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Public Comments Processing
Attn: Docket No. FWS-HQ-ES-2018-0097
U.S. Fish & Wildlife Service Headquarters, MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Public Comment, Proposed Rule – Removing the Gray Wolf (*Canis Lupus*) from the List of Endangered and Threatened Wildlife [Docket No. FWS-HQ-ES-2018-0097]

To Whom It May Concern:

Thank you for the opportunity to comment on the U.S. Fish & Wildlife Service’s (“Service”) proposed rule to remove the gray wolf (*Canis lupus*) from the federal list of endangered and threatened species.¹ These comments are submitted by the Western Environmental Law Center on behalf of the following western conservation organizations: WildEarth Guardians, Western Watersheds Project, Klamath-Siskiyou Wildlands Center, Cascadia Wildlands, Oregon Wild, Environmental Protection Information Center (“EPIC”), Kettle Range Conservation Group, The Lands Council, Wildlands Network, Rocky Mountain Wild, and the Klamath Forest Alliance.

Collectively, these organizations represent thousands of individuals who deeply care about the health and conservation of the American West’s public lands and wildlife resources, including the eventual recovery of the gray wolf to the rich habitat afforded across much of the gray wolf’s former western range. We appreciate your consideration of the following comments on the Service’s proposed rule to remove federal protections under the Endangered Species Act (“ESA” or “Act”), 16 U.S.C. § 1531 *et seq.*, from the gray wolf (*Canis lupus*) throughout the contiguous United States.

¹ U.S. Dep’t of the Interior, Fish & Wildlife Service, Endangered and Threatened Wildlife and Plants; Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 84 Fed. Reg. 9,648 (Mar. 15, 2019)[hereinafter “Proposed Rule”].

INTRODUCTION

The ESA is our nation’s preeminent wildlife conservation law enacted “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”² The Supreme Court of the United States has acknowledged the crucial significance of the Act, noting that “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”³ An “examination of the language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”⁴ Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as “institutionalized caution.”⁵ As a district court reminded the Service, “if there is one thing required of the Service under the ESA, it is to take action at the earliest possible, defensible point in time to protect against the loss of biodiversity within our reach as a nation.”⁶ The ultimate goal of the ESA is to use “all methods and procedures . . . necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.”⁷

Gray wolves were among the first species granted federal protections, first under the legislative predecessors to the ESA — the Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969 — and subsequently under the ESA of 1973, as amended.⁸ The entities listed in 1978 included: (1) an endangered population at the taxonomic species level (*C. lupus*) throughout the contiguous United States and Mexico (except Minnesota); and (2) a threatened population in Minnesota.⁹

² 16 U.S.C. § 1531(b).

³ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

⁴ *Id.* at 174.

⁵ *Id.* at 194.

⁶ *Defenders of Wildlife v. Jewell*, 176 F. Supp. 3d 975, 1011 (D. Mont. 2016).

⁷ 16 U.S.C. §§ 1531(b), 1532(3). *See also* INTERGOVERNMENTAL SCIENCE-POLICY PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERVICES, GLOBAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES (May 2019) available at <https://www.ipbes.net/global-assessment-report-biodiversity-ecosystem-services> (finding generally that “[n]ature and its vital contributions to people, which together embody diversity and ecosystem functions and services, are deteriorating worldwide.”)

⁸ Proposed Rule, 84 Fed. Reg. at 9,649.

⁹ *Id.*

Hundreds of thousands of wolves likely ranged across the western United States and Mexico.¹⁰ However, the gray wolf's range and numbers declined significantly throughout the 19th and 20th centuries as the result of human-caused mortality from poisoning, trapping, and shooting, and from government-funded programs of eradication.¹¹ By 1974, the species had been eliminated from most of its historical range, and occurred only in small populations in Minnesota and on Isle Royale, Michigan.¹² There were only approximately 1,235 wolves in Minnesota remaining at the time of the 1978 listing rule publication.¹³ Although gray wolves are making a remarkable comeback in select areas of the United States — e.g., a population of roughly 4,400 individuals currently roam the region surrounding the Great Lakes¹⁴ — they have yet to return to much of their historic habitats across vast portions of the American West, including in the Pacific Northwest, the Southern Rockies, and the Southwestern United States (including California and Nevada).

The Service's proposed rule to remove ESA protections from gray wolves throughout the contiguous United States and Mexico — excepting the Mexican wolf (*C. l. baileyi*) and red wolf (*C. rufus*) subspecies listings, as well as the already delisted wolf population in the Northern Rocky Mountains distinct population segment ("DPS")¹⁵ — is premature, conflicts with the Service's responsibility to take a precautionary approach to wildlife management in accordance with the mandates and intent of the ESA, and blatantly contravenes prior court orders and rulings on the matter.

Our comments are organized as follows: First, we discuss the severe legal deficiencies in the proposed rule. Second, we highlight the troubled status of the minimal wolf populations in the Pacific Northwest states, as well as the lack of viable gray wolf populations in the Southern Rocky Mountain and Southwestern regions. Third, we provide information explaining why the proposed rule's transfer of management authority to the states would be detrimental to the recovery of the species, as evidenced by the abusive regimes of state wolf management in the already-delisted Northern Rocky Mountains region. We conclude by respectfully requesting that the Service withdraw its proposed rule at this time due to these many legal and substantive failures.

¹⁰ Proposed Rule, 84 Fed. Reg. at 9,655.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Proposed Rule, 84 Fed. Reg. at 9,655. Note that we do not agree that recovery has indeed been achieved in the Great Lakes region based on this population estimate alone.

¹⁵ Proposed Rule, 84 Fed. Reg. at 9,653–54.

I. LEGAL DEFICIENCIES IN THE PROPOSED RULE

We are concerned that the Service’s proposed rule is legally deficient on a variety of procedural grounds under the ESA and the Administrative Procedure Act (“APA”), 5 U.S.C. § 702.¹⁶

The Proposed Rule’s Approach to Arbitrarily “Lump” the Minnesota and Contiguous United States and Mexico Wolf Populations into a Singular “Gray Wolf Entity” and Strip the Entire Entity of Federal Protections Altogether Violates the ESA and Prior Court Rulings

The proposed rule blatantly defies the logic and demands of prior court rulings analyzing the Service’s prior gray wolf delisting attempts. In fact, this proposed rule is a near-exact replica of failed rules of the past.

For example, in 2005, a federal district court in Oregon faulted the Service for promulgating its 2003 wolf downlisting rule that clearly violated the plain statutory mandates of the ESA.¹⁷ The 2003 rule lumped wolves into one of three separate DPSs — an Eastern, Western, or Southwestern DPS — and lessened protections for wolves wherever found within the Eastern and Western DPSs, even in areas with low or non-existent population levels. The court held this rule violated the law, holding that the Service: (1) arbitrarily and capriciously failed to properly analyze whether the gray wolf was endangered or threatened in a “significant portion of its range” by failing to consider that “a species can be extinct throughout a significant portion of its range if there are major geographical areas in which it is no longer viable but once was;”¹⁸(2) arbitrarily and capriciously applied its DPS Policy to “expand the boundaries” of its proposed DPSs, which effectively decreased protections for the species outside of core recovery areas despite there being no changes to existing threats to justify less protection;¹⁹ and (3) arbitrarily and capriciously failed to properly consider the attempt to downlist the species in vast portions of its geographic range without applying the ESA’s section 4 listing factors.²⁰ In short, the

¹⁶ *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014)(explaining that since the ESA does not supply a separate standard of review, claims under the Act are reviewed under the standards of the APA (citing *Bennett v. Spear*, 520 U.S. 154, 174 (1997))).

¹⁷ *Defenders of Wildlife v. Secretary, U. S. Dep’t of the Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005) [hereinafter “*Oregon Wolves*”].

¹⁸ *Oregon Wolves*, 354 F. Supp. 2d at 1167–68 (“By ruling out all other portions of the wolf’s range because a core population ensures the viability of a DPS, the Secretary’s interpretation ‘has the effect of rendering the phrase [significant portion of its range] superfluous.’” (quoting *Defenders*, 258 F.3d at 1142)).

¹⁹ *Id.* at 1171 (classifying the Service’s wolf DPS as appearing “to be a tactic for downlisting areas the FWS has already determined warrants listing, despite the unabated threats and low to nonexistent populations outside of the core areas.”).

²⁰ *Id.* at 1172 (“The Final Rule is arbitrary and capricious because FWS downlisted major geographic areas without assessing the threats to the wolf by applying the statutorily mandated listing factors.”).

court held that “by downlisting the species based solely on the viability of a small population within that segment, the Service was effectively ignoring the species’ status in its full range, as the [ESA] requires.”²¹

The District of Vermont also faulted the Service for these same shortcomings in its 2003 delisting rule.²² The *Vermont Wolves* court explicitly stated: the Service “cannot downlist an area that it previously determined warrants an endangered listing because it ‘lumps together’ a core population with a low to non-existent population outside of the core area.”²³ The Service “bypass[es] the application of the ESA in the non-core area” when it arbitrarily “expands the boundaries” of the wolf population to achieve its desired outcome to lessen federal protections for the species.²⁴ A final rule “that makes all other portions of the wolf’s historical or current range outside of the core gray wolf populations insignificant and unworthy of stringent protection” is “contrary to the plain meaning of the ESA phrase ‘significant portion of its range,’ and therefore, is an arbitrary and capricious application of the ESA.”²⁵

Rather than appealing these prior rulings, the Service promulgated subsequent rules in 2007, and again in 2009, which also failed to comply with the law.²⁶ In 2011, the Service tried again, this time seeking to remove ESA protections from just the wolves in the Western Great Lakes. This rule also failed to abide by the clear mandate of the ESA and, in 2017, the U.S. Court of Appeals for the D.C. Circuit upheld a district court ruling on the matter, again overturning the Service’s proposal because the Service failed to consider two significant aspects — the impacts of partial delisting on the remnant population and the impacts of historical range loss on the already-listed species.²⁷

Yet, despite these many failings, here, *once again*, the Service is attempting to sidestep the mandates of the ESA — this time by arbitrarily lumping all wolves in the contiguous United States and Mexico (including the Minnesota “threatened” population, but excluding the Mexican wolf and red wolf subspecies populations, as well as the already delisted Northern Rocky Mountain population) into a singular “gray wolf entity.” The effect of this combination is deeply troubling, for its creation is based solely on the fact that one metapopulation — gray wolves in the three states of Minnesota, Wisconsin, and Michigan’s Upper Peninsula — may be faring well

²¹ *Humane Society of the United States v. Zinke*, 865 F.3d 585, 592 (D.C. Cir. 2017).

²² *National Wildlife Federation v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005) [hereinafter “*Vermont Wolves*”].

²³ *Vermont Wolves*, 386 F. Supp. 2d at 565.

²⁴ *Id.*

²⁵ *Id.* at 566.

²⁶ See *Humane Society of the United States v. Kempthorne*, 579 F. Supp. 2d 7 (D.D.C. 2008)(vacating 2007 rule); *Humane Society of the United States v. Salazar*, No. 09-1092, Docket Entry No. 27 (D.D.C. July 2009)(settling case challenging 2009 rule for inadequate public notice and comment).

²⁷ *Humane Society of the United States v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017).

thanks to the beneficial protections ensured by the ESA's federal management regime.²⁸

Having failed to use the DPS tool to reach its desired outcome in the past (see legal history referenced above), the Service is now flipping its former reasoning entirely on its head and altogether abdicating its responsibility for recovering this species in the nearly 85 percent of former habitat and range where gray wolves once freely roamed but are now absent. Instead of actually considering and incorporating the courts' prior concerns into its gray wolf recovery program as required by law, the Service is attempting, whole scale, to wipe its hands clean of any responsibility for seeing the recovery of the gray wolf through to the finish line. Even if the Service is correct that it has achieved success and restored the gray wolf to the Great Lakes region, the Service cannot use that purported success alone to justify the stance that its job is complete and that it has no responsibility to restore the species throughout the ample, critically important, and biologically suitable habitats afforded by the Pacific Northwest, Southern Rocky Mountains, and Southwestern regions of the United States. This is especially true in parts of the country such as Washington, Oregon, and California where gray wolves are just beginning to recolonize their historic range and habitat. Pulling the plug on recovery in these states jeopardizes the potential success and time-frames for these recovery actions. The ESA demands more.²⁹

The Service's arbitrary creation of a "gray wolf entity" by merely lumping together the Minnesota metapopulation with the "remnant" population outside of the Great Lakes region does not cure the severe legal faults of prior delisting attempts. Once again, the Service is creating a fictional entity not based in biology or any other science and attempting to remove ESA protections in one fell swoop. While the Service tries to paper over its methodology with word-smithing, the effect is the

²⁸ See Proposed Rule, 84 Fed. Reg. at 9,683 ("The metapopulation in the Great Lakes area contains sufficient resiliency, redundancy, and representation to sustain populations within the gray wolf entity over time. Therefore, we conclude that the relatively few wolves that occur outside the Great Lakes area within the gray wolf entity, including those in the west coast States and lone dispersers in other States, are not necessary for the recovered status of the gray wolf entity."). To be clear, however, the signatories of this comment letter are not asserting or implying that wolves in the Great Lakes states are recovered by any measure. Rather, our focus is on ESA-listed wolves in west coast states, as well as in western states that once contained wolf populations and retain adequate habitat and prey-base to support wolf populations today.

²⁹ See *e.g.*, *Defenders of Wildlife v. Norton*, 23 F. Supp.2d 9, 19 (D.D.C. 2002)("[T]he Service's focus on only one region of the Lynx's population – the Northern Rockies/Cascades – to the exclusion of the remaining three-quarters of the Lynx's historical regions, is antithetical to the ESA's broad purpose to protect endangered and threatened species."); *National Wildlife Federation v. Norton*, 386 F. Supp. 2d 553, 566 (D. Vt. 2005)("The Final Rule makes all other portions of the wolf's historical or current range outside of the core gray wolf populations insignificant and unworthy of stringent protection. The Secretary's conclusion is contrary to the plain meaning of the ESA phrase 'significant portion of its range,' and therefore, is an arbitrary and capricious application of the ESA.").

same: The Service is once more trying to do what the courts have already said it cannot legally do under the mandates of the ESA by stripping a species of necessary protections before recovery has been achieved such that the Act's protections are no longer required.³⁰ This proposed rule, like its prior iterations, is the essence of arbitrary and capricious decision making disallowed by the APA.

The “Gray Wolf Entity” is Not a Listable/De-listable Entity Under the Act

The “gray wolf entity” does not qualify as a valid entity capable of listing or delisting under the ESA. The ESA allows the Service to list (and subsequently delist) a “species,” which is defined in Section 1532 as including “any sub-species of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”³¹ Thus, the Service may list/delist any “species,” “sub-species,” or “distinct population segment.”³²

Here, the Service has failed to demonstrate that the “gray wolf entity” it is proposing to delist properly fits under any one of these three categories. The “gray wolf entity” is not a “species” in itself, nor is it a “sub-species” of the gray wolf in its own right. That leaves only the DPS category left for qualifying the entity as a listable/de-listable unit.³³ But the Service explicitly states that it cannot find that the “gray wolf entity” qualifies as a DPS in accordance with its DPS Policy.³⁴

Notwithstanding this indisputable finding in the rule itself, the Service chooses to proceed with combining the Minnesota and Lower 48 populations into an arbitrary “gray wolf entity,” despite its noncompliance with the law and absent citation to any authority whatsoever allowing it to do so.³⁵ Instead of wholly ignoring this problem, the Service must properly grapple with this most fundamental hurdle underlying this and all prior gray wolf delisting attempts. The Service simply cannot legally delist a non-listable entity in the first place, and as such, cannot legally create an entirely fictional “gray wolf entity” and simultaneously delist it as proposed. The Service is merely repeating the same inherent mistake of the past, rendering the rule arbitrary and capricious and a plain violation of the law.

³⁰ See *Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553, 565 (D. Vt. 2005) (“The [Service] cannot downlist an area that it previously determined warrants an endangered listing because it ‘lumps together’ a core population with a low to non-existent population outside of the core area.”).

³¹ 16 U.S.C. § 1532(16).

³² *Id.*

³³ U.S. Fish & Wildlife Serv., Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996) (requiring consideration of three factors to determine whether an entity is a DPS, including: (1) discreteness of the population segment in relation to the remainder of the species to which it belongs, (2) the significance of the population segment to the taxon to which it belongs, and (3) the population's conservation status in relation to the Act's standards for listing).

³⁴ Proposed Rule, 84 Fed. Reg. at 9,653.

³⁵ *Id.*

The Service’s “Significant Portion of Its Range” Analysis is Fundamentally Flawed

Under the ESA, the Service must consider a species’ status across a “significant portion of its range” in making listing determinations.³⁶ Thus, there are two situations under which a species, subspecies, or DPS may qualify for listing: a species may be listed throughout all of its range, or a “significant portion of its range.”³⁷

The ESA does not define “significant portion of its range,” but the Ninth Circuit has explained that one way a species may qualify for listing throughout a “significant portion of its range” is if there are “major geographical areas in which it is no longer viable but once was.”³⁸ “Those areas need not coincide with national or state political boundaries, although they can.”³⁹ This requires the Service to: (1) quantify the species’ historic range in order to establish a temporal baseline; and (2) then determine whether the lost or no longer viable area, measured against the baseline, amounts to a significant portion. If a species is “expected to survive” in an area that is much smaller than its historic range, the Service must explain its conclusion that the lost area is not a “significant portion of its range.”⁴⁰ An “adequate explanation” why territory, which was part of a species’ historic range but is no longer occupied or considered viable, is not a “significant portion” of the species’ range is required. If the lost area qualifies as a “significant portion,” then the Service must complete a threats assessment to determine if the species qualifies for listing throughout a “significant portion of its range.”⁴¹

Importantly, the phrase *does not* mean that threats in the “significant portion” must render the entire species at risk of extinction.⁴² On the contrary, legislative history demonstrates that the phrase was intended to allow for protection in one area even if a species is abundant or overabundant in another area.⁴³ Nor is there any bright-line percentage of habitat that must be affected in order for an area to be

³⁶ 16 U.S.C. § 1532(6); *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001).

³⁷ 16 U.S.C. § 1532(6); *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001).

³⁸ *Defenders of Wildlife v. Norton*, 258 F.3d at 1145–46.

³⁹ *Id.*

⁴⁰ *Id.* at 1145.

⁴¹ 16 U.S.C. §§ 132(6),(20).

⁴² *Defenders of Wildlife v. Norton*, 258 F.3d at 1141.

⁴³ *Id.* at 1144. Note that we advocate for an interpretation of the “significant portion of its range” language that allows use of the “significant portion of its range” as an independent basis for listing that protects the entire entity; the Service can use other measures (i.e., Section 4(d)’s rule provisions) to vary levels of protection in select areas as may be necessary or appropriate.

“significant.”⁴⁴ For a species with a small historical range, even a very small percentage of habitat may be “significant.”⁴⁵

Notably, the Service cannot rely on its 2014 Policy interpreting the phrase “significant portion of its range,” 79 Fed. Reg. 37,578, which has since been vacated in-part in the federal district courts.⁴⁶ Specifically, in *Center for Biological Diversity v. Jewell*, the Court found that the “significant portion of its range” language “cannot permissibly be interpreted ‘to mean that a species is eligible for protection under the ESA’ only if it faces threats in enough key portions of its range that the *entire* species is in danger of extinction, or will be within the foreseeable future.”⁴⁷ Such an interpretation would render the ESA’s reference to “significant portion of its range” superfluous.⁴⁸

Nor can the Service interpret the phrase in a way that wholly excludes analysis of the species’ historic range.⁴⁹ Rather, the task of defining the phrase includes quantification of the species’ historic range and an evaluation of whether the lost habitat amounts to a “significant portion” of that range.⁵⁰ The Service may not look only to the health of the species’ population in certain areas while turning a blind eye to threats in areas where the population is either extirpated or home to only a few individuals. “It is insufficient, under *Defenders of Wildlife*, to point to one area or class of areas where [a species’] population persists to support a finding that threats to the species elsewhere are not significant”⁵¹ The ESA requires more.⁵²

Here, the Service’s “significant portion of its range” analysis is legally deficient.

First, the Service’s interpretation of the term “significant” in its “significant portion of its range” analysis is flawed. The proposed rule defines “significant” as

⁴⁴ *Id.* at 1143.

⁴⁵ *Id.*

⁴⁶ *Center for Biological Diversity v. Jewell*, 248 F. Supp. 3d 946 (D. Ariz. 2017) (finding the Service’s interpretation of “significant portion of its range” in the 2014 Policy “impermissibly clashes with the rule against surplusage and frustrates the purposes of the ESA” and is therefore arbitrary and capricious under the APA) *amended in part by* 2017 WL 8788052 (limiting the court’s vacatur of the 2014 Policy to the District of Arizona); *Desert Survivors v. Dep’t of the Interior*, 336 F. Supp. 3d 1131 (N.D. Cal. 2018) (clarifying the court’s ruling on the merits in 321 F. Supp. 3d 1011 that the 2014 Policy interpreting the phrase “significant portion of its range” is vacated and set aside in regards to the Policy’s definition of “significant”).

⁴⁷ *Center for Biological Diversity v. Jewell*, 248 F. Supp. 3d at 956 (quoting *Defenders of Wildlife*, 258 F. 3d at 1142 (emphasis in original)).

⁴⁸ *Id.*

⁴⁹ *Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 876 (9th Cir. 2009).

⁵⁰ *Id.*

⁵¹ *Id.* at 877.

⁵² *Id.*

“any portions [of the gray wolf entity’s range] that may be biologically important in terms of the resiliency, redundancy, or representation of the species.”⁵³ The rule rests on the assumption that there is — purportedly — sufficient resiliency, redundancy, and representation to sustain populations within the gray wolf entity over time provided by the Great Lakes area metapopulation alone.⁵⁴ As such, the Service asserts “that the relatively few wolves that occur outside the Great Lakes area within the gray wolf entity, including those in the west coast States and lone dispersers in other States, are not necessary for the recovered status of the gray wolf entity.”⁵⁵

But, this reasoning is inherently flawed because it wholly ignores the possibility of ever restoring gray wolves to the thousands of square miles of suitable habitat with sufficient prey base outside of the Great Lakes region altogether. The Service cannot reasonably find that suitable habitat in the Pacific Northwest, Southern Rocky Mountains, and Southwestern United States is not “significant” in terms of “resiliency, redundancy, or representation” to the recovery of gray wolves in these regions. In fact, the opposite is true and the habitat afforded by these regions *is* necessarily significant to the recovery of the species in these areas. The gray wolf was once viable in these major geographic areas and now no longer is, and the Service has failed to make the requisite findings to discount these regions’ significance to the recovery of gray wolves there. The Service cannot ignore these regions in favor of solely relying on the fate of the species as a whole, as such an approach would render the phrase “significant portion of its range” superfluous.⁵⁶

For example, the Service’s interpretation of the term “significant” as applied to the Pacific Northwest region is plainly wrong. The Service relies on the fact that the small number of wolves in Oregon, Washington, and Northern California are not biologically significant to the gray wolf entity because they occur only in small numbers and consist of only a few breeding pairs.⁵⁷ This factor alone, however, warrants a significance finding *in favor* of protecting this small population to allow the species to truly recover in the west coast region of the United States. To make these wolves sacrificial lambs because the species is faring well elsewhere is contrary to the ESA’s fundamental conservation mandate.

Further, the Service failed to consider whether the Southern Rockies and Southwestern United States may constitute a “significant portion” of the gray wolf entity’s range. There is no analysis whatsoever regarding the ample suitable habitats available for recovery to be realized in Colorado, Utah, Nevada, Southern California, and Northern Arizona and New Mexico. This analysis is lacking despite the fact that a number of dispersing wolves have been confirmed in these regions, including in

⁵³ Proposed Rule, 84 Fed. Reg. at 9,684.

⁵⁴ Proposed Rule, 84 Fed. Reg. at 9,683.

⁵⁵ *Id.*

⁵⁶ *Center for Biological Diversity v. Jewell*, 248 F. Supp. 3d 946 (D. Ariz. 2017).

⁵⁷ Proposed Rule, 84 Fed. Reg. at 9,685.

Colorado⁵⁸ and Nevada,⁵⁹ for example. Based on these occurrences, the Southern Rocky Mountains and other parts of the West should properly be considered a vital part of the gray wolf's *current* range, demanding further analysis of its significance to the recovery of the species.⁶⁰ As the *Oregon Wolves* court already has told the Service: “By ruling out all other portions of the wolf's range because a core population ensures the viability of a DPS, the Secretary's interpretation has the effect of rendering the phrase [significant portion of its range] superfluous.”⁶¹

The Service's “significant portion of its range” analysis wholly fails to consider that a species may qualify for listing throughout a “significant portion of its range” if there are “major geographical areas in which it is no longer viable but once was.”⁶² And further, it is arbitrarily based on the survival of the species as a whole, rendering the “significant portion of its range” phrase in the ESA redundant in violation of the law.⁶³

The Service Failed to Properly Apply the ESA's Section 4 Listing Factors Analysis Violating the ESA and APA

Under Section 4(a)(1) of the ESA, 16 U.S.C. § 1533(a)(1), and the Service's implementing regulations, the Service is required to determine whether a species is threatened or endangered because of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of the species' range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E)

⁵⁸ See Spencer McKee, *Are There Wolves in Colorado?*, OUT THERE COLORADO (Aug. 7, 2018) <https://www.outtherecolorado.com/are-there-wolves-in-colorado/> (last visited July 3, 2019) (summarizing recent, confirmed wolf sightings and deaths in Colorado); Stephanie Butzer, *CPW Investigating Possible Wolf Sighting in Northern Colorado*, THE DENVER CHANNEL (July 9, 2019) <https://www.thedenverchannel.com/news/local-news/cpw-investigating-possible-wolf-sighting-in-northern-colorado> (last visited July 9, 2019) (documenting recent wolf sighting under investigation in Colorado); Sam Tabachnik, *Gray Wolf Sighting Confirmed in Northern Colorado*, THE DENVER POST (July 10, 2019) <https://www.denverpost.com/2019/07/10/gray-wolf-colorado-wyoming/> (last visited July 15, 2019) (confirming recent wolf sighting in Colorado).

⁵⁹ See Damon Arthur, *North State Wolf Located in Nevada*, REDDING RECORD SEARCHLIGHT (April 5, 2017) <https://www.redding.com/story/news/2017/04/05/north-state-wolf-located-nevada/100101846/> (last visited July 9, 2019) (documenting confirmed sighting of young male member of Shasta Pack in Nevada's Black Rock Desert); Cathy Locke, *Offspring of California's Shasta Wolf Pack Spotted in Nevada*, SACRAMENTO BEE (March 25, 2017) <https://www.fresnobee.com/news/local/article140770443.html> (last visited July 9, 2019).

⁶⁰ See *Center for Biological Diversity v. Zinke*, 900 F.3d 1053 (9th Cir. 2018) (upholding the Service's interpretation of “range” in the phrase “significant portion of its range” as meaning “current” range).

⁶¹ *Oregon Wolves*, 354 F. Supp. at 1168 (quoting *Defenders of Wildlife*, 258 F. 3d at 1142)).

⁶² *Defenders of Wildlife v. Norton*, 258 F.3d at 1145–46.

⁶³ *Id.* at 1142.

other manmade factors affecting the species' continued existence.⁶⁴ These factors are listed in the disjunctive, such that any one or combination of them can be sufficient for a finding that a species qualifies as threatened or endangered under the ESA.

In deciding to propose the delisting of the “gray wolf entity,” the Service has determined that threats to the gray wolf throughout the Lower 48 have been reduced such that the entity no longer meets the definition of threatened or endangered under the ESA. In making this determination, the Service failed to utilize the best available science and failed to carefully consider and adequately apply Section 4(a)(1)'s threat factors in accordance with the ESA and the Service's implementing regulations and policy.

Southern Rockies & Southwest Section 4 Analysis Completely Absent

At the outset, we find it extremely troubling that a Section 4 threats assessment is completely absent from the proposed rule for gray wolves in the Southern Rockies and Southwest. This renders the proposed rule arbitrary and capricious, not only under Section 4(a)(1) of the ESA, but also under the APA because the Service entirely fails to consider an important aspect of the problem: the recovery of gray wolves in the Southern Rocky Mountains and Southwestern United States, where wolves are currently functionally extinct.⁶⁵ The rule effectively strips any wolves that currently do occur,⁶⁶ and those that may eventually recover in these regions, of vital ESA protections without analyzing the Section 4(a)(1) listing factors as applied to this region to justify the removal.⁶⁷

⁶⁴ *Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 873 (9th Cir. 2009)(citing 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(c)).

⁶⁵ *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (An agency must be reversed when the agency has “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

⁶⁶ See Spencer McKee, *Are There Wolves in Colorado?*, OUT THERE COLORADO (Aug. 7, 2018) <https://www.outtherecolorado.com/are-there-wolves-in-colorado/> (last visited July 3, 2019) (summarizing recent, confirmed wolf sightings in Colorado); Stephanie Butzer, *CPW Investigating Possible Wolf Sighting in Northern Colorado*, THE DENVER CHANNEL (July 9, 2019) <https://www.thedenverchannel.com/news/local-news/cpw-investigating-possible-wolf-sighting-in-northern-colorado> (last visited July 9, 2019) (documenting recent wolf sighting under investigation in Colorado); Sam Tabachnik, *Gray Wolf Sighting Confirmed in Northern Colorado*, THE DENVER POST (July 10, 2019) <https://www.denverpost.com/2019/07/10/gray-wolf-colorado-wyoming/> (last visited July 15, 2019) (confirming recent wolf sighting in Colorado).

⁶⁷ *Oregon Wolves*, 354 F. Supp. 2d at 1172 (“The Final Rule is arbitrary and capricious because [the Service] downlisted major geographic areas without assessing the threats to the wolf by applying the statutorily mandated listing factors. [The Service's] interpretation of its regulations cannot preclude a statutory mandate.”).

But, the Service may only delist a species after analyzing whether the Section 4(a)(1) factors justify removal of a species from the list.⁶⁸ Indeed, the Service *must* conduct this analysis in order to delist.⁶⁹

Yet here, while the Service cursorily conducts this analysis for wolves in the Great Lakes region and west coast states (not that we agree that the analysis was proper, complete, nor correct — see below), the Service completely fails to analyze these factors as applied to wolves in the Southern Rockies and Southwestern United States. By limiting its Section 4(a)(1) analysis as such, the Service “entirely failed to consider an important aspect of the problem” in violation of the ESA and APA.

The Pacific Northwest Section 4 Analysis Is Grievously Flawed

The Service’s threats assessment as applied to wolves in the west coast states of Oregon, Washington, and Northern California is severely lacking.

(A) The present or threatened destruction, modification, or curtailment of the species range

The Service’s assessment of “[t]he present or threatened destruction, modification, or curtailment of the species range” as applied to the west coast gray wolf population fails on a number of fronts. The rule’s analysis of “suitable habitat” based primarily on road density and human population density is not based in the best available science.⁷⁰ The Service fails to properly consider many other vital habitat components (such as forest cover and the availability of federally or state protected lands) and fails to properly assess the threats facing wolf habitat on a broader scale. In fact, the rule nearly completely fails to consider the vast areas of suitable habitat currently unoccupied by wolves in the west coast states. And the rule fails to consider important connectivity corridors and habitats necessary to foster movement into and allow the recolonization of habitats across the west coast states by dispersing wolves from the Northern Rocky Mountain populations in Idaho, Wyoming, and Montana.

(B) Overutilization for commercial, recreational, scientific, or educational purposes

The Service failed to adequately consider listing factor (B) as applied to the west coast wolves as well. First, the rule’s human-caused mortality discussion is entirely lacking as applied to wolf populations in Oregon, Washington, and Northern California. The rule does not discuss lethal management by state and federal land and wildlife managers, nor does it discuss the impact of excessive levels of recreational hunting in the Northern Rocky Mountain states, which severely threatens wolf

⁶⁸ 16 U.S.C. §§ 1533(a)(1), (c).

⁶⁹ *Id.*

⁷⁰ See e.g. Atkins North America, Inc., Summary Report of Independent Peer Reviews for the U.S. Fish and Wildlife Service Gray Wolf Delisting Review at 122, 179, 184 (May 2019) (critiquing the Service’s analysis and corresponding definition of suitable habitat)[hereinafter “Peer Review”].

populations in the west coast by inhibiting dispersal and recolonization capabilities. The rule also does not discuss recreational hunting seasons on tribal lands, such as the unlimited, year-round wolf hunting season on Confederated Tribes of the Colville Reservation lands, which also allows certain hunting and trapping activities outside of tribal lands. Further, the rule fails to consider the immense loss of wolves at the behest of livestock producers and fails to address the threats faced by the species due to the lack of non-lethal coexistence practices in key wolf habitats in the Pacific Northwest.

(C) Disease and predation

The rule is utterly dismissive of the potential for disease to threaten wolf populations in the west coast states. In fact, there is no specific discussion of the potential impacts of disease in the Pacific Northwest's uniquely different climate from that of the Great Lakes region. The Service only addressed the potential for disease to threaten wolf populations in the context of the Great Lakes region alone, and thereby failed to adequately assess this listing factor as applied to the west coast wolf populations. Additionally, the Service fails to properly acknowledge and deal with the fact that diseases are known to be causative factors for wolf population crashes, particularly in small and isolated populations,⁷¹ like those of the west coast states.

(D) Inadequacy of existing regulatory mechanisms

The Service's analysis of regulatory mechanisms in the west coast states is entirely inadequate. The Service fails to adequately consider the state wolf management plans in Oregon, Washington, and California in detail, fails to consider recent changes to these plans, and fails to consider the non-binding nature of the Washington plan. The Service fails to consider that the lack of state-level listing protections for the species in Oregon will necessarily inhibit the recovery of the species in the state absent vital federal-level protections. Both Oregon and Washington provide very instructive case studies for the Service, and it should have analyzed how both of these states have managed wolves, including a quantitative analysis of the number of wolves killed and packs eliminated in those states that considers both raw numbers and an analysis of geographic and temporal distribution. This analysis should also include impacts on dispersal, and an analysis of the corridors that dispersing wolves are taking and any barriers they face to their dispersal. Because both Oregon and Washington have been managing wolves in parts of their respective states that do not have federal protections in place, it provides an opportunity for the Service to conduct an analysis of what the states are doing and how their management plans have been working (or not). And, notably, the Service fails to discuss the very real threat of potential hunting in the west coast states upon delisting

⁷¹ See R.O. Peterson *et al.*, *Population Limitation and the Wolves of Isle Royale*, 79 J. MAMMAL. 828 (1998).

as well. For example, we've just seen the State of Wyoming allow wolf hunting to such an extent that the Wyoming wolf population was reduced below the target population the state insisted it would maintain within the state. The Service's cursory review of the existing regulatory mechanisms in place for wolves in Oregon, Washington, and California is insufficient to justify delisting at this time.

(E) Other manmade factors affecting the species' continued existence

The rule fails to consider the threats to the species by other manmade factors, such as the impacts of climate change. The rule cursorily dismisses climate change impacts based on the fact that gray wolves are "highly adaptable."⁷² But such a dismissive analysis fails to consider the threats the species may well face based on the necessary changes in its range that will occur and the lack of adequate protections in places where wolves may need to move in order to deal with a changing climate. Such a dismissive analysis also fails to consider the impacts on gray wolf prey, such as deer and elk populations. Additionally, the proposed rule fails to consider the potential for states to fail to employ science-based management practices absent federal oversight. For instance, once the five-year monitoring period expires, states may transition to more lethally aggressive and hate-based management practices for wolves, such as has occurred in Idaho since delisting (see below, e.g., discussing the institution of bounties to hunters for wolves killed). This is a valid concern that should be adequately addressed in the Section 4(a)(1)(E) analysis.

Cumulative impact of the threats

Despite any one of the above factors being enough to warrant continued protections for gray wolves in the west coast states in particular, the presence of all of these factors in combination necessarily points toward the need for maintaining ESA protections. Cumulatively, these threats will inhibit the recovery potential for gray wolves across the west coast states and beyond.

In short, the Service's section 4(a)(1) listing factor analysis as applied to the west coast states is grievously flawed and renders the rule arbitrary and capricious under the ESA and the APA.

The Proposed Rule is Not Based on the Best Available Science

The ESA requires that the Service make listing determinations "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). However, even a cursory review of the scientific Peer Review⁷³ of the proposed rule

⁷² Proposed Rule, 84 Fed. Reg. at 9,666.

⁷³ Atkins North America, Inc., Summary Report of Independent Peer Reviews for the U.S. Fish and Wildlife Service Gray Wolf Delisting Review (May 2019) [hereinafter "Peer Review"] [Note: page

shows that the Service failed to meet this mandate. This is a clear violation of the Act and renders the Service's proposed determination arbitrary and capricious under the APA.

First, and overall, every single one of the peer reviewers questioned whether the rule was based in the best available science,⁷⁴ noting there were clear omissions of key scientific data,⁷⁵ and that the publications and analysis relied upon appeared

numbers cited to in this document reference the Adobe PDF page number of the document as a whole (245 pages total)].

⁷⁴ See *e.g.*, Peer Review at 113 (“I had some difficulties in my evaluation because many statements throughout both documents do not include citations for the basis of the conclusion ... The common absence of citations made it hard to evaluate if the best available information was used and to evaluate the quality of the scientific information.”); Peer Review at 124 (“I found that the proposed rule did not build on the assembled scientific information to provide coherent factual support or logical information for the agency’s conclusions.”); Peer Review at 167 (noting the Service’s use of older publications where more recent, updated publications were readily available); Peer Review at 178 (“There are demonstrable errors in the proposed rule and draft biological report. Several of the Services’ documents’ interpretations and syntheses are neither reasonable nor scientifically sound. In several instances, a different and equally reasonable (or more) and sound (or more) interpretation has been reached in the scientific peer-reviewed literature. In several cases, results in the best journals (ranked independently on a worldwide scale of impact factors) were ignored or overlooked, in favor of non-peer-reviewed interpretations or results from lower-ranked journals.”); Peer Review at 179 (“In sum, I do not find the proposed rule and draft biological report present the best available science”); Peer Review at 183 (“The scientific basis of the gray wolf entity and its range seems questionable on scientific grounds because I found neither consistent terminology for subpopulations of current wolves, nor consistent handling of data on dispersal, discreteness, range, or status across the entity.”); Peer Review at 185 (noting the rule’s summary of human-caused mortality is not “a thorough and comprehensive review of the best available scientific and commercial data. Furthermore, even when the evidence summarized seems to be the best available, I find several key analyses and conclusions drawn from the review are unclear, illogical, or poorly reasoned.”); Peer Review at 237 (“The best available data were not always used.”); Peer Review at 240 (“[T]here are demonstrable errors of fact, interpretation, and logic. Some interpretations of scientific information are not sound. There are several instances where a different but equally reasonable and sound interpretation might be reached that differs from that provided by the [S]ervice.”).

⁷⁵ Peer Review at 121 (suggesting key publications wrongly omitted from the proposed rule’s underlying biological analysis report “that need to be addressed in order for the report to provide a comprehensive information base for the rule”); Peer Review at 149 (noting many “overlooked publications”); Peer Review at 177 (noting the rule’s “missing scientific information on all of the following topics: biology, ecology, [and] biological status” and expressing particular concern “by missing information on human-caused mortality, human attitudes leading people to kill wolves, and dispersal”); Peer Review at 203 (“In general, I find the draft biological report ignores a large number of relevant articles published in peer-reviewed journals of the highest rank. Being unaware of them does not seem plausible given the [Service] paid for some of the research in these articles and were sent many of them in previous rounds of delisting.”); Peer Review at 237 (“The review overlooked many rigorous, peer-reviewed studies that are directly relevant to understanding and predicting rates of human-caused mortality among wolves inhabiting the current range of the gray wolf entity. These include studies by Maletzke *et al.* (2018), O’Neil *et al.* (2017), Stenglein and Van Deelan (2016), and Stenglein *et al.* (2015a, 2015b, 2018). This list is not exhaustive and further literature may identify

“haphazard”⁷⁶ and “ad hoc;”⁷⁷ with one reviewer going so far as to state that the science and approach underlying the decision “looks like a predetermined conclusion.”⁷⁸ Multiple reviewers commented that the proposed rule fails to properly account for the ESA’s foundational policy of “institutionalized caution,”⁷⁹ and inherently avoids due consideration and employment of the “precautionary principle”⁸⁰ to wildlife management.⁸¹

Reviewers raised critical substantive concerns with the Service’s delisting approach as well. Although concerns relating to the Service’s confusing application of its DPS policy to the gray wolf entity,⁸² and oversimplified interpretation of genetic structure⁸³ — among others — were also advanced, we highlight three key considerations raised by reviewers exemplifying the Service’s failure to use and apply the best available science here:

Misinterpretation of the Three R’s — Resiliency, Redundancy, and Representation

The entire premise of the Service’s proposed rule rests on the supposition that wolves in the Great Lakes region alone purportedly provide adequate resiliency, redundancy, and representation to sustain populations within the gray wolf entity over time.⁸⁴ As noted earlier, the Service (falsely) uses these “3 R’s” to define “significance” under its “significant portion of its range analysis.”⁸⁵ And as such, the Service asserts “that the relatively few wolves that occur outside the Great Lakes area within the gray wolf entity, including those in the west coast States and lone

additional relevant studies.”); Peer Review at 237 (noting that “[n]one of the data or analysis cited ... related to western listed wolves”).

⁷⁶ Peer Review at 203

⁷⁷ Peer Review at 237.

⁷⁸ Peer Review at 180.

⁷⁹ Peer Review at 139 (“For those regions (Colorado/Utah, the northeastern US) where breeding pairs or packs are not yet documented, but multiple exploratory dispersals have been recorded, the ESA’s mandate for ‘institutionalized caution’ towards preventing extinction would suggest in-depth consideration and potentially inclusion within the definition of ‘range.’”).

⁸⁰ Peer Review at 201.

⁸¹ See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (“Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’”).

⁸² Peer Review at 113 (“Overall, the treatment of the DPS status of gray wolves is very confusing to me in the proposed delisting rule ... it is now 23 years since the DPS policy was established, and it is hard to understand why the treatment of gray wolves under the ESA is not in compliance with this policy.”).

⁸³ Peer Review at 126 (describing the Service’s genetics description as “an extreme oversimplification of the genetic structure of wolf metapopulations at regional and continental extents”).

⁸⁴ Proposed Rule, 84 Fed. Reg. at 9,683.

⁸⁵ Proposed Rule, 84 Fed. Reg. at 9,684.

dispersers in other States, are not necessary for the recovered status of the gray wolf entity.”⁸⁶

However, as at least one reviewer explained, the Service’s use of the 3 R’s in the delisting proposal represents a misinterpretation of “both wolf ecology and the [3 R’s] themselves[.]”⁸⁷

[T]he conservation principles of resiliency, redundancy and representation (the ‘3R’ criteria) as developed by Shaffer and Stein (2000) are quite different than as presented in the rule. The 3 Rs in essence state that, to be considered recovered, a species should be present in *many large populations arrayed across a range of ecological settings*. Redundancy of subpopulations in a metapopulation enhances the viability of each due in part to ‘spreading of risk,’ since episodic threats such as disease outbreaks or long-term trends such as climate change may not affect all subpopulations equally.

Although representation and preservation of genetic diversity and genetic evolutionary potential are important goals, they form only part of Shaffer and Stein (2000)’s concept of representation which they defined as a species’ presence across the diversity of ecosystems inhabited by the species and by the species’ role in ecosystem processes. Representation applies primarily to a population itself . . . rather than to a population’s contribution to the entire species.⁸⁸

As such, adequate representation of the species “across the diversity of ecosystems inhabited by the species” — and ensuring the species’ presence in “many large populations arrayed across a range of ecological settings” — should be key factors in considering whether “a portion of a species range is significant.”⁸⁹ The Service’s omission of key ecosystems inhabited (or formerly inhabited) by gray wolves — such as in the Southern Rockies, Southwest, and the Pacific Northwest — fails to properly apply this concept, as it is far too narrowly constrained to the ecosystem elements represented by the Great Lakes region alone.

Notably, Shaffer and Stein (2000) — the authors of the underlying 3 R’s concept employed by the Service in its proposed rule — note the crucial significance

⁸⁶ Proposed Rule, 84 Fed. Reg. at 9,683.

⁸⁷ Peer Review at 130.

⁸⁸ Peer Review at 130–31 (emphasis added).

⁸⁹ Peer Review at 131 (citing Carroll *et al.* 2010).

of understanding and applying the 3 R's in the broader ecosystem-based context: “The principle of representation — saving some of everything — will require identifying conservation targets not simply as species and communities but as the complexes of populations, communities, and environmental settings that are the true weave of biodiversity.”⁹⁰ The Service's narrowed application of the 3 R's as relating to the sustainability of gray wolves in the Great Lakes region alone blindly misleads the public into thinking that the presence of wolves in the Great Lakes ecosystem alone is enough for recovery to have been achieved under the mandates of the ESA. This is in error and contrary to a proper interpretation of the best available science.

Defining Habitat Suitability and Failing to Consider Habitats in the Southern Rockies

Multiple reviewers took issue with the Service's definition of habitat suitability and its complete omission of suitable habitats in the Southern Rockies and Southwest, such as Colorado and Utah, in determining that removal of ESA protections from the gray wolf entity is warranted.⁹¹

For example, one reviewer faulted the Service for placing human value judgments over standard scientific practice in defining suitable habitat based on human density, rather than the reproductive and survival needs of the species.⁹² The reviewer also faulted the Service for estimating suitability at the scale of entire populations, rather than of individual members or breeding pairs.⁹³ And further, the reviewer questioned the Service's basis for determining that human presence necessarily equates to unsuitable habitat.⁹⁴ “[E]cologists do not define habitat as

⁹⁰ Peer Review at 131 (citing Shaffer and Stein (2000)).

⁹¹ *See e.g.*, Peer Review at 122 (“The report combines detailed description of the distribution of suitable wolf habitat in some regions with the almost complete omission of such information in other regions. In this respect, the report is inconsistent with previous iterations of wolf listing and delisting rules, which at least attempted a more geographically complete distribution of suitable habitat.”); Peer Review at 179 (“I found the definition of suitable habitat did not conform to standard practice in ecology and conservation, and moreover it contained an unstated value judgment in place of scientific observation.”).

⁹² Peer Review at 184 (“[I]t is standard practice in ecology to define suitability by observing where reproduction and survival occur to define suitability, not by imposing a human value judgment on it”).

⁹³ Peer Review at 184 (“[H]abitat suitability is estimated at the scale of individual animals or breeding social units, not populations”).

⁹⁴ Peer Review at 184 (“[D]efining a human behavior (wolf-killing) as a habitat feature is contrary to long-standing ecological practice. Not all humans kill gray wolves or even want to kill gray wolves (Treves *et al.* 2013). Therefore, human density is a weak correlate of threat to wolves. Stronger correlates of inclination to kill wolves have been identified and they do not always occur where human population density is moderate or high (Smith *et al.* 2010). Therefore, any claim that the cause of suitability of habitat is the presence or density of humans would be erroneous.”).

unsuitable because a predator *resides there*. Nor should the proposed rule define a habitat as unsuitable *because people live there*.⁹⁵

Regarding the utter failure to consider the availability of ample suitable habitat in regions of the Southern Rockies and Southwest, reviewers called out the Service for its arbitrary change of position, as these areas were consistently found to qualify for assessment in the Service’s prior recovery efforts.⁹⁶ This oversight is a crucial flaw, as “[h]abitat modeling has suggested that Colorado alone could support a population of over [1,000] wolves, which would constitute the second or third largest state wolf population in the contiguous [U.S.], and thus a ‘core’ population for sustaining the species’ viability.”⁹⁷ The oversight also ignores the importance of wolves in this region serving as a key connector between wolves in the Northern Rockies and Southwestern and Mexican gray wolf populations.⁹⁸ The best available science — e.g., Hedrick (2018) (not referenced by the Service) — demonstrates that such connectivity would be highly beneficial to the genetic health and adaptive potential of both the Mexican wolf subspecies and the broader gray wolf species, especially as both species face range shifts coinciding with our changing climate.⁹⁹ The Service entirely fails to explain why the suitable habitats afforded by places like Colorado and Utah are not significant and fails to rationally explain away the inconsistencies associated with this determination as related to prior rules.¹⁰⁰ Again, the Service fails to abide by the ESA’s best available science mandate.

Precedential Impact of the Service’s ‘New’ Approach to Recovery

Finally, one reviewer summed up the deeply troubling precedential impact the Service’s approach here could have on the recovery of species elsewhere under the ESA: “If applied generally to other species, the interpretation proposed in the current wolf rule would represent a major scaling back of ESA recovery efforts, one which is clearly at odds with the purpose of the Act.”¹⁰¹ “[W]hile it is clear that the ESA does not require species to be restored ‘everywhere,’ this is not the same as concluding in favor of the central argument of the proposed rule, which is that recovery in one region (the Great Lakes) is sufficient to delist a species formerly distributed across the continent.”¹⁰² Applying this flawed, minimal approach to recovery elsewhere will

⁹⁵ Peer Review at 184 (emphasis in original); *See also id.* at 185 (“[U]nwillingness to curb human-caused mortality (by the agencies responsible) is a value judgment, not a scientific fact or prediction. Unwillingness to curb illegal killing does not make wolves less capable of using habitat.”).

⁹⁶ Peer Review at 138.

⁹⁷ Peer Review at 138 (citing Carroll *et al.* 2006).

⁹⁸ Peer Review at 138–39.

⁹⁹ *Id.*

¹⁰⁰ Peer Review at 140.

¹⁰¹ *Id.*

¹⁰² Peer Review at 140.

have devastating impacts to the efficacy of the ESA and to the preservation of biodiversity nationwide.

In short, the Peer Review of the Service's proposal represents a resounding cry by scientists across the board that the Service needs to go back to the drawing board and put the science first, as the ESA's best available science mandate appropriately demands.

The Service is Illegally Abandoning its Affirmative Duty to Conserve the Gray Wolf Under the ESA

With this proposed rule, the Service is abandoning its affirmative conservation duty under ESA Section 7(a)(1).¹⁰³ Section 7 (a)(1) provides: "The Secretary shall review other programs administered by [him or her] and utilize such programs in furtherance of the purposes of the Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authority for the conservation of endangered species and threatened species"¹⁰⁴ In turn, the ESA defines conservation as, "to use and the use of all methods and procedures which are necessary to bring an endangered species or threatened species to the point at which the measures pursuant to this chapter are no longer necessary."¹⁰⁵ Section 7(a)(1) applies to the Service.¹⁰⁶

By abandoning its responsibility to truly recover wolves throughout the lower 48 states — including in the Pacific Northwest, Southern Rockies, and Southwestern United States — the Service illegally abdicates its duty to conserve the species as required by Section 7(a)(1). The Service must continue its efforts to conserve wolves in the Pacific Northwest and Southern Rockies/Southwestern United States until the point at which the Act's protections are no longer required there. The Service has not yet reached that point for wolves across large geographic regions of the American West, and as such, cannot delist wolves in these regions without running afoul of the ESA.

II. WOLVES REMAIN ENDANGERED ACROSS MUCH OF THE WEST

Wolves in the Pacific Northwest

Wolves remain a recovering species in the west coast states of Oregon, Washington, and California. These states face slower than anticipated growth in wolf

¹⁰³ 16 U.S.C § 1536(a)(1).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1532(3).

¹⁰⁶ *Defenders of Wildlife*, 354 F. Supp. 2d at 1173–74.

populations and geographic expansion of those populations. Further, both Washington and Oregon are unique in that the states contain portions that currently provide federal ESA protections for wolves, and other portions where wolves no longer retain their federally protected status. While some state wildlife agencies proclaim that wolves have recovered in Washington and Oregon, the reality of wolf recovery there tells a very different story. Wolves are just now beginning to expand their geographic reach in these states, yet still do not have adequate populations or sufficient numbers of breeding pairs for agencies to state that wolf recovery has occurred in these states. By any reasonable measure, the States of California, Oregon, and Washington represent a significant portion of the gray wolf's range in the contiguous United States, both in terms of currently occupied habitat and lost historic range. There is no question that gray wolves are not yet recovered in these states, and the attempt to deprive wolves of ESA protections before they have recovered in these areas violates the ESA.

Washington

In Washington, wolves remain a state-listed endangered species throughout the entire state, although only wolves in the Western (approximately) two-thirds of the state retain federal ESA protections. In 2011, the Washington Department of Fish and Wildlife (“WDFW”) prepared a Wolf Management and Conservation Plan (“WA Wolf Plan”) to guide the state’s management of the endangered gray wolf in the state.¹⁰⁷ Importantly, this wolf plan was not codified as a rule, and as admitted by then-WDFW Director, Phil Anderson, at a Washington Fish and Wildlife Commission meeting, is merely a guidance document that can be changed “with a letter to the file” from the WDFW Director.

A federal judge in Tacoma, Washington recently explained that the WA Wolf Plan is not binding on WDFW, noting the WA Wolf Plan “is subject to changes and additions, allowing for room for discretionary acts” and that “the plan itself is not specific about when lethal versus non-lethal removal should be used.”¹⁰⁸ Judge Bryan concluded by noting the WA Wolf Plan “is subject to changes or additions by WDFW, giving the public scant recourse” in terms of commenting or influencing such changes.¹⁰⁹ As such, the WA Wolf Plan provides no assurances as to how WDFW will manage wolves now or into the future, nor are there any binding commitments that the Service could reasonably rely upon to know how WDFW intends to manage wolves into the future. Furthermore, WDFW is embarking on a State-level Environmental Policy Act (“SEPA”) process to consider potential changes to the WA Wolf Plan and its guidance for wolf management in Washington. This

¹⁰⁷ WASHINGTON DEP’T OF FISH AND WILDLIFE, WOLF CONSERVATION AND MANAGEMENT PLAN FOR WASHINGTON (2011) [hereinafter “WA Wolf Plan”].

¹⁰⁸ *Cascadia Wildlands v. Woodruff*, 151 F. Supp. 3d 1153, 1161, 1165 (W.D. Wash. 2015).

¹⁰⁹ *Id.* at 1167.

process could lead to fundamental changes to how Washington manages wolves, especially in a post-federal listing world, giving the Service no regulatory assurances as to whether or not wolves will be responsibly managed in Washington after a federal delisting decision is made for gray wolves. Delisting without binding assurances from the state agency as to how it intends to manage wolves in the future is a clear violation of the ESA.

The WA Wolf Plan established three recovery zones for wolves in Washington, including: (1) Eastern Washington; (2) the Northern Cascades; and (3) the Southern Cascades and Northwest Coast.¹¹⁰ The WA Wolf Plan provides explicit criteria for determining when wolves can be down-listed under state law from endangered, to threatened, to sensitive status, to no protected status.¹¹¹ As of the most recent wolf population estimates from WDFW, wolves are not recovered in Washington State and remain an endangered species under state law throughout the state.

As of the most recent wolf population estimates for Washington, there were approximately 126 wolves in 27 packs in Washington.¹¹² This represents a relatively lackluster population increase of only four individuals from 2017, or a mere 2 percent increase.¹¹³ Of those 27 wolf packs, 15 packs were confirmed to have successfully bred in 2018.¹¹⁴ While the wolf population has increased at a relatively steady rate from 2009 through 2018 in the Eastern Washington recovery region, wolves in the North Cascades recovery region have seen a stagnating population, with the total population of wolves in that region only at 20 wolves in five packs and one lone disperser.¹¹⁵ Importantly, wolves have not yet returned to the South Cascades and Northwest Coast recovery regions.¹¹⁶

WDFW's wolf management regime has been the source of extensive controversy since the state's wolf plan was adopted in 2011. Indeed, in 2012 — less than one year after the WA Wolf Plan was released — WDFW began killing wolves in Washington at the behest of livestock interests, including killing wolves several times for the same livestock producer who refused to deploy legitimate non-lethal deterrents in a good-faith attempt to avoid wolf/livestock conflict. In 2012, WDFW killed seven of the eight members of Northeastern Washington's Wedge Pack, wholly

¹¹⁰ WA Wolf Plan at 9.

¹¹¹ *Id.*

¹¹² WASHINGTON DEP'T OF FISH & WILDLIFE, CONFEDERATED COLVILLE TRIBES, SPOKANE TRIBE OF INDIANS, USDA-APHIS WILDLIFE SERVICES, AND U.S. FISH & WILDLIFE SERVICE, WASHINGTON GRAY WOLF CONSERVATION AND MANAGEMENT 2018 ANNUAL REPORT at WA-6 (2019) [hereinafter "2018 WA Wolf Report"].

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at WA-8.

¹¹⁶ *Id.*

eliminating one of only eight confirmed packs in the State at the time. The elimination of this pack represented killing 14 percent of Washington's endangered wolf population.

Since 2012, WDFW has killed wolves on several more occasions, with members of the public and Washington elected officials questioning the Department's conclusions and decisions leading to the lethal removal operations in every instance. For example:

- 2014: WDFW contracts with the U.S. Department of Agriculture's Wildlife Services to kill the alpha female of the Huckleberry Pack;
- 2016: WDFW kills seven of eleven members of the Profanity Peak Pack (approximately 10 percent of the wolf population at the time);
- 2017: WDFW kills two wolves (including a wolf pup) of the Smackout Pack;
- 2017: WDFW kills one of two members of the Sherman Pack;
- 2018: WDFW kills a member of the Togo wolf pack;
- 2018: WDFW kills a member of the Smackout Pack.

The attached complaint filed in state court in Washington by signatory Cascadia Wildlands provides more detail about these removal operations and the faulty basis for them.¹¹⁷

One critical issue related to Washington that is not recognized or examined in the proposed rule is that the Confederated Tribes of the Colville Reservation have an unlimited, year-round wolf hunting season, imposing no daily or seasonal limit on the number of wolves that may be killed. Importantly, the Confederated Tribes of the Colville Reservation represent a sovereign nation that can set its own wildlife management regulations. However, that does not absolve the Service from assessing the impact of this hunting season on wolves in Washington, and its potential effect on wolf recovery regionally and nationally. Importantly, because treaty rights allow members of the Confederated Tribes of the Colville Reservation to hunt wolves on lands outside of the Colville Reservation, the effects of this hunting season are not limited solely to Reservation lands. Accordingly, impacts on wolf dispersal and transient wolves from the year-round, unlimited hunting season should be assessed in any proposed rule to delist wolves in the region. The failure to assess these impacts on wolf recovery renders the Service's proposed rule here illegal.

Finally, a recent paper from Dr. Robert Wielgus — the retired, former Director of the Large Carnivore Conservation Lab at Washington State University —

¹¹⁷ See Complaint, *Center for Biological Diversity v. Washington Dep't of Fish & Wildlife* (filed Aug. 13, 2018 in Superior Court of Washington for Thurston County) (attached).

concluded, based on modeling developed by Dr. Wielgus in conjunction with WDFW, that wolves are not recovered in Washington.¹¹⁸ Dr. Wielgus' paper explains that he "supervised the construction and publication of a spatially explicit, wolf meta-population, stage matrix model as part of the WA [Wolf] Plan to predict re-colonization and recovery of wolves in Washington" after previously developing similar models for grizzly bear recovery in British Columbia, cougar management in Washington, and brown bear recovery in France and Spain.¹¹⁹ Dr. Wielgus analyzed immigration rates, population growth rates, and other data relevant to Washington wolf recovery. Dr. Wielgus found that after wolves were delisted in Idaho, the Washington wolf population was no longer being subsidized by immigrants from Idaho, and that growth rates in Washington were being determined based on birth and death rates alone. Dr. Wielgus noted that wolf population growth rates in Washington "were far below the previously observed intrinsic growth rates" when Idaho wolves were protected under the ESA. Based on current population growth rates in Washington, Dr. Wielgus estimates it will take five times longer than predicted (or about 55 years) for wolves to recover in Washington, as compared to an 11-year estimate for Northern Rocky Mountain wolves, if they retain their ESA protections. Given this dynamic, Dr. Wielgus concluded that the Service's proposed rule is unwarranted and premature.

Importantly, while Washington has seen some population growth in recent years, that growth has been limited to Northeastern Washington, while the rest of the State has struggled to see wolves expand into other areas and grow in numbers elsewhere. The proposal to remove ESA protections from wolves in the Western two-thirds of Washington will only slow wolf recovery even further, and may prevent it from ever being attained altogether in the State. Given that wolf delisting in the Northern Rockies — and the subsequent decline in the Northern Rocky Mountain wolf population — has already resulted in a predicted 55-year extension of time for wolf recovery in the State, it is reasonable to assume that the loss of ESA protections in Western Washington will only extend that time-frame even further. With the uncertainty surrounding future wolf management in Washington, and the lack of any concrete, enforceable standards for wolf management in Washington, wolves in the Western two-thirds of Washington need to retain federal ESA protections to ensure that wolf recovery will, indeed, be achieved in the State. Washington, in and of itself, represents a significant portion of gray wolf range in the contiguous United States, and certainly, when considered with Oregon and California, it constitutes a significant portion of gray wolf range. As such, it is unreasonable for the Service to ignore the plight of Washington wolves when considering a proposal to delist wolves nationwide.

¹¹⁸ R. Wielgus, *Wolf Delisting and Recovery in the Pacific Northwest* (May 2019) (attached).

¹¹⁹ *Id.*

Oregon

In Oregon, wolves have no state-level endangered species protections as a result of the Oregon Fish and Wildlife Commission prematurely stripping wolves of their state-level listing without complying with the requirements of the Oregon Endangered Species Act (“Oregon ESA”). This decision was not based on verifiable scientific information as required by the Oregon ESA, and therefore the Oregon Legislature passed a bill attempting to bless this illegal decision. Importantly, in stripping wolves of their state-level ESA protections in Oregon, the State failed to conduct an independent peer review of its analysis as required by law. The decision to prematurely strip wolves of their state designation is currently the subject of litigation at the Oregon Court of Appeals. Time and again, the Oregon Fish and Wildlife Commission fails to act according to the best available science in managing wolves in Oregon and its track record does not bode well for Oregon’s still recovering population of wolves. In particular, the current chair of the Oregon Fish and Wildlife Commission has publicly suggested wolf trophy hunting as a way to raise funds for the Oregon Department of Fish and Wildlife (“ODFW”). Given that wolves are not yet recovered, the possibility of a trophy hunting season for wolves in Oregon should give the Service pause in ascertaining whether or not adequate regulatory mechanisms exist to protect wolves in Oregon.

The most recent public information about the status of wolves in Oregon indicates that Oregon currently has approximately 137 known wolves. Importantly, the Oregon Department of Fish and Wildlife’s internal worst-case scenario analysis based on a Population Viability Analysis (“PVA”) assumed an annual wolf population increase of no less than 7 percent annually. The worst-case scenario analysis would have led to a 2018 wolf population of 135 wolves, and the actual number as reported by ODFW is 137. A wolf population increase in line with the worst-case scenario analysis is not acceptable, and supports the conclusion that wolves continue to need enhanced protections, included federal ESA listing, to continue to recover in Oregon. Importantly, in 2018, the wolf population in western Oregon (the part of Oregon where wolves retain federal ESA protections), the wolf population only grew by one individual.

Further, in the three years since wolves lost their state-level ESA protections in Oregon, the wolf population only grew by a total of 25 percent (110 wolves in 2015 to 137 wolves in 2018). During that same time period, livestock predation increased by 211 percent (9 to 28). Importantly, during the same time period since wolves lost state-level ESA protections in Oregon, 27 wolves are known to have died, and only two of those wolf deaths were due to natural causes. In 2018 alone, six of seven known wolf mortalities were human-caused.

During the three-year time-period before wolves lost state-level ESA protections in Oregon (2012–2015), the Oregon wolf population grew by 139 percent

(46 wolves in 2012 to 110 wolves in 2015), while livestock predation only increased by one-tenth of that rate (from 8 to 9). From 2012 to 2015, there were only two known human-caused wolf mortalities.

As Dr. Wielgus notes, while eastern Oregon has seen an increase in wolf populations and pack numbers, the population in western Oregon tells a very different story.¹²⁰ Dr. Wielgus explains that western Oregon requires a minimum conservation goal of six to seven wolf packs, 38 to 51 wolves, and seven breeding pairs.¹²¹ Current numbers of two wolf packs, 15 known wolves, and two known breeding pairs in western Oregon is far below what the science tells us is the necessary *floor* for wolf populations in western Oregon.¹²² Oregon has sufficient suitable habitat for wolves to expand into, and wolves need sufficient protections in place to recolonize that habitat to ensure wolf recovery across the state. When one considers currently occupied habitat in Oregon, that alone represents a significant portion of the wolf range where wolves have not yet recovered. When one considers currently occupied habitat and potential wolf habitat, Oregon indeed represents a significant portion of wolf range where wolves have not yet recovered.

In June 2019, the Oregon Fish and Wildlife Commission adopted a revised wolf plan to guide wolf management into the future. Interestingly, just after the vote, Oregon Governor Kate Brown blasted the new wolf plan, noting it failed to “ensur[e] the health of the wolf population while also meeting the needs of the ranching community.”¹²³ The new wolf plan makes it easier for the State of Oregon to kill wolves after predation incidents, allows members of the public to kill wolves in certain situations, and reduces requirements that ranchers employ non-lethal deterrents before the State of Oregon moves to lethal removal of wolves. Given that the new plan authorized by the Oregon Fish and Wildlife Commission dramatically reduces protections for wolves across Oregon, it counsels that Oregon wolves desperately need federal ESA protections to remain in place to allow the Oregon wolf population to continue to recover, and ultimately achieve minimum numbers for a viable population of breeding wolves in western Oregon. The new Oregon wolf plan does not provide adequate regulatory mechanisms sufficient to justify removing federal ESA protections.

¹²⁰ R. Wielgus, *Wolf Delisting and Recovery in the Pacific Northwest* at 5 (May 2019) (attached).

¹²¹ *Id.*

¹²² And as a floor, or minimum number, that does not mean these numbers represent the goal or desired wolf population in western Oregon.

¹²³ Kale Williams, *Governor, Environmental Groups Rip Oregon's New Wolf Plan*, THE OREGONIAN (June 8, 2019) available at <https://www.oregonlive.com/environment/2019/06/governor-environmental-groups-rip-oregons-new-wolf-plan.html> (last visited July 15, 2019).

California

With only one established gray wolf pack, California is in the earliest stages of recovery. At last count, in April of this year, there were less than a dozen confirmed gray wolves in the entire state. A majority of the wolves that have traveled to California have come from Oregon. Without the regional protections afforded by the ESA, wolves will have an even more difficult time establishing populations in the golden state.

As described above, the agency has failed to adequately address Section 4(a)(1)(E), the threats to the species by other manmade factors. The illegal killing of wolves is a serious threat to wolf recovery, particularly in California where nearly half of the State's animals have not survived. California's first confirmed wolf pack, the seven-member Shasta Pack, has literally vanished, aside from one known survivor. With no investigation into their disappearance, the pack is thought to no longer exist. Further, there are ongoing investigations for the deaths of wolves OR-59 and for a Lassen Pack yearling. The rule has not adequately considered the threat of poaching and illegal killing on these newly recovering populations in California.

Wolves in the Southern Rockies & the Southwest

As noted throughout these comments, the howl of the wolf remains missing from key habitats across much of the western U.S. In particular, many locations across Colorado, Utah, Nevada, Southern California, and Northern New Mexico and Arizona, provide the habitat conditions and prey availability necessary for a thriving population of wolves to exist.¹²⁴ Yet, with this proposed rule, the Service is wiping its hands of its obligation to affirmatively restore wolves to these important former habitats. This is unacceptable, and constitutes a clear violation of the Service's affirmative recovery duty under the Act.¹²⁵

Wolves are trying desperately to recolonize their former range in the Southern Rocky Mountains and Southwest, with multiple occurrences of wolves being sighted in places like Colorado and Arizona in recent years. For example, as recently as last week, Colorado Parks and Wildlife investigated and confirmed a wolf sighting in Northern Colorado.¹²⁶ In 2004, a wolf travelled south from the Greater Yellowstone region into Colorado, and was sadly hit by a car on Interstate-70 near Idaho

¹²⁴ See Peer Review at 123, Fig. 1 (map of potential habitat range from 2011).

¹²⁵ 16 U.S.C. § 1536(a)(1).

¹²⁶ Stephanie Butzer, *CPW Investigating Possible Wolf Sighting in Northern Colorado*, THE DENVER CHANNEL (July 9, 2019) <https://www.thedenverchannel.com/news/local-news/cpw-investigating-possible-wolf-sighting-in-northern-colorado> (last visited July 9, 2019); Sam Tabachnik, *Gray Wolf Sighting Confirmed in Northern Colorado*, The Denver Post (July 10, 2019) <https://www.denverpost.com/2019/07/10/gray-wolf-colorado-wyoming/> (confirming wolf sighting in Colorado) (last visited July 15, 2019).

Springs;¹²⁷ in 2009, a wolf that dispersed south from Montana was found poisoned in Rio Blanco County, Colorado;¹²⁸ and in 2015, a hunter killed what he believed to be a coyote, but was actually a gray wolf, just a few miles north of Kremmling, Colorado.¹²⁹ In 2014, a gray wolf originally captured and collared near Cody, Wyoming, was seen roaming about the North Kaibab Plateau by the North Rim of the Grand Canyon in Arizona before being fatally shot by a hunter near Beaver, Utah.¹³⁰

While the Service discounts these naturally occurring gray wolves as inconsequential “lone dispersers” in the proposed rule,¹³¹ this position is not supported by the plain language of the law. As noted above, the Service must give due consideration to the grave threats facing these “lone dispersers” in the Southern Rockies and Southwest under a proper Section 4(a)(1) listing factors analysis before it may arbitrarily strip these wolves — and others that might follow in their footsteps — of the vital protections afforded by the ESA.¹³²

III. STATE MANAGEMENT CONCERNS AS EVIDENCED BY WOLF DECLINES IN THE NORTHERN ROCKIES

The Service cannot turn a blind eye to the impact the delisting of the Northern Rocky Mountain wolves has had on population numbers, dispersal capabilities, and the potential for recovery elsewhere across the West, including particularly in the Pacific Northwest, Southern Rocky Mountains, and Southwest. Since delisting, the states of Idaho, Wyoming, and Montana have allowed the slaughter of hundreds of wolves via state-sanctioned hunts and management regimes focused foremost on lethal control first, coexistence never. The dramatic declines in the wolf populations in these states since delisting have had devastating impacts on recovering populations in Oregon, Washington, and Northern California, and have inhibited the return of the wolf to key habitats afforded by the wild landscapes of Colorado and Utah altogether. The hostile state management regime for gray wolves in Idaho serves as a disconcerting example of what might come absent federal oversight at the national level.

¹²⁷ Colorado Wolf Management Working Group, Findings and Recommendations for Managing Wolves that Migrate Into Colorado, at 13 (December 28, 2004) *available at* <https://cpw.state.co.us/wolves>.

¹²⁸ Spencer McKee, *Are There Wolves in Colorado?*, OUT THERE COLORADO (Aug. 7, 2018) <https://www.outtherecolorado.com/are-there-wolves-in-colorado/> (last visited July 3, 2019).

¹²⁹ *Id.*

¹³⁰ *Echo – The Grand Canyon Wolf*, Grand Canyon Wolf Recovery Project, <https://gcwolfrecovery.org/news-events/echo-the-grand-canyon-wolf> (last visited July 3, 2019).

¹³¹ Proposed Rule, 84 Fed. Reg. at 9,683 (“[W]e conclude that the relatively few wolves that occur outside the Great Lakes area within the gray wolf entity, including those in the west coast states and lone dispersers in other states, are not necessary for the recovered status of the gray wolf entity.”).

¹³² 16 U.S.C. § 1533(a)(1).

In the Northern Rocky Mountains region, the stability of the wolf population in Idaho, Wyoming, and Montana has been severely undermined by recreational hunting and trapping brought on by hate-driven state wolf management post-delisting. The declines this population has suffered without federal protections only underscore the need for maintaining those protections nationwide.

For example, wolf populations in Idaho have declined since 2008, when the statewide population was estimated at approximately 849 wolves.¹³³ The estimate for the Idaho wolf population was 659 at the end of 2013,¹³⁴ but the State of Idaho no longer uses radio collar data or aerial surveys to track wolf population numbers, rendering reliable population estimates largely unavailable.¹³⁵ Instead, the State relies upon DNA analysis, hair snags, camera traps, and hunter reports to estimate wolf abundance.¹³⁶ Even without reliable population estimates though, Idaho's wolf population shows concerning signs of decline, with pack sizes now reduced to only five to seven wolves per pack (from an average pack size of ten wolves each); increased numbers of pup mortalities; and recreational harvest down an average of 9.7 percent annually each year since 2011, despite extended seasons and liberal bag limits.¹³⁷

The wolf population data that do exist suggest that wolf population numbers in Idaho are approaching the State's bare-minimum requirement of only 150 individuals, or fifteen breeding pairs.¹³⁸ In 2002, the State identified fifteen breeding pairs — which it assumed equaled 150 wolves, based upon the estimated pack size of ten wolves per pack — as a minimum population threshold below which additional protections would need to be instituted.¹³⁹ However, in 2015, only 33 packs met the breeding pair criteria and the mean pack size was only 6.5 wolves per pack. Based upon these numbers, the statewide wolf population could potentially have been as low as only 215 wolves in 2015. While the Idaho Department of Fish and Game

¹³³ Idaho Dep't of Fish & Game, Statewide Report: Wolf, January 1, 2016 to June 30, 2017 at 7 (2017).

¹³⁴ Scott Creel *et al.*, *Questionable Policy for Large Carnivore Hunting: U.S. Wolf-Hunting Policies Do Not Align with Ecological Theory or Data*, 350 SCIENCE 1473 at 1475 (Dec. 18, 2015).

¹³⁵ Idaho Dep't of Fish & Game, Statewide Report: Wolf, January 1, 2016 to June 30, 2017 (2017).

¹³⁶ *Id.* at 5–6.

¹³⁷ See Scott Creel *et al.*, *Questionable Policy for Large Carnivore Hunting: U.S. Wolf-Hunting Policies Do Not Align with Ecological Theory or Data*, 350 SCIENCE 1473 (Dec. 18, 2015)(listing signs of decline); and Idaho Dep't of Fish & Game, Statewide Report: Wolf, January 1, 2016 to June 30, 2017 (2017)(discussing decline in hunter/trapper harvest).

¹³⁸ Ten breeding pairs, or 100 wolves, would likely trigger re-listing under the ESA. See IDAHO LEGISLATIVE WOLF OVERSIGHT COMMITTEE, IDAHO WOLF CONSERVATION AND MANAGEMENT PLAN at 31 (2002) (explaining, “if the population falls below 15 packs, we will begin instituting remedial measures, and if it falls below 10 packs, we will revert to the control plan currently specified in federal rules (50 CFR 17).”).

¹³⁹ Idaho Dep't of Fish & Game, Statewide Report: Wolf, January 1, 2016 to June 30, 2017 at 6 (2017).

(“IDFG”) estimated there were 81 wolf packs in Idaho in the summer of 2016, it did not identify how many of these wolves were breeding pairs.¹⁴⁰ The potential minimum population is perilously close to the point where re-instituting federal protections would be warranted.¹⁴¹

Nevertheless, at the Idaho Fish and Game Commission’s direction, IDFG has instituted increasingly aggressive wolf control policies, with hunting and trapping seasons that last year-round in some parts of the state, and even offering what effectively amounts to a wolf “bounty” in which the State is diverting public taxpayer dollars to pay hunters for wolves they kill.¹⁴² For example, wolf hunting is now allowed year-round in 25 of Idaho’s 99 Game Management Units, which amounts to just over 25% of the State.¹⁴³ IDFG also doubled the number of wolves hunters and trappers are allowed to take each season in the Panhandle, Clearwater, Upper Snake, and Salmon Regions from five to ten wolves each.¹⁴⁴ Wolf trappers may use either a wolf hunting or wolf trapping tag on a legally taken wolf when both hunting and trapping seasons are open — potentially increasing the number of wolves a single trapper could lawfully take to 20.¹⁴⁵ And, IDFG has funded what amounts to glorified bounties on wolves by funding “reimbursements” to successful wolf trappers from the nonprofit *Fund 4 Wildlife Management* in which hunters can receive \$750 to \$1,000 per wolf.¹⁴⁶ Recreational wolf killing is a significant source of wolf mortality in Idaho. In 2014, hunters and trappers killed 257 wolves in Idaho; in 2015 they killed 70; and in 2016 they killed 226.¹⁴⁷ Numbers for 2017 and 2018 are not presently publicly available, and IDFG refuses to reveal this data to the Western Watersheds Project (among the undersigned) unless the organization pays an approximately \$900 fee.

The impacts to Idaho’s wolf population from this extermination policy are significant at a larger, regional scale because populations are also declining in Montana and Wyoming, as well as in Yellowstone National Park and the broader Greater Yellowstone region. For example, a record 315 wolves were killed in Montana during the 2018-19 hunting and trapping season — almost half the

¹⁴⁰ *Id.*

¹⁴¹ *See* note 138.

¹⁴² Suzanne Stone, *Idaho’s disastrous approach to its wolf population*, NATION OF CHANGE (June 29, 2019), available at <https://www.nationofchange.org/2019/06/29/idahos-disastrous-approach-to-its-wolf-population/> (last visited July 5, 2019).

¹⁴³ Idaho Dep’t of Fish & Game, Statewide Report: Wolf, January 1, 2016 to June 30, 2017 at 7 (2017).

¹⁴⁴ Idaho Dep’t of Fish & Game, Idaho Big Game: 2019 & 2020 Seasons & Rules (1st Ed. 2019).

¹⁴⁵ Idaho Dep’t of Fish & Game, Statewide Report: Wolf, January 1, 2016 to June 30, 2017 at 7 (2017).

¹⁴⁶ Foundation for Wildlife Management, Reimbursement Process, <https://www.foundationforwildlifemanagement.org/Reimbursement> (last visited July 8, 2019).

¹⁴⁷ Idaho Dep’t of Fish & Game, Statewide Report: Wolf, January 1, 2016 to June 30, 2017 (2017).

estimated wolf population in the state.¹⁴⁸ In Wyoming, the wolf population dropped 18 percent between 2018 and 2019, invoking restrictions on hunting in the “trophy” zone there.¹⁴⁹ In Yellowstone National Park, the wolf population declined from 174 wolves in 2003 to only 80 or so in 2018, in-part due to mortalities outside the National Park boundaries in Wyoming and lethal predator control actions by the U.S. Department of Agriculture’s federal program of wildlife killing, Wildlife Services.¹⁵⁰ Looking at the whole picture, the Northern Rocky Mountains wolf population is tanking without federal oversight and states are not closely monitoring wolf abundance, except to justify killing more wolves. As Creel *et al.* (2015) explained, wolf populations cannot withstand such high levels of mortality, especially when there is no “source” population to provide colonizing replacement animals.¹⁵¹ Dr. Wielgus also cited this concern in his recent study analyzing the recovery status of wolves in the Pacific Northwest.¹⁵²

Notably, these alarming levels of population declines resulting from state-permitted hunting and trapping are also occurring alongside the increasingly aggressive predator control policies of Wildlife Services. Wildlife Services kills hundreds of wolves each year in the Northern Rocky Mountains in response to livestock depredations, as well as for so-called “ungulate protection.”¹⁵³ Wildlife Services apparently does not document its depredation investigations and too frequently seems to assign lethal control as the remedy for any alleged problems.

The Service cannot wholly ignore this clear history of abuse evidenced by state management in the Northern Rockies — and in particular, in Idaho — since delisting

¹⁴⁸ Tristan Scott, *Montana on Pace for Record Wolf Hunt*, FLATHEAD BEACON (Mar. 12, 2019), available at <https://flatheadbeacon.com/2019/03/12/montana-pace-record-wolf-hunt/> (last visited July 5, 2019).

¹⁴⁹ Cat Urbigkit, *WY Wolf Population Drops 18%*, PINEDALE ONLINE! (Apr. 21, 2019), available at <http://www.pinedaleonline.com/news/2019/04/WYWolfPopulationDrop.htm> (last visited July 5, 2019); Lew Freedman, *Wolf hunt quota to be reduced*, CODY ENTERPRISE (May 29, 2019), available at http://www.codyenterprise.com/news/local/article_92e0b784-8247-11e9-8944-e378a6665fe6.html (last visited July 5, 2019).

¹⁵⁰ Eric Galatas, *A Closer Look at Declining Yellowstone Wolf Numbers*, PUBLIC NEWS SERVICE (Apr. 26, 2019), available at <https://www.publicnewsservice.org/2019-04-26/endangered-species-and-wildlife/a-closer-look-at-declining-yellowstone-wolf-numbers/a66294-1> (last visited July 5, 2019).

¹⁵¹ Scott Creel *et al.*, *Questionable Policy for Large Carnivore Hunting: U.S. Wolf-Hunting Policies Do Not Align with Ecological Theory or Data*, 350 SCIENCE 1473 at 1474 (Dec. 18, 2015).

¹⁵² R. Wielgus, *Wolf Delisting and Recovery in the Pacific Northwest* (May 2019) (attached).

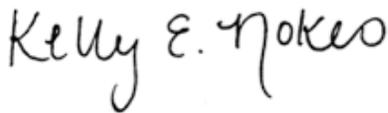
¹⁵³ U.S. Dep’t of Agriculture, Animal & Plant Health Inspection Serv., Wildlife Services, Program Data Report G (2018) available at https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/pdr/?file=PDR-G_Report&p=2018:INDEX: (documenting Wildlife Services killed 84 wolves in Idaho, 51 wolves in Wyoming, and 46 wolves in Montana, for a total of 181 wolves killed in the Northern Rockies region in 2018 alone); See Idaho Dep’t of Fish & Game, Statewide Report: Wolf, January 1, 2016 to June 30, 2017 at 7 (2017) (describing wolf predation management as being necessary to increase elk survival).

occurred there in determining that removal of ESA protections throughout the Lower 48 is warranted. Rather, the Service must include this information as part of its analysis in considering whether to delist the species across the contiguous U.S. The whole-scale failure to include any of this relevant information relating to the status of wolf populations and the species recovery throughout the West since the Northern Rocky Mountain population's delisting renders the Service's proposal here arbitrary and capricious under the APA for failing to consider an important aspect of the problem.

CONCLUSION

We appreciate your consideration of our comments on the proposed rule to remove ESA protections from gray wolves throughout the contiguous United States.¹⁵⁴ Based on the significant legal deficiencies, both procedurally and substantively, we sincerely hope that the Service will reconsider its conclusion that removing protections from gray wolves at this time is appropriate. As noted above, it is premature and irresponsible for the Service to remove essential ESA protections from this recovering species at this time. We caution the Service to remember that its responsibilities under the ESA require the agency to put the species' best interests ahead of politics, and respectfully request withdrawal of the proposed delisting rule.

Sincerely,



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¹⁵⁴ Note further that we have attached a number of materials to this comment letter, all of which are incorporated by reference into these comments. A complete index of attachments is included below the signatories.

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INDEX OF ATTACHMENTS

Exhibit 1: CO Wolf Management Findings and Recommendations

Final_December-28-2004

Date: December 28, 2004

Title: Findings and Recommendations for Managing Wolves That Migrate into Colorado

Author(s): Colorado Wolf Management Working Group

Exhibit 2: WA Wolf Plan_December-2011

Date: December 2011

Title: Wolf Conservation and Management Plan

Author(s): Gary J. Wiles; Harriet L. Allen; Gerald E. Hayes

Exhibit 3: Scientists Letter On Delisting_May-21-2013

Date: May 21, 2013

Exhibit 4: Top Wolf Experts Excluded From Scientific Review of Wolf Delisting_August-8-2013

Date: August 8, 2013

Title: Top Wolf Experts Excluded From Scientific Review of Wolf Delisting Proposal: Unprecedented Step Undermines 'Best Available Science' Mandate of the Endangered Species Act

Exhibit 5: Gray Wolf Peer Review UCSB_January-2014

Date: January 2014

Title: Review of Proposed Rule Regarding Status of the Wolf Under the Endangered Species Act

Author(s): National Center for Ecological Analysis and Synthesis

Exhibit 6: California Wolf Spotted in Northwest Nevada_March-25-2017

Date: March 25, 2017

Title: Offspring of California's Shasta wolf pack spotted in Nevada

Author(s): Cathy Locke

Exhibit 7: North State wolf located in Nevada_April_5_2017

Date: April 5, 2017

Title: North State wolf located in Nevada

Author(s): Damon Arthur

Exhibit 8: Program Data Report G_2018

Date: 2018

Title: Program Data Report G - 2018: Animals Dispersed/Killed or Euthanized/Removed or Destroyed/Freed or Relocated

Author(s): United States Department of Agriculture: Animal and Plant Health Inspection Service.

Exhibit 9: Are There Wolves in Colorado_August-7-2018

Date: August 7, 2018

Title: Are There Wolves in Colorado?

Author(s): Spencer McKee

Exhibit 10: Petition and Exhibit-A_August-20-2018

Date: August 20, 2018

Title: Petition for Declaratory and Injunctive Relief

Exhibit 11: Montana on Pace for Record Wolf Hunt- Flathead Beacon_March-12-2019

Date: March 12, 2019

Title: Montana on Pace for Record Wolf Hunt: With wolf hunting season slated to end this week, 315 wolves were reported killed

Author(s): Tristan Scott

Exhibit 12: Unspinning Wolves - Oregon Wild_April_9_2019

Date: April 9, 2019

Title: Unspinning Wolves

Author(s): Oregon Wild

Exhibit 13: FINAL 2018 WDFW WOLF REPORT_April-11-2019

Date: April 11, 2019

Title: Washington Gray Wolf Conservation and Management 2018 Annual Report

Exhibit 14: WY Wolf Population Drops 18% - Pinedale, Wyoming_April-21-2019

Date: April 21, 2019

Title: WY Wolf Population Drops 18%

Author(s): Cat Urbigkit

Exhibit 15: A Closer Look at Declining Yellowstone Wolf Numbers_April-26-2019

Date: April 26, 2019

Title: A Closer Look at Declining Yellowstone Wolf Numbers

Author(s): Eric Galatas

Exhibit 16: Open Letter to FWS Regarding Proposed Wolf Delisting_May-7-2019

Date: May 7, 2019

Title: An open letter to the U.S. Fish and Wildlife Service from Scientists and Scholars on Federal Wolf Delisting in the context of the U.S. Endangered Species Act

Exhibit 17: Draft Wolf Plan Cascadia ODFW Commission_May-22-2019

Date: May 22, 2019

Title: RE: Cascadia Wildlands testimony on the Draft Wolf Plan

Author(s): Nick Cady

Exhibit 18: Wolf Hunt Quota to be Reduced_May-29-2019

Date: May 29, 2019

Title: Wolf hunt quota to be reduced

Author(s): Lew Freedman

Exhibit 19: Global Assessment Report on Biodiversity and Ecosystem Services_May-29-2019

Date: May 29, 2019

Title: Global Assessment Report on Biodiversity and Eco System Services

Exhibit 20: Environmental Groups Rip Oregon's New Wolf Plan_June-8-2019

Date: June 8, 2019

Title: Governor, environmental groups rip Oregon's new wolf plan

Author(s): Kale Williams

Exhibit 21: Idaho's disastrous approach to its wolf population_June-29-2019

Date: June 29, 2019

Title: Idaho's disastrous approach to its wolf population

Author(s): Suzanne Stone

Exhibit 22: CPW Investigating Wolf Sighting in Northern Colorado_July-9-2019

Date: July 9, 2019

Title: CPW investigating wolf sighting in northern Colorado

Author(s): Stephanie Butzer

Exhibit 23: Colorado gray wolf sighting confirmed by state parks and wildlife_July-10-2019

Date: July 10, 2019

Title: Gray Wolf Sighting Confirmed in Northern Colorado

Author(s): Sam Tabachnik

Exhibit 24: Treves Public Comment_July-14-2019

Date: July 14, 2019

Author(s): Adrian Treves

Exhibit 25: Grand Canyon Wolf Recovery Project - Echo - The Grand Canyon Wolf_Undated

Date: Undated (assuming 2015)

Title: Echo - The Grand Canyon Wolf

Author(s): Grand Canyon Wolf Recovery Project

Exhibit 26: LDF Blog Post_Undated

Title: Partnering with Gray Wolves to Solve the Conservation Crises of Our Time

Exhibit 27: Ensuring ungulate populations recover in areas negatively impacted by wolves

Title: Ensuring ungulate populations recover in areas negatively impacted by wolves

Author(s): Foundation for Wildlife Management

Exhibit 28: Tribal Member Hunting Regulations Resolution 2019-2022-255_Undated

Title: Tribal Member Hunting & Trapping Regulations

Author(s): Colville Confederated Tribes

Exhibit 29: Comments submitted to Oregon Fish and Wildlife Commission on Oregon Wolf Management

Exhibit 30: Weilgus_2019

Date: May 2019

Title: Wolf Delisting and Recovery in the Pacific Northwest

Author(s): R. Wielgus

Exhibit 31: Carroll_2019

Date: July 12, 2019

Title: Biological and Sociopolitical Sources of Uncertainty in Population Viability Analysis for Endangered Species Recovery Planning

Author(s): Carlos Carroll, et al.

Exhibit 32: ODFW_Indigo_Wolf.jpg

Exhibit 33: ODFW_Wenaha_Wolf_Pups.jpg