



November 29, 2007

BY TELEFAX AND MAIL

Mr. Marvin E. Moriarty
Regional Director, Region 5
U.S. Fish and Wildlife Service
300 Westgate Center Drive
Hadley, MA 01035

Mr. Chris Lowie
Refuge Manager
Great Dismal Swamp NWR
3100 Desert Road
Suffolk, VA 23434

Dear Mr. Moriarty and Mr. Lowie:

On behalf of the nationwide membership of the Animal Welfare Institute (AWI) and In Defense of Animals (IDA), we are writing to express our strong opposition to the black bear hunt on the Great Dismal Swamp National Wildlife Refuge scheduled for November 30 and December 1, 2007.

As you may recall, in a letter dated November 28, 2006 we identified a number of deficiencies in the planning of the refuge's black bear hunt. These deficiencies included a failure by the U.S. Fish and Wildlife Service (FWS) to legally open the refuge to bear hunting in 1998 and a woeful analysis of the environmental impacts of the hunt contained in the 2006 Draft Comprehensive Conservation Plan and Environmental Assessment (Draft CCP/EA). Though our attempt to seek a temporary restraining order to stop last year's hunt was unsuccessful, we remain convinced that our claims have merit. Upon receipt of additional records requested pursuant to the Freedom of Information Act by IDA in July 2007, we now have even more evidence to support our claims.

Based on the collective evidence as disclosed and discussed below, we believe the FWS should cancel this year's hunt pending compliance with all relevant laws. Recognizing that the FWS is unlikely to do so, the primary purpose of this letter is to request that the FWS agree to subject its bear hunt to a more extensive environmental impact review pursuant to the National Environmental Policy Act (NEPA) prior to making any decision about continuing the hunt in 2008.

Considering the conclusions reached by Hellgren (1988) and Tredick (2005) about the increasing threats to the refuge's bear population as a result of off-refuge development pressures, including threats to the genetic health of the bear population, the extremely limited analysis of the environmental impacts of the bear hunt contained in the Draft CCP/EA is clearly deficient. Moreover, the cumulative impact analysis failed to include any analysis of the impacts of the bear hunt on bear hunting opportunities on other refuges, the impacts of off-refuge bear hunting on the refuge bear population, nor did it assess the impacts of development pressures and land-use changes off-refuge on the short or long-term health of the refuge bear population.

As an initial matter, AWI and IDA must reiterate their concern over the FWS failure to officially open the refuge to bear hunting in compliance with federal law. The FWS claimed, as Ms. Suzanne Baird, the refuge's former manager, testified in court that because the refuge had already been opened to "big game" hunting of deer in 1979 it was not required to prepare an official "opening package" (which by FWS policy would include a hunt-specific NEPA review) in order to open the refuge to bear hunting in 1998.¹ This argument is entirely antithetical to the requirements imposed on the FWS under NEPA, the Administrative Procedures Act (APA), and its own policies.

Based on this fallacious argument, the FWS authorized bear hunting on the refuge in the final 1998-99 refuge specific hunting regulation (63 FR 46910) despite the fact that bear hunting was not included in the previously published proposed rule (63 FR 40080). As a result, the public had no opportunity to participate in the FWS decision-making process as to whether the refuge should be opened to bear hunting in violation of the APA. Ms. Baird testified that it received comments on the bear hunt during the public comment period on the proposed rule suggesting that the public did participate in its decision-making process.²

Though the FWS reports that approximately 100 comments were received,³ this was not – and could not be – in response to the proposed rule since it is indisputable that the rule did not mention opening the refuge to bear hunting. Rather, these comments were allegedly from members of The Fund for Animals (The Fund).⁴ The Fund itself submitted a letter dated August 24, 1998 requesting a copy of all of the relevant planning documents that the FWS was required to assemble before opening a refuge to bear hunting. This was not a comment letter on the proposed rule and the fact that it was dated two days before the close of the comment period was merely coincidental (pers. comm. with Peter Petersan, November 27, 2007). According to Mr. Petersan, the author of The Fund's letter, the origin of the letter was a call from a frequent refuge visitor who, during a refuge visit in or around August 2006 learned about the proposed hunt, and contacted The Fund to raise concerns about the hunt (pers. comm. with Peter Petersan, November 27, 2007). Upon the advice of legal counsel, The Fund requested the required planning document not knowing that its simple request would ultimately result in the cancellation of the hunt. Any other letters from members of The Fund, if they in fact exist, were the product of an action alert issued by The Fund based on the complainant's call.

Moreover, the FWS claim that the bear hunt was not required to be subject to substantive NEPA review makes a mockery of NEPA. Under the logic of the FWS argument, NEPA analysis would only be applicable to the category of hunting (*i.e.* migratory game bird, upland game, big game) instead of the targeted species. This would suggest that the environmental impacts of deer hunting are identical to those of bear hunting despite considerable biological, ecological, physical, and behavioral differences in the species. In other words, deer are not bear. The bear population on the refuge is subject to or regulated by a number of factors that have little, if any,

¹ See Transcript of Proceedings in Moore v. Kempthorne at 44.

² See Transcript of Proceedings in Moore v. Kempthorne at 40.

³ See e-mail from Lloyd Culp, former refuge manager, to John Stasko dated December 13, 2006.

⁴ See e-mail from Lloyd Culp, former refuge manager, to John Stasko dated December 13, 2006.

impact on deer. For example, deer, unlike bear are more adaptable to living within a human-altered environment thus the increase in development pressures on off-refuge lands likely have less impact on the deer population. Bear are less productive than deer making them more susceptible to excessive mortality due to hunting, automobiles, and nuisance removals and slower to recover from population declines. Finally, there are far more deer than bear on the refuge. Thus, to suggest that an analysis of the environmental impacts of deer hunting (as the refuge allegedly performed prior to allowing deer hunting in 1979) is sufficient to cover the impacts of bear hunting is patently absurd not to mention entirely inconsistent with NEPA and FWS policies.

The FWS, through Ms. Baird's testimony, claimed that FWS policy allows refuges to expand hunting opportunities without the need for a formal "opening package" (which would include a hunt-specific NEPA document) if the refuge had already been officially opened to the same category of hunting (i.e. big game).⁵ This policy states that "revisions (to a hunt plan) can be approved by the regional director only if the refuge is listed in 50 CFR as being open to that particular category of hunting (i.e., migratory game birds, upland game, or big game)." 8 RM 5.4C.⁶ This policy also fails to provide any defense to the FWS failure to subject its proposed bear hunt to substantive NEPA review in 1998 as it is only relevant to the revision of hunt plans. A hunt plan is only one of eight documents that the FWS was required at that time to prepare when proposing to open or expand hunting opportunities on a refuge. Other required documents included an environmental assessment, 8 RM 5.3D(2), prepared pursuant to NEPA. Though AWI and IDA disagree that major revisions to a hunt plan (such as adding an entirely new species to a refuge's hunting program) does not trigger NEPA review of the hunt plan itself, the actual proposal to expand hunting opportunities on a refuge most certainly must be subject to NEPA and APA requirements.

In this case, the FWS did not avoid its duties under NEPA entirely since it attempted to categorically exclude the bear hunt from more substantive NEPA review in 1998.⁷ In other words, the FWS conceded that NEPA was applicable to its action but elected to avoid the need to prepare a substantive analysis of the environmental impacts by inappropriately and illegally categorically excluding the hunt from review. Only when the FWS began to compile information in response to the request submitted by The Fund for Animals did it realize that its Environmental Action Memorandum (the mechanism used by the FWS to document its categorical exclusion) had not been "thoroughly reviewed by the U.S. Fish and Wildlife Service for compliance with all legal details related to hunting on the refuge."⁸ This prompted the FWS to cancel the 1998 hunt claiming an "administrative oversight."⁹ Then, contrary to its claim that the hunt was not required to undergo substantive NEPA review, the FWS prepared a draft EA on

⁵ See Transcript of Proceedings in Moore v. Kempthorne at 44.

⁶ Though this policy, contained in the "Refuge Manual" has subsequently been replaced by revised policies, the policies contained in the "Refuge Manual" were applicable to the decision made in regard to the refuge bear hunt in 1998.

⁷ See March 1998 Environmental Action Memorandum.

⁸ See October 8, 1998 notice to bear hunt applicants signed by former refuge manager Lloyd Culp.

⁹ See October 8, 1998 letter from former refuge manager Lloyd Culp to The Fund for Animals.

its proposed black bear hunt which was never made public because a decision was made, after receiving funding to initiate the development of its CCP, to evaluate the environmental impacts of its bear hunt in the Draft CCP/EA.¹⁰

During the preparation of the Draft CCP/EA, e-mails between FWS officials reveal that questions of the legality of the refuge's opening package for black bears were raised. In a December 14, 2005 email from John Stasko to Ms. Baird, the following response was provided to that question:

“The decision is to press forward with the CCP assuming that the bear hunt is in the CFR and is already “open”. There are questions about that since no one can produce an EAM. We intend to have a signed CCP prior to the date of the hunt. Steve Funderbunk intends to beef up the NOA (for the CCP) to identify the hunt as a significant change to our management and indicate this is discussed in the CCP. A signed CCP will contain ALL of the requirements necessary with today's hunt openings. There are risks with this approach (no Washington support, we may get sued by Friends for Animals, etc.) If these things occur we can prepare a opening package and pay for a special federal register process. We're trying to avoid this (this was Barry's advised approach) because of the extra work.” [emphasis added]

This statement is particularly telling as to the efforts of the FWS to avoid subjecting its proposed refuge bear hunt on the refuge to substantive NEPA review in 1998 as part of its effort to legally open the refuge to bear hunting. Notwithstanding the legal requirement to do so under NEPA and the APA, it was a matter of convenience for the FWS to avoid this “extra work.” Even in 2005, despite some question as to whether the refuge had been legally opened to bear hunting and recognizing the risks in proceeding with including the bear hunt as part of the CCP, the FWS wanted to avoid the need to prepare a separate opening package for the bear hunt (and presumably a hunt-specific EA) because it would create “extra work.”

Beyond the concerns pertaining to the process followed to “open” the refuge to bear hunting in 1998, a far more serious deficiency in the process is the abject failure of the FWS to subject the refuge bear hunt to legally sufficient review in the Draft CCP/EA. In their November 28, 2006 letter (attached), AWI and IDA provide a number of examples of the deficiencies inherent in the Draft CCP/EA. These include a failure: to disclose all relevant information; to consider a range of reasonable alternatives; to accurately disclose and evaluate the environmental impacts of the hunt; and to adequately evaluate the cumulative impacts of the hunt. None of these deficiencies have been remedied in the past year so all are still relevant to the bear hunt on the refuge. It is because of these deficiencies that we are seeking an agreement from the FWS to subject the refuge bear hunt to a new environmental impact review pursuant to NEPA before deciding if a hunt should be conducted in 2008.

¹⁰ See “Excerpts from Response to Solicitor” attached to December 13, 2005 e-mail from former refuge manager Lloyd Culp to John Stasko.

A particular concern in regard to the analysis in the Draft CCP/EA is that the FWS failed to disclose any biological or ecological information about the refuge bear population. In describing the refuge bear population, the FWS estimated the entire refuge bear population to consist of 250-350 bears, that average off-refuge “harvest” of bears had remained unchanged for the past 11 years, that nuisance bear complaints and observational data provided evidence of an increasing bear population, and that the refuge wanted to proactively address an expected increase in potential bear/human conflicts.

In regard to the actual analysis of the environmental impacts of the proposed hunt, the FWS evaluated such impacts in seven short paragraphs. Six of those paragraphs were non-substantive providing a broad description of the likely impacts of the hunt (*i.e.* disruption of daily activities), how the FWS decided to limit the hunt to 20 bears, how many bears the FWS estimated would be killed based on nearby bear hunter success rates, and a concluding paragraph claiming that the bear hunt would have no impact on federally listed endangered or threatened species or to state listed species.

The remaining paragraph discussed the 2005 dissertation prepared by Catherine Tredick and the concerns she expressed over the isolated nature of the refuge bear population as determined based on her genetic analysis of the refuge bear population in comparison to two other black bear populations studied on the other side of the Albemarle Sound. The paragraph concluded by claiming that both Tredick and Michael Vaughan of Virginia Tech had agreed that the proposed FWS hunt “would not be detrimental to the bear population when held within the described parameters.”¹¹

Such a superficial analysis does not satisfy the requirements of NEPA. In this case, to make matters worse, the FWS had far more information about the refuge bear population that it completely failed to disclose. This information was primarily contained in two separate studies of the refuge bears by Hellgren (1988) and Tredick (2005). Specifically, those studies contained information that should have been disclosed in the Draft CCP/EA including data on the refuge bear population’s sex ratio, age structure, mortality rates and causes, age-specific survivorship, denning ecology, home range sizes and structure, fecundity, genetic variability, and habitat use patterns.

Had the FWS bothered to disclose information from the Hellgren or Tredick studies (or other relevant published studies), the public would have learned that:

- Hellgren documented a number of mortality factors affecting refuge bears including hunting, cannibalism, vehicle collisions, poaching, damage complaint kills, and handling.
- Forty-four percent of Hellgren’s tagged bears fell victim to depredation permit kills and vehicle collisions.

¹¹ See Draft CCP/EA at 188.

- A sizeable male bear bias in Hellgren's bear capture efforts leading him to conclude that "until a less biased collection technique is developed, the true sex ratio of the black bear populations will be virtually impossible to determine."¹²
- Hellgren cautioned that "the species (black bear) remains in precarious status in the Atlantic Coastal Plain due to the fragmented nature of populations" and that habitat fragmentation at that time was accelerating due to "phosphate or peat mining, forestry, and agriculture...."
- Hellgren was concerned about the "island nature" of the refuge bear population due to the potential loss of genetic variability.
- Hellgren and Vaughan (1989) calculated an effective population size of 56 bears which "is only slightly above the recommended size of 50 for short-term population survival and well below the 500 recommended for preservation of genetic variability and long-term population survival."
- Hellgren (1988) and Hellgren and Vaughn (1989) recommended, due to continued habitat destruction and fragmentation and genetic concerns, that the refuge bear population continue to be protected from hunting.
- Tredick's estimates of black bear density were similar to those reported by Hellgren some 15 years earlier suggesting that the bear population was stable.
- Tredick also documented a male bias in her bear hair snare sampling results.
- Tredick expressed concern about the presence of a major highway adjacent to the refuge and increasing urban developments surrounding the refuge as potentially contributing to decreasing habitat and limiting bear densities.
- Tredick found that the genetic variability in refuge bears was clearly lower when compared to other refuge bear populations and that the discovery of 12 unique alleles in the Great Dismal Swamp bears provided evidence of restricted gene flow which, given increasing off-refuge development, could contribute to a declining refuge bear population size and further loss of genetic diversity.
- Tredick recommended that "further study into demographic parameters (reproduction, survival, and population growth rate) must be completed before recommendations can be made regarding harvest of black bears" on the refuge and that given the documented low heterozygosity values found in refuge bears which is indicative of restricted gene flow "reducing bear numbers through hunting may exacerbate this issue." [emphasis added]¹³

¹² The bias toward male bears in his sampling effort calls into question the accuracy of the FWS claim that 20 female bears can be removed from the population without any adverse impacts on the population as this calculation is based on an assumed 50:50 sex ratio. Tredick also reported a male bias in her hair snare samples providing additional evidence that the sex ratio of refuge bears may not be 50:50.

¹³ When IDA contacted Tredick via email in November 2006, Ms. Tredick's response suggested that IDA's summary of her research findings in regard to hunting was misleading, that she did not claim that demographic studies were needed before a hunt could be contemplated, and that she "simply recommended that managers use caution in establishing hunting seasons." Clearly, Ms. Tredick's recollection of her own study recommendations was not clear as she explicitly stated that the recommended demographic studies "must be completed before recommendations can be made regarding harvest of black bears..."

Thus, if the FWS had disclosed all relevant information, the public would have been aware of the myriad threats to the refuge bear population identified by Hellgren and Tredick, both of whom (and others) recommended against a refuge bear hunt.¹⁴ As the studies by Hellgren and Tredick, despite their deficiencies, represent the best available scientific information on the refuge bear population, the FWS was obligated to both disclose their findings and to more seriously consider their conclusions and recommendations. Tredick, for example, explicitly recommended that additional demographic studies be conducted before recommendations are made about a black bear hunt yet, to date, the FWS has failed to conduct such studies.

Furthermore, had the FWS disclosed biological and ecological data reported by Hellgren and Tredick, the public could have conducted an independent analysis of the potential adverse impact of the hunt on the refuge bear population.

Similarly, though the FWS mentions the increasing threats to the refuge bears as a result of off-refuge changes in terms of human population numbers, land use changes, development pressures in the Draft CCP/EA it fails to quantify such impacts, predict how such impacts will escalate in the future, and/or what the short and long-term consequences will be for the refuge bears beyond eliminating potential movement corridors and increasing human/bear conflicts.¹⁵ That type of information is precisely what must be presented in a NEPA document so that the public can understand how additional mortality factors (i.e. a refuge hunt) will impact the bear population given existing off-refuge threats.

Its failure to quantify the off-refuge threats to the refuge's bears is reflective of its complete failure to adequately evaluate the cumulative impacts of the hunt in relationship to other reasonably foreseeable impacts to the bear population or its habitat. As defined in NEPA, "cumulative impact" refers to the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 CFR §1508.7. In other words, NEPA mandates that federal agencies consider the impacts of their proposed action in relationship to other past, existing, or reasonably foreseeable future impacts whether conducted by federal, state, municipal agencies, or by individuals.

In this case, the FWS engaged in no such analysis. Indeed, in its cumulative impact analysis of Alternative B (identified as the proposed action in the Draft CCP/EA) the only reference to

¹⁴ The claim by the FWS that Tredick (and Vaughan) agreed that a limited hunt would not adversely impact the refuge bear population is inconsistent with Tredick's own recommendations and does not obviate the need for the additional demographic studies that she recommended be completed before a black bear hunt was initiated. The recommended studies have not been completed.

¹⁵ See Draft CCP/EA at 114 and 115. In addition, these are just some of the concerns expressed by W. Michael Lane in his April 24, 2006 comments on the Draft CCP/EA. Specifically, Mr. Lane called for additional research into black bear dispersal patterns and rates, the population dynamics of "resident" bears outside of the refuge, the dynamics of the larger meta-population of bears, and bear travel routes. He explained that "it is critically important to collect sufficient baseline information on dispersal patterns, numbers, demographics, and habitat parameters before (potentially significant) additional levels of bear harvest are introduced in the heart of the 'bear factory.'" Not surprisingly, the FWS largely ignored Mr. Lane's comments in its document responding to public comments.

hunting was in the context of suggesting that an increase in hunting opportunities would expand public access on the refuge.¹⁶ The Draft CCP/EA is completely devoid of any analysis of commercial or residential developments, infrastructure developments (*i.e.* roads, shopping centers, schools), changing land use practices, hunting pressures, changes in the type and frequency of human recreational activities, poaching pressures, or other actions being taken by federal, state, municipal agencies or individuals off-refuge lands and how such impacts effect the short and long-term survival of the refuge bears, their core range, and their movement or dispersal corridors. Though the FWS published its "Finding of No Significant Impact" in early August 2006, the subsequent ruling in *The Fund for Animals v. Hall* (F. Supp. 2d, 2006 WL 2512872 (D.D.C. August 31, 2006)) provides additional cause for the FWS to agree to subject its refuge bear hunt to a new NEPA review particularly given the inadequacy of its cumulative impact analysis in the Draft CCP/EA.

In summary, as articulated in the November 28, 2006 letter and as further emphasized above, the analysis of the environmental impacts of the refuge bear hunt contained in the Draft CCP/EA fails to satisfy the basic requirements of NEPA. As such, though AWI and IDA strongly oppose the 2007 bear hunt and believe the FWS should cancel the hunt, the primary purpose of this letter is to request that the FWS agree to prepare a new NEPA analysis specific to the refuge bear hunt before deciding whether to conduct a bear hunt in 2008. Should the FWS ignore this request or elect to proceed with a 2008 bear hunt without preparing a new NEPA analysis, we will consider all options available to us to compel the FWS to act in accordance with federal law.

Thank you for considering this request and we look forward to receiving your reply.

Sincerely,



Cathy Liss
President
Animal Welfare Institute



Dr. Elliot Katz
President
In Defense of Animals

cc: Geoffrey Haskett, Assistant Director, National Wildlife Refuge System
Tony Leger, Regional Chief, National Wildlife Refuge System

¹⁶ See Draft CCP/EA at 197.