EARTHJUSTICE

November 5, 2020

By Email and FedEx

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Re: Notice of Violation of the Endangered Species Act: 2020 Gray Wolf Delisting Rule, 85 Fed. Reg. 69,778 (Nov. 3, 2020)

Greetings:

On behalf of Defenders of Wildlife, Center for Biological Diversity, Sierra Club, Oregon Wild, National Parks Conservation Association, and The Humane Society of the United States,[1] we write to provide you notice, pursuant to 16 U.S.C. § 1540(g), that the U.S. Fish and Wildlife Service's ("FWS") decision to remove gray wolves in the lower-48 states from the list of endangered species violates the Endangered Species Act ("ESA").

FWS issued the Final Wolf Delisting Rule on October 29, 2020, with publication in the Federal Register on November 3, 2020, under the title "Endangered and Threatened Wildlife and Plants; Removal of the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife." 85 Fed. Reg. 69,778 (Nov. 3, 2020). The Delisting Rule will become effective 60 days following Federal Register publication on January 2, 2021. Unless FWS withdraws the Final Wolf Delisting Rule and remedies the ESA violations, at the end of 60-days' time, we will commence litigation to challenge and vacate the Rule.

Hunted, trapped, and poisoned with the approval of the predecessor of the FWS, by 1967 there were fewer than 1,000 gray wolves remaining in one small part of northeastern Minnesota with an isolated population on Isle Royale National Park in Lake Superior. FWS protected gray wolves, *Canis lupus*, throughout the United States under the ESA in 1978 as two groups, a

[1] We have attached a list of these organizations' business addresses to the end of this letter.

threatened population in Minnesota and an endangered population in the rest of the lower-48 states. Final Wolf Delisting Rule, 85 Fed. Reg. at 69,780, Table 1. Today, there are recovering wolf populations in Minnesota, Wisconsin, Michigan, and the Northern Rocky Mountains; wolves have begun to inhabit the Pacific Northwest and California; and wolf habitat remains explored but largely unclaimed in states like the Dakotas, Maine, Colorado, and Utah. Slowly, with the ESA's protections, nationwide wolf recovery is moving forward.

Yet for more than a decade, FWS has proposed increasingly more tenuous delisting rules that federal courts have consistently rejected as invalid. In this series of prior delisting rules, FWS sought to remove ESA protections from gray wolves by splitting the population into small segments in order to declare each of those smaller segments recovered. Every time, federal courts struck down FWS wolf delisting rules for not only ignoring the vast amount of available wolf habitat still largely unoccupied, but also for purposefully leaving out "remnant" populations outside of the delisting area. *See* Final Wolf Delisting Rule, 85 Fed. Reg. at 69,780-81, Table 1—Key Federal Regulatory Actions under the Act and Predecessor Legislation pertaining to Gray Wolf and, Where Applicable, Outcomes of Court Challenges to these Actions.

Undaunted by this history of repeated unlawful actions, FWS has now finalized a nationwide delisting rule, once again eliminating all federal protections for these wolves. FWS justifies delisting by combining populations, ignoring available historical wolf habitat, and discarding relatively new wolf populations outside the Midwest as "colonizers" unnecessary to the survival and recovery of wolves in the Midwest.

Gray wolves still meet the ESA's definition of an endangered species, one that is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). FWS's Final Wolf Delisting Rule does not satisfy the ESA requirements that FWS may only delist species that are fully recovered and protected by adequate regulatory mechanisms, as well as the Administrative Procedure Act ("APA") requirement that agency decisions must show a rational connection between the facts found and the choices made. Specifically, in delisting gray wolves nationwide, FWS

- ignored the ESA's requirement that any delisting decision concerning wolves listed in the lower-48 states must consider the entire population, not merely wolves in the Midwest;
- failed to provide for a sustainable wolf population after delisting;
- failed to analyze and address the importance of lost historical habitat;
- did not rationally assess the status of gray wolves within significant portions of their current range;
- failed to use the best available science; and
- invalidly measured recovery using an out-of-date and geographically restricted recovery plan.

I. FWS FAILED TO EVALUATE THE DELISTING FACTORS FOR THE ENTIRE LOWER-48 GRAY WOLF POPULATION.

The ESA seeks to protect and recover imperiled species and populations by listing them as threatened or endangered based on enumerated statutory factors, 16 U.S.C. § 1533(a)(1)(A)-(E), using the "best scientific and commercial data available. 16 U.S.C. § 1533(b). The listing provisions are contained in section 4 of the ESA—the section Congress labeled the "cornerstone of effective implementation" of the Act. S. Rep. No. 97-418, at 10 (1982).

The ESA requires FWS to analyze the five listing/delisting factors of section 4(a), 16 U.S.C. § 1533(a)(1), as they apply to the protected entities. These factors are:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence.

FWS must use the best available science in its analysis. 16 U.S.C. § 1533(a)(1), (b)(1)(A).

On the basis of these factors, for delisting, FWS must determine whether a species has recovered and no longer meets the listing factors. The delisting evaluation must focus on the relevant species that was originally listed. Here, the relevant "species" are the Minnesota and lower-48 states' wolf populations. *See* 43 Fed. Reg. 9607 (March 9, 1978) (listing wolves in Minnesota as threatened and wolves in the lower-48 U.S. states and Mexico as endangered).

Yet in the Final Wolf Delisting Rule, FWS's analysis of the section 4(a) listing/delisting factors focused nearly exclusively on the wolf population in Minnesota, Michigan, and Wisconsin. FWS analyzed some of the factors for wolves in Washington, Oregon, and California, but only to determine how those populations affected wolves in the Midwest. FWS provided no section 4(a) analysis for significant portions of the wolf's range, such as the Northeast or the southern Rocky Mountains. The ESA prohibits limiting analysis of the section 4(a) factors to only a portion of the listed entity. "The Endangered Species Act's text requires the Service, when reviewing and redetermining the status of a species, to look at the whole picture of the listed species, not just a segment of it." *Humane Soc'y v. Zinke*, 865 F.3d 585, 601 (D.C. Cir. 2017) (rejecting FWS attempt to designate and delist a gray wolf Western Great Lakes DPS).

The appellate court in *Humane Society* was particularly concerned about the fate of a "remnant" population—such as the wolves in the Pacific Northwest, a portion of a listed entity left out of importance through redefinition or delisting. Without assurances that the remnant population would remain a protectable species, FWS could later attempt to delist those wolves on the theory that they no longer comprise a listable entity. 865 F.3d at 601-03. This outcome

would violate the ESA. *Id.* (FWS's "disregard of the remnant's status would turn … [the DPS] process into a backdoor route to the *de facto* delisting of already listed species, in open defiance of the Endangered Species Act's specifically enumerated requirements for delisting"). To guard against that result, the D.C. Circuit held that FWS "must make it part and parcel of its segment analysis to ensure that the remnant, if still endangered or threatened, remains protectable under the Endangered Species Act." *Id.* at 602. That is precisely what FWS has failed to do here.

FWS has tried this before, with the 2003 rule that attempted to create three new wolf DPSs and downlist two of them. *See Defenders of Wildlife v. Norton*, 354 F. Supp. 2d 1156, 1170-72 (D. Or. 2005) and *Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553, 564-65 (D. Vt. 2005). The courts invalidated FWS's attempt because it only assessed the status of core population portions of the new DPSs and did not apply the statutory listing factors outside of those areas. *Defenders of Wildlife*, 354 F. Supp. 2d at 1172 ("The Final Rule is arbitrary and capricious because FWS downlisted major geographic areas without assessing the threats to the wolf by applying the statutorily mandated listing factors."); *Nat'l Wildlife Fed'n*, 386 F. Supp. 2d at 565 ("The FWS simply cannot downlist or delist an area that it previously determined warrants an endangered listing because it 'lumps together' a core population with low to non-existent populations outside of the core area.").

Here, instead of carving out a DPS from the larger entity to delist (as in 2011) or dividing the larger entity into multiple DPSs to downgrade or delist (as in 2003), FWS has delisted a combined entity. But, as before, FWS failed to assess the currently listed entities, separately or combined, under the statutory listing factors and instead relied on the status of core populations (in the Midwest) to justify delisting a much larger area. Large swaths of the lower-48 gray wolf population will lose ESA protections even though FWS failed to assess the status of those wolves under the statutory listing factors. FWS's approach violated the plain language of the ESA and contradicted the reasoning behind the decisions in *Humane Society, Defenders of Wildlife*, and *National Wildlife Federation*.

In fact, FWS considered these combined populations together and delisted "the gray wolf entity" in part because "neither of the listed entities [Minnesota or the lower-48 population] is a DPS." 85 Fed. Reg. at 69,784. But regardless of whether the Minnesota and Lower-48 listings would be lawful under the subsequently enacted DPS Policy, it is not a lawful solution to create yet another violation of the Endangered Species Act. FWS cannot validly consider a new 'combined' population for delisting; the analysis must be of "species included in a list." 16 U.S.C. § 1533(c)(2).

II. FWS'S DELISTING RULE DOES NOT PROVIDE FOR A SUSTAINABLE WOLF POPULATION AFTER DELISTING.

Under the ESA, FWS must determine whether the lower-48 gray wolf entity remains endangered or threatened because of any of five factors, including "the inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D). If delisting is finalized, each individual

state would handle wolf management. While some states have welcomed wolves, some are hostile to wolf recovery, some favor trophy hunting over sustainable populations, and some have no plans at all. In Minnesota, without federal protection, landowners within approximately 60 percent of the state could kill wolves to protect livestock or pets even when there is no immediate threat. State management of wolves following delisting does not have a pretty history; in Montana and Idaho – where Congress ordered wolf delisting over scientific and legal objection – state wildlife agencies are managing wolves to drive down the population numbers and put wolf hunting ahead of other concerns.

FWS's review of state wolf management plans in Washington, Oregon, and California is inadequate. *See* 85 Fed. Reg. at 69,835-37. California only recently adopted its wolf management plan, and its effectiveness is uncertain. All three West Coast states opposed federal delisting.[2] Oregon recently adopted a new wolf management plan, and Oregon has already removed gray wolves from its state endangered species list without sufficient scientific justification as well as legislatively blocked judicial review of this decision. Washington's state wolf management plan has been controversial, has led to multiple years of state lethal control actions, and may not be robust enough to ensure permanent recovery. Following delisting, Washington will need to promulgate rules, for the first time, to govern wolf management. Other states, such as Wisconsin, have indicated that they intend to manage gray wolves to the minimum population level needed to prevent them from again warranting ESA protections, which is not the path to nationwide recovery.

Only eight states protect wolves as a state endangered or threatened species.[3] The majority of states within the lower 48 have no protections in place for gray wolves;[4] several of these states lack any plans or protections for wolves, even though wolves have dispersed into those states, including Indiana, Kentucky, Massachusetts, Maine, Missouri, Ohio, Utah and Vermont. *See* 78 Fed. Reg. at 35,675 (noting in the 2013 proposed nationwide delisting that wolves have been seen in Missouri and Indiana but no regulatory mechanisms relating to wolves exist in those states). Other states seek to actively prevent recovery of the species. For example, Utah requires state wildlife officials to capture and kill any wolf that comes into the state to prevent the establishment of a viable wolf pack. Utah Code § 23-29-201. South Dakota in 2013 passed legislation designating wolves in the eastern half of the state as "varmints" that can be

[2] As did Minnesota and Michigan.
[3] California, Colorado, Illinois, Nebraska, New Hampshire, New York, Texas, Virginia, and Washington. In Colorado, although results are not yet official, voters appear to have passed a ballot initiative to require the Colorado Parks and Wildlife Commission to create and implement a plan to reintroduce gray wolves into Colorado west of the Continental Divide by December 2023. 85 Fed. Reg. at 69,837.
[4] Alabama, Arkansas, Arizona (portion outside of Mexican wolf range), Connecticut, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Massachusetts, Maryland, Maine, Missouri, Mississippi, North Carolina, New Jersey, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, and West Virginia.

shot on sight. S.D. Codified Laws § 41-1-1. Other states with wolves within their borders have classified wolves as furbearers or game animals and would likely allow regulated hunting and trapping and livestock predation control upon removal of federal protections, including Iowa, Kansas, Michigan, Minnesota, Nevada, North Dakota, Oregon, South Dakota, Washington, and Wisconsin. Several of these states have committed to managing wolves for an aggressive population decline following delisting, on the basis of inadequate and out-of-date management plans that do not reflect the best available science regarding the super-additive effects of hunting mortality on wolf populations or the population sizes necessary to maintain wolves' genetic viability over the short and long term. Such management measures constitute inadequate regulatory mechanisms that continue to threaten wolves.

III. FWS FAILED TO ANALYZE THE IMPORTANCE OF LOST HISTORICAL RANGE FOR THE LISTED LOWER-48 WOLVES.

FWS's delisting rule is also flawed in its treatment of historical range. The ESA defines endangered and threatened species as "any species which is in danger of extinction or is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range...." 16 U.S.C. § 1532(6), (20) (emphasis added). The ESA does not define the phrase "significant portion of its range"; nor does it define the words "significant" or "range" as they are used in that phrase. In *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001), the Ninth Circuit held that "a species can be extinct 'throughout … a significant portion of its range' if there are major geographical areas in which it is no longer viable but once was." (emphasis added). In *Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 876-77 (9th Cir. 2009), the court held that while the criteria for "significance" was undefined, FWS must "develop some rational explanation for why the lost and threatened portions of a species' range are insignificant before deciding not to designate the species for protection." *See also id.* at 878 (upholding FWS's flat-tailed horned lizard's lost historical range analysis).

This interpretation of "range" to include historical range came before the adoption of FWS's final policy on the interpretation of this phrase ("SPR Policy"), 79 Fed. Reg. 37,578 (July 1, 2014). Since adoption of the SPR Policy, two appellate courts upheld FWS's SPR Policy interpretation of "range" to mean "current range." *See Humane Soc'y v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017) and *Center for Biological Diversity v. Zinke*, 900 F.3d 1053 (9th Cir. 2018). Both courts, however, stressed that the ESA required FWS to consider lost historical range:

> The SPR policy still requires that FWS consider the historical range of a species in evaluating other aspects of the agency's listing decision, including habitat degradation. The SPR policy recognizes that loss of historical range can lead to reduced abundance, inhibited gene flow, and increased susceptibility to extinction.

CBD v. Zinke, 900 F.3d at 1067 (citations omitted). The D.C. Circuit was even clearer that FWS must account for lost historical range in its listing and delisting decisions, in particular because FWS's SPR Policy interprets range as current range only:

> We hold that [FWS's] analysis of the status of the Western Great Lakes segment [of gray wolves] within its current range wrongly omitted all consideration of lost historical range. Just because the Endangered Species Act does not compel the Service to interpret "range" to mean historical range, that does not mean that the Service can brush off a substantial loss of historical range as irrelevant to the species' endangered or threatened status.
> …
> [A]n adequate evaluation of the threats confronting the survival of a species within its current range requires looking at more than just the current moment in time. The Service, consistent with its own Range Policy, also needs to consider the scope of the species' historical range, and the impact that material contraction or relocation might indicate for survival within a currently constricted or confined range.

Humane Soc'y v. Zinke, 865 F.3d at 605-06 (vacating FWS rule designating gray wolves in eight Midwestern states as the Western Great DPS and delisting that newly designated DPS).

The facts before FWS with respect to gray wolf historical habitat have not changed since the *Humane Soc'y* ruling: "[G]ray wolves have been extirpated from most of the southern portions of their historical North American range," with undisputed estimates that "95% of the gray wolf's historical range has disappeared." *Id.* at 606. And as before, FWS has failed to analyze the impact of that loss of historical range on the survival of the gray wolves as a whole or in various segments. FWS's delisting rule discussed historical range and abundance of gray wolves (85 Fed. Reg. at 69,786 and Figure. 2) and contained a section entitled historical context (85 Fed. Reg. at 69,792). Yet FWS actively omitted lost historical range in its actual delisting analysis. *Id.* at 69,853 ("In other words, we interpret 'range' in these definitions to be current range, i.e., range at the time of our analysis."). This omission is particularly problematic with respect to areas in the Northeast as there is no analysis at all of how that lost range affects the viability of wolf populations in other areas.

IV. FWS DID NOT RATIONALLY ASSESS THE STATUS OF GRAY WOLVES WITHIN SIGNIFICANT PORTIONS OF THEIR CURRENT RANGE.

While failing to consider the impact to gray wolves of their lost historical range, FWS also arbitrarily failed to assess the gray wolf's status within "significant portion[s] of its range," 16 U.S.C. § 1532(6), which FWS defines as current range.

A. Current Range Cannot Be Limited to Identified Wolf Populations.

FWS dismissed threats to wolves in significant portions of their range by improperly constricting its definition of "current range." FWS has acknowledged documented wolves in Vermont, Massachusetts, New York, Indiana, Illinois, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas, Colorado, Utah, Arizona, and Nevada over the last twenty years. 85 Fed. Reg. at 69,789. Independent reviews have documented wolves in many more states. *See* Petition to Maintain Protections for Gray Wolves (*Canis lupus*) in the Lower 48 States as Endangered or Threatened "Distinct Population Segments" Under the Endangered Species Act at 30 (December 17, 2018), https://www.biologicaldiversity.org/campaigns/gray_wolves/pdfs/Wolf-Petition-12-17-2018.pdf.[5] FWS, however, did not consider these areas to be part of the gray wolf's current range because they exist outside of established wolf packs or breeding pairs in the Midwest and Pacific Northwest. 85 Fed. Reg. at 69,789 ("In sum, gray wolves in the lower 48 United States today exist primarily as two large metapopulations: one spread across northern Minnesota, Michigan, and Wisconsin, and the other consisting of the recovered and delisted NRM DPS wolf population that is biologically connected to a small number of colonizing wolves in western Washington, western Oregon, northern California, and, most likely, Colorado.").

The Service has failed to offer a rational explanation for why the gray wolf's current range should exclude other areas where wolves recently have been documented and could repopulate with continued protections under the ESA. Limiting current range in such a way is not consistent with the FWS's own policy that defines range to encompass the "general geographical area within which the species is currently found, including those areas used throughout all or part of the species' life cycle, even if not used on a regular basis." SPR Policy, 79 Fed. Reg at 37583 (emphasis added).

B. The Delisting Rule Lacks Adequate (or Any) Discussion of Suitable Wolf Habitat in the Southern Rockies and the Northeast.

Although earlier delisting attempts more thoroughly surveyed suitable wolf habitat in Colorado, Utah, and the northeast United States, the delisting rule is virtually silent on wolves and wolf habitat in these areas. The lack of established wolf packs in Colorado, Utah, and New Mexico is instead used as an excuse to avoid consideration of suitable wolf habitat there, a formulation that turns ESA decisions upside-down. Prior habitat modeling has suggested that Colorado alone could support a population of over 1,000 wolves (Carroll et al. 2006), yet the delisting rule only notes that individual wolves have been confirmed in Colorado and other states.

[5] In the Delisting Rule, FWS also denied this Petition without rational justification, summarily and unjustifiably finding that the petition did not present substantial scientific or commercial information indicating that the petitioned actions were warranted. 85 Fed. Reg. at 69,778, 69,878-79.

The delisting rule also ignores northeast wolves and suitable wolf habitat in the northeast entirely, contrary to the 2013 proposed wolf delisting rule and other prior wolf planning documents. FWS defended this analysis gap by again asserting that any wolf populations outside the Great Lakes region are unnecessary for gray wolf recovery.

C. Wolves in the Lower-48 Remain Imperiled Throughout a Significant Portion of their Range.

In addition to misapplying the term "range" to exclude occupied portions of the gray wolf's current range, FWS arbitrarily assessed whether portions of the gray wolf's range are "significant." 16 U.S.C. § 1532(6). In the delisting rule, FWS repeated its circular definition of significant that had already been rejected by courts. *See Desert Survivors v. U.S. Dep't of Interior*, 321 F. Supp. 3d 1011 (N.D. Cal. 2018); *see also Center for Biological Diversity v. Jewell*, 248 F. Supp. 3d 946 (D. Ariz. 2017). Under FWS's SPR Policy, listing a species based on threats in a significant portion of its range would be considered warranted only if three conditions were satisfied: (1) the species was neither endangered nor threatened throughout all of its range, (2) the portion's contribution to the viability of the species was so important that, without the members in that portion, the species would be endangered or threatened throughout all of its range, and (3) the species was endangered or threatened in that portion of its range. *See* 79 Fed. Reg. at 37,582-83. The courts rejected FWS's position as "illusory," because "if a portion of a species' range is so vital that its loss would render the entire species endangered or threatened, and the species is endangered or threatened in that portion, then the entire species is necessarily endangered or threatened. Threats that render a species endangered or threatened in such a vital portion of its range should necessarily be imputed to the species overall." *Center for Biological Diversity v. Jewell*, 248 F. Supp. 3d at 956 (emphasis added). The district court in *Desert Survivors* vacated the "significant portion" part of the SPR Policy nationwide. *Desert Survivors*, 336 F. Supp. 3d 1131, 1134-37 (N.D. Cal. 2018). While the Proposed Delisting Rule acknowledged the nationwide injunction against applying the SPR significance definition, 84 Fed. Reg. at 9684, the Final Delisting Rule does not mention the nationwide injunction at all.[6]

FWS asserted that for the delisting rule, it would ask "whether any portions of the range may be biologically meaningful in terms of resiliency, redundancy, or representation of the entity being evaluated." 85 Fed. Reg. at 69,878. And yet, FWS then turned to precisely the disallowed standard from *Desert Survivors*, asserting that, for each of the combinations of wolf populations considered "these portions are not "'significant' under any reasonable definition of that term because they are not biologically meaningful to the [listed] entity in terms of its resiliency, redundancy, or representation." *Id.* at 69,882, 69,885, 69,888, 69,889, 69,892, 69,893.

[6] Because FWS relied on the SPR Policy, 79 Fed. Reg. 37,578 (July 1, 2014), to justify in part its Delisting Rule, Defenders of Wildlife *et al*. will also challenge that policy, and the SPR significance definition as applied here because the SPR policy is unlawful on the same basis as found in *Desert Survivors*.

Whatever the appropriate definition of significant portion of range may be, it cannot be the same illusory definition rejected by the federal courts.

FWS relied on the metric of representation, redundancy, and resiliency (the "3Rs") to assess whether an area is significant, focusing on how the current population in a particular portion contributes to the 3Rs. But FWS's use of the 3Rs metric was unreasonable and contrary to the conservation purpose of the ESA because it bars any area that lacked a recovered population from being considered a "significant" portion.

For example, FWS dismissed wolves on the west coast because only a small number of animals currently live there. Yet this position means that a species would never need to be recovered in any portion of its historical range because a tiny population could never meaningfully contribute to the 3Rs. FWS's interpretation eviscerates the ESA's conservation purpose. 16 U.S.C. §1531(b).

FWS also denigrates Pacific wolves as "colonizing wolves" from the Northern Rocky Mountains whose presence is unnecessary for wolf recovery. "In sum, gray wolves in the lower 48 United States today exist primarily as two large metapopulations: One spread across northern Minnesota, Michigan, and Wisconsin, and the other consisting of the recovered and delisted NRM DPS wolf population that is biologically connected to a small number of colonizing wolves in western Washington, western Oregon, northern California." 85 Fed. Reg. at 69,789; *id.* at 69,894 (these wolves "are part of the recovered and delisted population of gray wolves in the NRM DPS.").

Yet when the Northern Rocky Mountain DPS was carved from the lower-48 listing, FWS found that it was discrete from any wolves that could repopulate the west coast states due to the stretches of unsuitable habitat between them. 73 Fed. Reg. 10,518, 10,519 (Feb. 27, 2008). FWS's new position (that the coastal wolves are not discrete from the Northern Rocky Mountain DPS) raises red flags, as a prime example of the disappearing remnant population that the *Humane Society* court cautioned against—carving a DPS out of a larger listing only to turn around and declare that the remnant is no longer a valid DPS and therefore unlistable. *Humane Soc'y*, 865 F.3d at 603 ("The Service cannot circumvent the Endangered Species Act's explicit delisting standards by riving an existing listing into a recovered sub-group and a leftover group that becomes an orphan to the law.").

Finally, FWS determined that there are no significant portions of the gray wolf's range because the single gray wolf population that resides in the three Western Great Lakes states—Minnesota, Michigan and Wisconsin—is neither threatened nor endangered. This analysis flies in the face of years of court decisions. In litigation challenging a rule very similar to the proposed delisting Rule here, two federal courts invalidated FWS's decision to downlist gray wolves in large portions of the species' range where it had not recovered based on the viability of two core populations. *See Defenders of Wildlife v. Norton*, 354 F. Supp. 2d 1156, 1168 (D. Or. 2005) ("The Secretary's conclusion that the viability of two core populations in the Eastern and

Western DPSs makes all other portions of the wolf's historical or current range insignificant and unworthy of stringent protection is contrary to Ninth Circuit precedent and the ESA.") and *Nat'l Wildlife Fed'n v. Norton,* 386 F. Supp. 2d 553, 565 (D. Vt. 2005) ("The FWS simply cannot downlist or delist an area that it previously determined warrants an endangered listing because it 'lumps together' a core population with a low to non-existent population outside of the core area.").

V. THE DELISTING RULE FAILS TO USE THE BEST AVAILABLE SCIENCE.

Under the ESA, FWS is required to make listing and delisting determinations "solely on the basis of the best scientific and commercial data available[.]" 16 U.S.C. §1533(b)(1)(A). In issuing the Gray Wolf Delisting Rule, FWS violated this requirement, disregarding science and otherwise acting arbitrarily. While FWS offered responses to the peer review critiques in the Final Delisting Rule, *see* 85 Fed. Reg. at 69,844-56 (Comment 1-46), the responses did not change FWS's decision to delist nor its reasoning in support of delisting.[7]

The independent peer reviewers chosen by FWS expressed serious concerns about the proposed delisting rule and its failure to use the best available science. Summary Report of Independent Peer Reviews for the U.S. Fish and Wildlife Service Gray Wolf Delisting Review (May 2019). All five reviewers identified unclear or missing information in the Draft Biological Report and Proposed Delisting Rule, particularly with the Service's "inadequate treatment of the [distinct population segment] structure of gray wolves in the lower 48 states." Summary Report, App. C, Reviewer 1 – Dr. Fred W. Allendorf at 3.

Dr. Carlos Carroll criticized the proposed delisting rule for its failure to "build on the assembled scientific information [in the biological report] to provide coherent factual support or logical explanation for the agency's conclusions." Summary Report, App. C, Reviewer 2 – Dr. Charles (Carlos) Carroll at 5. Dr. Carroll questioned the proposed rule's "lack of detail and rigor in the treatment of genetic issues," *id.* at 6, as an "extreme oversimplification of the genetic structure of wolf metapopulations at regional and continental extents," *id.* at 7. This concern was echoed by multiple public commenters, who noted that the best available science showed that genetic health remained a threat to wolves across the listed entity and criticized FWS's failure to adequately consider the minimum viable population and effective population sizes necessary to ensure long-term genetic viability. Dr. Carroll also highlighted how the proposed rule's central tenet – that the loss of all gray wolf populations outside the Great Lakes region in Minnesota and Wisconsin would not threaten the listed entity – depends on a truncated view of the ecological concept of range and the specifics of range dynamics. *Id.* at 8-9, 16. Neither does the proposed

[7] The Final Delisting Rule also failed to consider a recent article published in BioScience authored by Dr. Carroll and others entitled "Wolf Delisting Challenges Demonstrate Need for an Improved Framework for Conserving Intraspecific Variation under the Endangered Species Act," available at https://academic.oup.com/bioscience/advance-article/doi/10.1093/biosci/biaa125/5941853 and attached to this letter.

rule use the ecological concepts of resiliency, redundancy, and representation correctly. *Id.* at 11-12.

Another area of deep concern from the independent scientists centered on the almost complete omission of information on suitable habitat in regions such as Utah, Colorado, and the northeast U.S. *See* Carroll at 18-22; Treves at 6. As Dr. Carroll noted, "in 2008, the FWS embarked on an effort to develop a National Wolf Strategy through the use of a 'Structured Decision Making' (SDM) process designed to develop a comprehensive strategy for gray wolf conservation by identifying appropriate wolf listing units within the broader continental distribution of the species as a whole." Although the process was flawed, "this process at least provided a comprehensive analysis of what recovery efforts would be appropriate in the different regions which still held suitable habitat for the species. … This current proposed rule, in contrast, omits substantive treatment of two regions which were previously considered to merit consideration because they hold substantial suitable habitat: the Colorado/Utah assessment unit and the area of the northeast US proposed in the SDM process to be occupied by the eastern wolf (putative *C. lycaon*)." *Id.* at 14.

Dr. Adrian Treves found that "the proposed rule does not address human-caused mortality or habitat suitability adequately," Summary Report, App. C, Reviewer 4 – Dr. Adrian Treves at 1, 9-21, and that the "conclusions drawn about current range, vacant habitats, and northeastern USA gray wolves were not well substantiated. My scientific judgment is that the gray wolf entity's current range is not defined well by scientific standards." *Id.* at 4; *see also id.* at 5-9 ("The scientific basis of the gray wolf entity and its range seems questionable on scientific grounds because I found neither consistent terminology for subpopulations of current wolves, nor consistent handling of data on dispersal, discreteness, range, or status across the entity.").

Dr. MacNulty disagreed with the proposed rule's determination that western listed wolves were not discrete from eastern wolves. "I found no scientific information in the Proposed Rule or Draft Biological Report supportive of the Service's interpretation that western listed wolves are not discrete from wolves in Minnesota, Wisconsin, and Michigan. Rather, the Proposed Rule and the Draft Biological Report supply scientific information that supports the opposite interpretation: that western listed wolves are discrete from wolves in Minnesota, Wisconsin, and Michigan." Summary Report, App. C, Reviewer 5 – Dr. Daniel R. MacNulty at 5.[8] Dr. MacNulty also questioned the Service's treatment of "current range" in contrast with "current distribution," *id.* at 6-8, and critiqued as incomplete the Service's review and analysis of human-caused mortality, *id.* at 9.

[8] The Final Delisting Rule attempted to address this concern by noting that "[t]he intent was not to imply that all of those wolves were meaningfully connected as part of a single metapopulation; we agree that there are no data to show effective dispersal between those two larger areas." 85 Fed. Reg. at 69,867-68.

The Final Rule explains that "Minnesota appears to be the western edge of a hybrid zone between gray wolves in the west and eastern wolves." 85 Fed. Reg. at 69,787. Two of the peer reviewers raised similar concerns about the uncertain taxonomic status of gray wolves and eastern wolves. Summary Report, App. C, Reviewer 3 – Dr. Adrian P. Wydeven at 9; Summary Report, App. C, Reviewer 5 – Dr. Daniel R. MacNulty at 5. Despite this uncertainty, FWS concludes that "any eastern wolves within the geographic boundaries of the entities we evaluated [are] members of the species *C. lupus*." 85 Fed. Reg. at 69,786. Dr. Wydeven criticizes that approach as "arbitrary." Wydeven at 9.

It is important to remember that FWS's 2013 delisting proposal was derailed because the agency failed to use the best available science with respect to species and sub-species wolf classifications in North America. As the independent peer reviews show, the genetics of the different wolf populations remain uncertain. Summary Report, App. C, Reviewer 3 – Adrian P. Wydeven at 1-2 (discussing eastern and gray wolf confusion); Summary Report, App. C, Reviewer 2 – Dr. Charles (Carlos) Carroll at 17-18 (discussing potential genetic uniqueness of west coast wolves). FWS has again failed to ensure that its proposed rule uses the best available science, as required by the ESA, 16 U.S.C. § 1533(b)(1)(A).

VI. FWS CANNOT VALIDLY MEASURE RECOVERY USING THE OUT-OF-DATE AND GEOGRAPHICALLY LIMITED 1992 RECOVERY PLAN.

The delisting rule mouths the language of recovery but looks only to a decades-old plan focused solely on the Midwest for its recovery standards. When FWS protected the gray wolf as a single species across the lower-48 states, it did not develop a nationwide recovery plan. Instead, for most of the lower-48 states (with the exception of the Northern Rocky Mountains gray wolf and Southwest Mexican wolf populations), FWS evaluated recovery efforts under its Western Great Lakes Recovery Plan, revised and renamed in 1992 as the Eastern Timber Wolf recovery plan. This limited and outdated recovery plan remains the planning document used by FWS to this day, despite pleas, petitions, and at least one lawsuit asking the agency to update it.

Reliance on such an outdated and geographically-restricted plan prevented FWS from facilitating nationwide wolf recovery, including in places such as the Pacific Northwest and the Northeast. Further, such a plan cannot provide "objective and measurable criteria" to support delisting outside of the plan's geographic scope. 16 U.S.C. § 1533(f)(1)(B)(i)-(iii). Not only does the failure to develop a nationwide wolf recovery plan violate FWS's duty under ESA § 4(f), but basing the delisting rule on the Eastern Timber Wolf Recovery Plan violates FWS's duty to use the best available science in a delisting decision.

VII. CONCLUSION

FWS's issuance of the Final Gray Wolf Delisting Rule violates the law and fails to use the best science. If FWS fails to withdraw the Rule within 60 days of receiving this letter, the

named organizations intend to file legal claims for declaratory and injunctive relief. *See* 16 U.S.C. § 1540(g).

If you believe any of the foregoing is in error, have any questions, or would like to discuss this matter, please do not hesitate to contact us.

Sincerely,

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