors is false. If the recovery criteria—despite all appearances to the contrary—are inadequate, the Service has a responsibility to 1) clearly explain the inadequacies in biological terms, and 2) fix the inadequacies by revising the plan.