

**PETITION FOR RULEMAKING
PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT,
5 U.S.C. § 553(e)**

**TO THE U.S. DEPARTMENT OF AGRICULTURE,
ANIMAL AND PLANT HEALTH INSPECTION SERVICE**

**FOR PROMULGATION OF A REGULATORY FRAMEWORK
TO GOVERN THE WILDLIFE SERVICES PROGRAM**

**FOR TRANSPARENCY, ACCOUNTABILITY, RELIABILITY,
THE HUMANE TREATMENT OF ANIMALS,
AND THE PROTECTION OF ANIMALS AND SPECIES,
AND PUBLIC HEALTH AND SAFETY**

December 2, 2013

SUBMITTED BY:

**CENTER FOR BIOLOGICAL DIVERSITY
PROJECT COYOTE
ANIMAL WELFARE INSTITUTE
ANIMAL LEGAL DEFENSE FUND**

NOTICE OF PETITION FOR RULEMAKING

Via Electronic Mail and Certified Mail/Return Receipt Requested (with Literature Cited)

December 2, 2013

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Dear Secretary Vilsack, Administrator Shea, and Deputy Administrator Clay:

Pursuant to section 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e) (“APA”), and 7 C.F.R. § 1.28, the Center for Biological Diversity, Project Coyote, Animal Welfare Institute, and Animal Legal Defense Fund (hereinafter “Petitioners”) hereby petition for issuance and amendment of rules to govern the Wildlife Services program that is administered by the Animal and Plant Health Inspection Service (“APHIS”), an agency within the U.S. Department of Agriculture (“USDA”).¹

Petitioners are “interested persons” under APA section 553(e), and seek issuance and amendment of certain existing rules to provide a regulatory framework to govern the Wildlife Services program and to make it consistent with American values, science, and with all relevant legal authorities and policies.

¹ 5 U.S.C. § 553(e) provides that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 7 C.F.R. § 1.28 states that “interested persons” may file petitions in accordance with 5 U.S.C. § 553(e) “for the issuance, amendment or repeal of a rule ... with the official that issued or is authorized to issue the rule,” and that “[a]ll such petitions shall be given prompt consideration and petitioners will be notified promptly of the disposition made of their petitions.”

Specifically, Petitioners seek issuance or amendment of rules to ensure that the Wildlife Services program:

- is fully transparent and accountable to the public;
- maintains and makes routinely available to the public reliable data and information about its activities;
- minimizes and phases out the use of lethal control, particularly prophylactic lethal control;
- emphasizes selective, non-lethal, non-toxic, and non-capture methods;
- restores apex predators and ecosystems and mitigates the likely effects of climate change;
- is humane and in accordance with proscribed ethical standards;
- adheres strictly to all applicable procedural and substantive legal requirements; and
- sets procedural and substantive criteria for APHIS-Wildlife Services to identify and control invasive species.

A. LEAD PETITIONERS

The CENTER FOR BIOLOGICAL DIVERSITY (“Center”) is a national, non-profit conservation organization with over 625,000 online activists and members whose mission is to work through science, law and creative media to secure a future for all species, great or small, hovering on the brink of extinction. The Center accomplishes its mission through scientific and legal advocacy, public education, and grassroots organizing.

PROJECT COYOTE works to promote coexistence between people and wildlife through education, science and advocacy. Project Coyote aims to create a shift in attitudes toward native carnivores by replacing ignorance and fear with understanding and appreciation. Project Coyote accomplishes its mission by championing progressive management policies that reduce human-coyote conflict, by supporting innovative scientific research, and by fostering respect for and understanding of America’s apex predators.

Since 1951, the ANIMAL WELFARE INSTITUTE (“AWI”) has sought to alleviate the suffering inflicted on animals by people. AWI works to end the torture inflicted on animals by Wildlife Services. It is particularly concerned about the routine use of lethal control techniques including, but not limited to, steel-jaw leghold traps, snares, poisoning, shooting, and denning. Instead, AWI favors non-lethal strategies to resolve human-wildlife conflicts and funds research to develop and test new strategies. AWI also works to minimize the impacts of all human actions that are detrimental to endangered species.

B. SUPPORTING PETITIONER

The ANIMAL LEGAL DEFENSE FUND (“ALDF”) is a national, non-profit organization dedicated to protecting the lives and advancing the interests of animals through the legal system. ALDF works to halt the ecologically harmful and inhumane killing of wild and domestic animals resulting from the outdated and unscientific predator policies practiced by APHIS–Wildlife Services. To this end, ALDF is engaged with governmental entities at the federal, state, and county level to highlight the problems of indiscriminant lethal control methods, provide compiled statistical data, and inform them of their legal obligations to protect and preserve wild animals currently being destroyed through their association with Wildlife Services.

C. PETITIONERS’ INTERESTS

Petitioners and their members are “interested persons” within the meaning of 7 C.F.R. § 1.28, with have aesthetic, moral, scientific, recreational, and procedural interests in the nation’s wildlife and ecosystems that are adversely affected and injured by the activities that are routinely conducted by APHIS-Wildlife Services. Petitioners’ members include individuals who have scientific or other interests in the species and ecosystems that are impacted by APHIS-Wildlife Services’ activities, and members who have domestic pets that have been injured or killed as a result of APHIS-Wildlife Services’ activities and/or who must curtail their activities out of concern for their own and their companion animals’ well-being.

Thank you for your consideration. We look forward to your timely response.

Respectfully submitted,

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*The large carnivores in particular are objects of fascination to most Americans,
and for every person whose sheep may be molested by a coyote
there are perhaps a thousand others
who would thrill to hear a coyote chorus in the night.*

Advisory Board on Wildlife and Game Management
(1964)

*It is clear that the basic machinery of [APHIS-Wildlife Services]
contains a high degree of built-in resistance to change.
The substantial monetary contribution by the livestock industry
serves as a gyroscope to keep the bureaucratic machinery
pointed towards the familiar goal of general reduction of predator populations,
with little attention to the effects of this on the native wildlife fauna.*

Cain Report
(1971)

*As long as private livestock producers can externalize the costs of predator losses
via government-subsidized predator control,
they will have little incentive for responsible animal husbandry techniques.*

Bergstrom *et al.*
(2013)

*The greatness of a nation and its moral progress
can be judged by the way its animals are treated.
I hold that, the more helpless a creature,
the more entitled it is to protection
by man from the cruelty of man.*

Mahatma Gandhi

I. EXECUTIVE SUMMARY

“Wildlife Services” is a federal program that was established more than a century ago and today is administered by the Animal and Plant Health Inspection Service (“APHIS”), an agency within the U.S. Department of Agriculture (“USDA”). The program kills millions of animals every year pursuant to the Animal Damage Control Act, 7 U.S.C. §§ 426-426d (“ADCA”), which provides statutory authority for – but does not require – establishment of a program within USDA for control of “injurious” wildlife.² In addition to the ADCA, Wildlife Services is bound by legal authorities that require transparency; the disclosure of reliable information; the humane treatment of animals; the protection of species, habitat and public health; and the control of invasive species. The program also operates pursuant to a series of “policy manuals” and “program directives” that apply such requirements to the program.

Despite the existing legal scheme, however, the Wildlife Services program has been marked by secrecy, controversy, public opposition, stale and deficient environmental reviews, and indiscriminate killings of large numbers of animals, with over 46.5 million animals reportedly killed since 1996, including more than 52,000 reported unintentional killings in the last 10 years.³ It has removed species from landscapes and continues to suppress their recovery, in turn releasing cascading effects that ripple throughout and degrade ecosystems. It continues to carry out its activities despite decades of criticism, societal values, and substantial gains in humankind’s understanding of animals, species, and the natural world that challenge the program’s very foundational underpinnings, and despite vast and growing evidence that its practices are not only dangerous and inhumane, but tremendously ineffective and highly problematic as well.

A program such as Wildlife Services “necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress” – through the promulgation of rules and regulations – something that is typically conducted as a matter of course under the Administrative Procedure Act, 5 U.S.C. § 553 (“APA”).⁴ Nonetheless, USDA and APHIS have never afforded interested persons or the public the opportunity to provide comment and guide the program through a rulemaking under the APA. Consequently, the program lacks substantive rules and regulations to ensure its activities are: transparent; based on reliable information; appropriate; protective; safe, ethical, and humane; and consistent with all applicable laws, policies, and American values.

² 7 U.S.C. § 426 provides:

The Secretary of Agriculture may conduct a program of wildlife services with respect to injurious animal species and take any action the Secretary considers necessary in conducting the program. The Secretary shall administer the program in a manner consistent with all of the wildlife services authorities in effect on the day before October 28, 2000.

³ See Center for Biological Diversity, *Data Compilation of Annual Animal Killings by APHIS-Wildlife Services* (2013) (hereinafter “Data Compilation”) (Center for Biological Diversity compilation of agency program data reports documenting the number of native and invasive animals taken each Fiscal Year from 1996 through 2012).

⁴ *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

Petitioners are four conservation and animal protection organizations that seek to correct these severe, long-standing defects, and to that end petition the USDA and APHIS pursuant to section 553(e) of the APA for promulgation of a comprehensive regulatory framework to govern Wildlife Services, which fills the gaps in the relevant statutory scheme and proscribes a regulatory framework for program activities that achieves necessary reform, thereby ensuring consistency with all relevant laws and policies and the shared values of the American people.

II. INTRODUCTION

APHIS-Wildlife Services is a century-old, highly-controversial and secretive animal “damage control” program that is administered by APHIS, an agency within USDA.⁵ APHIS-Wildlife Services traps, snares, poisons, and shoots millions of animals every year in the United States, primarily on behalf of the livestock industry and other agribusiness as well as hunting interests.⁶ As the editorial board of the *New York Times* recently observed, Wildlife Services is “misnamed” because its “lethal damage is broad and secretive” and its techniques are “old-fashioned.”⁷ And “the result ... is a program that is wasteful, destructive to the balance of ecosystems, and ultimately ineffective.”⁸

According to the program’s reported data, Wildlife Services has killed more than 46.5 million animals since 1996, including federally- or state-protected animals like eagles, falcons, condors, foxes, wolves, grizzly bears, and many more.⁹ Killing wildlife at this scale has contributed to the local extinction (the “extirpation”) of many North American species, and has fundamentally altered ecosystems at a local, regional, and continental scale – as the *New York Times* Editorial Board put it, “undercut[ing] other programs intended to protect the balance of natural ecosystems” in the process.¹⁰ Coyotes are the program’s most frequently-targeted mammal, with over 1.4 million coyotes reportedly killed since 1996 and an average of 600 coyotes killed every

⁵ For an overview of the program, see USDA, APHIS, ANIMAL DAMAGE CONTROL PROGRAM: FINAL ENVIRONMENTAL IMPACT STATEMENT (1997) [hereinafter “1997 Programmatic FEIS”]. As set forth in the 1997 FEIS, the agency broadly defines “control” as “integrated pest management” actions to prevent or minimize wildlife conflict, including technical assistance, direct control, or both. *Id.* at 1-5. “Direct control” means actions that kill or relocate wildlife.

⁶ See Data Compilation (note 3).

⁷ Editorial, Agriculture’s Misnamed Agency, *New York Times* (July 19, 2013) [hereinafter “NY Times Editorial”].

⁸ *Id.*; see also *id.* (concluding that Wildlife Services needs to be brought “into accord with sound biological practices” as “[r]esolving wildlife conflicts need not involve indiscriminate killing”).

⁹ Bergstrom, J.B., Arias, L.C., Davidson, A.D., Ferguson, A.W., Randa, L.A. & Sheffield, S.R., 2013, License to kill: reforming federal wildlife control to restore biodiversity and ecosystem function, *Conservation Letters*, v. 6, p. 1-12 [hereinafter “Bergstrom *et al.* (2013)”]; see also Levine, N. and Knudson, T., Interactive graphic: Animals killed by Wildlife Services nationwide, *Sacramento Bee* (May 1, 2012) [available at <http://www.sacbee.com/2012/04/28/4448951/interactive-graphic-animals-killed.html>] [hereinafter “Interactive Graphic”].

¹⁰ *NY Times* Editorial (note 7); Berger, K. M., 2006, Carnivore-livestock conflicts: Effects of subsidized predator control and economic correlates on the sheep industry, *Conservation Biology*, v. 20(3), p. 751 [hereinafter “Berger (2006)”]; Estes, J.A., Terborgh, J., Brashares, J.S., Power, M.E., Berger, J., Bond, W.J., Carpenter, S.R., Essington, T.E., Holt, R.D., Jackson, J.B.C., Marquis, R.J., Oksanen, L., Oksanen, T., Paine, R.T., Pickett, E.K., Ripple, W.J., Sandin, S.A., Scheffer, M., Schoener, T.W., Shurin, J.B., Sinclair, A.R.E., Soulé, M.E., Virtanen, R. & Wardle, D.A., Trophic Downgrading of Planet Earth, 2011, *Science*, v. 333, p. 301-306 [hereinafter “Estes *et al.* (2011)”]; Bergstrom *et al.* (2013) (note 6).

week from aerial gunning alone.¹¹ Such extensive killing of coyotes is typically unwarranted and ineffective, especially across large geographic areas.¹² As high as they are, however, the actual figures are likely much greater; the program's reported data are not reliable and much of the take is never reported.¹³

Even worse, a significant portion of APHIS-Wildlife Service's killing and harm is unintentional. Based on program data (the actual numbers are likely much higher), since 2003 APHIS-Wildlife Services has killed more than 52,000 "non-target" animals using indiscriminate killing methods like snares, leg-hold traps, and poisons.¹⁴ These methods have also killed and injured domestic

¹¹ See Data Compilation (note 3); *infra* note 14 ("Pandora's Box"); Advisory Committee on Predator Control, Report to the Council on Environmental Quality and The Department of the Interior (Jan. 1972) [hereinafter "Cain Report (1971)"] at 1 ("After the wolves and grizzly bears had been largely exterminated and mountain lions eliminated or reduced except in a few local areas, the ubiquitous coyote inherited the role of chief target of predator-control programs.").

¹² See, e.g., Bergstrom (2013) (note 9) ("We acknowledge that range-wide effects" from removing coyotes are "likely are negligible, because coyotes have greatly expanded their range east and west during the period of WS control"); Camilla H. Fox, Carnivore Management in the U.S: The Need for Reform, *AWI Quarterly* (Fall 2009) ("[n]ot all predators kill livestock" but Wildlife Services' approach is to kill a large number of coyotes in order to kill the "offending animal"); Conner, M.E. Jaeger, M.M., Weller, T.J. & McCullough, D.R., 1998, Effect of Coyote Removal on Sheep Depredation in Northern California, *Journal of Wildlife Management*, v. 62(2), p. 690 [hereinafter "Conner *et al.* (1998)"] (finding low correlation between coyote control effort and reduction in sheep killing).

¹³ See Knudson (2012) (note 14) at *Long Struggles* (reporting that "many non-target mortalities are not reported to avoid drawing attention to the agency") and *Neck Snares* ("[t]he field guys do not report even a fraction of the non-target animals they catch," according to a former Wildlife Services trapper).

¹⁴ See *Interactive Graphic* (note 6); see also:

- Knudson, T., The killing agency: Wildlife Services' brutal methods leave a trail of animal death, *Sacramento Bee* (Apr. 28, 2012) [hereinafter "*The Killing Agency*"];
- Knudson, T., Federal agency kills 7,800 animals by mistake in steel body-grip traps, *Sacramento Bee* (Apr. 28, 2012) [hereinafter "*7,800 Animals Killed by Mistake*"];
- Knudson, T., Long struggles in leg-hold device make for gruesome deaths, *Sacramento Bee* (Apr. 28, 2012) [hereinafter "*Long Struggles*"];
- Documents: Wildlife mysteries revealed, *Sacramento Bee* (Apr. 29, 2012);
- Knudson, T., Wildlife Services' deadly force opens Pandora's box of environmental problems, *Sacramento Bee* (Apr. 30, 2012) [hereinafter "*Pandora's Box*"];
- Knudson, T., Neck snare is a "non-forgiving and nonselective" killer, former trapper says, *Sacramento Bee* (Apr. 30, 2012) [hereinafter "*Neck Snares*"];
- Knudson, T., M-44s lure animal with smelly bait, kill with cyanide, *Sacramento Bee* (Apr. 30, 2012) [hereinafter "*M-44s*"];
- Knudson, T., Environmental group sues to halt killing practices of federal wildlife agency, *Sacramento Bee* (May 2, 2012);
- Knudson, T., Suggestions in changing Wildlife Services range from new practices to outright bans, *Sacramento Bee* (May 6, 2012) [hereinafter "*Suggested Changes*"];
- Knudson, T., Humane Society calls for reform of Wildlife Services after Bee series, *Sacramento Bee* (May 12, 2012) [hereinafter "*Calls for Reform*"];
- Knudson, T., Congressmen call for investigation of Wildlife Services agency, *Sacramento Bee* (May 20, 2012) [hereinafter "*Calls for Investigation*"];

animals, and in some cases have harmed people. Still, the program has not materially altered its methods or approach. As Congressman Peter DeFazio, D-Ore. has warned, “[s]ooner or later [the program is] going to kill a kid.”¹⁵

Not only does APHIS-Wildlife Services use destructive and dangerous methods to decimate native wildlife populations and ecosystems and put the public at risk, but its killing of native wildlife has also been frequently ineffective at accomplishing its stated purpose: reducing predation such as livestock depredations or otherwise reducing or eliminating species that agricultural or other interests deem to be “pests.”¹⁶ The near extermination of wolves from the United States, for example, led to substantial increases in coyote populations through a process called “predator release.” In response, APHIS-Wildlife Services has killed millions of coyotes – indeed, over 1.4 million reportedly killed since 1996 alone – but this has only resulted in

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- Knudson, T., Efforts to investigate Wildlife Services’ methods continue, *Sacramento Bee* (June 25, 2012) [hereinafter “*Efforts to Investigate*”];
 - Knudson, T., Wildlife Services meets with its critics, *Sacramento Bee* (June 30, 2012) [“*WS Meets its Critics*”]; Tom Knudson, Davis cuts ties with Wildlife Services over coyote killings, *Sacramento Bee* (July 19, 2012) [hereinafter “*Davis Cuts Ties*”];
 - Knudson, T., U.S. wildlife worker’s online photos of animal abuse stir outrage, *Sacramento Bee* (Nov. 2, 2012) [hereinafter “*Outrage*”];
 - Knudson, T., Reform urged for Wildlife Services, *Sacramento Bee* (Nov. 18, 2012) [hereinafter “*Reform Urged*”];
 - Knudson, T., Federal Wildlife Services makes a killing in animal-control business, *Sacramento Bee* (Nov. 18, 2012) [hereinafter “*Making a Killing*”];
 - Knudson, T., Renewed call for probe of federal Wildlife Services, *Sacramento Bee* (Dec. 9, 2012) [hereinafter “*Renewed Calls for Probe*”];
 - Knudson, T., Fish and Wildlife Department cancels Davis predator-hunting clinic, *Sacramento Bee* (Jan. 26, 2013) [hereinafter “*Clinic Canceled*”];
 - Knudson, T., Wildlife Services tightens dog policy, *Sacramento Bee* (Apr. 16, 2012) [hereinafter “*Dog Policy*”];
 - Knudson, T., Federal Wildlife Services changes rules on use of dogs, *Sacramento Bee* (Apr. 18, 2013) [hereinafter “*Dog Rules Changed*”]; and
 - Knudson, T., Documents show questions about Wildlife Services probe in animal cruelty, *Sacramento Bee* (June 15, 2013) [hereinafter “*Animal Cruelty Probe Questions*”]

[collectively hereinafter “Knudson (2012)”].

¹⁵ See Cong. Rec. H4286 (June 16, 2011) (statement of Rep. DeFazio).

¹⁶ Berger (2006) (note 10); Bergstrom *et al.* (2013) (note 9); Conner *et al.* (1998) (note 9); Way, J.G., 2010, Double-litters in coywolf, *Canis latrans* × *lycaon*, packs following the death or disappearance of a resident territorial male, *Canadian Field-Naturalist*, v. 124(3), p. 256; Hurley, M.A., Unsworth, J.W., Zager, P., Hebblewhite, M., Garton, E.O., Montgomery, D.M., Skalski, J.R. & Maycock, C.L., 2011, Demographic response of mule deer to experimental reduction of coyotes and mountain lions in southeastern Idaho, *Wildlife Monographs*, v. 178, p. 1; Blejwas, K.M., Sacks, B.N., Jaeger, M.M. & McCullough, D.R., 2002, The effectiveness of selective removal of breeding coyotes in reducing sheep predation, *Journal of Wildlife Management*, v. 66(2), p. 451-462; Cypher, B.L. & Scrivner, J.H., 1992, Coyote control to protect endangered San Joaquin kit foxes at the Naval Petroleum Reserves, California, *Proceedings of the Fifteenth Vertebrate Pest Conference 1992*, Paper 21.

increased coyote populations due to compensatory reproduction.¹⁷ APHIS-Wildlife Services' own research branch, the National Wildlife Research Center, has identified and tested non-lethal measures to reduce livestock depredations that are more effective, humane, and in line with American values, but Wildlife Services has failed to emphasize these methods.¹⁸

All of these and additional problems with Wildlife Services have been extensively documented for *decades*, with little discernible change in agency practice – instead, APHIS-Wildlife Services has actively worked to shield its activities from public scrutiny.¹⁹

Meanwhile, APHIS-Wildlife Services lacks any formal regulations to specify its mission and set regulatory standards for compliance with major federal statutes, including the Freedom of Information Act; National Environmental Policy Act; Data Quality Act; Endangered Species Act; Bald and Golden Eagle Protection Act; Migratory Bird Treaty Act; Federal Insecticide, Fungicide, and Rodenticide Act; and other authorities, as well as with its own policies and prevailing American values.

Therefore, Petitioners seek a formal rulemaking under the APA, including notice and an opportunity for public comment and final promulgation of substantive regulations, that will fill gaps in the existing statutory scheme, set a regulatory framework for program activities, and ensure the program's consistency with all applicable laws, policies, the best information, and American values.²⁰

¹⁷ Robert L. Crabtree & Jennifer W. Sheldon, *Coyotes and Canid Coexistence in Yellowstone*, in CARNIVORES IN ECOSYSTEMS: THE YELLOWSTONE EXPERIENCE 127 (1999) [hereinafter "Crabtree and Sheldon (1999)"]; Eric M. Gese, *Demographics and Spatial Responses of Coyotes to Changes in Food and Exploitation*, in PROCEEDINGS OF THE 11TH WILDLIFE DAMAGE MANAGEMENT CONFERENCE 271 (2005) [hereinafter "Gese (2005)"].

¹⁸ See *infra* at 29-30 (overview of non-lethal control methods); Bergstrom *et al.* (2013) (note 9) ("WS's National Wildlife Research Center (NWRC) conducts important research in nonlethal control, but those methods NWRC concludes are effective rarely are adopted by WS field operation.").

¹⁹ See *infra* at 40-49 (discussing program's lack of transparency).

²⁰ "Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and which implement the statute' and 'have the force and effect of law.'" *Batterton v. Francis*, 432 U.S. 416, 437 (1977) (quoting U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act (1947) and citing *U.S. v. Mersky*, 361 U.S. 431, 437-438 (1960); *Atchison, T. & S.F.R. Co. v. Scarlett*, 300 U.S. 471, 474 (1937)); see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979) ("For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.'") (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969)).

Specifically, Petitioners seek rules that:

- Ensure that the Wildlife Services program is fully transparent and accountable to the public;
- Ensure that Wildlife Services maintains and routinely makes available reliable data and information about its activities;
- Set regulatory standards and procedures for the selection, use, and location of control methods, with the objective of minimizing and phasing out the use of lethal control and prophylactic lethal control, and with an emphasis on non-lethal, non-toxic, non-capture, and selective methods;
- Set narrow substantive and procedural criteria for those circumstances when the use of lethal control methods may be permitted, *e.g.*, only if selective and in response to local, verified injurious wildlife problems, after nonlethal methods have been documented to have been fully exhausted;
- Ensure that the Wildlife Services program does not jeopardize endangered or threatened species or undermine ecosystems, and works to restore apex predators to ecosystems;
- Set ethical standards for animal treatment, ensure that animals affected by the program are treated humanely, and ensure that agency personnel who commit acts of animal cruelty are subject to disciplinary action and/or employment termination;
- Specify regulatory standards and procedures by which the program will strictly adhere to all applicable procedural and substantive legal requirements; and
- Sets procedural and substantive criteria for APHIS-Wildlife Services to identify and control invasive species.

The ADCA – the primary legal authority which authorizes the program – provides that the program “may” be established, but does not mandate its existence or that it conduct any method(s) of control in particular.²¹ Hence, in the absence of a substantive regulatory framework that successfully and consistently accomplishes objectives set forth above, there can be no viable rationale for the program’s continued existence.

²¹ 7 U.S.C. § 426 (“The Secretary of Agriculture *may* conduct a program of wildlife services with respect to injurious animal species and take any action the Secretary considers necessary in conducting the program.”) (emphasis added).

III. BACKGROUND

Below is an historical overview of the program and long-standing pressure for reform from policy experts, advisory committees, scientific organizations, and non-governmental organizations, followed by an overview of the specific areas in which reforms are necessary in order to make the program consistent with all applicable legal authorities, policies, the best information, and American values.

A. ORIGINS OF THE WILDLIFE SERVICES PROGRAM

The animal control program that is now known as APHIS-Wildlife Services began in 1885, with the creation of the USDA Branch of Economic Ornithology.²² Renamed the Division of Economic Ornithology and Mammalogy in 1886, the Division of Ornithology and Mammalogy in 1890, and the Division of Biological Survey in 1896, the agency became known as the Bureau of Biological Survey in 1905.²³ Through 1905, the Bureau focused on species identification, landowner education, and control of house sparrows.²⁴

In 1906, the Bureau began to support U.S. Forest Service efforts to eradicate wolves from the newly-established forest reserve system.²⁵ By 1911, the agency was advocating for the use of strychnine to kill moles, squirrels, and prairie dogs – *i.e.*, species that agricultural interests consider to be undesirable.²⁶ In 1913, Congress appropriated funds for the Bureau to start killing ground squirrels in California.²⁷ In 1914, the first cooperative agreement was signed with the New Mexico College of Agriculture and Mechanical Arts.²⁸

In 1915, Congress first appropriated funds to the Bureau of Biological Service for “destroying” wolves, coyotes, and other “injurious” animals (predators).²⁹ In 1931, Congress passed the ADCA, which “expanded the government role in predator control, authorizing the use of federal

²² 1997 Programmatic FEIS (note 5) at 1-8.

²³ *Id.* at 1-8 – 1-9.

²⁴ *Id.*; *see also* MICHAEL J. ROBINSON, PREDATORY BUREAUCRACY: THE EXTERMINATION OF WOLVES AND THE TRANSFORMATION OF THE WEST (2005) [hereinafter “PREDATORY BUREAUCRACY”] at 61.

²⁵ PREDATORY BUREAUCRACY (note 24) at 62-63.

²⁶ *Id.* at 67.

²⁷ *Id.*; 1997 Programmatic FEIS (note 5) at 1-9.

²⁸ 1997 Programmatic FEIS (note 5) at 1-9.

²⁹ PREDATORY BUREAUCRACY (note 24) at 79; Cain Report (1971) (note 11) at 1, 8.

funds and personnel on private lands.”³⁰ In 1939, the program was transferred to the Department of the Interior as the “Division of Predator and Rodent Control” (“PARC”).³¹

In the first half of the 20th century, hunters employed by the program intentionally and unintentionally killed millions of wolves, coyotes, and other animals, especially in the West.³² The program grew, facilitated in part by the “establishment of cooperative funding mechanisms – money from states, counties, and local ranching associations directly paid to [the program] for its services.”³³

The program was transferred to the Department of the Interior in 1939, and in 1940 was incorporated into the newly-created U.S. Fish and Wildlife Service’s (“FWS”). In 1956, the program came to be directed by the Bureau of Sport Fisheries and Wildlife, within FWS.³⁴ In 1986, a congressional rider transferred the program, known then as “Animal Damage Control,” back to USDA.³⁵

B. PRESSURE FOR REFORMS AND FOR REGULATORY STANDARDS

The policies that initially underpinned the Wildlife Services program sought eradication or extermination of wildlife believed to threaten livestock grazing and agriculture. However, public opinion led to calls for reform – including regulatory reform – of APHIS’s wildlife control program beginning in the late 1920s and early 1930s, and again during the 1960s and 1970s, and to passage of legal authorities and restrictions that bind APHIS in administering its Wildlife Services program today.

The program’s primary response to criticism has been cosmetic, however, as it has tried to shape public opinion to be supportive of its activities and to avoid reform. Meanwhile, although many have recommended regulatory reform of Wildlife Services over the years, APHIS has never engaged in a substantive rulemaking under the APA to set regulatory standards and procedures for the program. And although APHIS-Wildlife Services has endeavored to improve its public image, critics have maintained that it still operates in the shadows, doing the bidding of private

³⁰ Feldman, J.W., 2007, Public Opinion, the Leopold Reports and the Reform of Federal Predator Control Policy, *Human-Wildlife Conflicts*, v. 1(1), p. 112 [hereinafter “Feldman (2007)”]. The ADCA has been amended since it was first enacted in 1931, but remains the statutory foundation for the Wildlife Services program.

³¹ PREDATORY BUREAUCRACY (note 24) at 79; Cain Report (1971) (note 11) at 1, 8.

³² PREDATORY BUREAUCRACY (note 24) at 111-113 (recounting non-target killings of wolverines, dogs, grouse, and sage hens); *see also* “WT Detail Page” (Sep. 14, 2010) (reporting killing of non-target wolverine in a foothold trap meant for wolves in Idaho) [hereinafter “WT Detail Page”]; 78 Fed. Reg. 7864 (Feb. 4, 2013) (recounting non-target killing of wolverine in Montana in 2010).

³³ Feldman (2007) (note 30) at 14.

³⁴ PREDATORY BUREAUCRACY (note 24) at 303.

³⁵ 1997 Programmatic FEIS (note 5) at 1-12.

agricultural interests, refusing to emphasize nonlethal methods and ethical standards, to the detriment of animals, species, and public accountability. Such deceptiveness has had consequences for Wildlife Services. For example, several counties in California are starting to take the lead in transitioning to local, cost-sharing programs, however, that focus on nonlethal methods in order to protect livestock from predators.

1. The Murie Report (1931)

In late 1930-early 1931, a survey employee named Olaus J. Murie authored one of the first highly-critical reports of the program.³⁶ Having studied the practices of program trappers and hunters in the field, Murie pronounced that “there is an incipient landslide in the direction of denouncing everything with fur or feathers that has the slightest adverse effect on any human interest and it makes me wonder where it will end.”³⁷ Murie recommended a change in attitude, stating that “we should not discourage interest and enjoyment of any form of wild life, even if we are killing off such animals for economic reasons” and “consider sympathetically any plan which might be proposed ... which shows leniency toward species that are in conflict with certain interests”³⁸ Murie’s report was suppressed by the program’s brass, however, who “execrated him” for writing it.³⁹

2. The Leopold Report (1964)

Modern calls for reform of APHIS-Wildlife Services began in 1964 with publication of what has become known as the “Leopold Report,” named for its lead author: Dr. A. Starker Leopold, a son of pioneering ecologist Aldo Leopold and a long-time advisor to the National Park Service.⁴⁰ Leopold spearheaded the Advisory Committee on Wildlife Management, a seven-member committee of wildlife biologists that had been created by U.S. Secretary of the Interior Stewart Udall.⁴¹

Secretary Udall established the committee in response to shifting public attitudes and growing protests against the program – protests which started to gain momentum as the program employed poisons like Compound 1080, an extremely-lethal poison with no antidote that can kill

³⁶ PREDATORY BUREAUCRACY (note 24) at 234-235; Murie, O.J., Report on Investigations of Predatory Animal Poisoning, Wyoming and Colorado,” *U.S. Fish and Wildlife Service, 1860-1961, Field Reports*, Record Unit 717b, Box 45, SIA, 20, 6 [hereinafter “Murie”].

³⁷ *Id.* at 234 (quoting Murie at 23-25).

³⁸ *Id.*

³⁹ *Id.* at 234-235.

⁴⁰ Leopold, A. S.; Cain, S. A.; Cottam, C. M.; Gabrielson, I. N.; and Kimball, T. L., 1964, Predator and Rodent Control in the United States, *US Fish & Wildlife Publications*, Paper 254 [hereinafter “Leopold Report”].

⁴¹ Feldman (2007) (note 30) at 7.

100 people with a single teaspoon. Secretary Udall tasked the committee to review the program, answer growing public criticisms, and make recommendations for needed change.⁴² The Leopold Report observed that:

In America we inherited a particularly prejudiced and unsympathetic view of animals that may at times be dangerous or troublesome. From the days of the mountain men through the period of conquest and settlement of the West, incessant war was waged against the wolf, grizzly, cougar, and the lowly coyote, and even today in the remaining backwoods the maxim persists that the only good varmint is a dead one.

But times and social values change.⁴³

The Leopold Report “lambasted” the program for failing to “differentiate those local situations where control is justified from the numerous cases where the same species of animals have societal values far in excess of the negligible damage they cause.”⁴⁴ It found “abundant evidence that [some agency officials] willingly support almost any control proposal in which someone is enough interested to contribute matching funds.”⁴⁵ The Board unanimously opined that “control as actually practiced today is considerably in excess of the amount that can be justified in terms of total public interest.”⁴⁶ It concluded that “some review mechanism is required to protect animal life against unnecessary or excessive control and to assure that the interests of the public at large are duly considered, as well as the interests of agriculturalists and livestock operators.”⁴⁷

To that end, the Leopold Report recommended that the program work to achieve the following goals: (1) cease coyote control in areas that are occupied only by cattle, and not used by sheep; (2) undertake predator control for the protection of other forms of wildlife only after competent research has proven it to be desirable and locally needed; and (3) deem no predator control method acceptable if it results in the inadvertent death of a great number of animals during the process of killing a few that are causing damage.⁴⁸

⁴² *Id.*

⁴³ Leopold Report (note 40) at 1. Although Leopold had supported extermination of mountain lions and wolves throughout the West in the 1920s, his ideas about wildlife management and predator control “altered drastically” later in the century. Feldman (2007) (note 30) at 3.

⁴⁴ Leopold Report (note 40) at 1-2; Feldman (2007) (note 30) at 7.

⁴⁵ Leopold Report (note 40) at 5; *see also id.* at 5-6 (characterizing the program’s “firm entrenchment as a protective subsidy of livestock and agricultural interests” that has “invited criticism and distrust from many groups and individuals interested primarily in wildlife protection, including many ranchers”).

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* at 6.

⁴⁸ *Id.* at 8, 9, 24.

To meet these goals, the Leopold Report made the following specific recommendations:

1. The program should appoint an Advisory Board on Predator and Rodent Control;
2. The program should “reassess ... its own goals”;
3. The program should set forth “properly enforced regulations” and “explicit criteria to guide control decisions”;
4. The program should cease rabies control programs where rabies are an “ephemeral disease in the wild”;
5. The program should greatly amplify its research program;
6. The program should change its name (then known as the Branch of Predator and Rodent Control) in order to reflect a change in philosophy; and
7. The program should pursue regulation of the use of poisons.⁴⁹

In the five years following issuance of the Leopold Report, the program went through a “spring cleaning,” with “[p]olicies, names, terms, titles, and philosophies ... replaced or changed” and a heavy emphasis on public perception.⁵⁰ In 1965, the program was renamed, from the U.S. Division of Predator and Rodent Control to the U.S. Division of Wildlife Services.⁵¹ On its face, the program’s guiding philosophy shifted as well, to be made consistent with the Leopold Report – *i.e.*, that “all animals have a right to exist, but control is necessary in certain situations.”⁵²

However, the Leopold Report’s core substantive recommendations for reform – including the recommendation that the program set regulations and explicit criteria for control decisions – were not adopted. The “public clamor” over the program grew.⁵³

In 1966, Congressman John Dingell held hearings on the program, and in 1970, the National Academy of Sciences published a USDA report which noted tremendous changes in public attitudes about wildlife and increasing recognition of the value of environmental conservation.⁵⁴

⁴⁹ *Id.* at 22-27.

⁵⁰ See Feldman (2007) (note 30) at 118 (noting that “[e]veryone involved in the predator control house cleaning recognized the importance of public perception” as “[a] public outcry had spurred the Leopold Report and its recommendations in the first place” and “federal policy needed to respect this public concern”).

⁵¹ *Id.* at 8. Other key terms were changed as well – thus, “[p]oison” became ‘toxicant’ or chemical compound” and “kill” became ‘reduction’ or ‘removal.’” *Id.*

⁵² *Id.* at 9.

⁵³ Cain Report (1971) (note 11) at 2.

3. The Cain Report and President Nixon's Ban on the Use of Toxicants on Federal Lands (1970s)

Supporters of reform made substantial gains during the 1970s and early 1980s (until the agricultural lobby pushed back during the Reagan Administration).⁵⁵ Precipitating this period was an event in May 1970, when Boy Scouts near Casper, Wyoming came upon a grisly scene of dead bald and golden eagles which had been poisoned by agency personnel, who had heavily laced sheep carcasses with thallium sulfate.⁵⁶ A Senate hearing was held the next month to investigate the matter, shining more intense public scrutiny on the incident and bringing more negative publicity to the program.⁵⁷

Popular magazines ran investigative articles about the program and environmental organizations filed lawsuits. In June 1970, the *New Yorker Magazine* ran a lengthy cover article about prairie dog control on the South Dakota prairie and the steep decline of the black-footed ferret, which preys on prairie dogs.⁵⁸ *Sports Illustrated* published another exposé by Jack Olsen in 1971 which chronicled out-of-control, poisoning by federal agents and cooperating sheep ranchers, and recounted poisoned dogs, eagles, bears, and humans.⁵⁹ In March 1971, Defenders of Wildlife, Sierra Club, National Wildlife Federation, and the Humane Society of the United States (“HSUS”) filed suit, alleging a failure to comply with NEPA.⁶⁰

⁵⁴ Cain Report (1971) (note 11) at 2; COMMITTEE ON AGRICULTURAL LAND USE AND WILDLIFE RESOURCES, NATIONAL RESEARCH COUNCIL, LAND USE AND WILDLIFE RESOURCES 208 (1970).

⁵⁵ In line with the Leopold Report's recommendation that it do so, however, the program did change its name, *i.e.*, to the Division of Wildlife Services. See Cain Report (1971) (note 11) at 2.

⁵⁶ PREDATORY BUREAUCRACY (note 24) at 316.

⁵⁷ “Predator Control and Related Problems,” Hearings before the Subcommittee on Agriculture, Environmental and Consumer Protection of the Committee on Appropriations. Senate. 92nd Congress, 1st Session. 1971; Feldman (2007) (note 30) at 122.

⁵⁸ McNulty, F., A Reporter at Large, “THE PRAIRIE DOG AND THE BLACK-FOOTED FERRET,” *The New Yorker* (June 13, 1970) at 40.

⁵⁹ Jack Olsen, “THE POISONING OF THE WEST,” *Sports Illustrated* (Mar. 8, 1971) at 72. Olsen “argued that no scientific studies had proven the wool growers’ claims about the threat predators posed to sheep and lambs, suggesting instead that coyotes preferred rabbits, mice, and other forest rodents” Feldman (2007) (note 30) at 120.

⁶⁰ 42 U.S.C. §§ 4321-4347. In November 1971, these non-governmental organizations secured an order requiring the program to cease using toxic chemicals for predator damage control by February 15, 1972. Wade, D.A., 1980, Predator Damage Control, 1980: Recent History and Current Status, *Proceedings of the 9th Vertebrate Pest Conference* [hereinafter “Wade (1980)”] at 196.

The growing drumbeat for reform emanated from the Nixon Administration as well. In April 1971, three senior Nixon officials began to develop a plan to dismantle the program.⁶¹ In July 1971, U.S. Department of Interior Secretary Rogers Morton appointed the Cain Committee, named for Stanley A. Cain (a former assistant secretary at U.S. Department of Interior and co-author of the Leopold Report), and made up of non-program scientists, to conduct another review.⁶²

In January 1972, the “Cain Report” was released to the public.⁶³ Like the Leopold Report seven years before, the Cain Report criticized Wildlife Services for its “built-in resistance to change” and allegiance to livestock interests.⁶⁴ It went “one crucial step farther” than the Leopold Report, however, and abandoned hope that “[g]uidelines and good intentions” would result in needed changes.⁶⁵ Hence, the Cain Report recommended 15 specific reforms, including increased transparency and legislative and regulatory reforms:

1. Continued federal-state cooperation in predator control, but with all funds appropriated by Congress and the legislatures in order to allow for “citizen review and input in decision-making”;
2. Immediate legislation to “remove all existing toxic chemicals from registration and use for operational predator control”;
3. Professionalization of program personnel, to achieve a “balance of interests”;

⁶¹ PREDATORY BUREAUCRACY (note 24) at 317; “Predatory Mammals and Endangered Species,” Hearings before the Subcommittee on Fisheries and Wildlife Conservation of the Committee on Merchant Marine and Fisheries, House of Representatives, 92nd Congress, 2nd Session, March 21 and April 10, 1972.

⁶² In convening the new panel on July 9, 1971, Secretary Morton personally pledged “that performance will follow program so that our imperiled predators will not perish in a sea of platitudes.” PREDATORY BUREAUCRACY (note 24) at 317.

⁶³ Wade (1980) (note 60); Cain Report (1971) (note 11).

⁶⁴ Cain Report (1971) (note 11) at 2. The Cain Report observed that:

Not only are many of the several hundred field agents the same former ‘trappers,’ but the cooperative funding by federal, state, and county agencies, and by livestock associations and even individual ranchers, maintains a continuity of purpose in promoting the private interest of livestock growers, especially in western rangeland states. The substantial monetary contribution by the livestock industry serves as a gyroscope to keep the bureaucratic machinery pointed towards the familiar goal of general reduction of predator populations, with little attention to the effects of this on the native wildlife fauna.

Id.

⁶⁵ PREDATORY BUREAUCRACY (note 24) at 318; Cain Report (1971) (note 11) at 2 (“Guidelines and good intentions will no longer suffice.”).

4. Establishment of “trapper-trainer extension programs” by states, to encourage the use of humane methods;
5. Congressional action to alleviate the economic burdens of livestock producers who experience heavy losses by predators;
6. Revisions to federal land grazing permits and leases to “provide for possible suspension or revocation” when “regulations governing predator control are violated”;
7. Prohibition of “all methods of predator control” in Wilderness Areas;
8. Congressional and state legislation to make aerial gunning of wildlife illegal, “except under exceptional circumstances and then only by authorized wildlife biologists of the appropriate federal and state agencies”;
9. Regulatory ability to suspend or revoke the license of any pilot who “knowingly carries a passenger whose acts lead to conviction of illegal predator control”;
10. Congressional action to “rule out the broadcast of toxicants for the control of rodents, rabbits, and other vertebrate pests on federal lands” and, if possible, “correlative action ... for private lands as well”;
11. A long-term program to research “the actual livestock losses caused by each major predator,” to “validate the causes of economic damage and guide actions to alleviate excessive losses”;
12. A “detailed socio-economic study of cost-benefit ratios,” to “evaluat[e] the need for and efficacy of the program and its separate parts”;
13. A study of the “epidemiology of rabies in the field by a team of specialists provided with adequate funding,” to find out whether sending trappers to a rabies outbreak “does the slightest bit of good in terminating the disease”;
14. Congressional action to give necessary authority to the DOI Secretary to protect endangered predators;
15. State action to supplement federal protections of locally-rare wildlife populations.⁶⁶

As the Cain Report was released in early 1972, President Nixon signed Executive Order 11643, which banned the use of several toxicants on federal public lands – including Compound 1080 (sodium fluoroacetate), strychnine, sodium cyanide (M-44s), and thallium sulfate – except for

⁶⁶ Cain Report (1971) (note 11) at 5-14.

emergency use by prior agreement of the Secretaries of the Departments of Interior, Agriculture, and Health, Education and Welfare, and the EPA Administrator.⁶⁷ On March 9, 1972, EPA cancelled the registration of these toxicants.⁶⁸ From 1972 to 1974, Congressional hearings were held to reassess the program and its use of toxic chemicals to control predators.⁶⁹ During that time, EPA denied several requests and applications by several western states for re-registration of the cancelled toxicants.⁷⁰

Unfortunately, the cancellations of sodium cyanide and Compound 1080 did not last. In 1974, EPA granted experimental use of sodium cyanide (M-44s) to the State of Texas, and in 1975, EPA granted experimental or emergency use to Montana, California, South Dakota, Idaho, Nebraska, Kansas, and Texas A&M University, and to the program itself, which had by this time come to be known as the Office of Animal Damage Control.⁷¹ In 1975, President Ford amended Executive Order 11643 to allow for the experimental use of M-44s for predator control on federal lands.⁷² The following year, President Ford amended Executive Order 11643 again, to allow for the reregistration of sodium cyanide for this purpose.⁷³ And in 1977, EPA granted an experimental use permit to DOI for Compound 1080.⁷⁴

⁶⁷ Executive Order No. 11643, ENVIRONMENTAL SAFEGUARDS ON ACTIVITIES FOR ANIMAL DAMAGE CONTROL ON FEDERAL LANDS (Jan. 11, 1972); *see also* 37 Fed. Reg. 3000 (Feb. 20, 1972) (Department of Interior notice of closure of the use of chemicals toxic to predatory animals on public grazing lands). As described by James Feldman:

[President] Nixon explained his order as a political decision – based on changing values – as much as a scientific one. “Americans today set high value on the preservation of wildlife,” Nixon explained.

Feldman (2007) (note 30) at 122-123. On February 10, 1972, the Department of Interior announced that it had ceased the use of toxic chemicals in the animal damage control program. Wade (1980) (note 60).

⁶⁸ EPA Order PR 72-2, MANUFACTURERS, FORMULATORS, DISTRIBUTERS, AND REGISTRANTS OF ECONOMIC POISONS: SUSPENSION OF REGISTRATION FOR CERTAIN PRODUCTS CONTAINING SODIUM FLUOROACETATE (1080), STRYCHNINE AND SODIUM CYANIDE (Mar. 9, 1972). EPA’s cancellation was based on its finding that strychnine, cyanide, and sodium fluoroacetate Compound 1080 “are among the most toxic chemicals known to man” and “are toxic not only to their targets but other animals and wildlife.” *Id.* at 59-60.

⁶⁹ Wade (1980) (note 60).

⁷⁰ *Id.* Between 1972 and 1979, EPA did provide emergency use permission to several western states for the use of strychnine for rabies control, and granted such use to the State of Montana for the use of Compound 1080 on Columbian ground squirrels. *Id.*

⁷¹ *Id.*; Government Accountability Office, WILDLIFE SERVICES PROGRAM INFORMATION ON ACTIVITIES TO MANAGE WILDLIFE DAMAGE, GAO-02-138 (2001) [hereinafter “GAO (2001)”].

⁷² Executive Order No. 11870, ENVIRONMENTAL SAFEGUARDS ON ACTIVITIES FOR ANIMAL DAMAGE CONTROL ON FEDERAL LANDS (July 18, 1975).

⁷³ Executive Order No. 11917, AMENDING EXECUTIVE ORDER NO. 11643 OF FEBRUARY 8, 1972, RELATING TO ENVIRONMENTAL SAFEGUARDS ON ACTIVITIES FOR ANIMAL DAMAGE CONTROL ON FEDERAL LANDS (May 28, 1976).

Nevertheless, critics cheered when DOI Secretary Cecil Andrus formed an advisory committee in 1978 called the Animal Damage Control Study Advisory Committee.⁷⁵ The committee released draft reports in May and June of 1978, and released a final report in December 1978 that was, like the Leopold and Cain reports, highly critical of the program.⁷⁶ It found “insufficient documentation to justify the program’s existence.”⁷⁷ Its December 1978 report led to a November 1979 Department of Interior (“DOI”) policy which declared that the program:

[W]ill recognize the importance of predators to natural ecosystems, will strive to reduce conflicts between predators and livestock as far as possible, will direct lethal controls at offending animals, not the species as a whole, will prohibit the routine use of poisons on public lands except as provided in Executive Order 11643, as amended by Executive Orders 11870 and 11917, and will maintain public land use and wildlife resource values as a public trust.⁷⁸

DOI Secretary Andrus set the specific goals for achieving these policy objectives, and directed FWS “to work toward their rapid implementation”:

1. In the near term, prophylactic control should be limited to specific situations where unacceptably high levels of losses have been documented during the preceding 12 months. In the long term, through additional research, our goal should be to minimize and phase out the use of lethal prophylactic controls, including the creation of buffer zones;
2. Emphasize corrective control, utilizing non-lethal, non-capture methods and focusing on offending animals to the greatest degree possible;
3. Reduce conflicts through livestock husbandry techniques which decrease exposure of livestock to predators;
4. Expand the availability of extension services to ranchers;

⁷⁴ Wade (1980) (note 60). Sodium cyanide and Compound 1080 continue to be two of the most controversial toxicants used by Wildlife Services; last year, Reps. DeFazio and Campbell introduced a bill to prohibit them. *See infra* at 19.

⁷⁵ The Leopold Report recommended establishment of an advisory committee for the program. *See supra* at 10; Leopold report (note 40) at 22

⁷⁶ FWS, PREDATOR DAMAGE IN THE WEST: A STUDY OF COYOTE MANAGEMENT ALTERNATIVES (1978).

⁷⁷ 1997 Programmatic FEIS (note 5) at 1-12; GAO (2001) (note 71) at 53.

⁷⁸ Memorandum from Secretary, U.S. Department of the Interior to Assistant Secretary, Fish and Wildlife and Parks, U.S. Department of the Interior (Nov. 8, 1979) [hereinafter “1979 DOI Policy”]; 1997 Programmatic FEIS (note 5) at 1-11.

5. Display resources to locations and in seasons of greatest need; and
6. Redirect and refocus research efforts to support the above goals and to achieve the long-term objective of preventing predator damage rather than controlling predators.

Secretary Andrus also set four immediate restrictions on certain activities, including the elimination of denning; tight restrictions on aerial gunning; selection of the most selective and humane traps and check frequency; and the immediate cessation of “further research or development of potential uses of Compound 1080.”⁷⁹

4. Critics Force Restrictions on Compound 1080 as Pressure for Reform Grows (1980s-2000s)

The agricultural lobby pushed back heavily against reforms including the 1979 DOI Policy beginning in the 1980s – in particular, against restrictions on toxicants use – but the public clamor for reform nevertheless led EPA to maintain restrictions on the program’s use of one of its worst lethal poisons, Compound 1080.

In 1981 DOI Secretary James Watt rescinded the 1979 DOI policy that banned denning, and shortly thereafter, President Reagan signed Executive Order 12342, which revoked President Nixon’s Executive Order 11643 in its entirety, making way for the resumed use of toxicants on federal lands.⁸⁰ Lobbyists for agricultural industries pushed for the program’s transfer from DOI back to USDA as well, which occurred in 1986.⁸¹ And in 1986, another advisory committee was established; its membership did not favor wildlife conservation interests.

In 1986, following years of administrative proceedings, EPA agreed to reauthorize above-ground use of strychnine for prairie dog control conditioned on pre-use surveys for black-footed ferrets living near targeted colonies.⁸² Two years later, ruling on a lawsuit brought by Defenders of Wildlife and the Sierra Club, the Eighth Circuit Court of Appeals enjoined the registration of strychnine pending APHIS’ compliance with the Endangered Species Act (“ESA”) as to 14 protected species including migratory birds.⁸³ As a result, although APHIS-Wildlife Services

⁷⁹ 1997 Programmatic FEIS (note 5) at 1-12.

⁸⁰ Executive Order No. 12342, ENVIRONMENTAL SAFEGUARDS FOR ANIMAL DAMAGE CONTROL ON FEDERAL LANDS (Jan. 27, 1982).

⁸¹ 1997 Programmatic FEIS (note 5) at 1-12.

⁸² PREDATORY BUREAUCRACY (note 24) at 330; Wade (1980) (note 60); 48 Fed. Reg. 48,522 (Oct. 19, 1983); *see also Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1297 (8th Cir. 1989), *aff’d in part, rev’d in part, Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989) (discussing history of administrative process).

⁸³ *Defenders of Wildlife v. EPA*, 688 F. Supp. at 1342-43.

employs strychnine to poison rodents in underground burrows today, EPA has maintained restrictions on the use of above-ground, non-arboreal field use of this toxicant.⁸⁴

Although the bans on Compound 1080 were not permanent, they did lead to restricted use of the highly-toxic poison – *i.e.*, to “livestock protection collars,” which are devices with two bladders containing the poison that are placed around the necks of potential prey animals (*e.g.*, sheep and goats) to target coyotes.”⁸⁵ Since 1985, EPA has approved the use of Compound 1080 in LPCs.⁸⁶

During the 1990s, APHIS prepared environmental analyses in order to meet requirements of NEPA and the ESA, culminating in programmatic environmental reviews that revealed more information about the program, then known as Animal Damage Control. A 1997 final “programmatic” environmental impact statement (“EIS”) under NEPA confirmed the program’s continued use of myriad lethal methods, including hunting, trapping, and the use of dozens of different poisons, including methods that it acknowledged kill or harm non-target wildlife (including endangered and threatened species) and affect ecosystems.⁸⁷ An accompanying biological opinion, required under the ESA, determined that program activities are likely to jeopardize the continued existence of seven endangered and threatened species, including the black-footed ferret, San Joaquin kit fox, Southwestern population of bald eagle, Attwater’s prairie chicken, Mississippi sandhill crane, California condor, and Wyoming toad.⁸⁸ Yet, APHIS-Wildlife Services has elected to continue these activities, and has not since amended or prepared a new a programmatic review of the program.

⁸⁴ PREDATORY BUREAUCRACY (note 24) at 330; EPA, REREGISTRATION ELIGIBILITY DECISION: STRYCHNINE (July 1996); Memorandum from Jane Smith, Health Effects Division, EPA to Jay Ellenberger, Special Review and Reregistration Division, STRYCHNINE, HED Chapter of the Reregistration Eligibility Decision Document (RED), Case #3133 (Jan. 22, 1996).

⁸⁵ PREDATORY BUREAUCRACY (note 24) at 330.

⁸⁶ Connolly, G., 1993, Livestock Protection Collars in the United States, 1988-1993, *Great Plains Wildlife Damage Control Workshop Proceedings*, Paper 327 [hereinafter “Connolly (1993)”]; USDA, APHIS-Wildlife Services Policy Directive 2.420, LIVESTOCK PROTECTION COLLARS (Feb. 17, 2004).

⁸⁷ 1997 Programmatic FEIS (note 5) at 3-48, 3-77 & Appendix H; USDA, APHIS, Animal Damage Control Program: DRAFT ENVIRONMENTAL IMPACT STATEMENT (1990); USDA, APHIS, Animal Damage Control Program: SUPPLEMENT TO THE DRAFT ENVIRONMENTAL IMPACT STATEMENT (1993). FWS previously released a FEIS for the program in 1979. Department of Interior, U.S. Fish and Wildlife Service, FINAL ENVIRONMENTAL IMPACT STATEMENT ON MAMMALIAN PREDATOR DAMAGE MANAGEMENT FOR LIVESTOCK PROTECTION IN THE WESTERN UNITED STATES (1979).

⁸⁸ U.S. Department of the Interior, U.S. Fish and Wildlife Service, ANIMAL DAMAGE CONTROL “MAY AFFECT” DETERMINATIONS FOR FEDERALLY LISTED THREATENED AND ENDANGERED SPECIES, USFWS BIOLOGICAL OPINION (1997) [hereinafter “1997 Programmatic BiOp”]. These programmatic environmental reviews remain in effect a quarter-century later, even though they do not assess all of the program’s impacts to all affected endangered and threatened species, and despite greater understanding of such activities to wildlife, species, and ecosystems. *See infra* at 29-35.

Despite these decisionmaking processes, APHIS-Wildlife Services has not shed its poor reputation, as more information about its activities has continued to emerge. In 1990, the Government Accountability Office (“GAO”) issued a report which acknowledged APHIS-Wildlife Services’ “heavy emphasis on protecting sheep from coyotes” and public criticism for its killing of predators to minimize losses for livestock producers “who use public lands in an already heavily subsidized manner,” as well as its failure to emphasize nonlethal, prophylactic techniques and the pain and suffering that it causes.⁸⁹ In a 1995 report, the GAO confirmed that, despite its rhetoric, the program primarily employs lethal control methods and that “field personnel rarely use nonlethal methods when controlling livestock predators.”⁹⁰ The 1995 GAO Report also noted that “an operator’s use of nonlethal control methods is not a prerequisite for receiving program assistance.”⁹¹

The program and its allies have had to forestall legislative reforms. In 1998, Rep. DeFazio introduced an amendment to an appropriations bill to eliminate all federal funding for lethal predator control which passed the House of Representatives.⁹² After Republican congressmen and powerful lobbyists for agricultural interests called for a revote the next day, the amendment failed.⁹³

The American Society of Mammalogists – which has protested the program since shortly after it was founded in 1919⁹⁴ – maintains staunch opposition to the program. In 1999, the society passed a resolution that called on APHIS to: “critically review their methods for control of mammalian predators in light of the principles and practices of current wildlife management science and conservation biology”; “cease indiscriminant, preemptive, lethal control programs on federal, state, and private lands”; research alternative methods of predator control and “implement successful methods into field operations”; and “focus on . . . non-lethal control strategies, compensatory measures, and sound animal husbandry techniques, that could be supplemented by targeted, lethal control methods when necessary.”⁹⁵

⁸⁹ USDA, APHIS, Animal Damage Control Program, DRAFT ENVIRONMENTAL IMPACT STATEMENT (1990); Government Accountability Office, WILDLIFE MANAGEMENT: EFFECTS OF ANIMAL DAMAGE CONTROL PROGRAM ON PREDATORS, GAO/RCED-90-149 (1990).

⁹⁰ Government Accountability Office, ANIMAL DAMAGE CONTROL, EFFORTS TO PROTECT LIVESTOCK FROM PREDATORS, GAO/RCED-96-3 (1995) [hereinafter “GAO (1995)”] at 3.

⁹¹ *Id.*

⁹² Watson, K. & Hanscom, G., Poison Traps Kill Unintended Victims, *High Country News* (Mar. 13, 2000) [available at <http://www.hcn.org/issues/174/5628>] [hereinafter “Poison Traps”].

⁹³ *Id.*

⁹⁴ PREDATORY BUREAUCRACY (note 24) at 212-213.

⁹⁵ American Society of Mammalogists Resolution, *Mammalian Predator Control in the United States* (1999).

The program itself has admitted problems – *e.g.*, in 2005, APHIS identified many problems with the program’s cooperative agreement process.⁹⁶ The final report of the agency’s “Cooperative Agreements Process Improvement Team,” known as the CAPIT Report, found that the cooperative agreement process had become decentralized “due to [an] increase in cooperative agreements,” and that communication, guidance, and follow up have not kept pace⁹⁷ The CAPIT Report also found APHIS’s processing of cooperative agreements to be internally inconsistent, with differences in planning, information sharing, communication, and paperwork as well as in how “working relationships are developed and how finances and results are monitored and reported.”⁹⁸ The CAPIT Report concluded that cooperative agreements should be retained “as an approach to achieving program objectives and agency goals,” but that the cooperative agreement process should be standardized, streamlined, and simplified, with a consistent message regarding expectations and practices and improved follow up.⁹⁹

Chronic problems with the program were exposed again in a *Sacramento Bee* investigative series last year, and since then calls for reform have only amplified, including from members of Congress.¹⁰⁰ In March 2012, Rep. John Campbell, R-Calif. and Rep. DeFazio introduced a bill to ban the use of M-44s and Compound 1080.¹⁰¹ In June 2012, along with Elton Gallegly, R-Calif., and Jackie Speier, D-Calif., Reps. Campbell and DeFazio requested a congressional investigation of the program.¹⁰² In August 2012, Rep. Susan Davis, D-Calif., introduced legislation to require Wildlife Services to disclose details about the millions of animals that it kills; Rep. Davis reintroduced this legislation in 2013.¹⁰³ In November 2012, Reps. DeFazio and Campbell asked Agriculture Secretary Thomas Vilsack for a complete audit of the “culture”

⁹⁶ USDA, APHIS: Cooperative Agreements Process Improvement Team Final Report (Feb. 2005) [hereinafter “CAPIT Final Report”] at 1-2.

⁹⁷ *Id.* at 1.

⁹⁸ *Id.*

⁹⁹ *Id.* at 2-3.

¹⁰⁰ Knudson (2012) (note 14). In addition to Tom Knudson’s award-winning investigative reporting on APHIS-Wildlife Services, Cristina Corbin of FoxNews.com has reported extensively on the program as well. See Corbin, C., Lawmaker accuses federal agency of ‘stonewalling’ attempts to investigate alleged coyote torture, *FoxNews.com* (Dec. 10, 2012) [hereinafter “*Federal Agency Accused of Stonewalling*”]; Corbin, C., Animal torture, abuse called a ‘regular practice’ within federal wildlife agency, *FoxNews.com* (Mar. 12, 2013) [hereinafter “*Torture, Abuse Regular Practice*”]; Corbin, C., Hundreds of family pets, protected species killed by little known federal agency, *FoxNews.com* (Mar. 17, 2013) [hereinafter “*Hundreds of Pets, Protected Species Killed*”]; Corbin, C., Federal agency gives few answers on months-long probe of alleged animal cruelty, *FoxNews.com* (June 12, 2013).

¹⁰¹ Compound 1080 and Sodium Cyanide Elimination Act, H.R. 2074, 112th Cong. (2d Sess. 2013).

¹⁰² Letter from Campbell, J., DeFazio, P., Gallegly, E. & Speier, J. to Issa, D. & Cummings, E. (June 8, 2012) at 1 (“We are concerned that Wildlife Services is failing to efficiently or effectively use the resources provided to it by the American taxpayers and that it is not adequately transparent or accountable to the public.”).

¹⁰³ Transparency for Lethal Control Act, H.R. 2074, 113th Cong. (1st Sess. 2013).

within Wildlife Services by the USDA Office of Inspector General.¹⁰⁴ In December 2012, Senator John Tester, D.-Mont. wrote the director of Wildlife Services to express “serious concerns” with the program.¹⁰⁵ In its annual plan for Fiscal Year 2013, the Office of Inspector General announced it would audit Wildlife Services’ predator control activities and cooperator agreements.¹⁰⁶

Along with several authors, Bradley Bergstrom, Ph.D., a professor of wildlife biology at Valdosta State University and chairman of the American Society of Mammalogists’ conservation committee, published a review of APHIS-Wildlife Services in May of this year.¹⁰⁷ Calling it ineffective at reducing predation in the long term, Bergstrom *et al.* (2013) admonished the program for engaging in widespread lethal predator control and recommended its “sparing use of lethal control by methods that are species-specific” and the cessation of “all lethal control in federal wilderness areas and for the purpose of enhancing populations of common game species.”¹⁰⁸

In July, the *New York Times* editorial board declared that the program to be “wasteful, destructive to the balance of ecosystems and, ultimately, ineffective” and called for a “clear picture of what Wildlife Services is up to,” stating that it is “time for the Department of Agriculture to bring the agency’s work into accord with sound biological principles.”¹⁰⁹

Non-governmental organizations – including Petitioners – have maintained steadfast pressure and opposition to APHIS-Wildlife Services as well. Such organizations have repeatedly called for reforms and have consistently supported the efforts of members of Congress to investigate or cease federal funding for the program.¹¹⁰ A broad, united coalition of environmental conservation and animal protection organizations – representing millions of Americans – met

¹⁰⁴ Letter from DeFazio, P. & Campbell, J. to Vilsack, T. (Nov. 30, 2012) (“we are gravely concerned that photographs, published on Mr. Olson’s Facebook in an album labeled ‘work’ and since removed, do not represent an isolated occurrence, but may reflect a deep-rooted problem within the Wildlife Services program that allows for, and encourages, inhumane lethal methods of predator control”); *see also Torture, Abuse Regular Practice* (note 100) (“Evidence showing animal cruelty has not been difficult to uncover.”).

¹⁰⁵ Letter from Tester, J. (Sen.) to Green, J., Director of Wildlife Services (Dec. 5, 2012).

¹⁰⁶ Letter from Cathy Liss, AWI & Camilla Fox, Project Coyote to Phyllis K. Fong (the Hon.), USDA Office of Inspector General (May 29, 2013).

¹⁰⁷ Bergstrom *et al.* (2013) (note 9).

¹⁰⁸ *Id.*

¹⁰⁹ *NY Times* Editorial (note 7).

¹¹⁰ *See, e.g., Calls for Reform* (note 14); *infra* at note 178 (discussing Change.org petition).

with Assistant USDA Secretary Edward Avalos in July, expressing continued dissatisfaction with the program's refusal to be transparent and implement non-lethal methods in the field.¹¹¹

5. Concerned with APHIS-Wildlife Services' Practices, California Cooperators are Taking Alternative Measures to Coexist with Carnivores

Before an overview of the areas in need of reform, it is worth noting that in the absence of meaningful reform by an intractable agency, California cooperators are beginning to reassess their agreements with APHIS-Wildlife Services and to pursue alternative livestock protection programs. For instance, Sonoma County, California is currently taking another look at the program and considering whether to renew its contract.¹¹² In July 2012, the Davis, California City Council voted unanimously to sever its contractual relationship with APHIS-Wildlife Services.¹¹³

Marin County, California has taken a strong lead in reform, severing its ties with APHIS-Wildlife Services in 2000 and replacing it with a new program that takes a fundamentally-different approach to livestock protection. The *Marin County Strategic Plan for Protection of Livestock and Wildlife* consists of a cost-share program to help ranchers install or upgrade fencing and other livestock-protective infrastructure, install strobe lights and other predator-deterrents and detectors, and purchase and sustain large-breed guard dogs and llamas.¹¹⁴ Participants do not relinquish the ability to kill predators consistent with state and federal law, but rather than contract with APHIS-Wildlife Services, the county assigns personnel and allocates money to help stock-owners prevent depredations through non-lethal means.

The Marin County program has been resoundingly successful. According to the *San Francisco Chronicle*, coyote depredations on sheep in the county have fluctuated but have declined steadily from 236 in Fiscal Year 2002 to 90 in Fiscal year 2010 – a 62 percent reduction – with 14 ranchers recording no predation losses at all, and only three ranchers losing over 10 sheep during Fiscal Year 2010.¹¹⁵ And contrary to an APHIS-Wildlife Services critique of the program,¹¹⁶ annual direct program costs declined from \$50,000 in 2001 to \$20,000 in 2012, with the higher

¹¹¹ See Letter from Camilla Fox, Project Coyote & Cathy Liss, AWI to Tom Vilsack, USDA (July 31 2013) (expressing gratitude for meeting with Assistant Secretary Avalos and requesting follow-up meeting with USDA Secretary Vilsack).

¹¹² Scully, S., Sonoma County Pulls Predator-Control Officer Off Job During Contract Review, *The Press Democrat* (Sep. 26, 2013).

¹¹³ *Davis Cuts Ties* (note 14).

¹¹⁴ See Fox, C.H., 2008, Analysis of the Marin County Strategic Plan for Protection of Livestock & Wildlife: An Alternative to Traditional Predator Control. M.A. thesis, Prescott College, AZ. 120 pp. Larkspur, CA.

¹¹⁵ Fimrite, P., Ranchers shift from traps to dogs to fight coyotes, *San Francisco Chronicle* (Apr. 27, 2012) [hereinafter "Fimrite (2012)"].

¹¹⁶ Shwiff, S.A., Sterner, R.T., Kirkpatrick, K.N., Engeman, R.M., and Collahan, C.C., 2005, Wildlife Services in California: Economic Assessments of Select Benefits and Costs, *USDA/APHIS/WS National Wildlife Research Center Publication*.

amounts likely reflecting start-up acquisition and installation expenses or upkeep of guard-animals.¹¹⁷

Yet, in the face of an intractable, highly-controversial federal program which lacks regulatory standards and refuses to reform despite decades of criticisms from experts, scientists, non-governmental organizations, government officials, and the program itself, Marin County is showing how cooperators can take matters into their own hands, sever their relationship with the program, and implement a new approach that can facilitate coexistence with wildlife, consistent with the values of the American public.

C. NEEDED REFORMS

Since the program's inception a century ago, humankind's understanding of wildlife and ecosystems has expanded and societal attitudes about our relationship with the natural world have shifted.¹¹⁸ Livestock and agricultural industries, including those on whose behalf APHIS-Wildlife Services conducts its activities, produce a substantial percentage of humankind's greenhouse gas emissions, which are crossing perilous thresholds that will fundamentally change the Earth's life-sustaining systems.¹¹⁹ As we cross over these thresholds, we have little choice but to examine the true consequences of our choices.¹²⁰ Among these are the consequences of our relationship with, and our policies regarding, animals and species.

Indeed, our knowledge and scientific understanding of animals – their ecology, physiology, behavior, cognition, sentience, and psychology – is much deeper than when the Wildlife Services program was initiated in the early part of the last century. We now recognize that animals have intrinsic value apart from their perceived value to humans.¹²¹ This challenges old notions.¹²²

¹¹⁷ Fimrite (2012) (note 115).

¹¹⁸ See GAO (1990) (note 89) at 14 (“Although the ADC programs have continued to focus on killing predators, the thrust of the programs has changed over the years. Program emphasis in its early years was on conducting general eradication campaigns that might be directed at the entire statewide population of a particular species of predators. This operating philosophy contributed to decimating gray wolf populations in the continental United States. With changes in public attitudes, the program now emphasizes killing only problem animals.”).

¹¹⁹ See Beschta, R.L., Donahue, D.L., DellaSala D.A., Rhodes, J.J., Karr, J.R., O'Brien, M.H., Fleischner, T.L., and Williams, C.D., 2012, Adapting to Climate Change on Western Public Lands: Addressing the Ecological Effects of Domestic, Wild, and Feral Ungulates, *Environmental Management*, v. 51, p. 474-91 (“the ongoing and impending effects of ungulates in a changing climate require new management strategies for limiting their threats to the long-term supply of ecosystem services on public lands” and “[r]eestablishing apex predators in large, contiguous areas of public land may help mitigate any adverse ecological effects of wild ungulates”).

¹²⁰ Fischlin, A., Midgley, G.F., Price, J.T., Leemans, R., Gopal, B., Turley, C., Rounsevell, M.D.A., Dube, O.P., Tarazona, J., Velichko, A.A., 2007, *Ecosystems, their properties, goods, and services*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 211 (Parry, M.L., Canziani, O.F., Palutikof, J.P., van der Linden, P.J. & Hanson, C.E., eds.).

¹²¹ Messmer, T.A., Reiter, D. & West, B.C., 2001, Enhancing Wildlife Sciences' Linkage to Public Policy: Lessons from the Predator-Control Pendulum, *Wildlife Society Bulletin*, v. 29, p. 1255 (advocating that wildlife managers

Indeed, Americans today value the welfare of all beings and believe that the human species has a moral obligation to be compassionate and humane toward the other animals and species, which have a right to live their lives on Earth, undisturbed and in their natural environments, without abuse or cruelty or the unraveling of their social relationships.¹²³ Old fairy tales and fables that demonize wolves and coyotes are being deconstructed. The ways in which we perceive and treat fellow beings and species has a direct connection to our own destiny.

Considering this, there are many specific areas where APHIS-Wildlife Services remains in dire need of reform – in particular with regard to: the program’s indiscriminate killing and harming of wildlife; its targeting of predators and the consequences for wildlife populations and ecosystems; its ineffectiveness at reducing wildlife conflicts; its inhumane treatment of animals; the lack of nonlethal alternatives; and its lack of transparency and reliable information. Each of these areas is addressed below. As this overview demonstrates, reform of the APHIS-Wildlife Services program and its culture are long overdue.

1. APHIS-Wildlife Services Kills and Harms Vast Numbers of Animals

Since shortly after the first congressional appropriation to destroy wildlife in 1915, APHIS-Wildlife Services has contracted with “cooperators” – such as corporate agribusiness interests, livestock owners and associations, and local, state, and other federal government agencies – to kill animals on their behalf.¹²⁴ Cooperator funding currently comprises well over half of the program’s funding for animal control.¹²⁵ This arrangement has created a substantial conflict of interest, as APHIS-Wildlife Services, which also receives Congressional funding, is beholden to narrow special interests and often takes actions in conflict with the interests of a majority of the American public.¹²⁶ As explained below, the consequences to the nation’s wildlife are myriad.

should “institutionalize new approaches to better address information lag time between scientific discovery and policy formation”).

¹²² APHIS-Wildlife Services has stated that while the program initially “focused on predator control activities for the protection of livestock,” “[o]ver the years, the program’s philosophy ...has evolved, along with societal values and perspectives” and the goal today is to “seek balance among a variety of priorities, including wildlife and environmental conservation, human health and safety, economic considerations, and social factors.” See APHIS-Wildlife Services, PARTNERSHIPS AND PROGRESS (Aug. 2009) [hereinafter “PARTNERSHIPS AND PROGRESS”]; see also USDA, APHIS-Wildlife Services Policy Directive 1.301, CODE OF ETHICS (Aug. 31, 2010) [hereinafter APHIS-Wildlife Services Policy Directive 1.301] (“Throughout the history of WS, the philosophy of wildlife damage management has evolved, along with societal values and perspectives.”).

¹²³ Duda, M.D. and Young, K.C., 1998, American Attitudes Toward Scientific Wildlife Management and Human Use of Fish and Wildlife: Implications for Public Relations and Communications Strategies, *Transaction of the North American Wildlife and Natural Resources Conference*, v. 63, p. 589 (“Attitudes toward consumptive, wildlife-related activities involve attitudes toward animal welfare and animal rights. Most Americans support animal welfare – that is, using animals but treating them humanely and with respect.”).

¹²⁴ USDA, APHIS-Wildlife Services, *Fiscal Year 2012 Federal and Cooperative Funding by Resource Category*.

¹²⁵ *Id.*

¹²⁶ See O’Toole, R., Audit of the USDA Animal Damage Control Program, *The Thoreau Institute* (1994) (finding that the program is unfairly distributed to selected Americans and creates perverse incentives for ranchers, and is

To begin with, the sheer number of animals killed on behalf of these interests is staggering.¹²⁷ APHIS-Wildlife Services reports that it kills millions of animals every year, with most of these being mammals and birds.¹²⁸ A tally of the number of animals that the program has reported that it has killed over the last 10 Fiscal Years (2003-2012) reveals nearly 14 million native animal deaths from 475 species over the past decade, an average of nearly 1,400,000 animals per year.¹²⁹

Coyotes, beavers, and red-winged blackbirds were among those intentionally killed most frequently.¹³⁰ APHIS-Wildlife Services estimates that it has killed more than 1.4 million coyotes – the most frequently-targeted mammals – since 1996.¹³¹ The toll on native carnivores, typically at the behest of corporate agribusiness interests, is very high, with about 120,000 native carnivores killed every year. Thousands of dens and burrows – *e.g.*, for coyotes and prairie dogs – are destroyed annually.¹³² Accurate tallies are likely much greater; many animals killed in traps or by poison are simply discarded without reporting by agents in the field and are never found.¹³³ An unknown number of animals are injured or maimed, but are not necessarily killed, and are never reported.¹³⁴

ineffective, and highlighting the alternative approach of farmers in Kansas, who with no ADC assistance have significantly lower predation rates than those in neighboring states); Bergstrom *et al.* (2013) (note 9) (“A relatively few influential western ranchers and major agribusiness lobbying groups, such as the American Farm Bureau, have prevented Congress from reforming WS in the past.”).

¹²⁷ *Pandora’s Box* (note 14) (estimating the total number of predators killed daily by APHIS-Wildlife Services from 2006-11 totals about 560,000, an average of 256 killings each day). “Since 2001, more than 340,000 coyotes have been gunned down from planes and helicopters across 16 Western states, including California – an average 600 a week, agency records show.” *Id.*

¹²⁸ Data Compilation (note 3); *see also* Bergstrom *et al.* (2013) (note 9) (“since 2000, WS has killed – intentionally and unintentionally – 2 million native mammals”).

¹²⁹ Data Compilation (note 3).

¹³⁰ *Id.*

¹³¹ *Id.*; *see also* *The Killing Agency* (note 14) (noting that over one million coyotes were reportedly killed during 2006-11); *Pandora’s Box* (note 14) (estimating that APHIS-Wildlife kills 600 coyotes weekly with aerial gunning).

¹³² Data Compilation (note 3).

¹³³ *Supra* note 13.

¹³⁴ The agency does not publicly disclose any data of animal injuries or maimings, only killings, removals, and/or “dispersals” of animals. *See* APHIS-Wildlife Services Program Data Reports [*available at* http://www.aphis.usda.gov/wildlife_damage/prog_data/2012_prog_data/index.shtml]. Former APHIS-Wildlife Services trappers have attested to frequent killings of “nontarget catch” that are not documented or reported by the program. *See, e.g., The Killing Agency* (former agency trapper stating recounting incident involving death of a federally-protected golden eagle, when supervisor advised “If you think nobody saw it, go get a shovel and bury it and don’t say nothing to anybody.”).

Much of the program's take of animals is unintentional or leads to unintended consequences that are not monitored. According to APHIS-Wildlife Services' figures, a substantial number – over 52,000 – of reported killings since 2003 were “unintentional” of non-target catch.¹³⁵ Protected species have been impacted as well; 15 species protected under the ESA and 328 birds species protected under the Migratory Bird Treaty Act (“MBTA”) have been unintentionally killed as “non-targets” during the last decade.¹³⁶ These include grizzly bears, Louisiana black bears, bald eagles, golden eagles, swift foxes, San Joaquin kit foxes, and Mexican wolves, to name a few. Even this large tally is recognized as vastly under-representative of the number of non-target animals that are killed unintentionally.¹³⁷

The program's reporting also fails to account for the secondary effects of its activities. Many animals are killed with poisons like Compound 1080 and M-44s, which are “spring-loaded metal cylinders that are baited with scent and fire sodium cyanide powder into the mouth of whatever tugs on them.”¹³⁸ However:

Only 10% of the bodies of poisoned animals are recovered, which leaves 90% to enter the ecosystem as food for exploring badgers, bobcats, crows, bears and pets. Scavenging leads to the secondary poisoning of thousands of innocent companion animals and unoffending wildlife, including threatened and endangered species, each year.¹³⁹

2. APHIS-Wildlife Services Contributes to Species Decline and Impairment of Recovery by Decimating Wildlife Populations and Upending Ecosystems

Over the past century, APHIS-Wildlife Services played a leading role in the decimation of populations of a multitude of wildlife species, contributing to the endangerment of the bald eagle, California condor, Canada lynx, kit fox, swift fox, Utah prairie dog, Gunnison's prairie dog, grizzly bear, gray wolf, Mexican gray wolf, fisher, wolverine, and others.¹⁴⁰ The agency

¹³⁵ See APHIS-Wildlife Services Program Data Reports (1996-2012) (complete set of all reported tallies of animals killed, trapped, relocated, and dispersed); see also *7,800 Animals Killed by Mistake* (note 14) (reporting that more than 7,800 animals have been mistakenly killed by steel body-grip traps during Fiscal Years 2006-2011); *The Killing Agency* (M-44s are “[u]sed mainly to control coyotes” but have also “accidentally killed ... black bears, raccoons, ravens, bobcats, kit foxes, wild pigs, opossums and federally protected bald eagles”); 1997 Programmatic FEIS (note 5) at Appendix P, page 271 (“use of M-44[s] ... has resulted in the death of not only nontarget canids, including domestic dogs, but also other animals ... such as the badger, bobcat, skunk, porcupine, raccoon, ring-tailed cat, black bear, raven crow and vulture”).

¹³⁶ *Id.*

¹³⁷ Bergstrom *et al.* (2013) (note 6) (at 8) found that vast percentages of some species have been killed unintentionally.

¹³⁸ *M-44s* (note 14).

¹³⁹ Fox, C., The Case Against Poisoning Our Wildlife, *Huffington Post* (Aug. 6, 2010) [hereinafter “Fox, *Huff Post*”].

¹⁴⁰ 41 Fed. Reg. (July 12, 1976) (bald eagle); 1997 Programmatic BiOp (note 5) at 44 (California condor); 78 Fed. Reg. 7864 (Feb. 4, 2013) (proposed rule to list the wolverine as threatened species); FWS, SPECIES

contributed to the extermination of gray and red wolves, grizzly bears, prairie dogs, black-footed ferrets, and other animals from most or all of their historic ranges.¹⁴¹ The killing of endangered species continues today, with one study reporting that more than a dozen state- and federally-protected species have been killed by APHIS Wildlife Services since 2000, including grizzly bears, gray wolves, Mexican wolves, bald and golden eagles, and others.¹⁴²

In a number of cases, the federal government has had to expend considerable resources to reverse the impact of the program's species eradication, including expensive and difficult recovery programs for gray wolves, black-footed ferrets, and grizzly bears. For example, the federal government has spent tens of millions of dollars since 1974 restoring gray wolves, following their extirpation from most of the United States that was in large part carried out by APHIS-Wildlife Services.¹⁴³

Monetary expense, however, is just the beginning of the damage caused by the program. Many of the species targeted by APHIS-Wildlife Services play critical roles in ecosystems, and their removals result in a cascade of unintended consequences. The loss of top predators in particular is well documented to cause a wide range of "unanticipated impacts" that are often profound, altering "processes as diverse as the dynamics of disease, wildfire, carbon sequestration, invasive species, and biogeochemical cycles."¹⁴⁴

An overview of ecological principles illustrates this. "Predators" (or carnivores) are animals that prey on other animals.¹⁴⁵ "Apex" predators have few or no predators of their own and occupy

ASSESSMENT AND LISTING PRIORITY ASSIGNMENT FORM, GUNNISON'S PRAIRIE DOG (Apr. 2010); FWS, RECOVERY PLAN FOR UPLAND SPECIES OF THE SAN JOAQUIN VALLEY, CALIFORNIA (1998) (San Joaquin kit fox); FWS, UTAH PRAIRIE DOG (*CYNOMYS PARVIDENS*) REVISED RECOVERY PLAN (2012); FWS, GRIZZLY BEAR RECOVERY PLAN (1993); FWS, NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN (1987); FWS, SPECIES ASSESSMENT AND LISTING PRIORITY ASSIGNMENT FORM, WEST COAST POPULATION OF FISHER (Apr. 2012).

¹⁴¹ Leopold report (note 40) at 15, 16 (discussing eradication of grizzly bears in Mexico, and poisoning of eagles, prairie dogs, and black-footed ferrets in the northern Great Plains); GAO (1990) (note 89) at 2 ("Killing offending animals, even to the extent of exterminating entire populations, became an accepted approach to control predator damage.").

¹⁴² Bergstrom *et al.* (2013) (note 9).

¹⁴³ FWS, NORTHERN ROCKY MOUNTAINS WOLF RECOVERY PROGRAM UPDATE (2011) at 1; *see also* PREDATORY BUREAUCRACY (note 24) at 104-168, 285-86; Bergstrom *et al.* (2013) (note 9) (the WS \$57 million annual budget is a livestock subsidy that "contravenes other federal expenditures" – like the \$43 million that the U.S. Department of Interior has spent since 1974 reintroducing and conserving the gray wolf).

¹⁴⁴ Estes *et al.* (2011) (note 10); Bergstrom *et al.* (2013) (note 9).

¹⁴⁵ *See, e.g.*, Leopold report (note 40) at 9 ("The assertion that native birds and mammals are in general need of protection from native predators is supported weakly, if at all, by the enormous amount of wildlife research on the subject conducted in the past two or three decades.").

the top of the food chain.¹⁴⁶ Terrestrial apex predators include wolves, grizzly bears, and mountain lions.¹⁴⁷

Apex predators create a “trophic cascade” of beneficial effects that flow through and sustain ecosystems and the web of life.¹⁴⁸ For example, wolves in Yellowstone and Grand Teton national parks have been found to benefit a host of species, including aspen, songbirds, beavers, bison, fish, pronghorn, foxes, and grizzly bears.¹⁴⁹ By reducing numbers and inducing elk to move, wolves have reduced browsing on aspen and other streamside vegetation, which has benefitted beavers, songbirds and fish populations.¹⁵⁰ Studies have also shown how wolves and coyotes interact, and how wolves can aid pronghorn populations as “wolves suppress[] coyotes and consequently fawn depredation.”¹⁵¹ Wolves also benefit scavengers by leaving carrion derived from predation; hence, wolf removal leads to reduced abundance of carrion for scavengers in specific areas.¹⁵² For instance, the extirpation of wolves works to the detriment of grizzly bears, which are listed as a threatened species and which, in addition to acting as apex predators, can scavenge carrion left by wolves. A 2013 study shows that wolves benefit grizzly bears in Yellowstone through another trophic mechanism as well – specifically, wolf predation on elk has led to less elk browsing of berry-producing shrubs, providing grizzlies with access to larger quantities of fruit.¹⁵³

The removal of apex predators may have other unexpected outcomes – for example, the “release” – of mid-sized or “mesopredators” like foxes, raccoons, and skunks that are not at the

¹⁴⁶ Prugh, L.R., Stoner, C.J., Epps, C.W., Bean, W.T., Ripple, W.J., Laliberte, A.S. & Brashares, J.S., 2009, The Rise of the Mesopredator, *BioScience*, v. 59(9), p. 779 [hereinafter “Prugh *et al.* (2009)”].

¹⁴⁷ *Id.*

¹⁴⁸ Ripple, W.J. and Beschta, R.L., 2011, Trophic cascades in Yellowstone: The first 15 years after wolf reintroduction, *Biological Conservation*, v. 145, p. 205 [hereinafter “Ripple and Beschta (2011)”]; Estes *et al.* (2011) (note 10); Ripple, W.J., Beschta, R.L., Fortin, J.K. & Robbins, C.T., 2013, Trophic cascades from wolves to grizzly bears in Yellowstone, *Journal of Animal Ecology*, doi: 10.1111/1365-2656.12123 [hereinafter “Ripple *et al.* 2013”].

¹⁴⁹ Ripple and Beschta (2011) (note 148); Bergstrom *et al.* (2013) (note 9); Estes *et al.* (2011) (note 10).

¹⁵⁰ *Id.*

¹⁵¹ Berger, K.M. & Gese, E.M., 2007, Does interference competition with wolves limit the distribution and abundance of coyotes? *Journal of Animal Ecology*, v. 76, p. 1075; Smith, D.W., Peterson, R.O. & Houston, D.B., 2003, Yellowstone after Wolves, *BioScience*, v. 53(4), p. 330; Berger *et al.* (2008) (note 10); Prugh *et al.* (2009) (note 146); Bergstrom *et al.* (2013) (note 9).

¹⁵² Ripple and Beschta (2011) (note 148); Wilmsers C.C., Crabtree R.L., Smith D.W., Murphy K.M. & Getz, W.M., 2003, Trophic facilitation by introduced top predators: grey wolf subsidies to scavengers in Yellowstone National Park, *Journal of Animal Ecology*, v. 72, p. 909; Wilmsers C.C., Stahler, D.R., Crabtree, R.L., Smith, D.W. & Getz, W.M., 2003, Resource dispersion and consumer dominance: scavenging at wolf- and hunter-killed carcasses in Greater Yellowstone, USA, *Ecology Letters*, v. 6(11), p. 996.

¹⁵³ Ripple *et al.* 2013 (note 148).

top of the food chain in the presence of coyotes.¹⁵⁴ Increased abundance of mesopredators in turn can negatively affect populations and diversity of other species, including ground-nesting birds, rodents, lagomorphs, and others. In some cases, declines in these species results in reduced prey for other predators and contribute to their decline and extirpation.

An example is the variation of the distribution and abundance of coyotes in coastal southern California – where wolves do not occur at all and, hence, coyotes have assumed the role of apex predator but have declined or disappeared due to urbanization and fragmented habitat.¹⁵⁵ As a study of this area observed, “[i]t appears that the decline and disappearance of the coyote, in conjunction with the effects of habitat fragmentation, affect the distribution and abundance of smaller carnivores and the persistence of their avian prey.”¹⁵⁶ An estimated 75 local extinctions of native, scrub-breeding bird species may have occurred over the past century in these areas.¹⁵⁷

Moreover, APHIS Wildlife Services has not limited its activities to lethal control of predators. Many other animals that serve important roles in their ecosystems have been targeted by the program as well. This is perhaps best exemplified by the elimination of prairie dogs from more than 90 percent of their range, which once spanned a large swath of North America.¹⁵⁸ This in turn has fundamentally altered the continent’s grasslands – for example, causing an increase in

¹⁵⁴ Crooks, K.R. and Soulé, M.E., 1999, Mesopredator release and avifaunal extinctions in a fragmented system, *Nature*, v. 400, p. 563 [hereinafter “Crooks & Soule (1999)”]; Prugh *et al.* (2009) (note 146). Although coyotes are mesopredators when wolves are present, they can act as apex predators where wolves have been extirpated. *See, e.g.*, Crooks & Soulé (1999).

¹⁵⁵ Crooks & Soulé (1999) (note 154). For additional examples *see*: Soulé, M.E., 1988, Reconstructed dynamics of rapid extinctions of chaparral-requiring birds in urban habitat islands, *Conservation Biology*, v. 2, p. 75; Sovada, M.A., Sargeant, A.B. & Grier, J.W., 1995, Differential effects of coyotes and red foxes on duck nest success, *Journal of Wildlife Management*, v. 59, p. 1; Palomares, F., Gaona, P., Ferreras, P. & Delibes, M., 1995, Positive effects on game species of top predators by controlling smaller predator populations: an example with lynx, mongooses, and rabbits, *Conservation Biology*, v. 9, p. 295; Rogers, C.M. & Caro, M.J., 1998, Song sparrows, top carnivores, and nest predation: a test of the mesopredator release hypothesis, *Oecologia*, v. 116, p. 227; CONTINENTAL CONSERVATION: SCIENTIFIC FOUNDATIONS FOR REGIONAL RESERVE NETWORKS (1999).

¹⁵⁶ *Id.* It is also noteworthy that coyotes are a primary target of killing by APHIS-Wildlife Services, yet the program’s activities have contributed to growth of coyote populations. *See infra* at 29-30 (discussing ineffectiveness of coyote control).

¹⁵⁷ Crooks & Soulé (1999) (note 154) at 565.

¹⁵⁸ Kilgore D.L., 1969, An ecological study of the swift fox (*Vulpes velox*) in the Oklahoma Panhandle, *American Midland Naturalist*, v. 81, p. 512 [hereinafter “Kilgore (1969)”]; Miller, B.J., Reading, R.P., Biggins, D.E., Detling, J.K., Forrest, S.C., Hoogland, J.L., Javersak, J., Miller, S.D., Proctor, J., Truettand, J. & Uresk, D.W., 2007, Prairie Dogs: An Ecological Review and Current Biopolitics, *The Journal of Wildlife Management*, v. 71, p. 2801; Haug, E.A., Millsap, B.A. & Martell, M.S., 1993, Burrowing Owl (*Athene cunicularia*), Species Account Number 061, The Birds of North America Online (A. Poole, Ed.), Ithaca, NY: Cornell Laboratory of Ornithology; from The Birds of North America Online database: <http://bna.birds.cornell.edu/bna>; Bergstrom *et al.* (2013) (note 9).

shrubs – and has led to the decline of many animals that use prairie dog burrows or are dependent on them for prey, such as black-footed ferrets, swift foxes, and burrowing owls.¹⁵⁹

In short, the widespread killing of animals by APHIS Wildlife Services has caused, and continues to create, widespread impacts on North American wildlife populations and ecosystems.

3. APHIS-Wildlife Services is Frequently Ineffective at Reducing Wildlife Conflicts

Not only are APHIS-Wildlife Services' killing campaigns destructive, but they are also frequently ineffective at their stated purpose of protecting livestock or crops from native wildlife or boosting game species.

One study, for example, looked at whether killing wolves in response to depredation in Minnesota reduced the likelihood of depredations in the following year and found no reduction.¹⁶⁰ The extirpation of wolves from the landscape has removed one of the key limitations on coyote populations, further increasing the abundance of coyote populations and possibly negating reductions in depredations that had been achieved through wolf removal.¹⁶¹ Predator control programs have proven to be ineffective at increasing game populations as well, because other factors, such as climate, habitat and forage are often more important than predation in determining population trajectory.¹⁶²

A number of studies have found that removing coyotes – the most frequently-persecuted mammal, with more than 76,000 reportedly killed by APHIS-Wildlife Services in Fiscal Year 2012 alone¹⁶³ – is ineffective at reducing coyote populations in the long-term, or of targeting and killing individual animals responsible for the depredations.¹⁶⁴ Likewise, APHIS-Wildlife

¹⁵⁹ Miller, B.J., Reading, R.P., Biggins, D.E., Detling, J.K., Forrest, S.C., Hoogland, J.L., Javersak, J., Miller, S.D., Proctor, J., Truettand, J. & Uresk, D.W., 2007, Prairie Dogs: An Ecological Review and Current Biopolitics, *The Journal of Wildlife Management*, v. 71, p. 2801; Delibes-Mateos, M., Smith, A.T., Slobodchikoff, C.N. & Swenson, J.E., 2011, The paradox of keystone species persecuted as pests; the call for conservation of abundant small mammals in their native range, *Biological Conservation*, v. 144, p. 1335.

¹⁶⁰ Harper, E.K., Paul, W.J., Mech, L.D., and Weisberg, S., 2007, Effectiveness of Lethal, Directed Wolf-Depredation Control in Minnesota, *Journal of Wildlife Management*, v. 72(3), p. 778-784.

¹⁶¹ Crabtree & Sheldon (1999) (note 17); Prugh *et al.* (2009) (note 146).

¹⁶² Hurley, M.A., Unsworth, J.W., Zager, P., Hebblewhite, M., Garton, E.O., Montgomery, D.M., Skalski, J.R. & Maycock, C.L., 2009, Demographic response of mule deer to experimental reduction of coyotes and mountain lions in southeastern Idaho, *Wildlife Monographs*, v. 178, p. 1.

¹⁶³ Data Compilation (note 3).

¹⁶⁴ Gese (2005); Linnell, J.D., Odden, J., Smith, M.E., Aanes, R. & Swenson, J.E., 1999, Large Carnivores That Kill Livestock: Do "Problem Individuals" Really Exist? *Wildlife Society Bulletin*, v. 27(3), p. 698; Mitchell, B.R., Jaeger, M.M. & Barrett, R.H., 2004, Coyote Depredation Management: Current Methods and Research Needs, *Wildlife Society Bulletin*, v. 32(4), p. 1209. One reason for this is that as coyote populations are aggressively targeted, more yearling females breed and more pups survive, allowing for populations to rebound and even increase to compensate

Services has dramatically increased its killing of prairie dogs in recent years – on behalf of livestock interests – yet “it is questionable whether livestock directly benefit from extermination of prairie dogs,” whose colonies increase both the “nutritional content and digestibility of forage plants” and the “live-plant to dead-plant ratio,” benefiting for both bison and cattle.”¹⁶⁵ Indeed, the “decline of the sheep industry in both eastern and western United States” could be just as attributable to “market trends and production costs” as to predators or any other reason.¹⁶⁶

4. APHIS-Wildlife Services Has Failed to Prioritize Non-lethal Methods, Which Are More Effective in Preventing Livestock Depredations

In contrast to the largely ineffective killing of predators, many non-lethal methods have been developed, tested, and shown to be effective at reducing livestock depredations, including by confining sheep at night or calving livestock in fenced enclosures/paddocks, which is sometimes surrounded by fladry (electrified or not electrified), as well as: by using range riders, rag boxes, livestock guard animals like dogs, llamas or donkeys, and others’ bonding young sheep to cattle and goats to sheep and cattle; and by adjusting the timing of calving and turn out.¹⁶⁷ Much of this research was conducted by APHIS-Wildlife Services itself, yet the agency has failed to emphasize use of these methods – to the contrary, as the GAO made clear in 1995, “field personnel rarely use nonlethal methods when controlling livestock predators.”¹⁶⁸

for the individuals killed. Crabtree & Sheldon (1999) (note 17). Even in cases where the population is reduced, studies show it will return to pre-control levels in less than a year. See Gese, E.M., *Demographics and Spatial Responses of Coyotes to Changes in Food and Exploitation*, in PROCEEDINGS OF THE 11TH WILDLIFE DAMAGE MANAGEMENT CONFERENCE 271 (2005).

¹⁶⁵ Bergstrom *et al.* (2013) (note 9).

¹⁶⁶ *Id.* (citing Berger (2006) (note 10)). Berger (2006) assessed whether coyote removal was effective at reducing widespread declines in sheep grazing, comparing sheep numbers between areas of the United States with extensive coyote control and areas with no coyote control, and found that declines in sheep grazing were largely comparable.

¹⁶⁷ Green, J.S. & Woodruff, R.A., 1988, Breed Comparisons and Characteristics of Use of Livestock Guarding Dogs, *Journal of Range Management*, v. 41(3), p. 249; Andelt, W.F., Phillips, R.L., Gruver, K.S. & Guthrie, J.W., 1999, Coyote predation on domestic sheep deterred with electronic dogtraining collar, *Wildlife Society Bulletin*, v. 27, p. 12; Shivik, J.A., Treves, A. & Callahan, P., 2003, Nonlethal techniques for managing predation: primary and secondary repellents, *Conservation Biology*, v. 17, p. 1531; Espuno, N., Lequette, B., Poulle, M., Migot, P. & Lebreton, J., 2004, Heterogeneous response to preventive sheep husbandry during wolf recolonization of the French Alps, *Wildlife Society Bulletin*, v. 32(4), p. 1195; Hawley, J.E., Gehring, T.M., Schultz, R.N., Rossler, S.T., & Wydeven, A.P., 2007, Assessment of Shock Collars as Nonlethal Management for Wolves in Wisconsin, *Journal of Wildlife Management*, v. 73(4), p. 518; Lance, N.J., Breck, S.W., Sime, C., Callahan, P., & Shivik, J.A., 2010, Biological, technical, and social aspects of applying electrified fladry for livestock protection from wolves (*Canis lupus*), *Wildlife Research*, v. 37, p. 708; Breck, S.W., Kluever, B.M., Panasci, M., Oakleaf, J., Johnson, T., Ballard, W., Howery, L., Bergman, D.L., 2011, Domestic calf mortality and producer detection rates in the Mexican wolf recovery area: Implications for livestock management and carnivore compensation schemes, *Biological Conservation*, v. 144, p. 930. As Bergstrom *et al.* (2013) (note 9) notes, “there is no downward trend in lethal control, despite GAO (1995) admonishments” (citing GAO (1995) (note 90)).

¹⁶⁸ GAO (1995) (note 90) at 3. “WS’s National Wildlife Research Center (NWRC) conducts important research in nonlethal control, but those methods NWRC concludes are effective rarely are adopted by WS field operations, particularly on livestock grazing allotments in the West, which are heavily biased toward lethal control.” Bergstrom *et al.* (2013) (note 9).

This is highly problematic because lethal control can be an excuse for not employing effective non-lethal methods, particularly for the most anti-predator livestock operators, who would rather see wolves or other predators killed than take action to prevent depredations from occurring.

5. APHIS-Wildlife Services Utilizes Dangerous and Inhumane Methods to Kill Wildlife

To accomplish its objectives, APHIS-Wildlife Services employs many lethal-control methods, including: strangling-neck, foot, and catch-pole snares; leghold, cage, Conibear, snap, gopher, and mole traps; shooting and aerial gunning; egg, nest, and hatchling removal and destruction; and use of a long list of highly-toxic chemicals like strychnine, sodium cyanide (M-44s), sodium fluoroacetate (Compound 1080), and fumigants.¹⁶⁹ APHIS-Wildlife Services “removes” coyote and fox dens by removing and shooting pups, or “destroys” them and other dens by placing poisonous fumigants inside that cause animals inside to asphyxiate and die.¹⁷⁰

Animals caught in Wildlife Services traps die slow, excruciating deaths.¹⁷¹ Traps are left for weeks and months, and even longer, with animals left to die of starvation, thirst, heat, stress, and exposure.¹⁷² While the agency recommends that its traps be checked “as frequently as possible” and its “policy [is] to provide the quickest, most painless death possible to the animal,” “[t]here are traps that are not checked for literally months at a time.”¹⁷³ Ineffective aerial gunners miss

¹⁶⁹ 1997 Programmatic FEIS (note 5) (at Appendix J, p. 9-14).

¹⁷⁰ *Id.* (at Appendix J, p. 11) (“Denning”).

¹⁷¹ *Mistake* (note 14); *see also Long Struggles* (note 14) (quoting Dick Randall) (“The leg-hold trap ... is probably the most cruel device ever invented by man and is a direct cause of inexcusable destruction and waste of our wildlife.”); *M-44s* (note 14) (former Wildlife Services trapper describing death from M-44s: “It’s not a painless death. They start whining. They start hemorrhaging from their ears and nose and mouth. They get paralysis and fall over. Then they start convulsing and they’re gone. They are suffering endlessly until they die. It’ll make you literally want to puke.”); *Neck Snares* (note 14) (dog owner describing day in 2010 when his dog became ensnared in a Wildlife Services trap on an Idaho national forest: “This was a shocking thing Sometimes I try not to think about it because it hurts too much.”).

¹⁷² *Long Struggles* (note 14); *id.* (quoting former agency trapper) (“Remember, these animals have fur coats on. They exert themselves trying to get out. They over-stress with the heat and keel over and die. Most coyotes die this way, and when the trapper gets there, all that is left is a bunch of hair, bones and maggots. I’ve seen it hundreds of times and it always bothered me. It has to be a horrendous and torturous way to die.”).

¹⁷³ USDA, APHIS-Wildlife Services Policy Directive 4.450, TRAPS AND TRAPPING DEVICES (Mar. 10, 2004) (“All traps and trapping devices are to be checked as frequently as possible and no less frequently than required by law, unless specific exemptions that may be provided for in applicable wildlife regulations are obtained”); 1997 Programmatic BiOp (note 88) at 5 (“it is ADC policy to provide the quickest, most painless death possible to the animal”); *Long Struggles* (note 14) (quoting former agency trapper as stating that “[t]here are traps that are not checked for literally months at a time”); *see also Pandora’s Box* (note 14) (noting that animals often rot away before they are found by agency hunters).

their target and leave animals wounded or crippled.¹⁷⁴ Poisons (especially Compound 1080) can cause prolonged pain and suffering.¹⁷⁵

Not only are companion dogs killed or harmed by traps and poisons, but dogs used by agency trappers attack trapped animals. Last year, Jamie Olson, an APHIS-Wildlife Services employee, posted seven photographs on his Facebook page – in a folder entitled “work” – of his dogs “ripping into live coyotes trapped in steel foot-holds” and of coyote carcasses.¹⁷⁶ Mr. Olson’s work photographs also showed his dogs attacking bobcats and raccoons.¹⁷⁷ Mr. Olson evidently felt comfortable sharing these photographs with his Facebook friends without consequence to his position at APHIS-Wildlife Services.¹⁷⁸ One of the photographs posted by Mr. Olson is depicted below:



¹⁷⁴ *Pandora’s Box* (note 14) (quoting former agency trapper) (“Who wants to see an animal get crippled and run around with its leg blown off? I saw that a lot.”); 1997 Programmatic BiOp (note 5) at 5 (“it is ADC policy to provide the quickest, most painless death possible to the animal”).

¹⁷⁵ See Letter from Danielle Clair to Rep. DeFazio (Feb. 18, 2002) (recounting death of family dog from M-44 in Oregon in 2002: “Oberon did not die immediately but after eight hours, during which the local emergency veterinarian clinic worked to turn this nightmare around” but “[u]nfortunately, Oberon received a lethal dose.”).

¹⁷⁶ *Federal Agency Gives Few Answers* (note 100). The seven photographs from Mr. Olson’s Facebook page are included as sources in support of this Petition.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* Project Coyote has collected almost 98,000 signatures to date on a petition seeking termination of Mr. Olson as a program employee. See Petition by Project Coyote, Fire USDA Wildlife Services Federal Trapper Jamie Olson for Animal Cruelty [available at <http://www.change.org/petitions/fire-usda-wildlife-services-federal-trapper-jamie-olson-for-animal-cruelty>].

Following a public outcry, APHIS-Wildlife Services was forced to conduct an investigation.¹⁷⁹ The APHIS Report of Olson Incident concluded that there was no “evidence” to support “allegations of animal cruelty” and that Mr. Olson did not violate “any part” of the agency’s official standards of ethical conduct.¹⁸⁰ To date, Mr. Olson has not been disciplined as a result of the incident.

Russell Files – another APHIS-Wildlife Services trapper – was federally charged with criminal animal cruelty charges last year for deliberately setting traps in order to capture a neighbor’s dog in suburban Phoenix, reportedly using APHIS-Wildlife Services equipment and while on agency time.¹⁸¹ The following photograph shows the severely-injured dog:



¹⁷⁹ USDA, APHIS, Marketing and Regulatory Programs – Business Service (MRP-BS), Human Resources Division (HRd), Administrative Investigations and Compliance Branch (AICB), REPORT OF INVESTIGATION: CASE NUMBER – AR-13-06-WS (Dec. 6, 2012) [hereinafter “REPORT OF OLSON INVESTIGATION”] at 2.

¹⁸⁰ REPORT OF OLSON INVESTIGATION (note 179). The agency has claimed that the photographs were “taken out of context.” Email from P. Sanchez, APHIS (Nov. 15, 2012). However, the formal investigation found that the photographs were posted on Facebook by Mr. Olson and were taken at several locations while Mr. Olson was “performing his official duties” with APHIS-Wildlife Services on behalf of ranchers. *See id.* at 2-4; *id.* at 2 (“The pictures ... found in OLSON’s Facebook accounted were located in a file entitled ‘work.’”). During the investigation, Deputy Administrator William Clay told colleagues that he had “created a rule ... to send all emails with ‘Jamie Olson’ in the Subject line directly to my junk folder.” Email from William H. Clay, APHIS-Wildlife Services to G. Littauer and J. Green, APHIS-Wildlife Services (Nov. 8, 2012). Deputy Administrator Clay was made aware of several instances when Mr. Olson had not checked his traps in “accordance with our reporting directive” – including “some instances where Jamie Olson’s M-44’s had not been checked for up to 69 days.” Email from William H. Clay, APHIS-Wildlife Services to G. Littauer, APHIS-Wildlife Services (Dec. 20, 2012). Despite this, the formal investigation concluded that Mr. Olson violated no trap-check frequency directives. *Id.*

¹⁸¹ RUSSELL FILES POLICE REPORT (Jan. 18, 2012); *see also Hundreds of Pets, Protected Species Killed* (note 100). A family dog named Maggie was killed by a “body-grip” trap set by Wildlife Services in suburban Oregon in 2011. *The Killing Agency* (note 14).

Like Mr. Olson, Mr. Files was not fired or even disciplined; rather, he finished his career at APHIS-Wildlife Services by resigning voluntarily, citing “personal reasons.”¹⁸² Mr. Olson, Mr. Files, and other examples plainly illustrate why many have identified a “culture of animal cruelty” – indeed, a culture of outright lawlessness – at Wildlife Services.¹⁸³

In addition to traps, the use of toxicants – in particular, M-44s and Compound 1080 – cause tremendous pain and suffering. M-44s are devices that release sodium cyanide into the mouth of an animal when triggered, causing the animal to go into convulsions and die.¹⁸⁴ Compound 1080 is placed in a “livestock protection collar” (LPC), a bladder that attaches to the neck of a sheep or a goat, and which is designed to dispense the highly-toxic contents when it is punctured by an attacking coyote.¹⁸⁵ Compound 1080 is extremely toxic in very small amounts – a teaspoonful could kill 100 people – and LPCs do not always work as intended.¹⁸⁶ Death from a M-44 usually takes minutes (although it can take longer), whereas death from a Compound 1080 device typically occurs after many hours of suffering.¹⁸⁷

APHIS-Wildlife Services’ lethal toxicants pose a danger to the public. The agency has poisoned tens of thousands of animals to death in recent years, and its chemicals are present wherever the

¹⁸² RUSSELL FILES POLICE REPORT (note 181); *see also* *Hundreds of Pets, Protected Species Killed* (note 100). The dog, which lost “more than a dozen teeth in the ordeal,” was captured in two leg-hold traps that had been set in Mr. Files’ yard; she was ““covered in blood from trying to chew her way out” and “[t]he traps ... were covered in blood.”” *Id.*

¹⁸³ *See Torture, Abuse Regular Practice* (note 100) (former APHIS-Wildlife Services trapper recounting incident when he and a supervisor found nine coyotes caught in leghold snares in Nevada, and as was routine agency practice, signaled his dogs to attack, as his supervisor watched and laughed and as the dogs circled the coyotes and ripped into them); *id.* (quoting Rep. John Campbell, R-Calif.) (“This agency has become an outlet for people to abuse animals for no particular reason. It is completely out of control. They need to be brought into the 21st century.”); Letter from Reps. DeFazio and Campbell to Tom Vilsack, USDA (Nov. 30, 2012) (“[W]e are gravely concerned that [Olson] photographs ... do not represent an isolated occurrence, but may reflect a deep-rooted problem within the Wildlife Services program, that allows for, and encourages, inhumane lethal methods of predator control.”); *see also* Letter from Cathy Liss, AWI & Camilla Fox, Project Coyote to William H. Clay, APHIS-Wildlife Services (Mar. 15, 2013) (“We have a broader concern that illegal behavior and shocking acts of animal abuse have emerged as patterns within WS.”); *id.* (citing Olson, Traweck, and Files examples); Email from David M. Root, APHIS-Wildlife Services to William H. Clay, APHIS-Wildlife Services (May 17, 2013) (noting involvement of Jamie Olson’s boss, David Bergman, who also has yet to be disciplined).

¹⁸⁴ 1997 Programmatic FEIS (note 5) at 1-11.

¹⁸⁵ *Id.* at Appendix P, p. 272.

¹⁸⁶ Turkington, R., *CHEMICALS USED FOR ILLEGAL PURPOSES: A GUIDE FOR FIRST RESPONDERS TO IDENTIFY EXPLOSIVES, RECREATIONAL DRUGS, AND POISONS* (2010) [hereinafter “Turkington (2010)”] at 361; Fox, *Huff Post* (note 139) (although LPCs are designed to be punctured by attacking predators, “pouches are just as easily punctured by vegetation and barbed wire, leaking Compound 1080 into the environment where grazing animals can be poisoned from eating the contaminated forage”).

¹⁸⁷ Turkington (2010) (note 186).; *see also* Affidavit of Paul Wright (Sep. 19, 2001) [hereinafter “Wright Affidavit”] (describing how family dog who triggered APHIS-Wildlife Services M-44 device suffered for hours before dying from the cyanide exposure).

program is active – including, in some cases, near roads and places that are frequented by people and their pets. Indeed, examples of APHIS-Wildlife Services’ personnel placing poisons in such areas are abundant, and even doing so with the intention of poisoning family dogs.¹⁸⁸ Moreover, since 1987 18 agency staff and members of the public have been exposed to M-44s that cause nausea, blurred vision, and other problems.¹⁸⁹ Ten people have died in aircraft crashes from aerial gunning operations since 1979.¹⁹⁰ Disruption of ecosystems risks exposing species and humans to dangerous diseases.¹⁹¹ Remarking about sodium cyanide, Rep. Peter DeFazio, D-Ore., has warned that “[s]ooner or later it’s going to kill a kid.”¹⁹²

6. APHIS-Wildlife Services Lacks Transparency and Accountability

Not surprisingly given its activities, APHIS is not transparent about the program – to the contrary, it “operates in the shadows.”¹⁹³ It does not routinely make available specific, reliable

¹⁸⁸ In 1996, two APHIS-Wildlife Services were cited for violations in connection with the unlawful placement of several M-44s in prohibited areas on the Gila National Forest, including within 200 feet of water and closer than 50 feet or within sight of a public road or pathway. See New Mexico Department of Agriculture, INVESTIGATIVE REPORT, Case No. 96-24 (Apr. 29, 1996). A similar incident was investigated in Texas last year. See Texas Department of Agriculture, NOTICE OF VIOLATION, TDA Incident No. 02414-00006891 (June 6, 2012) (citing APHIS-Wildlife Services employee Kyle Traweek for unlawfully placing M-44s in an area “frequented by humans or domestic dogs and where exposure to the public and family pets is probable,” intentionally causing the fatal poisoning neighbor’s dog). As Knudson (2012) reported, the agency has killed over 1,100 dogs including family pets since 2000; many of these were animals who died from agency poisons. See *The Killing Agency* (note 14). Examples of such incidents are abundant; for instance, a family dog was killed by an M-44 in Philomath, Oregon in 2002. Letter from Clair to Rep. DeFazio (note 175). Another family dog was killed by an M-44 in southern Colorado in 2001. A dog was killed in Oregon in 2000 from an M-44 placed on a tree farm where children frequently played. Cole, M. & Lednicer, L.G., Neighbor Dog’s Death Halts Attempt to Trap Coyotes on Estacada Tree Farm, *The Oregonian* (Jan. 11, 2000). In 1999, APHIS-Wildlife Services placed an M-44 on land frequented by David Wright, killing his dog and exposing him and his daughter to cyanide. Wright Affidavit (note 187). In 1996, APHIS-Wildlife Services placed an M-44 on property belonging to Amanda Wood in Oregon, killing her dog and exposing her to cyanide poisoning. Watson, K. & Hanscom, G., Poison Traps Kill Unintended Victims, *High Country News* (Mar. 13, 2000) [available at <http://www.hcn.org/issues/174/5628>].

¹⁸⁹ *The Killing Agency* (note 14); *M-44s* (note 14); see also Predator Poison Under Review, *Associated Press* (Jan. 21, 2008) (Utah man exposed to APHIS-Wildlife Services’ M-44 in 2003 “suffers from long-term health effects,” “has difficulty breathing, vomits almost daily and can no longer work”).

¹⁹⁰ *The Killing Agency* (note 14).

¹⁹¹ For instance, in 2011 mule deer tested positive for the plague in an area in Nevada where APHIS-Wildlife Services had been targeting coyotes. *Pandora’s Box* (note 14) (description of the emergence of the plague in mule deer in an area where APHIS-Wildlife Services was killing predators). The plague is a disease that is sparked by rodents and transmittable to humans. Killing coyotes typically results in an increase of coyote prey species including rodents that carry plague, at least until coyotes respond to the increase in prey with larger litter sizes. See *supra* note 16

¹⁹² See Cong. Rec. H4286 (June 16, 2011) (statement of Rep. DeFazio); see also *id.* (“Some kid is going to be pulling on that little string saying, gee, I wonder what this does – BAM, cyanide shot shell. Now, that’s really discriminate. That’s really effective.”).

¹⁹³ *The Killing Agency* (note 14); *id.* (quoting acting state director in California as stating: “We pride ourselves on our ability to go in and get the job done quietly without many people knowing about it.”); see also Email from Carol

information about its activities, including the specific wildlife “problems” that it purports to solve, on whose behalf it conducts its activities, and where.¹⁹⁴

The agency’s website provides only broad summaries of program activities and categories of funding sources.¹⁹⁵ The program self-reports the number of animals that it kills, but these figures are not reliable; former agency personnel have revealed that the program kills far more animals than it reports. The program has no accurate sense of whether it is effective, as it “conducts little or no population monitoring of lethally controlled mammals nor of their alternate natural prey, no studies of whether WS is additive with other causes of mortality, and no studies of how control affects populations of nontarget species that are unintentionally killed.”¹⁹⁶ The agency has policies that “prohibit agency employees from identifying themselves on social media websites.”¹⁹⁷

An investigation into Jamie Olson has concluded without any disciplinary action being taken against him, and the agency refuses even to disclose the results of the investigation.¹⁹⁸ In another high profile incident, an investigation into the January, 2013 killing of a Mexican wolf – a critically-endangered animal – was initiated only after the killing was leaked to the media and after the federal government suppressed information showing that the killing had occurred.¹⁹⁹

Indeed, because the program is so secretive, the fact that anything is known about its darker aspects at all is due to agency whistleblowers, dogged investigative journalism, longtime

A. Bannerman, Publication Affairs Specialist, Wildlife Services & Veterinary Services to Bill Clay, APHIS-Wildlife Services Administrator *et al.* (Nov. 16, 2012) (lead program public affairs specialist expressing gratitude that media were not present to witness comments by Mr. Olson to Conserve County, Wyoming Board Livestock Predator Control Board – *i.e.*, that “animal activist groups have nothing better to do than send the e-mails and then go hug a tree” – but bemoaning that Mr. Olson evidently had not “learned something from this”).

¹⁹⁴ APHIS-Wildlife Services, *Selected advance questions from American Society of Mammalogists in preparation for forum with APHIS official on Wildlife Services (WS)* (June 2012).

¹⁹⁵ See APHIS-Wildlife Service, Wildlife Services’ 2010 Program Data Reports, available at http://www.aphis.usda.gov/wildlife_damage/prog_data/2012_prog_data/index.shtml. Although FY 2012 ended 12 months ago and FY 2014 began two months ago, as of today’s date, APHIS-Wildlife Services has yet to make FY 2012 Program Data available on its website. See *id.*

¹⁹⁶ Bergstrom *et al.* (2013) (note 9).

¹⁹⁷ See REPORT OF OLSON INVESTIGATION (note 179) at 4.

¹⁹⁸ In June 2013, Rep. Campbell published leaked documents on his website which show the results of the investigation of Mr. Olson. See John Campbell, Congressman, Leaked Documents Reveal Cover-Up of Animal Abuse Investigation in USDA’s Wildlife Services Agency – Predator Defense (June 24, 2013).

¹⁹⁹ Initially, the agencies denied that any Mexican wolf had been killed in January 2013. See MEXICAN WOLF BLUE RANGE REINTRODUCTION PROJECT MONTHLY UPDATE (Jan. 1-31, 2013) (failing to report the shooting); Tony Davis, Possible Mexican Wolf Killing Under Investigation in N.M., *Arizona Daily Star* (Apr. 10, 2013) (reporting that “The killing occurred in January in Southwestern New Mexico, where rancher resistance to the release of the endangered Mexican gray wolves has been fiercest.”).

advocacy by non-governmental organizations, and targeted, prolonged interest by members of Congress. It is telling that most of the incidents that do come to light involve members of the public and their pets – in other words, incidents that cannot be easily shielded from public view.²⁰⁰ As one agency manager told investigative journalist Tom Knudson from the *Sacramento Bee*, “[w]e really don’t have to tell anybody what we’re doing.”²⁰¹

These major problems run counter not only to prevailing societal values, but also to a statutory scheme that authorizes a wildlife control program only if it can be done with transparency and based on reliable information.²⁰² Yet, it is clear that this is not the case in practice.

As Rep. Defazio has observed in advocating for the elimination of Wildlife Services’ lethal predator control, “it’s incredibly important that we bring the actions of this agency out of the shadows.”²⁰³

IV. PETITION FOR RULEMAKING

APHIS-Wildlife Services manuals and directives set forth the official mission, philosophy and policies of the program.²⁰⁴ They set forth an agency “management philosophy” to “conserve and manage wildlife resources while being responsive to public desires, views, and attitudes” and engaging in “control” of “injurious wildlife” only after “careful assessments” of an identified problem and its resolution, in accordance with “biologically sound, environmentally safe, scientifically valid, and socially acceptable” methods that are designed to minimize risks to humans, wildlife, non-target animals, and the environment.²⁰⁵ Although it has long been known

²⁰⁰ See *supra* at 11 (discussing Boy Scout incident). The 1971 Boy Scout incident ultimately lead to President Nixon’s signing of Executive Order 11643, which banned the use of certain toxicants on public lands. See Feldman (2007) (note 30) (“the 1971 discovery by a Boy Scout troop of 24 eagle carcasses near a poisoned bait station in Wyoming ... brought intense public scrutiny on the federal program” followed by Congressional hearings, lawsuits, an investigation, and ultimately, President Nixon’s signing of Executive Order 11643); see also *Calls for Investigation* (note 14) (“Why won’t they let anyone go with them to see what they are doing? Why is there such a shroud of secrecy?” said Campbell. “Whose interests are they serving? That is the sort of thing we need to find out.”). Citing the lack of transparency, Reps. Campbell and DeFazio have called for an investigation into APHIS-Wildlife Services, and Rep. Davis has introduced a bill that would require greater program transparency. Transparency for Lethal Control Act, H.R. 2074, 113th Cong. (1st Sess. 2013).

²⁰¹ *Neck Snares* (note 14).

²⁰² 7 U.S.C. § 426.

²⁰³ *Federal Agency Accused of Stonewalling* (note 100) (quoting Rep. DeFazio).

²⁰⁴ See APHIS-Wildlife Services Policy Manual (updated Mar. 1, 2013) (see Literature Cited section for complete set of program policies); see also USDA, APHIS-Wildlife Services Publication, PARTNERSHIPS AND PROGRESS (Aug. 2009) at 1 (noting that “[w]hile WS’ authorizing legislation continues to be the base of its authority, it is the program’s policy directives that guide WS personnel daily in responding to requests for assistance.”) (hyperlink in original).

²⁰⁵ USDA, APHIS-Wildlife Services Policy Directive 1.201, MISSION AND PHILOSOPHY OF THE WS PROGRAM (July 20, 2009) [hereinafter “APHIS-Wildlife Services Directive 1.201”].

that it does not do so in practice, APHIS-Wildlife Services claims that when it does take control actions, “[p]reference is [to be] given to nonlethal methods when practical and effective.”²⁰⁶ The directives also require APHIS-Wildlife Services to maintain accurate, relevant, and reliable records about program activities, and to make this information readily available to the public.²⁰⁷ APHIS-Wildlife Services must also set forth the terms of its engagement on behalf of other Federal agencies, state agencies, and private parties in Memoranda of Understanding and cooperative agreements, and is to administer its cooperator agreements in an open and transparent manner.²⁰⁸

Yet, however far these pronouncements go, it is plainly evident that they do not work to ensure that APHIS-Wildlife Services is transparent and in compliance with the law or consistent with prevailing American values. Many key aspects of the program – including standards to ensure program transparency and reliability of information, definitions of key terms, standardized procedures for cooperator agreements, or procedures that fill in the gaps in the regulatory schemes and ensure strict adherence to the requirements of federal environmental laws – lack any policy directives at all. And the policy directives that do exist are merely supplanted by APHIS on occasion, evading the rigorous requirements of the APA including required notice and opportunities for public comment.²⁰⁹

²⁰⁶ USDA, APHIS-Wildlife Services Policy Directive 2.201, SELECTING WILDLIFE DAMAGE MANAGEMENT METHODS (Oct. 29, 2003). Despite this, it has been plainly evident that APHIS-Wildlife Services emphasizes the use of lethal control methods over nonlethal methods. *See* GAO (1995) (note 90) at 3 (“in practice, the role of nonlethal methods in the program’s efforts to control livestock predators differs from that indicated by the guidance” and “field personnel rarely use nonlethal methods when controlling livestock predators”); *see also* Bergstrom *et al.* (2013) (note 9) (“there is no downward trend in lethal control, despite GAO (1995) admonishments”).

²⁰⁷ USDA, APHIS-Wildlife Services Policy Directive 156.1, FOIA/PRIVACY ACT GUIDELINES (Oct. 19, 1982) [hereinafter “APHIS Directive 156.1”] at §VII (recognizing that FOIA “is a disclosure statute designed to allow ease access to documents held by the administrative agencies of the executive branch of the Federal Government” and that “[e]ach Agency has the responsibility to expedite all releasable information as prescribed by the FOIA”).

²⁰⁸ USDA, APHIS-Wildlife Services Policy Directive 4.135, REQUESTS FOR INFORMATION (Oct. 7, 2005); *see also supra* at 19 (discussing CAPIT recommendations regarding cooperator agreement process).

²⁰⁹ For example, in July APHIS-Wildlife Services quietly replaced its policy directive entitled “Reporting.” *See* APHIS-Wildlife Service Policy Directive 4.205.1, DATA AND ACTIVITY REPORTING (July 2, 2013). Likely in response to the Jamie Olson incident – which has generated a public outcry, multiple investigative articles, calls for an investigation by members of Congress, and a petition to terminate Mr. Olson’s employment with APHIS-Wildlife Services on Change.org from Project Coyote – the directive includes new requirements. These include the requirement that all agency personnel report all “critical issues or potential problems” “immediately to their supervisor for further action as appropriate.” *Id.* at 3. This includes “situations, occurrences, and media events” which “may ... [r]esult in publicity, substantial/national media and public inquiries, or Congressional inquiries, or ... [a]ffect WS’ relationship with other agencies, States, or cooperators.” *Id.* Hence, as this was simply a policy directive, the public was never notified of the revisions or invited to comment – and to be able to urge APHIS, *e.g.*, to prioritize termination of employees who carry out such activities rather than to facilitate program’s ability to minimize or control public scrutiny of such incidents.

As APHIS-Wildlife Services has never promulgated substantive regulations that are codified in the Code of Federal Regulations in accordance with the APA, Petitioners, other interested persons, and the general public have never been afforded an opportunity to guide APHIS-Wildlife Services, and to ensure that it maintains and adheres to a clear, consistent regulatory scheme that, in turn, ensures that the program is fully transparent and accountable to the public.

A. PETITION TO USDA-APHIS TO CONDUCT A FORMAL RULEMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT TO ESTABLISH A REGULATORY SCHEME FOR THE WILDLIFE SERVICES PROGRAM

Petitioners formally petition USDA and APHIS pursuant to APA section 553(e) and 7 C.F.R. § 1.28, for issuance and amendment of rules that govern the Wildlife Services program. USDA and APHIS have legal authority to conduct such a rulemaking, and promulgation of rules is necessary to fill the gaps in the statutory scheme.

The ADCA is the primary statutory authority for the Wildlife Services program.²¹⁰ The ADCA was enacted in 1931 to authorize the Bureau of Biological Survey to investigate, experiment, test, determine, demonstrate, and promulgate methods of eradicating, suppressing, or bringing under control mountain lions, wolves, coyotes, bobcats, prairie dogs, gophers, ground squirrels, jack rabbits, and other so-called “injurious” animals.²¹¹ In 1986, administration of the Act was passed from the Secretary of the Interior to the Secretary of Agriculture.²¹² An amendment passed in 2000 gave broad authority to the Secretary of Agriculture to control “injurious species” in accordance with agency policies but removed eradication as a goal of the law.²¹³

APHIS-Wildlife Services is required to comply with many additional federal legal authorities as well.²¹⁴ These include laws and policies that:

- Require access to program records, public participation, transparency, and reliable information, including the Freedom of Information Act, 5 U.S.C. § 552, *as amended*; National Environmental Policy Act, 42 U.S.C. § 4321-4370h, 40 C.F.R. Parts 1500-1508, and the Data Quality Act, Public Law 106–554; H.R. 5658;

²¹⁰ 7 U.S.C. §§ 426-426c.

²¹¹ 1997 Programmatic FEIS (note 5) at 1-13.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ APHIS-Wildlife Services Policy Directive 1.210, LEGAL AUTHORITY (Sep. 19, 2003) [hereinafter APHIS-Wildlife Services Policy Directive 1.210”]; *see also* APHIS-Wildlife Services Policy Directive 2.210, COMPLIANCE WITH FEDERAL, STATE, AND LOCAL LAWS AND REGULATIONS (Oct. 27, 2009) [hereinafter APHIS-Wildlife Services Policy Directive 2.210”] (“[a]ll employees ... are responsible for conducting official duties in compliance with all Federal laws” and “[s]upervisors shall ensure that all employees are aware of laws applicable to their official duties”).

- Protect biodiversity and wildlife, like the Endangered Species Act, 16 U.S.C. §§ 1531-1544, *as amended* (“ESA”), the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668-668d, *as amended* (“BGEPA”), the Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-711 (“MBTA”), and the Fish and Wildlife Act of 1956, 16 U.S.C. § 742j-1;
- Set a national policy for the humane treatment of animals, like the Animal Welfare Act, 7 U.S.C. §§ 2131-2159, the Humane Slaughter Act, 7 U.S.C. §§ 1901-1907, and require the humane treatment of wildlife that are protected under the ESA, MBTA, or BGEPA, 50 C.F.R. § 13.41; and
- Protect public health, like the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 135-136y, *as amended* (“FIFRA”).

In addition to these authorities, Executive Order No. 13112 (Feb. 3, 1999) directs all federal agencies to use their programs and authorities to: “prevent the introduction of invasive species”; “detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner”; “monitor invasive species populations accurately and reliably”; and “conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species.”

APHIS-Wildlife Services maintains a set of Program Directives and Policy Directives that are designed to fill the gaps in the regulatory scheme, and to specify the relevant statutory requirements.²¹⁵ On their face, these directives value and emphasize transparency, wildlife conservation, and minimal, direct control only when necessary and according to methods that are humane and socially acceptable.²¹⁶

However, APHIS has never promulgated regulations under the APA to codify any policies and authorities in a regulatory scheme that will ensure program consistency with all applicable authorities. Therefore, Petitioners formally request that APHIS undertake a substantive

²¹⁵ See *supra* at 37-38.

²¹⁶ See USDA, APHIS-Wildlife Services Policy Directive 1.201 (note 205); USDA, APHIS-Wildlife Services Directive 1530.1, OTHER GOVERNMENT AGENCY AND NON-FEDERAL REVIEWS OF APHIS (Mar. 23, 1993); APHIS Directive 156.1 (note 207) at §VII (FOIA “is a disclosure statute designed to allow eas[y] access to documents held by the administrative agencies of the executive branch of the Federal Government” and “[e]ach Agency has the responsibility to expedite all releasable information as prescribed by the FOIA”); PARTNERSHIPS AND PROGRESS (note 122) at 1 (“While WS’ authorizing legislation continues to be the base of its authority, it is the program’s *policy directives* that guide WS personnel daily in responding to requests for assistance.”) (emphasis in original). That said, Petitioners do not suggest here that the existing policy directives cannot not be substantially improved in certain, key respects – *e.g.*, no longer engaging in ongoing predator control without any “end point.” U.S. Department of Agriculture, APHIS-Wildlife Services, Policy Directive 2.201, DECISION MODEL (Jul. 21, 2008). Rather, these policies simply underscore the existence of gaps in the statutory scheme that governs the program, which can be appropriately addressed through a substantive rulemaking under the APA, including with notice and an opportunity for public comment.

rulemaking under the APA in order to fill the gaps in the existing statutory scheme.²¹⁷ Such rules must include:

1. definitions of key terms, such as “injurious,” “predator,” “control,” “invasive,” and “cooperator”;
2. procedures to ensure program transparency, such as rules specifying the information, documentation, data, and records that will be maintained by program personnel and routinely provided to the public;
3. criteria for the selection of specific control methods and the circumstances in which they may be utilized, with an emphasis on highly-selective, nonlethal, non-toxic, and non-capture methods, and with the goals of phasing out lethal methods and prophylactic control and of restoring apex predators to ecosystems;
4. criteria setting forth and requiring a documented correlation between specific wildlife problems that warrant a response by Wildlife Services as well as the appropriate methods that may be employed by program personnel, with an emphasis on and exhaustion of nonlethal measures in each situation;
5. procedures specifying the development and content of Wildlife Services work plans;
6. measures to ensure that “non-target” animals are not harmed or killed;
7. a standard of ethics and requirements to ensure professionalism of program personnel;
8. rules to ensure that all animals affected by the program are treated humanely and that agency personnel who commit acts of animal cruelty are subject to disciplinary action and/or employment termination;
9. factors for determining when previously-approved control activities must cease;
10. criteria that govern the selection of cooperators, the temporal scope for cooperator status, and cooperator agreements, the circumstances necessitating their modification or revocation, and public participation and disclosure requirements for determinations of cooperator status and cooperator agreements;
11. standardized procedures for processing cooperator agreements; and

²¹⁷ See *Morton v. Ruiz*, 415 U.S. at 231 (“The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”).

12. procedures that ensure strict adherence to the requirements of federal environmental laws, including rules to clarify the type and frequency of environmental reviews of program work plans.

The time for a regulatory scheme for the Wildlife Services program is long overdue; indeed, observations from the Leopold Report 50 years ago still hold true today:

... there is need for explicit criteria to guide control decisions, something that we find sadly lacking at present. Under properly enforced *regulations* and constraints the team of trained professional hunters can certainly achieve control with maximum efficiency and potentially with minimum damage to other values.²¹⁸

Accordingly, Petitioners request promulgation of rules to govern the APHIS-Wildlife Services program, including rules to ensure legal compliance, as explained below.

B. SUBSTANTIVE RULES MUST ENSURE THAT THE PROGRAM MEETS AND IS CONSISTENT WITH ALL RELEVANT POLICIES AND LEGAL AUTHORITIES, AND SHOULD CODIFY AND MAKE BINDING SEVERAL EXISTING APHIS-WILDLIFE SERVICES POLICY DIRECTIVES.

Rulemaking must ensure strict compliance with all relevant legal authorities and national policies that guide the program. Specifically, rules must ensure: transparency and reliability; an emphasis on nonlethal methods; the humane treatment of animals; and strict adherence to all relevant procedural and substantive legal requirements. In the absence of such a regulatory scheme, the program will continue to render itself obsolete and out of step with societal values.

1. Rules Must Ensure that All Program Activities are Fully and Accurately Documented and Disclosed to the Public.

In its regular course, APHIS-Wildlife Services does not make available to the public basic information or records regarding its activities, only broad summaries.²¹⁹ The program does not document specific problems or efforts to emphasize nonlethal control methods. Its field reports and work plans and monetary expenditures are obscure, inconsistent, and difficult to obtain. APHIS-Wildlife Services does not post its work plans or all environmental reviews – which were prepared to satisfy NEPA and/or the ESA many years ago – on its website.²²⁰ Even when it

²¹⁸ Leopold report (note 40) at 24 (emphasis added).

²¹⁹ See USDA APHIS-Wildlife Services, 2012 Program Data Reports (*see Literature Cited*) (providing only summary data regarding resources and agency expenditures and omitting information or records about non-target mortalities and harm such as geographic areas of operation, results from monitoring to assess program efficacy, adverse effects incident reports or summaries, cooperative service agreements; cooperative agreements; interagency agreements; material transfer agreements, confidentiality agreements; memoranda of understanding; all APHIS-WS-related environmental reviews under NEPA, the ESA, or other laws).

²²⁰ See USDA, APHIS-Wildlife Services, Wildlife Damage Management – National Environmental Policy (NEPA) Documents [available at http://www.aphis.usda.gov/regulations/ws/ws_nepa_environmental_documents.shtml]

makes completed NEPA documents available, many are heavily redacted.²²¹ Other programmatic environmental reviews are not easily accessible. Nor are agency handbooks, policy statements, guidance manuals, or best practices manuals. Many such documents must be requested under FOIA, but APHIS does not necessarily respond to FOIA requests in a timely manner.²²² Members of the news media are not permitted to observe agency personnel in the field.²²³

A defining characteristic of the Wildlife Services program is secrecy.²²⁴ As just one example, a FWS investigation concluded that on January 19, 2013, a Wildlife Services employee shot and killed a critically-endangered Mexican wolf, one of the most critically-endangered land mammals in North America.²²⁵ Yet, only after a public outcry did FWS law enforcement investigate the killing.²²⁶

(making available only recent environmental assessments and other NEPA documents available); *see also* USDA, APHIS-Wildlife Services, FOIA Reading Room [available at http://www.aphis.usda.gov/foia/foia_reading_room.shtml] (“APHIS only maintains an electronic reading room.”); Wildlife Damage Management, eLibrary [available at http://www.aphis.usda.gov/wildlife_damage/library.shtml].

²²¹ *See* USDA, APHIS-Wildlife Services, FINAL ENVIRONMENTAL ASSESSMENT, PREDATOR DAMAGE MANAGEMENT ON FEDERAL LANDS IN ARIZONA (Nov. 1998).

²²² *Infra* note 223 (reporting that APHIS-Wildlife Services “hasn’t promptly released numerous public documents about the animals it’s killed [in San Diego]”); Memorandum from Administrator Kevin Shea & Deputy Administrator William H. Clay, APHIS-Wildlife Services to APHIS Management Team & Program Leaders Group (June 19, 2009) [hereinafter “Shea and Clay Memorandum”] (“we still have much work ahead of us” to reduce the “FOIA backlog”).

²²³ *The Killing Agency* (note 14); *id.* (noting that even military agencies allow reporters in the field); *see also* Rob Davis, Congresswoman Pushes for Transparency from Secretive Agency: The Wildlife Killers, *Voice of San Diego* (Aug. 2, 2012) (reporting that Wildlife Services “doesn’t allow reporters to watch its trappers in action and it hasn’t promptly released numerous public documents about the animals it’s killed [in San Diego], despite a formal request we filed under [FOIA]” and “[w]hen I asked for a database of kills it maintains, two of its employees laughed out loud at my request”).

²²⁴ *The Killing Agency* (note 14) (“because lethal control stirs strong emotions, Wildlife Services prefers to operate in the shadows”); *id.* (quoting former Wildlife Services District Manager Carter Niemeyer) (“The public has every right to scrutinize what’s going on.”); *see also* *Neck Snares* (note 14) (quoting Wildlife Services manager telling owner of dog maimed by agency snare as stating: “We really don’t have to tell anybody what we’re doing.”); *Pandora’s Box* (note 14) (discussing how Wildlife Services does not disclose the ranches where its employees conduct activities).

²²⁵ *See* U.S. Department of the Interior, U.S. Fish and Wildlife Service Office of Law Enforcement, REPORT OF INVESTIGATION REPORT #: 2013200634R003 (Aug. 14, 2013).

²²⁶ *See* Blake, R., One Mexican Wolf Killed; Two Pairs Transferred for Release into the Wild, *Public News Service*, (May 2013) [hereinafter “Blake (2013)”]; *see also* Press Release, U.S. Fish and Wildlife Service Confirms Recent Canine Mortality in New Mexico Was a Mexican Gray Wolf (undated). FWS originally stated that no wolves had been killed that January, until the Center for Biological Diversity provided contrary information to the media, suggesting that FWS concealing the truth on behalf of APHIS-Wildlife Services which also did not publicly disclose the incident until over two months later, and only then after being approached by reporters. *See also* Montoya-Bryan, S., Feds release few details in possible wolf shooting, *Associated Press* (Apr. 4, 2013).

Ultimately, the U.S. Attorney for New Mexico decided not to prosecute the APHIS-Wildlife Services employee, based on the employee's claim that he had mistaken the Mexican wolf (pictured below) for a coyote, even though APHIS-Wildlife Services personnel "who conduct ... activities in occupied wolf range" are required to be "knowledgeable at a professional level in identification of Mexican wolf, their habitat and use of habitat, and their sign."²²⁷



For decades, the program has mistakenly killed a "great many" animals "as innocent victims of the control operation."²²⁸ Indeed, the extensive list of non-target animals that are indiscriminately killed and maimed by APHIS-Wildlife Services personnel includes, in addition to Mexican wolves, bald and golden eagles, San Joaquin kit fox, swift fox, Hawaiian ducks and geese, and scores of migratory birds that are protected under the MBTA, as well as coyote, river otter, black bear, beaver, porcupine, mountain lion, wolf, pronghorn antelope, mule deer, badger, white-fronted goose, great blue heron, wild turkey, hog-nosed skunk, mule deer, black-tailed jack rabbit, and dogs.²²⁹ The non-target impacts of Wildlife Services' activities extend to domestic pets as well, which become injured and/or die horrible deaths in Wildlife Services' traps or from ingesting the program's poisons.²³⁰

²²⁷ See REPORT OF INVESTIGATION REPORT #: 2013200634R003 (note 225); *Blake* (2013) (note 226).

²²⁸ Leopold report (note 40) at 8.

²²⁹ Data Compilation (note 3).

²³⁰ See Letter from Sharyn Aguiar to Joy Schnackenberg, EPA (Sep. 14, 2007) (personal account of the day her German Shepherd was lured to a Wildlife Services-set M-44 cyanide trap set on public lands, where no warning signs were posted, as follows: "I kneeled at the top of his head, bending over him, crying and trying to figure out what happened to him. I remember crying out 'I don't understand, I don't understand' as I looked at his mouth. His mouth had a pinkish/salmonish colored foam coming from it."); see also Letter from A. Wood Kingsley to Whom it May Concern (Nov. 15, 2003) (thanking Predator Defense for helping to pursue answers in connection with the death of family dog by cyanide gas from a trap set on Ms. Wood Kingsley's family farm in the Willamette Valley); Wright Affidavit (note 187) (describing death of family dog from M-44 placed by Wildlife Services on neighbor's

Former agency trappers acknowledge that much of this non-target catch goes unreported.²³¹ Animal carcasses are “usually tossed behind a bush or into a ravine.”²³² As one former program trapper characterized the status quo, “[t]he field guys do not report even a fraction of the non-target animals they catch.”²³³ The 2012 *Sacramento Bee* investigative series about the program documented 7,800 accidental killings of 85 non-target wildlife species from steel body-grip traps since 2006, reflecting an accuracy rate of only five percent.²³⁴ Yet, even these details are only known today because *Sacramento Bee* reporter Tom Knudson conducted extensive investigative reporting, sent multiple FOIA requests, and interviewed experts, pet owners, and former agency employees.²³⁵

APHIS-Wildlife Services would claim that non-target mortalities are minimal. However, it is indisputable that large numbers of animals that were not the intended targets, including protected animals, are being harmed and killed – often painfully so – as a result of program activities, and that the agency does not even keep accurate data of these impacts.

Indeed, APHIS-Wildlife Services’ own reported data is unreliable. It is incomplete and does not account for substantial numbers of unreported catch and/or non-target catch, nor does it account for animals that are injured or maimed from program activities.²³⁶

property); *M-44s* (note 14) (“On that windy afternoon in Utah in 2006, Max joined the ranks of thousands of non-target animals – wild and domestic – that have been mistakenly killed by one of the most lethal tools in Wildlife Services’ arsenal: spring-loaded metal cylinders that are baited with scent and fire sodium cyanide powder into the mouth of whatever tugs on them.”); *id.* (noting that Ms. Aguiar’s claim for \$1,500 compensation from Wildlife Services for Max’s death was rejected); *Efforts to Investigate* (note 14) (describing death of a family dog in Texas from M-44 cyanide trap: “It was a horrible thing. She had thrown up. You could tell it had been a horrible death. It was really, really heart-wrenching.”). The *Sacramento Bee* reported that more than 1,100 dogs, including companion pets, have been killed since 2000, and M-44s have killed 250 dogs since 2006. Members of the petitioning organizations have had their companion animals harmed, maimed, and killed by traps set by APHIS-Wildlife Services, and/or avoid areas that they would otherwise frequent because of the risk to their companion pets.

²³¹ U.S. Fish and Wildlife Service, LAW ENFORCEMENT REPORT (Dec. 29, 2003) (describing illegal, unreported killing of a golden eagle in a steel-jaw leghold trap set by Wildlife Services in the Henry Mountains in Utah, and subsequent shooting); APHIS-Wildlife Services, MIS LEGACY REPORT (Mar. 4, 2005) (reporting neck snaring and killing of golden eagle on BLM lands in Lincoln County, Nevada in 2005); *Neck Snares* (note 14) (former Wildlife Services trapper Gary Strader stating that “The field guys do not report even a fraction of the non-target animals they catch.”).

²³² *Neck Snares* (note 14) (quoting Dick Randall); *id.* (account of Wildlife Services manager stating: “We really don’t have to tell anybody what we’re doing.”); *see also The Killing Agency* (note 14) (relating case in which federally-protected golden eagle was caught in a Wildlife Services strangling neck snare, and supervisor directed agency trapper to “go get a shovel and bury it and don’t say nothing to anybody”).

²³³ *Neck Snares* (note 14) (quoting former agency trapper).

²³⁴ *7,800 Animals Killed by Mistake* (note 14). FoxNews.com has also reported extensively on the program. *See* note 100.

²³⁵ *Id.*

²³⁶ *See supra* at 25 (discussing reports from former agency trappers of underreporting of non-target catch, including protected species).

There are, in addition, many aspects of the program for which the agency does not provide reported data at all – for instance, the agency does not specifically correlate its control actions with instances of injurious wildlife, the cooperators on whose behalf control actions were carried out, or the geographic areas where problems and control actions occurred. Nor does the agency maintain data about how many animals are injured but not necessarily killed – as portrayed by a former agency trapper Gary Strader:

Some of the gunners are real good and kill coyotes every time. And other ones wound more than they kill. Who wants to see an animal get crippled and run around with its leg blown off? I saw that a lot.²³⁷

APHIS refuses to provide specific details about the cooperators on whose behalf the program kills so many animals.²³⁸ It is unclear whether the agency even records such data.²³⁹ It is likewise unknown whether it possesses all permits and licenses that are necessary to carry out Wildlife Services activities consistent with the ESA, BGEPA, MBTA, FIFRA, and other authorities. APHIS-Wildlife Services does not make such permits or any required records easily available to the public or even notify the public or interested persons of its intent to pursue such permits and licenses from FWS or EPA.

Members of Congress have made repeatedly demanded program transparency. Rep. Davis, D-San Diego, reintroduced H.R. 2074, the Transparency for Lethal Control Act, on May 21, 2013.²⁴⁰ Ms. Davis' introductory remarks to the House of Representatives regarding H.R. 2074 called for APHIS-Wildlife Services to publish "clear and accessible information," and noted that the public and Congress "need to have the opportunity for vigorous oversight" and that "[t]his lack of transparency and public reporting makes oversight impossible," as "USDA could be acting inappropriately or recklessly and without this data, we can't know."²⁴¹

²³⁷ *Pandora's Box* (note 14).

²³⁸ *Critics* (note 14) (describing exchange during public meeting to address program critics, during which agency officials stated that it is official agency policy not to inform the public who its cooperators are or what they contribute to the program); *see also* WS Responses to American Society of Mammalogists (note 194) (noting that the program does not maintain information about the proportion of its expenditures go toward non-lethal versus lethal control methods, cooperator types (including public versus private cooperators), or updated information about the cost versus the benefits of its activities).

²³⁹ For instance, the agency stated that it cannot provide information about how much it spends on aerial gunning of coyotes and wolves. Katherine McGill, Wildlife Services Exterminates Over 4.1 Million Animals in 2009, *Examiner.com* (Oct. 12, 2010). The agency claims that it "does not have a managerial need" for basic facts. *Id.*; *see also* WS Responses to American Society of Mammalogists (note 194) (noting that the program does not know the proportion of its expenditures that go toward non-lethal versus lethal control methods, cooperator types (including public versus private cooperators), or updated information about the cost versus the benefits of its activities).

²⁴⁰ Transparency for Lethal Control Act, H.R. 2074, 113th Cong. (1st Sess. 2013).

²⁴¹ Introducing Transparency for Lethal Control Act, H.R. 2074, 112th Congress (Aug. 2, 2012) (statement of Rep. Davis). In introducing the legislation, Congresswoman Davis also stated that that "efforts to gather adequate information regarding Wildlife Services operations have been difficult" and criticized Wildlife Services for not making detailed data regarding "where, why, how and which animals have been killed." *Id.*

Rep. Campbell has criticized APHIS for thwarting attempts to investigate Wildlife Services. Campbell stated, “[t]hey appear to be stonewalling every attempt by everybody to investigate why they’re doing it.”²⁴² And in advocating for its elimination, Congressman DeFazio remarked that it is “ineffective, indiscriminate, inhumane... [and] it’s incredibly important that we bring the actions of this agency out of the shadows.”²⁴³

Indeed, the absence of basic information about its activities stands in stark contrast with APHIS-Wildlife Services’ avowed commitment to “openness and transparency” and to making information readily available to the public.²⁴⁴ It is also inconsistent with FOIA and NEPA – laws that require APHIS-Wildlife Services to be transparent.

FOIA’s “core purpose” is to allow the public to be informed about “what their government is up to.”²⁴⁵ FOIA requires every agency to proactively “make available for public inspection and copying” “statements of policy and interpretations” that are not published in the Federal Register, “administrative staff manuals and instructions to staff that affect members of the public[,]” and “copies of all records, regardless of form or format” as well as a “general index” of all records “which have been released to any person” that “have become or are likely to become the subject of subsequent requests for substantially the same records[.]”²⁴⁶ “In no uncertain terms,” President Obama directed federal agencies to “share information proactively on policies and decisions so that members of the public don’t have to use the FOIA to obtain information held by their Government.”²⁴⁷ Agencies are to “use modern technology to inform

²⁴² *Federal Agency Accused of Stonewalling* (note 100).

²⁴³ *Id.*

²⁴⁴ See Shea and Clay Memorandum (note 222) (characterizing President Obama’s FOIA Memorandum as a “tall order” and stating that “we still have much work ahead of us” to reduce the “FOIA backlog” and “to operate in an exceedingly open, transparent, and accessible way for all the customers and stakeholders we serve”); APHIS-Wildlife Services, FOIA Reading Room [available at http://www.aphis.usda.gov/foia/foia_reading_room.shtml] (stating that under FOIA, APHIS must make available, among other records, “statements of policy and interpretations adopted by the agency”).

²⁴⁵ *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989); see also *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (Congress enacted FOIA to “open agency action to the light of public scrutiny”) (quotation omitted).

²⁴⁶ 5 U.S.C. § 552(a)(2).

²⁴⁷ President Obama directed all federal agencies to “take affirmative steps to make information public” without waiting for specific requests and to “use modern technology to inform citizens about what is known and done by their Government.” *Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act*, 74 Fed. Reg. 4683 (Jan. 21, 2009); accord Attorney General Holder’s Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter “Attorney General FOIA Guidelines”]. Additionally, federal agencies are to “exercise their discretion to make a broader range of records available beyond the minimum required by the statute.” DOJ FOIA Reference Guide at 10 (citing 74 Fed. Reg. at 4683) stating that agencies should automatically disclose information about “what is known and done by ... Government”); see also Attorney General FOIA Guidelines (calling for an increase in the systematic online posting of information in advance of FOIA requests); *id.*; (advising that making more information public is a “key area where agencies should strive for significant improvement”).

citizens what is known and done by their Government.”²⁴⁸ Attorney General Eric Holder has explained that this means “agencies should readily and systematically post information online in advance of any public request” because “[p]roviding more information online reduces the need for individualized requests and may help reduce existing backlogs.”²⁴⁹

FOIA’s broad disclosure mandate also requires federal agencies to disclose agency records upon request unless they fall within one of the statute’s nine, narrowly-construed exemptions.²⁵⁰ The statutory time period for making a determination in response to a request for agency records submitted under FOIA is 20 days, which may only be extended in “unusual circumstances.”²⁵¹ President Obama and Attorney General Eric Holder emphasize a policy of prompt disclosure in responding to FOIA requests.²⁵²

NEPA, one of the nation’s preeminent environmental protection statutes, mandates federal transparency as well.²⁵³ NEPA is a disclosure statute (in part). It requires all agencies, for every action that they propose to undertake that will significantly affect the quality of the human environment, to prepare a “detailed statement” on the environmental impact of the proposed action and its adverse and unavoidable environmental effects, in order to inform the public and decisionmakers about the environmental consequences of federal actions before it is too late to reverse those consequences.²⁵⁴ In a 1993 report, the CEQ recommended that all federal agencies “[a]cknowledge the conservation of biodiversity as national policy and incorporate its consideration in the NEPA process.”²⁵⁵

Additionally, the Data Quality Act was enacted in 2005 to “ensur[e] and maximize[e] the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.”²⁵⁶ Guidelines issued by the Office of Management and Budget (“OMB”)

²⁴⁸ *Id.*

²⁴⁹ Attorney General FOIA Guidelines (note 247) at 3.

²⁵⁰ *U.S. Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7 (2001)).

²⁵¹ 5 U.S.C. § 552(a)(6)(A); *id.* § 552(a)(6)(B)(i).

²⁵² See *Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act*, 74 Fed. Reg. 4683 (Jan. 21, 2009); accord Attorney General Holder’s FOIA Guidelines (note 247); see also *FOIA Post*, “OIP Guidance: President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines Creating a New Era of Open Government” (posted Apr. 17, 2009).

²⁵³ 42 U.S.C. § 4331(a) (declaring as the “continuing policy of the Federal Government” “to use practicable means and measures ... to create and maintain conditions under which man and nature can exist in productive harmony.”).

²⁵⁴ 42 U.S.C. § 4332(C).

²⁵⁵ CEQ, INCORPORATING BIODIVERSITY CONSIDERATIONS INTO ENVIRONMENTAL IMPACT ANALYSES UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Jan. 1993) at 23.

²⁵⁶ Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554).

urge agencies to “issue guidelines” to meet these objectives.²⁵⁷ OMB updated the guidelines on February 22, 2002 and March 4, 2002.²⁵⁸ Pursuant to these guidelines, USDA has issued “information quality guidelines” that “apply to all types of information disseminated by USDA agencies and offices,” specifying that these agencies and offices will set a “basic standard of quality” for information they disseminate and ensure the information meets this standard, and that such information will be accurate, reliable, unbiased, useful, and transparent.²⁵⁹

In contrast to these mandates, as explained above APHIS-Wildlife Services does not currently make available reliable, detailed information about its activities or programmatic environmental reviews, or disclose records promptly when requested under FOIA.²⁶⁰ Therefore, when completing a substantive rulemaking pursuant to the APA, APHIS must promulgate binding rules to clarify the categories of information that it will making readily available to the public on its website. Moreover, it should clarify where such information will be provided to the public, such as on the agency’s eLibrary website. Accordingly, Petitioners request that USDA and APHIS amend the FOIA implementing regulations at 7 C.F.R. Part 1 in order to maintain and routinely make available, on the agency’s “eLibrary,” the following categories of agency records:

1. All information regarding its practices and activities, including work plans and field reports;
2. Complete, accurate data regarding the numbers of animals killed, maimed, and injured on a periodic basis;
3. Data reflecting all affected animals, both wild and domestic, and all species and geographic areas where it conducts activities;
4. Complete monitoring information regarding all effects of its activities, including direct, secondary, and cumulative effects;
5. All environmental reviews and supporting documents (without redactions), including but not limited to work plans, environmental assessments,

²⁵⁷ Office of Management and Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* (Oct. 1, 2001).

²⁵⁸ 66 Fed. Reg. 49,718 (Sep. 28, 2001); 67 Fed. Reg. 8452 (Feb. 22, 2002); 67 Fed. Reg. 9797 (Mar. 4, 2002). OMB also issued supplementary guidance that discussed important issues, identified noteworthy approaches for consideration, and provided guidance on those provisions that need to be adopted uniformly in all agency guidelines. Memorandum from John D. Graham for the President’s Management Council, Agency Draft Information Quality Guidelines (June 10, 2002); Memorandum from John D. Graham for the President’s Management Council, Agency Final Information Quality Guidelines (Sep. 5, 2002).

²⁵⁹ USDA, Office of the Chief Information Officer, Information Quality Activities, General Requirements [available at <http://www.ocio.usda.gov/policy-directives-records-forms/information-quality-activities>].

²⁶⁰ See, e.g., USDA, Office of the Chief Information Officer, *Chief Freedom of Information Act (FOIA) Officer Report* (Mar. 2012) (Revision 1.5).

environmental impact statements, biological opinions, biological assessments, letters of concurrence, conference reports, incidental take statements and/or permits, and underlying documents;

6. Specific information that disclose the identities and affiliations of the cooperators on whose behalf APHIS-Wildlife Services carries out control actions; and
7. Correlations of the above with identified wildlife problems in specific areas and cooperator funding arrangements in response to such problems.

Proactively making such information available for public inspection on the agency's website is the most effective way to bring agency practice in line with its purported commitment to transparency, national policy, FOIA's disclosure mandate, and the Data Quality Act.²⁶¹ It is impossible for the program to demonstrate – and therefore, for the American people to be assured – that APHIS Wildlife Services is fully complying with the law without specific information being available that identifies wildlife problems and the efforts that were made to solve those problems without lethal methods. Indeed, the public simply cannot assess the program's efforts to employ non-lethal methods without greater transparency. Binding regulations could also work to ensure that APHIS-Wildlife Services' is consistent with congressional calls for greater transparency.

2. Rules Should Phase Out Lethal Control, Restore Predators to Ecosystems, and Set Substantive and Procedural Criteria for Determinations of Injurious Wildlife Problems for Which an APHIS-Wildlife Services Response May be Warranted.

As observed in the Leopold Report nearly 50 years ago:

Particularly when professional hunters are employed, control tends to become an end in itself, and following Parkinson's law, the machinery for its accomplishment can easily proliferate beyond real need.²⁶²

The 1979 DOI Policy recommended long-term “phase out” of “the use of lethal preventative controls.” But a quarter-century later, APHIS-Wildlife Services still routinely engages in “preventative” (prophylactic) predator control, and does not limit its activities to situations in which, *e.g.*, “substantial calf losses are established on a basis of irrefutable evidence.”²⁶³ For example, the program does not justify killing the approximately 75,000 coyotes that it kills every year – often prophylactically, prior to lambing season, and before any damage has been verified.

²⁶¹ See Shea & Clay Memorandum (note 222).

²⁶² Leopold report (note 40) at 2.

²⁶³ *Id.* at 8; see also 1979 DOI Policy (note 78) at 2 (setting near-term goal of limiting “preventative control” to “specific situations where unacceptably high levels of losses have been documented during the preceding 12 months”).

The program refuses to phase out – or even meaningfully limit – its prophylactic lethal control, despite decades of criticism of this practice.

Accordingly, Petitioners seek promulgation of regulations that would finally bring an end to lethal control, and in particular prophylactic lethal control. Additionally, all lethal control should be phased out in all but the rarest of circumstances involving serious, verified, and documented injurious wildlife problems. Moreover, promulgation of regulations should involve a delineation – based on public comment and the best and most reliable data and information – of the narrow circumstances in which a lethal method by APHIS-Wildlife Services may be considered to be acceptable, and in such narrow circumstances, the procedures by which APHIS-Wildlife Services must verify and document the presence of such circumstances as well as the specific methods that may be utilized.

Moreover, such a rulemaking should conclude that any permission to graze livestock on public lands shall not be subsidized by lethal predator control by APHIS-Wildlife Services, *e.g.*, through lethal control; rather, the risk of livestock losses to predators should be borne by the livestock producer(s) who use public lands and resources.²⁶⁴ Furthermore, such rules should clarify that no control method – for example, leg-hold traps, which catch only an estimated *five percent of the intended targets* – should be deemed acceptable if it “results in the advertent death of a great number of animals during the process of killing a few that are causing damage.”²⁶⁵

Finally, whatever methods it does employ, APHIS-Wildlife Services should have a regulatory scheme which requires it to carry out its activities in a fully transparent manner, based on reliable information, in response to specific, local situations involving injurious animals that have been verified and documented based on irrefutable evidence; and/or where necessary in order to minimize the adverse effects of invasive animals or plants to endangered and threatened species. Such rules should set a standardized, rigorous, and complete process for verifying and documenting specific injurious wildlife problems and the use of non-lethal methods to address them, and should clarify the procedures by which such records of such problems shall routinely be made available to the public at large and to Congress. And as explained above, the rules identify and phase out specific lethal control methods that are known to be ineffective and non-selective. Moreover, such rules should extend to all control activities that are carried out by the program.

Such rules may codify APHIS-Wildlife Services’ “management philosophy” – *i.e.*, to “control” “injurious wildlife” only after “careful assessments” of an identified problem, as well as its

²⁶⁴ See *Long Struggles* (note 14). A growing body of science has found the agency’s war against predators, waged to protect livestock and big game, is altering ecosystems in ways that diminish biodiversity, degrade habitat and invite disease.”).

²⁶⁵ See *id.* (investigative journalism reporting that out of 80,800 animals captured in leg-hold traps between 2006 and 2011, only five percent (4,300 animals) were the intended targets); Leopold report (note 40) at 9 (“No method is acceptable if it results in the inadvertent death of a great number of animals during the process of killing a few that are causing damage.”).

resolution, in accordance with “biologically sound, environmentally safe, scientifically valid, and socially acceptable” methods that are designed to minimize risks to humans, wildlife, non-target animals, and the environment.²⁶⁶

Although there is now plenty of evidence, generated over the course of many decades, that illustrates beyond any doubt the ineffectiveness of many of the program’s existing, commonly-utilized lethal control methods and warrants immediate cessation of their use – or at a minimum, immediate cessation of their general use over large areas – a rulemaking with an opportunity for public comment will allow interested members of the public at large (including Petitioners) and/or experts in the fields of academia, science, and law to advise the agency about how to effectively achieve these important objectives. Indeed, as shown by the Marin County, California example, there are viable non-lethal and alternative measures that can be implemented, thereby eliminating altogether or substantially reducing any need both to kill, injure, or maim any wildlife, including protected animals and domestic pets, and put species, animals, pets, and humans at risk.²⁶⁷

3. Rules Must Set Professional, Ethical Standards for the Humane Treatment of Animals, and a Clear, Consistent Disciplinary Process for Violations of Such Rules by Program Personnel.

As reflected by state and federal laws, prevailing social attitudes in the United States value the humane treatment of animals. Forty-seven states now have felony laws that prohibit animal cruelty.²⁶⁸ Several federal laws seek to protect animals from inhumane treatment or cruelty as well. The Animal Welfare Act, 7 U.S.C. §§ 2131-2159, reflects the national policy objective of furthering the humane treatment of animals.²⁶⁹ The Humane Slaughter Act, 7 U.S.C. §§ 1901-1907, seeks to further the humane treatment of animals in slaughterhouses and the prevention of their “needless suffering.”²⁷⁰ FWS regulations require the humane treatment of all wildlife that

²⁶⁶ APHIS-Wildlife Services Policy Directive 1.201 (note 205); *see also* Leopold report (note 40) at 24:

... the justification for each local control program should be documented far better than at present, and such proof of need should be available when requested by the Advisory Board or the Secretary. The mere appeal for additional control by local groups of ranchers or the offer to help pay for a control program by a county or state is not of itself deemed justification that the program should be undertaken. As a form of justification, narrative descriptions of damage should be supplemented with quantitative statistics on the true extent of damage.

²⁶⁷ *Supra* at 21-22 (discussing Marin County program); *see also supra* at 30 (discussion of nonlethal methods).

²⁶⁸ HSUS, *Animal Cruelty Facts and Statistics: Statistics on the victims and current legislative trends* [available at http://www.humanesociety.org/issues/abuse_neglect/facts/animal_cruelty_facts_statistics.html] (the exceptions are Idaho, North Dakota, and South Dakota). Reflecting changing times and the progression of American values, 42 of the 47 states with felony animal cruelty laws have enacted their laws within the last three decades. *Id.*

²⁶⁹ *Id.* § 2131.

²⁷⁰ *Id.* § 1901.

is protected under the ESA, MBTA, and/or BGEPA.²⁷¹ APHIS-Wildlife Services' policy directives recognize the need for consistency with these laws and policies.²⁷² The agency has long promised to adapt its practices to changing societal attitudes about animal treatment.²⁷³

Nevertheless, many observe a “culture of animal cruelty” that persists at APHIS-Wildlife Service.²⁷⁴ Despite demurrals by USDA and APHIS, stories steadily emerge about an agency that does not fire or discipline personnel – or even take much if any action at all – when they commit cruel acts against animals or break the law. Jamie Olson, the Wildlife Services employee who posted photographs on his Facebook page depicting his dogs attacking and killing coyotes in leg-hold traps, and who left his traps unchecked for up to 69 days, has not been fired or even disciplined.²⁷⁵ Instead of disciplining Mr. Olson, APHIS-Wildlife Services has chosen to supplant a policy directive on the use of dogs and create an entirely-new directive that, among other things, prohibits Wildlife Services personnel from “post[ing] or shar[ing] photographs taken or documents developed, during the course of their or their colleagues’ official duty” – *e.g.*, on Facebook – unless first cleared “through official channels.”²⁷⁶ Russell Files, the trapper who deliberately trapped a neighbor’s dog, was not disciplined. Neither was Kyle Traweek, another trapper who deliberately trapped a neighbor’s dog. Nor was the agency employee who killed a Mexican wolf in January 2013. A former agency trapper has indicated that these incidents are not unusual or isolated; indeed, there are many examples of professional program hunters and trappers committing similar acts of animal cruelty or illegal behavior.²⁷⁷

²⁷¹ 50 C.F.R. § 13.41 (“Any live wildlife possessed under a [ESA, MBTA, or BGEPA] permit must be maintained under humane and healthful conditions.”).

²⁷² See APHIS-Wildlife Services Policy Directive 2.210 (note 214) (requiring agency personnel to comply with all Federal and state laws); *see also, e.g.*, USDA, APHIS-Wildlife Services Policy Directive 2.445, USE OF TRAINED DOGS IN WILDLIFE SERVICES (WS) ACTIVITIES (July 2, 2013) (“WS personnel shall not allow their trained dogs to have physical contact or in any way attack, bite, or kill animals that are restrained in a trap or any other device.”); APHIS-Wildlife Services Policy Directive 1.301 (note 122) (requiring all program personnel to “show exceptionally high levels of respect for people, property and wildlife” and to “strive to use the most selective and humane methods available, with preference given to nonlethal methods when practical and effective”).

²⁷³ See, *e.g.*, Feldman (2007) (note 30) (describing “spring cleaning” of the agency which occurred during the 1970s, in part in response to public criticism over its treatment of animals); 1997 Programmatic FEIS (note 5) at Summary 8 (promising to use nonlethal methods “whenever practical”).

²⁷⁴ *Supra* at 34.

²⁷⁵ *Id.*

²⁷⁶ APHIS-Wildlife Services Policy Directive 4.104, USE OF NEW MEDIA BY PERSONNEL (June 20, 2013).

²⁷⁷ See Utah Division of Wildlife Resources, INITIAL REPORT OF INVESTIGATION (Dec. 2, 2003) (reporting 2003 discovery of trapping and shooting by APHIS-Wildlife Services trapper of a golden eagle caught in APHIS-Wildlife Services’ leg-hold trap in Utah, and of decomposing carcasses of red fox and coyote trapped nearby); *supra* note 230 (describing instances of dogs becoming caught in APHIS-Wildlife Services traps and being injured or killed); *see also* *Torture, Abuse a Regular Practice* (note 100) (former trapper describing situation when he and supervisor found nine coyotes caught in leg hold snares and, “[a]s was routine” he “signaled his dogs to attack” while his supervisor “watched and laughed as the dogs circled the coyotes and ripped into them”); *id.* (quoting former trapper as stating that “[t]hat was regular practice”).

To be sure, the program's preferred methods (*e.g.*, snares, leghold traps, and poisons) inherently cause tremendous pain and suffering. This is made much worse because the agency does not require (but merely recommends) that agency personnel check their traps frequently, much less enforce their failure to do so. And, as former agency trappers have revealed and as made evident by the Olson Investigation, "traps ... are not checked for literally months at a time" as animals are "left to die of starvation, thirst, heat, stress, and exposure."²⁷⁸ While most Americans would be appalled by such atrocities, such accounts paint the picture of an agency that excuses such acts, and in so doing, condones the inhumane treatment of animals.²⁷⁹

The culture of animal cruelty at APHIS-Wildlife Services hangs like a dark cloud over American society, and runs counter to values and the policies that support laws to protect animals. A rulemaking must, at long last, correct this problem and bring APHIS-Wildlife Services into compliance with all relevant national policies, federal laws, its own policies, and prevailing societal values. If APHIS-Wildlife Services cannot show itself to be humane, then it cannot (and need not) continue at all.²⁸⁰

Therefore, in conducting a rulemaking, USDA and APHIS must "completely reassess its function and purpose in the light of changing public attitudes toward wildlife," as the Leopold Report recommended decades ago.²⁸¹ Petitioners request promulgation of regulations that strictly prohibit acts such as those committed by Mr. Olson, Mr. Files, Mr. Traweek, and others, set forth legal and ethical standards for the treatment of animals by agency personnel, and set forth a clear and consistent process for ensuring that employees who violate such prohibitions are subjected to a disciplinary process and terminated. In addition, Petitioners seek rules that

²⁷⁸ *Long Struggles* (note 14) (quoting former agency trapper); *see id.* (quoting former agency trapper) ("Remember, these animals have fur coats on. They exert themselves trying to get out. They over-stress with the heat and keel over and die. *Most coyotes die this way*, and when the trapper gets there, all that is left is a bunch of hair, bones and maggots. I've seen it hundreds of times and it always bothered me. It has to be a horrendous and torturous way to die.") (emphasis added); *see also Pandora's Box* (note 14) (noting that animals often rot away before they are found by agency hunters). Although APHIS-Wildlife Services would assert that it complies with state laws that regulate trapping, as Mr. Strader's direct experience shows, this is clearly not the case. No state trapping laws allow traps to be left unchecked for longer than a few days.

²⁷⁹ *Torture, Abuse a Regular Practice* (note 100).

²⁸⁰ The ADCA provides authority for a wildlife services program, but does not mandate its existence. *See* 7 U.S.C. § 426 ("The Secretary of Agriculture *may* conduct a program of wildlife services") (emphasis added).

²⁸¹ Leopold report (note 40) at 23.

There persists a traditional point of view that the [animal control program] is responsible primarily to livestock and agricultural interests, and that the growing interest of the general public in all wild animal life, including predators, is a potential obstruction to the progressive control program and is to be evaded and circumvented wherever possible.

...

In point of fact, the segment of the public interested in husbandry and wise use of all animal resources represents a substantial majority and can no longer be suppressed. Even in farming and ranching communities there is a growing reaction against unwarranted killing of animals not actually creating a problem.

provide a transparent process for program selection of control methods, with opportunities for the public to participate, as well as the development of method selection criteria that would bar the use of methods that – by design or in practice – are either known to or may cause pain or suffering to wildlife, companion animals, or members of the public.

4. Rules Must Ensure that APHIS-Wildlife Services is in Strict Compliance with All Legal Authorities and Policies Which Protect Wildlife and the Public

APHIS is required to comply with procedural and substantive requirements of many federal laws in administering the Wildlife Services program, including the ESA, BGEPA, MBTA, FIFRA, and NEPA, as well as the Fish and Wildlife Act, 16 U.S.C. § 742j-1 (“FWA”). APHIS-Wildlife Services policy directives require compliance with these laws.²⁸²

The ESA, BGEPA, and MBTA impose strict permitting requirements to conserve and protect certain species.²⁸³ These laws make it unlawful for any person to “take,” “depredate,” or commit other detrimental acts against protected animals or species without a permit from the FWS, applying specific regulatory criteria, terms and conditions, and record-keeping and monitoring requirements to permittees.²⁸⁴ FIFRA imposes conditions on the use of registered pesticides such as M-44s.²⁸⁵ NEPA requires APHIS-Wildlife Services to take a hard look at the consequences of its actions; publicly disclose what it is doing; allow the public to participate and to inform USDA and APHIS decisionmaking regarding the program; and ensure that program choices are based on current law, knowledge, and societal values.²⁸⁶ The FWA imposes a permit requirement for aerial gunning to help ensure public safety and provides enforcement authority to FWS.²⁸⁷ In so doing, the ESA, BGEPA, MBTA, FIFRA, NEPA, and FWA further a national policy of transparency, wildlife protection and conservation, the humane treatment of animals, and protection of the public health and welfare.²⁸⁸

²⁸² APHIS-Wildlife Services Policy Directive 1.210 (note 214).

²⁸³ 16 U.S.C. § 1538(a)(1)(B) (ESA take prohibition); *id.* § 668a (prohibiting take of protected bald or golden eagles without permit from the Secretary of Interior); *id.* § 703 (prohibiting take of protected migratory birds); *id.* § 704 (setting forth circumstances when migratory birds may be taken, killed, or possessed).

²⁸⁴ *See generally id.*; *see also* 50 C.F.R. Part 13 (general permit requirements); *id.* Part 17 (imposing permitting and conditions for take of endangered and threatened species); *id.* Part 20 (permitting and reporting requirements for BGEPA take permits); *id.* Parts 20 and 21 (general management regulations and MBTA control order for Canada geese); *id.* §§ 21.43, 21.44 and 21.48 (MBTA depredation orders).

²⁸⁵ *Id.* § 136(j)(a)(2)(F).

²⁸⁶ 42 U.S.C. § 4321; 40 C.F.R. Parts 1508-1525 (CEQ regulations).

²⁸⁷ 16 U.S.C. § 742j-1.

²⁸⁸ *See* 16 U.S.C. § 1531(a)(1) (ESA declaring as the “policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act”); *id.* § 668a (controlling the take, possession, and transportation of bald and golden eagles); *id.* § 703 (prohibiting take of protected migratory birds). In addition, NEPA declares as the “continuing policy of

In the regular course, however, APHIS-Wildlife Services takes and/or depredates – *i.e.*, it kills, harms, and harasses – animals that are protected under the ESA, BGEPA, and MBTA, including: gray wolves, Mexican gray wolves, and red wolves; grizzly bears; black-footed ferrets; Hawaiian ducks; Hawaiian geese; swift foxes and San Joaquin kit foxes; bald and golden eagles; and scores of protected migratory birds.²⁸⁹ Yet, APHIS-Wildlife Services cannot demonstrate that it has all of the necessary authorizations to conduct its control actions consistent with these laws.

a. Endangered Species Act

Petitioners seek substantive rules that specify the substantive conservation measures and the procedures by which APHIS-Wildlife Services will strictly satisfy its obligations under the Endangered Species Act.

ESA section 9 prohibits the unauthorized “take” of listed animals, which means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”²⁹⁰ ESA section 7(a)(1) requires all federal agencies to “utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species”²⁹¹ ESA section 7(a)(2) requires all federal agencies to “insure that any action” that they authorize, fund, or carry out “is not likely to jeopardize” any listed species.²⁹²

The only way that APHIS can satisfy these mandatory duties is through strict compliance with the procedural requirements set forth in the ESA’s implementing regulations at 50 C.F.R. Part 402.²⁹³ These procedures require strict adherence to permitting requirements for all “take” and consideration of all relevant factors and the effects of its actions, based on the best scientific information, to endangered and threatened species, including both “direct” and “indirect” effects as well as “cumulative” effects.²⁹⁴ This can only be achieved through consultation with FWS and reinitiation of consultation when new species become listed, circumstances change, or new information about the agency’s impacts comes to light.²⁹⁵

the Federal Government” “to use practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony.” 42 U.S.C. § 4331(a).

²⁸⁹ GAO (1990) (note 89).

²⁹⁰ 16 U.S.C. §§ 1532(19) and 1638(a)(1)(B).

²⁹¹ *Id.* § 1536(a)(1).

²⁹² *Id.* § 1536(a)(2).

²⁹³ *Id.* § 1536(c), (d); 50 C.F.R. Part 402 (ESA consultation procedures).

²⁹⁴ 50 C.F.R. Part 402.

²⁹⁵ 50 C.F.R. §§ 402.24 and 402.16.

APHIS-Wildlife Services routinely engages in activities that adversely affect the survival and recovery of endangered and threatened species. For example, APHIS-Wildlife Services engages in the “control” of critically-endangered Mexican gray wolves in the American Southwest at the behest the livestock industry.²⁹⁶ The Mexican wolf is one of the rarest land mammals on Earth, and its population size remains well below 100 animals – about 75 wolves at the last census count – with 100 wolves considered to be the bare minimum population size for survival.²⁹⁷ Indeed, Mexican wolves already occur in numbers that are too low to be viable and too low relative to elk, their primary prey. The loss of even one Mexican wolf is detrimental to the species’ survival.²⁹⁸

The primary reasons for the Mexican wolf’s suppressed numbers are shootings and capture – including shootings and trappings by APHIS-Wildlife Services. Over the years APHIS-Wildlife Services has shot and killed 12 Mexican wolves, caused the accidental deaths of 18 wolves, and captured and removed many more dozens of Mexican wolves from the wild.²⁹⁹ This year, a FWS investigation concluded that an APHIS-Wildlife Services’ employee shot and killed a critically-endangered Mexican wolf on January 19, 2013.³⁰⁰ Like many prior Mexican wolf killings committed by APHIS-Wildlife Services, the killing of this wolf was inadvertent – *i.e.*, it was not done because the wolf was “injurious” – and, hence, the killing of this wolf is out of compliance with any “take” coverage under ESA section 9.³⁰¹ Moreover, by taking Mexican

²⁹⁶ The *Arizona Republic* recently called for a reexamination of the issuance of granting grazing leases for public lands, citing the “entitlement attitude” of public lands ranchers that “should not be allowed to doom wolf-recovery efforts.” See *Arizona Republic, Give Wolves a Chance: Ranchers’ entitlement hurting population* (June 4, 2013). The Mexican wolf has been listed as endangered since 1978. In a recent proposed rule to reclassify its listing status under the ESA, FWS reiterated the dire status of the Mexican wolf. 78 Fed. Reg. 35,719 (June 13, 2013).

²⁹⁷ FWS, MEXICAN GRAY WOLF RECOVERY PLAN (1982) at 23, 28. The most recent FWS population count for the Mexican wolves in the wild is 75, including only three breeding pairs. The 1996 FEIS for Mexican wolf reintroduction predicted that by 2006, the population would grow to 102 animals and include 18 breeding pairs. FWS, REINTRODUCTION OF THE MEXICAN WOLF WITHIN ITS HISTORIC RANGE IN THE UNITED STATES, FINAL ENVIRONMENTAL IMPACT STATEMENT (1996) at 2-8, table 2-2. Scientists recommend a recovery target of a minimum of 750 Mexican wolves in 3 interconnected populations. FWS, MEXICAN WOLF CONSERVATION ASSESSMENT (2010) [hereinafter “MEXICAN WOLF CONSERVATION ASSESSMENT”] at 78.

²⁹⁸ Ripple and Beschta (2011) (note 148); See MEXICAN WOLF CONSERVATION ASSESSMENT (note 297) at 61; see also 1997 Programmatic FEIS (note 5) at 4-17 (“As defined by the Act an impact to even one individual of the species could constitute an unacceptable impact.”)

²⁹⁹ See Data Compilation (note 3) (totaling 10 Mexican wolf deaths directly caused by APHIS-Wildlife Services since 1996).

³⁰⁰ See *One Mexican Wolf Killed; Two Pairs Transferred for Release into the Wild* (note 226); see also FWS Press Release (note 226) (confirming canine mortality in New Mexico in January 2013 was a Mexican wolf).

³⁰¹ Blake (2013) (note 226); see also REPORT OF INVESTIGATION (note 225) at 62 (biological opinion terms and conditions requiring that “WS personnel who conduct ... Program activities in occupied wolf range shall be knowledgeable at a professional level in identification of Mexican wolf”).

wolves, APHIS-Wildlife Services prevents healthy populations from re-establishing in ecosystems where they are sorely needed.

The Mexican wolf is just one example of many. According to APHIS-Wildlife Services' own data, the program has killed hundreds of protected species since 1996, including 340 swift foxes,³⁰² 17 grizzly bears, four Louisiana black bears, and five pearly-eyed thrashers.³⁰³

The program also uses a variety of methods – including “pyrotechnics” such as shell crackers, bombs, firecrackers, rockets, and Roman candles – to “disperse” thousands of endangered Hawaiian ducks, Hawaiian geese, Hawaiian coots, Hawaiian hawks, Newell’s shearwaters, Hawaiian stilts, pearly-eyed thrashers, and wood storks every year.³⁰⁴ In addition, the program has dispersed 19 Louisiana black bears.³⁰⁵ While dispersing these species may not necessarily (immediately) kill them, such acts are still a “take” under the ESA; the ESA’s definition of “take” is broadly defined to include the harassment or harm of endangered and threatened species, and since “dispersing” these bears is a form of harm and/or harassment, it constitutes a take of these threatened animals as well.³⁰⁶

It bears noting that these totals are from program data reports, which are not reliable in light of a substantial number of killings that are not reported, a clear disincentive not to report killings of legally-protected species, and a lack of any information about other forms of take (*e.g.*, injuries

³⁰² APHIS-Wildlife Services kills about 25 swift foxes annually. *See* Data Compilation (note 3). APHIS-Wildlife Services is likely under the misimpression that swift foxes are not protected under the ESA, but this is in error. The swift fox has been federally protected since 1970, when it was listed throughout its range and therefore was legislatively placed on the endangered list in 1973 upon enactment of the ESA. In 1980, FWS published a notice saying that the 1970 listing for the northern swift fox and six other species (including jaguar, thick-billed parrot, wood bison, margay, short-tailed albatross) violated state-notice requirements of the 1969 Endangered Species Conservation Act and thus was invalid. 45 Fed. Reg. 49,844 (July 25, 1980). Based on this legal opinion, and without going through the ESA delisting process, FWS summarily declared that the species were henceforth not to be considered as listed in the United States. In 2009, however, FWS issued a legal opinion that confirms that the northern swift fox (and many similarly-situated species) “is currently protected in its entirety and is not listed as a distinct population segment under the Act.” 74 Fed. Reg. 33,957 (July 14, 2009).

³⁰³ Data Compilation (note 3).

³⁰⁴ 1997 Programmatic BiOp (note 88) at 3 (stating that dispersals involve the use of pyrotechnics); *see also* Data Compilation (note 3).

³⁰⁵ Data Compilation (note 3).

³⁰⁶ 16 U.S.C. § 1532(19). The ESA’s definition of “harm” includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3. The term “harass” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.* The ESA’s legislative history supports “the broadest possible” reading of “take.” *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 704-05 (1995). “Take” includes direct as well as indirect harm and need not be purposeful. *Id.* at 704. FWS has promulgated a regulation which prohibits the unlawful take of threatened species. 50 C.F.R. § 17.31.

or maimings) that result from attempts to kill or disperse protected wildlife.³⁰⁷ Whatever the true numbers may be, many endangered and threatened species that are killed or harmed by APHIS-Wildlife Services can ill afford to lose even a few individuals and meet recovery objectives, as the take of even a minimal number of individuals can jettison their survival.³⁰⁸

Direct killings and animal dispersals are not the only ways in which APHIS-Wildlife Services takes listed species; APHIS-Wildlife Services also does so through its “indirect effects.”³⁰⁹ For example, the 1997 Programmatic BiOp acknowledges that northern aplomado falcons can be indirectly affected by APHIS-Wildlife Services’ reduction in the “the number of available blackbirds ... through the use of avicides and rodenticides.”³¹⁰ In Fiscal Year 2012, the program eliminated 359 Brewer’s and 145 red-winged blackbirds in New Mexico, where the falcon occurs.³¹¹ This reduces the number of animals on which the aplomado falcon depends in order to survive and recover from the threat of extinction.³¹² All told, the program reports that it has killed over 45,000 Brewer’s blackbirds and 3.7 million red-winged blackbirds since 1996.³¹³

As a related matter, it is estimated that only 10 percent of the bodies of poisoned animals are ever recovered, and the other 90 percent are left to enter the ecosystem as food for other animals, leading to the “secondary poisoning of thousands of innocent companion animals and unoffending wildlife, including threatened and endangered species.”³¹⁴ Consequently, it is reasonable to conclude that even the reported figures regarding take of Brewer’s and red-winged blackbirds, for example, represent only a small fraction of the total animals affected and cannot account for the secondary effects of poisoning, including (possibly) to other protected species.

³⁰⁷ For example, a grizzly bear carcass was discovered southwest of Helmville, Montana in August 1998. The bear had evidently been poisoned many months prior by a cyanide gun that had been set for coyotes by Wildlife Services. See Preliminary overview of grizzly bear management and mortality 1998-2005. Montana Fish, Wildlife and Parks. LIVING WITH PREDATORS PROJECT WORKING PAPER 0004 at 29.

³⁰⁸ 1997 Programmatic FEIS (note 5) at 4-17 (“As defined by the Act an impact to even one individual of the species could constitute an unacceptable impact.”).

³⁰⁹ See 50 C.F.R. § 402.02 (an action’s “indirect effects” are “those that are caused by the proposed action and are later in time, but still are reasonably certain to occur”).

³¹⁰ 1997 Programmatic BiOp (note 88) at 38.

³¹¹ APHIS-Wildlife Services, TABLE G: ANIMALS TAKEN BY COMPONENT/METHOD TYPE AND FATE BY WILDLIFE SERVICES – FY 2012 (Sep. 30, 2012).

³¹² Another example is the black-footed ferret. The 1997 Programmatic BiOp states that program activities can adversely affect black-footed ferrets by using gas cartridges and other toxic chemicals and leg-hold traps to kill prairie dogs – specifically, black-tailed or white-tailed prairie dogs – which are the primary prey base of the black-footed ferret, and that this will adversely impact the ferret’s survival and recovery. 1997 Programmatic BiOp (note 88) at 14.

³¹³ Data Compilation (note 3).

³¹⁴ Fox, *Huff Post* (note 139).

Thus, APHIS-Wildlife Services' reported numbers do not reflect actual take given the inability of agency personnel to recover all poisoned animals.

APHIS-Wildlife Services would likely claim that it routinely consults with FWS under the ESA to consider the effects of its activities to listed species, but it cannot establish that this is in fact the case. Section 7(a)(2) consultation with FWS over the programmatic effect of APHIS-Wildlife Services activities to listed species last occurred in 1997, about 16 years ago.³¹⁵ At that time, a programmatic biological opinion (the 1997 Programmatic BiOp) concluded that program activities adversely affect many endangered and threatened species, including the Utah prairie dog, northern aplamado falcon, whooping crane, desert tortoise, blunt-nosed leopard lizard, eastern indigo snake, and San Francisco garter snake.³¹⁶ For these species, the 1997 BiOp includes an "incidental take statement" ("ITS") with mandatory terms and conditions.³¹⁷ However, there are substantial gaps in information about: the agency's activities; unreported killings, injuries, and maimings; non-target catch; secondary (indirect) and cumulative effects; and the effects from harassing activities such as dispersals. Hence, there is simply no documentation that could demonstrate that APHIS-Wildlife Services is in strict compliance with these conditions or the ESA.³¹⁸

Additionally, the 1997 Programmatic BiOp concluded that APHIS-Wildlife Services activities are likely to *jeopardize* the continued existence of six endangered and threatened species that are protected under the ESA, including the black-footed ferret, San Joaquin kit fox, Attwater's prairie chicken, Mississippi sandhill crane, California condor, and Wyoming toad.³¹⁹ Considering the ITS terms and conditions that are set forth in the 1997 Programmatic BiOp and in light of the agency's lack of transparency, APHIS-Wildlife Services simply cannot establish that it is in compliance with its mandatory "reasonable and prudent alternatives."

The agency's activities are also contributing to the need to list species under the ESA. For example, FWS proposed to list the American wolverine as threatened in February 2013 in accordance with an historic settlement agreement reached between the Center for Biological Diversity and FWS in 2011.³²⁰ In the preamble to the proposed rule to list the wolverine as threatened, FWS noted that APHIS-Wildlife Services trapped and killed a wolverine in Montana in 2010.³²¹ According to FWS, this was "possibly locally significant for wolverines in [this]

³¹⁵ 1997 Programmatic BiOp (note 88).

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ 50 C.F.R. § 402.16.

³¹⁹ *Id.*

³²⁰ 78 Fed. Reg. 7864 (Feb. 4, 2013) (proposed rule to list the wolverine as threatened species); *see also* Center for Biological Diversity, Saving the American Wolverine [available at: http://www.biologicaldiversity.org/species/mammals/American_wolverine].

³²¹ *Id.* at 7881.

area” because it occurred near a population that occurs in a small, isolated mountain range.³²² Also in 2010, Wildlife Services shot another wolverine that had been caught in a leg-hold trap in Idaho in 2010.³²³ Nonetheless, the agency has failed to confer with FWS to consider the impacts of APHIS-Wildlife Services’ activities to the wolverine.³²⁴

In addition to the wolverine, the fisher is declining toward extinction due in part to trapping, including by APHIS-Wildlife Services.³²⁵ Fisher populations are particularly sensitive to the effects of trapping because of their life-history traits, including slow reproductive rate, the sensitivity of population numbers to prey fluctuations, and the strong influence of adult survival on fisher life history.³²⁶ Removing adults from populations even by light levels of trapping can cause local extirpation, and biologists suspect that incidental trapping mortality is limiting fisher recovery in Idaho.³²⁷

In Fiscal Year 2010 alone, for example, APHIS-Wildlife Services reported killing five fishers and freeing 18 unintentionally-caught fishers.³²⁸ Fishers are difficult to remove from traps when found still alive, and suffer broken bones, hemorrhage, self-mutilation, and predation as consequences of capture; the estimated survival rate for incidentally-captured fishers after release is as low as 50 percent.³²⁹ Thus, in addition to the five fishers that are reported to have been intentionally killed by APHIS-Wildlife Services in Fiscal Year 2010, at least another nine

³²² *Id.*

³²³ WT Detail Page (note 32). Incidentally, only one of these wolverine deaths – the killing in Idaho – was reported in the program data for Fiscal Year 2010. See U.S. Department of Agriculture, APHIS-Wildlife Services, Table G: Animals Taken by Wildlife Services - FY 2011 (Sep. 30, 2010) [hereinafter “FY 2010 Program Data”].

³²⁴ 16 U.S.C. § 1536(d) (requiring federal agencies to confer to consider the impacts of federal activities to species that are proposed for listing).

³²⁵ Fishers are classified as furbearers under state codes in both Idaho and Montana. In addition to trapping by individual permit holders, however, fishers are also caught in traps set by APHIS-Wildlife Services.

³²⁶ Powell, R. A. & W. J. Zielinski, 1994, *The Fisher*, in THE SCIENTIFIC BASIS FOR CONSERVING FOREST CARNIVORES: AMERICAN MARTEN, FISHER, LYNX, AND WOLVERINE IN THE WESTERN UNITED STATES: GENERAL TECHNICAL REPORT RM-254) 38-73 (1994); Buskirk, S.W., Bowman, J. & Gilbert, J.H., *Population Biology and Matrix Demographic Modeling of American Martens and Fishers*, in BIOLOGICAL AND CONSERVATION OF MARTENS, SABLES, AND FISHERS: A NEW SYNTHESIS (2012).

³²⁷ Powell, R.A., 1979, Fishers, population models and trapping. *Wildlife Society Bulletin*, v. 7, p. 149; Powell, R.A., THE FISHER: LIFE HISTORY. ECOLOGY AND BEHAVIOR (1982); Jones, J.L., 1991, Habitat use of fishers in north-central Idaho, *M.S. Thesis, University of Idaho. Moscow*; Heinemeyer, K.S., 1993, Temporal dynamics in the movements, habitat use, activity, and spacing of reintroduced fishers in northwestern Montana, *M.S. Thesis, Univ. of Montana, Missoula*; Idaho Department of Fish and Game, THE FISHER (*MARTES PENNANTI*) IN IDAHO: HABITAT CONSERVATION ASSESSMENT (HCA) (Feb. 15, 1995).

³²⁸ FY 2010 Program Data (note 323).

³²⁹ Lewis, J.C. & Zielinski, W.J., 1996. Historical harvest and incidental capture of fishers in California. *Northwest Science*, v. 70(4), p. 291..

were likely also killed but not recorded. APHIS-Wildlife Service's killing and injuring of fishers threatens the population of fishers in the northern Rocky Mountains and is one of the reasons that the fisher now warrants protection under the ESA.³³⁰

For the foregoing reasons, Petitioners seek substantive rules that specify the substantive conservation measures and the procedures by which APHIS-Wildlife Services' activities will not result in the unlawful take any protected species, by which the program will satisfy its affirmative duty to utilize any Wildlife Services program in furtherance of the conservation of endangered and threatened species, and by which it will satisfy its affirmative duty to ensure that the program is not likely to jeopardize the continued existence of such species. 16 U.S.C. §§ 1536(a)(1), 1536(a)(2) & 1538(a)(1)(B). In addition, such rulemaking should set forth the reasonable and prudent measures and the procedures that the program will apply in order to prevent the decline of, and the need to list as endangered or threatened, any species.

b. Bald and Golden Eagle Protection Act and Migratory Bird Treaty Act

Petitioners seek promulgation of regulations to specify the substantive conservation measures and the procedures by which APHIS-Wildlife Services will ensure that strictly complies with the BGEPA and MBTA.

APHIS-Wildlife Services kills thousands of protected migratory birds every year.³³¹ Reported data show that its non-target catch of migratory birds – such as bald and golden eagles, which are protected under the BGEPA as well as the MBTA – is frequent.³³² The unreported catch is likely far greater.³³³

³³⁰ Indeed, trapping is one of the primary threats to the Northern Rockies fisher population, according to a recent petition to list the Northern Rocky Mountain population of fishers that was submitted to FWS by the Center for Biological Diversity and numerous other organizations pursuant to the ESA's citizen petition process. *See* Center for Biological Diversity, Defenders of Wildlife, Friends of the Bitterroot, Friends of the Clearwater, Western Watersheds Project & Friends of the Wild Swan, PETITION TO LIST THE NORTHERN ROCKIES DISTINCT POPULATION SEGMENT OF FISHER (*PEKANIA PENNANTI*) AS THREATENED OR ENDANGERED UNDER THE ENDANGERED SPECIES ACT (Sep. 23, 2013).

³³¹ Data Compilation (note 3).

³³² *See* Utah Division of Wildlife Resources, INITIAL REPORT OF INVESTIGATION (Dec. 2, 2003) (note 277) (describing illegal, unreported killing of golden eagle in steel-jaw leghold trap set by Wildlife Services in the Henry Mountains in Utah); U.S. Department of the Interior, U.S. Fish and Wildlife Service Office of Law Enforcement, REPORT OF INVESTIGATION (Feb 17, 2004); APHIS-Wildlife Services, MIS Legacy Report (Mar. 4, 2005) (note 231) (describing death of golden eagle in snare trap on BLM lands in Nevada in 2005); Letter from R. Merrell, Wildlife Services to Interested Parties (May 24, 2011) (describing deaths of two golden eagles from snare traps set in Wyoming in 2009).

³³³ An investigation by FWS in 1990 revealed a covert operation – performed, condoned, and/or promoted by APHIS-Wildlife Services supervisors and personnel – using poisons to kill bald and golden eagles suspected to be preying on sheep herds, including Compound 1080 (which had been prohibited for sale or use in Wyoming). Memorandum from Regional Director, FWS, Region 6 to Director, FWS, Washington, D.C., (Nov. 1990).

The BGEPA protects the bald eagle and golden eagle from harm.³³⁴ It imposes criminal penalties for the knowing, or with “wanton disregard,” take, possession, sale, or other acts that are detrimental to bald or golden eagles without a permit, and for violating any permit or regulation issued pursuant to the law.³³⁵ The BGEPA imposes civil penalties for committing prohibited acts as well.³³⁶

The MBTA establishes a federal prohibition, unless permitted by regulations, to “pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention ... for the protection of migratory birds ... or any part, nest, or egg of any such bird.”³³⁷ The original MBTA implements treaties for the protection of migratory birds between the U.S. and Great Britain (for Canada), the U.S. and Mexico, the U.S. and Japan, and the U.S. and the Soviet Union (now Russia).³³⁸ The MBTA’s prohibition applies to birds that are included in these respective international conventions. This list of birds that are protected under the MBTA is extensive.³³⁹

The BGEPA and MBTA authorize the Secretary of Interior to enforce their prohibitions and to issue permits to engage in the otherwise-prohibited acts against protected birds.³⁴⁰ APHIS-Wildlife Services must comply with these laws and obtain all necessary permits in order to take such species or otherwise commit prohibited acts in connection with control activities. Yet, although it states that it does so, neither APHIS-Wildlife Services nor FWS notify the public when it submits applications to FWS to obtain such permits. APHIS-Wildlife Services does not make available on its website all current permits that it may hold under these laws. Furthermore, even assuming that it does have such permits, such permit coverage cannot cover unreported and/or non-target catch.

³³⁴ 16 U.S.C. § 668-668d.

³³⁵ *Id.* § 668.

³³⁶ *Id.* § 668(b).

³³⁷ 16 U.S.C. § 703.

³³⁸ FWS, DIGEST OF FEDERAL RESOURCE LAWS OF INTEREST TO THE U.S. FISH AND WILDLIFE SERVICE: MIGRATORY BIRD TREATY ACT OF 1918 [available at <http://www.fws.gov/laws/lawsdigest/migtrea.html>].

³³⁹ FWS, MIGRATORY BIRD PROGRAM, LIST OF BIRDS PROTECTED BY THE MIGRATORY BIRD TREATY ACT [available at <http://www.fws.gov/migratorybirds/RegulationsPolicies/mbta/mbtintro.html>].

³⁴⁰ 16 U.S.C. 668b (BGEPA enforcement); 50 C.F.R. Part 22 (BGEPA permitting); 16 U.S.C. §§ 704 (MBTA permits) and 706 (MBTA enforcement).

c. Federal Insecticide, Fungicide and Rodenticide Act

Petitioners seek promulgation of regulations to specify the substantive measures and the procedures by which APHIS-Wildlife Services will ensure that it strictly complies with FIFRA.

The authors of the Leopold Report identified the need for regulatory restrictions on the use of toxicants by APHIS-Wildlife Services nearly 60 years ago. Concerned about the use of Compound 1080 in 1964, they urged regulation of the “distribution and the use of 1080 or any other poison capable of having a secondary effect” and admonished the program for the “need for much stricter adherence to operational rules” for its use.³⁴¹ President Nixon and DOI Secretary Andrus later sought to prohibit the use of toxicants on public lands.³⁴²

The Federal Environmental Pesticide Control Act was passed eight years later, in 1972.³⁴³ It amended FIFRA and mandated the Environmental Protection Agency (“EPA”) to regulate the use and sale of pesticides to protect public health and the environment.³⁴⁴ To that end, FIFRA section 3 requires that all new pesticides to be registered by EPA before they may be used within the United States.³⁴⁵ The EPA must classify pesticides for general or restricted use, depending on their particular risks, and must classify (or reclassify) a pesticide as “restricted” when necessary to guard against unreasonable adverse environmental effects. Restricted use pesticides may only be applied by a certified applicator or under his/her direct supervision, and application must follow all limitations on the frequency, type, location, or protective measures associated with its use.³⁴⁶

EPA classified sodium cyanide, which is used in M-44s, as a restricted use pesticide in 1994.³⁴⁷ EPA classified sodium fluoroacetate, which is used in Compound 1080, as a restricted use

³⁴¹ Leopold report (note 40) at 26-27.

³⁴² See *supra* at 12, 13.

³⁴³ Env'tl. Protection Agency, FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA): OVERVIEW OF FIFRA [available at <http://www.epa.gov/oecaagct/lfra.html>].

³⁴⁴ *Id.*

³⁴⁵ 7 U.S.C. § 136a. To be registered as a pesticide, EPA must determine that:

- Its composition is such as to warrant the proposed claims for it;
- Its labeling and other material required to be submitted comply with the requirements of the Act;
- It will perform its intended function without unreasonable adverse effects on the environment; and
- when used in accordance with widespread and commonly recognized practice, it will not generally cause unreasonable adverse effects on the environment.

Id. § 136a(c)(5).

³⁴⁶ 7 U.S.C. §§ 136 *et seq.*

³⁴⁷ EPA, R.E.D. FACTS: SODIUM CYANIDE (Sep. 1994).

pesticide in 1995.³⁴⁸ The agency placed both sodium cyanide and sodium fluoroacetate into Toxicity Category 1, reflecting the “highest degree of acute toxicity.”³⁴⁹ Although APHIS-Wildlife Services employs strychnine to poison rodents in underground burrows today, EPA has maintained restrictions on the use of above-ground, non-arboreal field use of this toxicant.³⁵⁰ The EPA has set forth 26 “Use Restrictions” for M-44s. Hence, under FIFRA, APHIS-Wildlife Services may use these poisons only in accordance with restricted conditions.³⁵¹

APHIS-Wildlife Services claims that it is in compliance with FIFRA, yet the EPA and state agricultural agencies have notified the agency of multiple violations of EPA restrictions in connection with using M-44s on federal public lands, in recreational areas, on private party without permission from landowners, in standing water, and/or close to roads.³⁵² Citizen enforcement led the EPA to fine APHIS-Wildlife Services for multiple violations of FIFRA in New Mexico.³⁵³ Notwithstanding whatever compliance with FIFRA’s requirements APHIS-Wildlife Services may claim, it cannot cover the thousands of accidental animal deaths caused by Wildlife Services’ M-44s or Compound 1080.³⁵⁴

Moreover, in many circumstances the use of pesticides to control predators simply does not comport with the purpose of FIFRA. A pest is defined as an animal that is “deleterious to man or the environment.”³⁵⁵ Yet, given their ecosystem benefits, apex predators and mesopredators

³⁴⁸ EPA, REREGISTRATION ELIGIBILITY DECISION: SODIUM FLUOROACETATE (Sep. 1995).

³⁴⁹ EPA, REREGISTRATION ELIGIBILITY DECISION (RED): SODIUM FLUOROACETATE (Sep. 1995).

³⁵⁰ PREDATORY BUREAUCRACY (note 24) at 330; EPA, REREGISTRATION ELIGIBILITY DECISION: STRYCHNINE (July 1996); Memorandum from Jane Smith, Health Effects Division, EPA to Jay Ellenberger, Special Review and Reregistration Division, STRYCHNINE, HED Chapter of the Reregistration Eligibility Decision Document (RED), Case #3133 (Jan. 22, 1996).

³⁵¹ 7 U.S.C. § 135(t) (definition of “pest”); *id.* § 135(u) (definition of “pesticide”).

³⁵² See Letter from M. Chalfant and D. Janik, Region 8, Environmental Protection Agency to M. Linnell, Utah State Director, APHIS-Wildlife Services (Mar. 20, 2008); Texas DOA Notice of Violation (note 188) (notifying APHIS-Wildlife Services employee of violations of use restrictions for M-44, which was placed “less than six-tenths of a mile from [a] house near roadways that [resident], her family, and family’s dog frequently traveled” and which killed the family dog); Wright Affidavit (explaining how M-44 that killed family dog was “sitting in a pool of water that was overflow from the irrigation ditch,” in violation of EPA Use Restriction 12).

³⁵³ New Mexico Department of Agriculture, Investigative Report, Consent Agreement and Final Order for Case No. 96-24 (fining APHIS-Wildlife Services \$1,000 in 1994 for illegally placing several M-44s in the Gila National Forest).

³⁵⁴ *M-44s* (note 14) (“Agency records show that more than 3,400 animals have been mistakenly killed by M-44s since 2006, including black bears, bobcats, raccoons, opossums, ravens, ringtails, red fox, gray fox, kit fox, swift fox, turkey vultures and dogs.”); 1997 Programmatic FEIS (note 5) at 3-46-47 (acknowledging that non-target species may be inadvertently attracted to baits placed for other species”; for example, “swift foxes may be attracted to the bait placed for coyotes or other canids, resulting in ... death by an M-44”).

³⁵⁵ 40 C.F.R. § 152.5(a).

such as wolves and coyotes are not “deleterious to man or the environment” – to the contrary, they have tremendous environmental benefits.³⁵⁶ Therefore, they cannot accurately be classified as “pests.”

Thus, a rulemaking is necessary in order to ensure that Wildlife Services complies with FIFRA; the circumstances in which toxicants such as M-44s, Compound 1080, strychnine, or any new toxicants may be used, if at all, and if so, where they may be used; and the strict consequences for agency personnel who violate such rules are minimal requisites.

d. National Environmental Policy Act

Petitioners seek promulgation of regulations to specify the procedures by which APHIS-Wildlife Services will ensure strict compliance with NEPA.

NEPA requires federal agencies to analyze the environmental impact of a particular federal action before proceeding with that action. 42 U.S.C. § 4332(2)(C). NEPA is designed to “insure that environmental information is available to public officials and citizens before decisions are made and actions are taken,” and to “help public officials make decisions that are based on understanding of environmental consequences” *Id.* § 1500.1(b)-(c). “Public scrutiny [is] essential to implementing NEPA.” *Id.*

To accomplish these purposes, NEPA requires all federal agencies to prepare a “detailed statement” regarding all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). This statement is known as an environmental impact statement (“EIS”). The EIS is the cornerstone of NEPA. An EIS is required for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). An agency may first prepare an environmental assessment (“EA”) to determine whether an EIS is required. *See* 40 C.F.R. § 1501.4(b).

An EA must take a “hard look” at the potential consequences of the proposed action and provide enough evidence and analysis for determining whether to prepare an EIS or a “finding of no significant impact.” After preparing an EA or EIS, NEPA requires an agency to prepare a supplemental NEPA analysis when “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or...[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed actions or its impacts.” 40 C.F.R. § 1502.9(c)(1).

A “programmatic” FEIS for the APHIS-Wildlife Services program is more than 15 years old and is outdated.³⁵⁷ Currently, APHIS-Wildlife Services routinely prepares EAs under NEPA to consider the effects of its activities in various areas around the country. The focus of these EAs is generally limited to activities related to the killing of predators and other so-called injurious

³⁵⁶ *See supra* at 27-28.

³⁵⁷ 1997 Programmatic FEIS (note 5).

animals; these EAs do not encompass the full scope of APHIS-Wildlife Services' activities or consider the consequences of these activities to biodiversity. Indeed, APHIS-Wildlife Services is already aware that it is out of compliance with NEPA with regard to numerous old EAs.³⁵⁸

For example, APHIS-Wildlife Services' EAs do not provide any information about the cumulative impact of APHIS-Wildlife Services' activities to ecosystems or rigorously analyze or consider alternatives to standard agency practices. The risk assessment for the 1997 Programmatic FEIS assumed that "no individual application" of any one of the dozens of chemical control methods used by APHIS-Wildlife Services will cause an "adverse nontarget exposure," and therefore, the total, programmatic exposure from the program would be negligible.³⁵⁹ As discussed above, however, this stands in stark contrast to numerous examples of adverse non-target exposures since 1997.

APHIS-Wildlife Services EAs are also often out of date and do not reflect changes in state trapping laws. For example, in California APHIS-Wildlife Services relies on four district EAs that have not been updated since the 1998 passage of Proposition 4, which prohibited certain traps and poisons statewide.

Therefore, a rulemaking is necessary to set regulatory procedures that govern APHIS-Wildlife Services' NEPA compliance, including rules to specify when programmatic environmental reviews and site-specific environmental analyses are necessary and when they must be updated. Frequent reviews of the program under NEPA are the only way to ensure that the public has an ongoing opportunity to guide the program and that program activities are based on current scientific understanding, knowledge, and societal values.

e. Fish and Wildlife Act

The FWA prohibits anyone from shooting any animal from an aircraft without a license or permit.³⁶⁰ APHIS-Wildlife Services engages in aerial gunning of wildlife, including wolves and coyotes – primarily on behalf of livestock and hunting interests. However, it is not clear that the agency has obtained the necessary permission to carry out these activities under the FWA.³⁶¹ Therefore, a rulemaking is necessary to set the regulatory procedures for FWA compliance as well.

³⁵⁸ See, e.g., Email from Alton Dunaway, APHIS-Wildlife Services to William H. Clay, APHIS-Wildlife Services (July 13, 2010) ("O[regon] has done almost nothing to help with their predator EA for the last 6 - 8 months and has not even cooperated in establishing a time schedule to complete the EA."); Email from Alton Dunaway, APHIS-Wildlife Services to William H. Clay, APHIS-Wildlife Services (July 8, 2010) (noting legal vulnerability of several outdated EAs).

³⁵⁹ 1997 Programmatic FEIS (note 5) at 4-29.

³⁶⁰ 16 U.S.C. § 742j-1.

³⁶¹ Evidently, APHIS-Wildlife Services does not even know how much it spends on aerial gunning, *supra* note 238, so it pushes belief that that is all of the necessary permits to carry out this activity.

f. Invasive Species Control

As a final note, Petitioners acknowledge the adverse impact that some invasive species have on endangered and threatened species. Invasive species have been identified as one of the greatest threats to imperiled species in the United States. Petitioners note the efforts of APHIS-Wildlife Services to study and control invasive species to mitigate such impacts.

That said, Petitioners note two important guiding principles. First, it is imperative that regulations are promulgated to guide the program's invasive species control activities informed by comment from the public including non-governmental organizations, the scientific community, experts, ethicists, and academics. Second, such regulations must include criteria for transparent determinations of whether specific invasive species conflicts warrant a response by APHIS-Wildlife Services and how such conflicts should be addressed, ensuring humane treatment of animals, while reducing/eliminating impacts on non-target species. Petitioners recognize the value of invasive species control using humane, effective and selective techniques at the site- and species-specific level in order to protect and recover federally-listed endangered and threatened species, but do not favor the preventative killing of species over large geographic areas at the behest of livestock, agricultural, or other interests under the auspices of invasive species control.

V. CONCLUSION

For all of the foregoing reasons, Petitioners seek promulgation of rules to set forth a clear, consistent regulatory scheme for Wildlife Services, to ensure program transparency, reliability, humaneness, and compliance with all federal laws that protect and conserve wildlife, including the ESA, BGEPA, MBTA, FIFRA, FWA, NEPA, and other authorities.

Thank you for your consideration. We look forward to a timely response.

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