



February 27, 2018

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February 26, 2018

Re: Regional ESA Audits; Distinguishing Agency Guidance from Congressional Mandates;
Forthcoming KNRC Action; Meeting Notice

Dear Acting Director Sheehan and Acting Solicitor Jorjani:

As a County Commissioner and the President of the Kansas Natural Resource Coalition (KNRC), I am encouraged by recent developments and informal contacts with the United States Fish and Wildlife Service (FWS). While these contacts appear positive, there is still much to be accomplished to facilitate a foundational, government-to-government policy trajectory with KNRC¹.

The purpose of this correspondence is to request a formal, pre-publication notice on the Lesser prairie-chicken (*Tympanuchus pallidicinctus*), (LPC) Status Review process, and to propose meetings with FWS at both the local and national level. Our coalition would also now like FWS to initiate inquiries into local FWS programs, including a review of a failing Black-footed ferret (*Mustela nigripes*) program in Logan County, and a status review of the critical habit of the endangered Arkansas River shiner (*Notropis girardi*).

On September 8, 2016, FWS received a petition from Defenders of Wildlife, Wild Earth Guardians, and the Center for Biological Diversity to list the LPC as endangered. As mandated by 16 U.S.C. §1533(B), the Secretary of Interior is to publish a finding within twelve (12) months of the petition. As you know, no status on the LPC to date has been published as required by statute.

In January 2018, FWS published its regulatory agenda as required under the Regulatory Flexibility Act (RFA).² A cursory review of the RFA notice, included as attachment A, indicates FWS to be poised to publish a Notice of Proposed Rulemaking (NPR) for the LPC. My purpose in calling your attention to this is to reiterate our strong interest - as affected local governments - to be included in the policy decision-making process. This includes prior notice before major agency actions.

KNRC has a long-held position in the public record that all threatened and endangered listing proposals require a NEPA Environmental Assessment (EA) or Environmental Impact Statement (EIS). On several occasions and through a number of administrative processes, we have demonstrated the illegitimacy of FWS reliance on a September 1983 policy outlined in a letter from the Council on Environmental Quality negating the NEPA process; specifically, taking the position that “*as a matter of law*” the protective NEPA process is not required during the species listing proposals³. (Attachment B)

We understand that President Trump is in the process of modifying the NEPA review process as part of his infrastructure improvement program in rural areas. There is now no barrier to FWS performing an EA or EIS on each and every species listing proposal. We intend to petition the White House Council on Environmental Quality and advocate vigorously to effect an appropriate and necessary return to the NEPA process that balances both the human and natural environments.

¹ KNRC counties have jurisdiction over 16,938 square miles (10,840,000 acres) of land; an area larger than the states of Maryland, Massachusetts, Vermont, Rhode Island, or New Hampshire.

² 5 USC 601-612§

³ Federal Register Vol. 48, No 207. Tuesday October 25, 1983.

On November 16, 2017, the United States Attorney General's office issued a directive prohibiting agencies from using "guidance" as a mechanism to coerce compliance with what otherwise are *optional* compliance policies. This expansive directive also binds the US Department of Justice (DOJ), meaning that agencies accessing DOJ for litigation support are not to represent agency guidance as anything but voluntary for the regulated community. (Attachments C and D)

It is difficult to understate the scope and impact of regulations - posing as the rule of law - that have been imposed by Federal agencies on the American public over time. For our part as a coalition of local governments, we would like to support the President in illuminating and unraveling this problematic practice, returning only to the organic congressional mandates that form the basis of agency authority. To that end, we would like to partner with FWS to identify guidance documents and policy websites that need to be revised to reflect the directives in the Attorney General's memo.

Turning to local initiatives, there are two FWS programs that we request your office to audit. Over a 10-year period your agency has had a marginal relationship with KNRC member Logan County, Kansas over the failing and expensive Black footed-ferret (*Mustela nigripes*) program. KNRC has well documented⁴ what we believe are permit problems, misrepresentation to land holders, safety issues, and other extremely serious infractions affecting the entire region. Through this letter, we request a technical and financial audit of the program be undertaken with meaningful participation of the Logan County, Kansas Board of County commissioners and KNRC.

We also request FWS to conduct a review of the critical habitat of the Arkansas River shiner, (*Notropis girardi*), an endangered minnow listed in our region. Our issue is that a significant reach of one of the rivers designated as critical habitat has been dry for *years*. We now believe a status review and corresponding modification of critical habitat for *Notropis girardi* to be well overdue.

In April or early May, I would like to set a meeting with you or senior policy staff to discuss these and forthcoming announcements that will be of interest to FWS, and the Departments of Interior, Justice, and the Congress. In the interim, I would appreciate it if you would designate a contact within your DC office for myself and staff to have ongoing dialogue.

Regards,

THE KANSAS NATURAL RESOURCE COALITION

Shawn Tasset
President, KNRC
Ford County Commissioner

c: J. R. Carlson – Executive Director, KNRC
Hon Senator P. Roberts
Derek Schmidt – Attorney General – KS
D. Wiser COS; Con. Bishop
T. VanFlein COS; Con. Gosar
KNRC Steering Committee
Logan County Board of Commissioners
Clark County Board of Commissioners
Seward County Board of Commissioners

The Kansas Natural Resource Coalition (KNRC) is an association of counties who maintain collective and participatory involvement in administrative government on behalf of its citizenry. The Coalition serves as a conduit between local, state and federal governments to promote balanced, necessary and effective administrative policymaking through the mechanism of government-to-government coordination. Our mission is to monitor, analyze, understand, communicate, and participate in those initiatives that materially affect the natural or human systems governed by individual member counties.

⁴ [Findings of Fact and Conclusions of Law: In Re: The Advisability of Listing the Lesser-Prairie Chicken as a Threatened Species under the Endangered Species Act](#)