



April 21, 2009

The Honorable Kenneth Salazar  
Secretary of the Interior  
U.S. Department of the Interior  
Room 6156  
1849 C Street, N.W.  
Washington, DC 20240

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

Dear Secretary Salazar and Secretary Locke:

On behalf of the Western Urban Water Coalition (WUWC), I am writing to request that the Departments of the Interior and Commerce not take any action to withdraw or reissue the regulations published by the last Administration on December 16, 2008, 73 Fed. Reg. 76,272-87 ("Kempthorne Rule"), pertaining to section 7(a)(2) of the Endangered Species Act (ESA) without complying with the notice and comment requirements of the Administrative Procedure Act (APA). The WUWC takes this position not because it supports retaining the Kempthorne Rule in its current form. In fact, we do not. Instead, we urge you to engage in APA procedures on the basis of fundamental principles of good government and the clearly stated position of President Obama in favor of transparency and participatory decision-making.

The WUWC consists of the largest urban water utilities in the West, serving over 30 million western water consumers in 13 metropolitan areas in five states. The membership of the Western Urban Water Coalition (WUWC) includes the following urban water utilities: *Arizona* – Central Arizona Project, City of Phoenix; *California* – East Bay Municipal Utility District, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utilities Commission, Santa Clara Valley Water District; *Colorado* – City of Aurora, Denver Water; *Nevada* – Las Vegas Valley Water District, Southern Nevada Water Authority, Truckee Meadows Water Authority; and *Washington* – Seattle Public Utilities.

By letter of October 14, 2008, WUWC commented on the proposed Kempthorne Rule. In that letter, we expressed concern over both the proposal to assign a greater role to action agencies and expressed concern over the intention to create a broad exemption for agency actions resulting in greenhouse gas emissions. We also commented in favor of clarification on how cumulative and indirect effects would be taken into account during the interagency consultation process. In furtherance of full disclosure and adequate comment, we called for an extension of the comment period and compliance with NEPA through public comment.

The WUWC has long advocated full compliance with public participation and accountability in government decision-making. WUWC members consistently adhere to these principles for the review of their own projects. It is the position of the WUWC that government decision-making *always* benefits from full disclosure and public review.

Based on this strong policy position, the WUWC was very pleased with President Obama's Memorandum of January 21, 2009 – *Transparency and Open Government*. 74 Fed. Reg. 4683. The President forcefully stated that “[p]ublic engagement enhances the Government’s effectiveness and improves the quality of its decisions.” 74 Fed. Reg. 7685. We also agree with the President’s directive that “Executive departments and agencies should offer Americans increased opportunities to participate in policy-making and to provide their Government with the benefits of their collective expertise and information.” *Id.* Finally, we agree and support the President in his stance on “collaborative government” that “agencies should solicit public feedback to assess and improve their level of collaboration and to identify new opportunities for cooperation.” *Id.* That admonition is particularly relevant to the section 7 “interagency consultation” process that is the subject of the Kempthorne Rule.

The WUWC also approves of the President’s memorandum of March 3, 2009, calling for internal review of the Kempthorne Rule. 74 Fed. Reg. 9753. As noted above, the WUWC opposed certain aspects of the rule. Clearly, an internal “hard look” is appropriate to inform future actions regarding the Kempthorne Rule. In that memorandum, the President also directed agencies to “exercise their discretion” to follow longstanding consultation and concurrence procedures under the ESA. Having taken that action, the President, in effect, removed one of the most controversial aspects of the Kempthorne Rule from ongoing agency practice and eliminated the need for immediate action.

We are aware that Congress has authorized you to “withdraw or reissue” the Kempthorne Rule without complying with any other law, such as the APA. Such action would have to occur within 60 days of the enactment of this provision (included in section 429 of the Omnibus Appropriation Act), or May 11. In addition, we understand that 44 members of Congress wrote to you by letter of April 3 to urge you to invoke that authority, as did 53 environmental groups by letter of April 19. We respectfully disagree with the position asserted in those letters.

For the reasons set forth in this letter, the WUWC requests that you apply the relevant procedural laws to all future actions involving the Kempthorne Rule. Many of the disconcerting aspects of the Rule have already been avoided by the President’s March 3 ESA memo, and your future actions will be better informed and on unquestionably solid procedural grounds if you follow the established public process avenues for reconsidering and taking further action on the Rule. There has been much criticism of the Bush Administration for dictating policy results under the ESA at the expense of science and public process. We urge you to avoid those mistakes and follow the traditional path of public review. We pledge our constructive involvement in any such procedure you would initiate.

Sincerely,



Hamlet J. Barry III  
Chairman