



CENTER *for* BIOLOGICAL DIVERSITY

Via Facsimile and Certified Mail, Return Receipt Requested

December 26, 2012

Ken Salazar, Secretary
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240
Fax No: (202) 208-6956

Dan Ashe, Director
U.S. Fish and Wildlife Service
1849 C Street NW
Washington, D.C. 20240
Fax No: (202) 208-6965

Re: Notice of Intent to Sue Re: Violations of the Endangered Species Act in Connection with TE-091551-7 (Research and Recovery Permit for the Mexican Wolf Recovery Program)

Dear Secretary Salazar and Director Ashe:

This letter serves as official notice by the Center for Biological Diversity (the “Center”) of violations of the Endangered Species Act (“ESA”) in connection with the renewed and amended Research and Recovery Permit for the Mexican Wolf Recovery Program (TE-091551-7) and the Intra-Service Biological and Concurrence Opinion for this permit.

Background

Permit TE-091551-7 was issued on November 23, 2011 as a renewal of the U.S. Fish and Wildlife Service’s (FWS) Research and Recovery Permit for the Mexican Wolf Recovery Program, which has governed the capture and take of wolves within the Mexican Wolf Experimental Population Area. Importantly, Permit TE-091551-7 also *amends* the Research and Recovery Permit to permit take of *endangered* wolves outside of the Mexican Wolf Experimental Population Area.

In particular, Permit TE-091551-7 provides that “Authorized Permittees may also take any gray wolf (*Canis lupus*) in Arizona and New Mexico outside the Blue Range Wolf Recovery Area according to the terms and conditions below, with the exception of purposeful lethal take.” Further, the permit authorizes permittees

for scientific research and recovery purposes to conduct activities related directly to the propagation, management, and recovery of captive and free-ranging Mexican gray wolves in accordance with USFWS-approved, current management plans and protocols for the Mexican Wolf Recovery Program. Specifically, authorization includes all actions related to: capture via leg-hold traps, helicopter or ground darting and net-gunning;

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John Buse, Senior Attorney • 351 California St., Suite 600 • San Francisco, CA 94104
Phone: 323-533-4416 • Fax: 415-436-9683 • jbuse@biologicaldiversity.org

handle; possess; administer health care; propagate; radio collar; release; obtain and preserve blood, tissue, semen, ova, and other samples; translocate; transport between approved Mexican gray wolf captive management facilities in the United States and Mexico, and to approved release sites; purposeful lethal take (lethal control is limited to wolves within the experimental nonessential (10(j)) area in Arizona and New Mexico); hazing via less-than-lethal projectiles; injurious harassment; plus carry out any other USFWS-approved husbandry practice or management action for Mexican wolves within Region 2.

Permit TE-091551-7 at p. 4. “Authorized Permittees” include designated employees of FWS, USDA Wildlife Services, Arizona Game and Fish Department, New Mexico Game and Fish Department, Apache Sitgreaves National Forest, San Carlos Apache Tribe, the Turner Endangered Species Fund, and other entities, as well as personnel under the direct supervision or direction of these employees.

In contrast, the previous permit, Permit TE-091551-6 applied only to the nonessential experimental wolf population. Permit TE-091551-6 at pp. 3-4. Permit TE-091551-7 however, allows non-lethal take of wolves outside the Mexican Wolf Experimental Population Area. As FWS acknowledges in the November 7, 2011 Intra-Service Biological and Concurrence Opinion (“Intra-Service BiOP”) for Permit TE-091551-7, such wolves may include wolves that disperse from releases within Mexico or disperse from the Northern Rocky Mountain population in the United States. Intra-Service BiOP at p. 7. These wolves are fully protected under the ESA as endangered unless evidence establishes that they are part of the nonessential experimental population. *Id.*

The Intra-Service BiOp’s reference to potential wolf releases by the Mexican government is not hypothetical. In October 2012, Mexican officials released nine Mexican gray wolves near the international border. Additional releases within Mexico are possible. Should these wolves (or wolves from the Northern Rocky Mountain population) disperse into Arizona or New Mexico, they must be considered fully protected as endangered under the ESA. As a result of the amendment of Permit TE-091551-7, however, such wolves can be captured or trapped and relocated to the Mexican Wolf Experimental Population Area (where they will be treated for all purposes as part of the nonessential experimental population), returned to Mexico, or placed in a captive breeding facility. Intra-Service BiOP at pp. 25, 32. In effect, Permit TE-091551-7 has the potential to transform fully protected endangered wolves into nonessential experimental wolves. This substantial amendment violates the ESA, was undertaken without notice and an opportunity for public comment, and without compliance with the National Environmental Policy Act (“NEPA”).

By this letter, the Center puts Secretary Salazar, Director Ashe, and FWS on official notice that the Center believes amended Permit TE-091551-7 violates the ESA. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision

of the ESA, to the extent such notice is deemed necessary by a court. 16 U.S.C. § 1540(g). In particular, the Center provides notice of the following violations of the law:

1. Violation of Section 10(a)(1)(A)

ESA section 10(a)(1)(A) provides that the Secretary may permit acts that could result in the take of listed species otherwise prohibited by ESA section 9 “for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance” of nonessential experimental populations. 16 U.S.C. § 1539(a)(1)(A).

The Intra-Service BiOP acknowledges that wolves released in Mexico that cross the international border “will further the conservation and recovery of the species by improving the species’ baseline and will contribute to the goals of the Mexican Wolf Recovery Program.” Intra-Service BiOP at p. 25. FWS further acknowledges that “[c]apture and translocation or incorporation of a wolf into the captive breeding population has inherent risks such as injury or death,” but contends that documented occurrences of injury or death are “extremely low.” *Id.* Permit TE-091551-7 nonetheless authorizes the capture of such wolves and their relocation to the Mexican Wolf Experimental Population Area. In support of the authority to capture endangered wolves, the Intra-Service BiOP states that “[t]he adverse effects of capture and translocation or incorporation of a wolf into the captive breeding population is outweighed by the beneficial effects on the species’ survival and recovery by reducing human and livestock conflicts within the action area.” Intra-Service BiOP at pp. 25-26.

FWS has failed to provide any substantial evidence of the purported beneficial effects on the survival and recovery of the species associated with the capture and translocation of endangered Mexican gray wolves, either in Permit TE-091551-7, in the Intra-Service BiOP, or elsewhere. On the contrary, approximately 18 wolves of the nonessential experimental population have died as a consequence of capture efforts, indicating that the risk of injury or death due to capture and translocation is significant. Moreover, captured endangered wolves that are translocated to the Mexican Wolf Experimental Population Area will be subject to permitted lethal take, which has claimed 12 wolves killed by or under federal authorities since reintroduction began, and recapture.

There is no evidence that on balance the benefits of capturing and translocating endangered wolves outweighs the acknowledged adverse effects of capturing and translocating these wolves. Accordingly, amended Permit TE-091551-7 does not meet the requirements of ESA section 10(a)(1)(A) that permits be issued “for scientific purposes or to enhance the propagation or survival of the affected species.” Moreover, Permit TE-091551-7 is inconsistent with the issuance criteria for permits for scientific purposes or for the enhancement of propagation or survival according to FWS’s regulations. According to these criteria, FWS must consider, among other things, “[w]hether the purpose for which the permit is required is adequate to justify removing

from the wild or otherwise changing the status of the wildlife sought to be covered by the permit.” 50 C.F.R. § 17.22(a)(2)(i). Here, the “scientific research and recovery purposes” for Permit TE-091551-7 do not adequately justify removing endangered wolves from the wild or changing their status from endangered to nonessential experimental through translocation.

FWS must further consider “[w]hether the permit, if issued, would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population from which the wildlife sought to be covered by the permit was or would be removed.” 50 C.F.R. § 17.22(a)(2)(iii). The 1982 Mexican Wolf Recovery Plan calls for the establishment of two viable populations in the species’ historic range in the United States and Mexico. To date, only one population has been established in the United States, and it has not attained viability. The Mexican releases are the basis for a second population, yet Permit TE-091551-7 permits the capture and incorporation with the existing nonessential experimental population of this nascent second population. Permit TE-091551-7 is inconsistent with the 1982 Recovery Plan, yet this conflict is neither disclosed nor evaluated in the permit or Intra-Service BiOP.

FWS must further consider “[w]hether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit.” 50 C.F.R. § 17.22(a)(2)(iv). Here, the “scientific research and recovery purposes” for Permit TE-091551-7 are not likely to reduce the threat of extinction facing Mexican gray wolves. On the contrary, the permit is likely to result in additional take of endangered wolves, both directly through the effects of capture and translocation and indirectly through the effects of lethal take if endangered wolves are translocated to the Mexican Wolf Experimental Population Area.

Although the stated purpose of Permit TE-091551-7 is for “scientific research and recovery,” the Intra-Service BiOP includes an incidental take statement permitting the *incidental* take of up to three Mexican gray wolves due to harm or mortality during the life of the permit. Intra-Service BiOP at pp. 35. Thus, FWS has authorized incidental take for a research and recovery permit, but has not evaluated or authorized the permit by the standards of an incidental take permit. *See* 50 C.F.R. § 17.22 (“the Director may issue a permit authorizing any activity otherwise prohibited by § 17.21, in accordance with the issuance criteria of this section, for scientific purposes, for enhancing the propagation or survival, *or* for the incidental taking of endangered wildlife.” [emphasis added]).

2. Violation of Section 10(c)

ESA section 10(c) requires the Secretary to publish notice of each application for a permit for scientific purposes or to enhance the propagation or survival of an endangered or threatened species in the Federal Register and to provide a 30-day comment period for

the submission of “written data, views, or arguments with respect to the application.” 16 U.S.C. § 1539(c).

On the Center’s information and belief, no notice and opportunity for comment was provided for Permit TE-091551-7. Even if notice was published in the Federal Register for preceding permits (which the Center has been unable to verify), Permit TE-091551-7 substantially amends preceding permits because it allows the capture and take of endangered wolves. The failure to provide notice and an opportunity for public comment on Permit TE-091551-7 violates section 10(c) of the ESA.

3. The Intra-Service BiOP Fails to Insure Against Jeopardy

ESA section 7(a)(2) requires that each federal agency must “insure” that its actions are not likely to jeopardize the continued existence of any endangered or threatened species. Through the Intra-Service BiOP, however, FWS has authorized Permit TE-091551-7, which allows the take through capture and translocation of any and all endangered Mexican gray wolves that enter the United States through Mexico. FWS has not ensured against jeopardy for endangered Mexican gray wolves.

4. FWS Failed to Comply with NEPA in Issuing Permit TE-091551-7

Permit TE-091551-7, in authorizing the capture and translocation of endangered Mexican gray wolves, departs from the terms of previous Mexican gray wolf research and recovery permits, and is a major federal action that may significantly affect the quality of the human environment. Accordingly, the amended permit requires FWS to comply with NEPA. On the Center’s information and belief, no NEPA documentation has been completed in connection with the issuance of Permit TE-091551-7.

Identity of Organization Giving Notice

Center for Biological Diversity
P.O. Box 710
Tucson, AZ 85702-0710

Please contact me if you have any questions. Thank you for your attention to this matter.

Sincerely,



John Buse
Senior Attorney
Center for Biological Diversity