



United States Department of the Interior

FISH AND WILDLIFE SERVICE



In Reply Refer to:

2010-TA-0038

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NOV 20 2009

David Chanda, Director
New Jersey Department of Environmental Protection
Division of Fish and Wildlife
P.O. Box 400
501 East State Street, 3rd Floor
Trenton, New Jersey 08625

Dear Mr. Chanda:

The U.S. Fish and Wildlife Service (Service) is writing to the New Jersey Department of Environmental Protection's Division of Fish and Wildlife (NJDFW) in support of the New Jersey Fish and Game Council's Resolution on Trap-Neuter-Release (TNR) and free-ranging domestic cats, passed June 19, 2007 (enclosed). The Service strongly opposes domestic or feral cats (*Felis catus*) being allowed to roam freely within the U.S. due to the adverse impacts of these non-native predators on federally listed threatened and endangered (T&E) species, migratory birds, and other vulnerable native wildlife. Therefore, the Service opposes TNR programs that allow return of domestic or feral cats to free-ranging conditions. As with any other domestic animal, the Service encourages the State of New Jersey to take appropriate action to ensure that cat owners act responsibly to restrain or confine their animals and be held accountable for any damages to wildlife that occur from allowing animals to roam at large. Further, the Service recommends that the State of New Jersey take action to eliminate free-ranging feral cats throughout New Jersey.

Feral and free-ranging domestic cats are a non-native, invasive predator species to North America. Invasive species, particularly cats, are recognized as one of the most widespread and serious threats to the integrity of native wildlife populations and natural ecosystems (Nogales *et al.* 2004). It has been estimated that hundreds of millions of birds, small mammals, reptiles, and amphibians are killed annually by free-ranging cats (American Bird Conservancy, undated). A growing body of literature strongly suggests that domestic cats are a significant factor in the mortality of birds (Winter 2004; Winter and Wallace 2006; Hughes *et al.* 2008). Because free-ranging and TNR cats often receive food from humans, they can reach population levels that may create areas of abnormally high predation rates on wildlife. When the wildlife prey is a threatened or endangered species, the result may be extirpation or extinction (Knowlton *et al.* 2007).

Feeding cats does not deter them from killing wildlife for they do not always eat what they kill. Even if food is available, free-ranging house cats hunt natural prey during all seasons and seem to

prefer natural prey when it is easily accessible (Liberg 1984). Furthermore, studies suggest that cats' hunger and hunting instincts are regulated by separate areas of the brain (Polsky 1975; Adamec 1976). Therefore, even well-fed, feral or free-ranging cats pose a threat to nesting shorebirds, migratory birds, and other native wildlife.

The following comments are provided pursuant to the Endangered Species Act (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*) (ESA) and the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-712) (MBTA). We preface our comments by providing the regulatory context for our recommendations.

RELEVANCY OF APPLICABLE FEDERAL WILDLIFE LAWS

Endangered Species Act

Unauthorized take of listed species can occur through a variety of means, including but not limited to wounding, killing, harm, and harassment. These are the circumstances that the NJDFW should strive to avoid by opposing free-ranging TNR efforts in New Jersey. Failure of an agency or municipality to take action to reduce the likelihood of death or injury to T&E species from feral cats could result in a violation of the ESA for which the agency or municipality may be held responsible for unauthorized "take" if free-ranging cats kill, injure, or harass T&E species. The below information is provided to clarify key prohibitions under the ESA.

- Principal among the ESA's system of species protection is the Section 9 prohibition rendering it illegal for any "person" to "take" any species listed as endangered (16 U.S.C. § 1538(a)(1)(B)). This prohibition against taking applies equally to species listed as threatened (50 C.F.R. § 17.31). The ESA defines the term "take" to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Under Section 1538(g) of the ESA, it is unlawful to solicit another to commit, or cause to be committed, any offense described above.
- The Service's regulations (50 C.F.R. 17.3) further define the terms "harassment" and "harm." Harass is defined as an intentional or negligent act or omission that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns, which include but are not limited to breeding, feeding, or sheltering. Harm is defined as any act that actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where the act actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

The ESA not only prohibits any person from directly taking wildlife, but it also prohibits any person from causing an ESA violation to be committed (16 U.S.C. § 1538(g)). Equally as important, under the ESA, the term "person" includes "any officer, employee, agent, department, or instrumentality . . . of any State, municipality, or political subdivision of a State . . . [or] any State, municipality, or political subdivision of a State . . ." (16 U.S.C. § 1532(13)). The ESA "not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking." (*Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997)). Further, a "governmental third party pursuant to whose authority an actor directly exacts a taking . . . may be

deemed to have violated the provisions of the ESA.” [Id. for an illustration of such instances, see U.S. v. Town of Plymouth, Mass., 6 F.Supp.2d 81 (D.Mass. 1998) (enjoining municipal beach vehicle management plan that caused take of piping plover).

See also: Defenders of Wildlife v. EPA, 882 F.2d 1294, 1301 (8th Cir. 1989) (holding EPA liable for violation of the ESA for its registration of strychnine pesticide administered by ranchers which poisoned endangered species); Loggerhead Turtle v. County Council of Volusia Co., 148 F.3d 1231 (11th Cir. 1998), cert. denied, 526 U.S. 1081 (1999); Sierra Club v. Lyng, 694 F.Supp. 1260 (E.D.Tex. 1988), aff’d Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991)].

If take under the ESA occurs, the violators may be held responsible and be subject to civil and criminal penalties. Under a civil penalty, fines can reach up to \$25,000 per take, while a criminal penalty may reach up to \$50,000 per take and up to one year in prison. The potential liability of the State or a municipality, its agents, contractors, as well as individual TNR caregivers is of concern not only due to the Service’s enforcement responsibilities, but because the ESA contains a citizen suit provision allowing the general public to initiate litigation to address alleged violations of the Act.

Migratory Bird Treaty Act

Migratory birds are Federal trust resources and are afforded protection under the MBTA, which prohibits the take of a migratory bird’s parts, nest, or eggs. Many species of migratory birds, wading birds, and songbirds nest or migrate throughout New Jersey. Migratory birds could be subject to predation from State, municipality, or land manager-authorized cat colonies and free-ranging feral or pet cats. Predation on migratory birds by cats is likely to cause destruction of nests or eggs, or death or injury to migratory birds or their young, thereby resulting in a violation of the MBTA. Criminal penalties under the MBTA can reach up to \$15,000 and up to 6 months in prison.

RECOMMENDATIONS FOR CONTROL / MANAGEMENT OF FREE-RANGING AND FERAL CATS

The Service recommends that the NJDFW consider implementation of the following actions to control and manage free-ranging and feral cats:

- Ban and eliminate free-ranging TNR colonies, feral, and domestic cats through humane capture by authorized or licensed animal care or control personnel.
- Prioritize removal of cat colonies in close proximity to shorelines, natural wetlands, undeveloped forested areas, areas managed for wildlife, parks, and other open space, and other sensitive areas supporting concentrations of T&E species, migratory birds, or other native wildlife.
- Support efforts of volunteers or organizations that trap and neuter free-ranging cats, but require that animals be adopted and kept indoors or be released into managed areas that are appropriately fenced or otherwise enclosed to prevent animals from roaming outside of a contained space. Such managed areas should be situated only within landscapes where adverse impacts to T&E species, migratory birds, and native wildlife will be unlikely to occur.

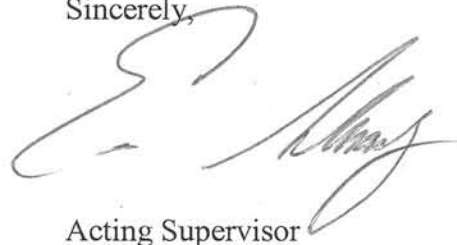
- Require the municipal licensing of all cats and prohibit free-ranging cats with leash laws similar to those in existence for dogs.
- Support educational programs to promote the American Bird Conservancy's "Cats Indoors" program for New Jersey residents and seasonal visitors.
- Encourage an annual census of all cats to be conducted within each New Jersey municipality to establish a baseline and evaluate progress toward elimination of free-ranging cats.
- Encourage microchipping of all cats currently held as pets. Require microchipping of all cats sold commercially, adopted through animal welfare or control facilities, or released into managed fenced or enclosed colonies. This will facilitate cat registration, assist in identifying owners of "lost" cats, and aid in identifying cat owners or facilities not in compliance with regulations and / or accountable for death or injury to T&E species, migratory birds, or other native wildlife.
- Encourage greater enforcement of the State's "No Animal Abandonment" statute (N.J.S.A 4:22-20(a)(b)) and establish stricter penalties for violators. Work with animal welfare and conservation groups to provide a low-cost solution for pet-owners who are no longer willing or able to care for their pets.

CONCLUSION

The Service strongly supports the New Jersey Fish and Game Council's Resolution on TNR cat colonies and free-ranging domestic cats. The Service encourages the NJDFW to use its authorities to take appropriate action to control all domestic and feral cats (a non-native and invasive predator) in fulfillment of NJDFW's responsibility to protect of T&E species, migratory birds, and other native New Jersey wildlife.

The Service looks forward to continuing to work cooperatively with the NJDFW in ensuring the protection of federally listed species and migratory birds. Please contact Stephanie Egger or Annette Scherer at 609-383-3938 extensions 47 or 34, respectively, if you have any questions regarding the above comments or require additional assistance regarding Federal trust resources.

Sincerely,



Acting Supervisor

Enclosure

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**New Jersey Fish and Game Council Resolution on Trap-Neuter-Release (TNR)
and Free-ranging Domestic Cats**

WHEREAS, free-ranging domestic cats are a non-native, invasive predator species; and

WHEREAS, free-ranging domestic cats annually kill millions of native birds, small mammals, reptiles, and amphibians; and

WHEREAS, free-ranging domestic cats are a threat to the survival of endangered and threatened species, and also those that are considered rare and those designated as being of special concern; and

WHEREAS, free-ranging domestic cats kill many of the species that serve as prey for a variety of native wildlife, including raptors, which, by depriving these native species of valuable food unnecessarily compounds the difficulty of their survival, and places unnecessary stress on the larger ecosystem; and

WHEREAS, the "management" (supplemental feeding, trap-neuter-release, etc.) of domestic cat colonies does not moderate unacceptable negative impacts on natural resources as even well-fed cats still kill native wildlife and in fact, are in better physical condition and therefore better able to kill native wildlife; and

WHEREAS, domestic cat colonies are sometimes established in areas that are considered to be of little wildlife value but, in fact, these areas provide temporary, essential resting and foraging areas for migrant species, especially birds; and

WHEREAS, any time large numbers of animals congregate in one area, as in domestic cat colonies, there is increased risk for the spread of diseases, including feline leukemia, toxoplasmosis, and rabies, among others; and

WHEREAS, food provided for free-ranging cats also attracts skunks, raccoons, black bears and other species that are capable of contracting and/or spreading rabies through interactions with vector species; and

WHEREAS, these diseases not only endanger native wildlife, but rabies, toxoplasmosis and other diseases also pose significant health risks to people; and

WHEREAS, the National Association of State Public Health Veterinarians has stated that there is no evidence that colony management programs will reduce diseases; and

WHEREAS, NJSA 23:2A-14 makes it illegal to intentionally leave out food that can be accessed by or attractive to bears; therefore, be it

RESOLVED, that the New Jersey Fish and Game Council does not support non-native, invasive domestic cats being allowed to roam freely anywhere in New Jersey.

Passed June 19, 2007