



September 10, 2012

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Also Via Certified Mail, Return Receipt Requested

Re: Notice of Violation of Endangered Species Act Relating to the Final Rule Removing the Gray Wolf, *Canis Lupus*, in Wyoming from the Federal List of Endangered and Threatened Wildlife, 55 Fed. Reg. 55530.

Dear Secretary Salazar and Director Ashe:

On behalf of WildEarth Guardians, Alliance for the Wild Rockies, Biodiversity Conservation Alliance, Conservation Congress, Friends of Animals, Friends of the Clearwater, National Wolfwatcher Coalition, and Western Watersheds Project, I write to notify you (collectively referred to herein as “FWS”) that FWS’s final rule removing the Gray Wolf, *Canis lupus*, in Wyoming from the federal list of endangered and threatened wildlife violates Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533. This letter is provided as formal notice, in keeping with the 60-day notice requirement in the ESA’s citizen-suit provision, 16 U.S.C. § 1540(g)(2)(C), that unless FWS remedies its violations of the ESA described herein, within the next 60-days, the above listed organizations intend to file a civil action against you.

LEGAL REQUIREMENTS

The ESA provides FWS shall determine whether any “species,” in this case the Distinct Population Segment of Gray Wolf in the Northern Rockies, is endangered or threatened due to any of the following five factors:

- (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.

16 U.S.C. § 1533(a)(1). FWS shall make its determination under each of these five listing factors “solely on the basis of the best scientific and commercial data available ... after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State ... to protect such species ...” 16 U.S.C. § 1533(b)(1)(A).

Additionally, in cases, such as the present, when FWS has decided to remove a species from the list of protected species it “shall implement a system in cooperation with the States to monitor effectively for not less than five years the status” of the species. 16 U.S.C. § 1533(g).

VIOLATIONS OF LAW

In light of these legal requirements, FWS’s decision to remove ESA protection from the Gray Wolf in Wyoming violates the law in the following general respects:

- (1) the best available scientific information does not support FWS’s conclusion that the Distinct Population Segment of Gray Wolf in the Northern Rockies is no longer endangered or threatened under any of the five listing factors in violation of 16 U.S.C. §§ 1533(a)(1) and 1533(b)(1)(A);
- (2) FWS has not established a system to monitor the status of the species effectively for at least five years in violation of 16 U.S.C. § 1533(g); and
- (3) FWS’s decision was not made “solely on the basis of the best scientific and commercial data available” in violation of 16 U.S.C. § 1533(b)(1)(A).

These violations of law are expounded upon below. In addition, the organizations providing this notice incorporate herein by reference their prior comments on FWS’s delisting proposal and all further violations of law alleged therein.

I. FWS Has Misapplied the Term “Species” and thus Conducted the Wrong Analysis

The ESA defines a “species” as including “any subspecies,” and “any distinct population segment [DPS] of any species of vertebrate ... wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). In the present case, the relevant “species” is not the “Gray Wolf in Wyoming” as FWS’s decision implies, but the DPS of Gray Wolf in the Northern Rockies, the “species” described by FWS in prior listing actions. See e.g. 74 Fed. Reg. 15123 (April 2, 2009). At least three federal district courts have recognized that FWS may not create entities, for listing

or delisting purposes, which are not specified in the ESA, and thus may take action only at the species, subspecies, or DPS level. See Defenders of Wildlife v. Salazar, 729 F. Supp. 2d 1207 (D. Mont. 2010); WildEarth Guardians v. Salazar, 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010); Center for Native Ecosystems v. Salazar, 795 F. Supp. 2d 1236 (D. Co. 2011).

Accordingly, FWS's analysis of the 5 listing factors under 16 U.S.C. § 1533(a)(1) cannot be limited to "Gray Wolf in Wyoming" as it has done here, but must be conducted in terms of the entire Northern Rockies Gray Wolf DPS. In short, FWS has failed to conduct the correct analysis by looking only at the five listing factors for wolves in Wyoming as opposed to looking at the five listing factors for the "species" concerned – the entire DPS. FWS attempts to excuse this error by relying on the Congressional delisting of wolves elsewhere in the Northern Rockies DPS. See Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. 112-10, § 1713, 125 Stat. 38, 150 (2011). However, in delisting wolves in the Northern Rockies outside of Wyoming, Congress did not amend the basic provisions of the ESA discussed above. Thus, when FWS turns, as it has done here, to the question of delisting the remainder of the DPS (i.e. Wyoming) – it must look at the listing factors in terms of the entire DPS and not simply the remainder. Because FWS has failed to conduct the correct analysis it has violated 16 U.S.C. § 1533(a)(1).

II. FWS Failed to Use the Best Available Science by Relying on the Recovery Plan

FWS based its delisting decision upon wolves having reached the recovery goal specified in the Recovery Plan – "30 or more breeding pairs ... comprising 300 + wolves" with state-level minimum recovery goals of "at least 10 breeding pairs and at least 100 wolves" in each of three states, Wyoming, Montana, and Idaho. However, this goal never represented the "best available science" concerning what a recovered wolf population would look like, but simply represented a politically possible goal for planning purposes. Rather, the best available science has long recognized what is known as the 50/500 rule. This standard for a minimum viable population indicates that 50 breeding individuals are needed for a population to be ecologically viable for the short term. The Recovery Plan standard, requiring 10 packs per state, would result in only 20 breeding individuals per state, and thus at the state-level these populations are not viable even over the short term. Moreover, the 50/500 standard provides that 500 breeding individuals are needed for a population to be evolutionarily viable on a long-term basis – i.e. 100 years. Because breeding individuals comprise only 10 to 20 percent of a total population, the 500 rule translates to a total population of between 2,500 and 5,000 individuals for long-term viability. See e.g. Soule and Wilcox (1980); Frankel and Soule (1981); Lande (1988), Lande (1995), Frankham (1995), Franklin and Frankham (1998), Fallon (2008), and Palstra and Russante (2008). More recent scientific articles confirm the Northern Rockies Gray Wolf DPS is not recovered biologically based on the best available scientific understanding. See e.g. Bergstrom (2009); Bruskotter (2010, 2011); Bergstrom, *Science* (2011).

Indeed, FWS has recognized that more wolves are necessary to comprise a recovered population in a closely analogous situation. In delisting the Western Great Lakes Gray Wolf DPS, FWS required a population of 1,251 to 1,400 wolves in Minnesota alone – a much smaller geographic area than the Northern Rockies DPS. FWS's decision that only 300 wolves are necessary for recovery in the entire Northern Rockies DPS, 100 in each of Wyoming, Montana,

and Idaho is simply inexplicable under the best available scientific understanding. The recovery plan goal represents a politically “doable” number, nothing more. This is a violation of the best available science requirement in 16 U.S.C. § 1533(b)(1)(A).

III. FWS Failed to Base Its Decision Solely on the Best Available Science

While FWS’s action cannot be explained in terms of the best available science, it can be explained as a political accommodation. Once Congress delisted wolves everywhere in the Northern Rockies DPS except Wyoming, FWS entered into negotiations with Wyoming’s Governor to accomplish delisting in Wyoming. These negotiations resulted in what can only be described as a “promise” from Secretary Salazar to the Governor that wolves would be delisted in Wyoming. To effectuate this political deal, Wyoming made cosmetic changes to its wolf management plan which had previously been rejected by FWS as inadequate. 74 Fed. Reg. 15123. FWS then reversed course and approved Wyoming’s wolf management strategy relying on these superficial changes. However, the conclusion of FWS’s analysis of Wyoming’s “new” plan was pre-ordained. FWS simply needed the cosmetic changes as a fig leaf to cover its otherwise exposed reversal of its prior opinion. The present decision is thus not based “solely” on the best available science, but represents shoddy science and tortured explanation to accomplish a promised result. Thus, FWS has violated 16 U.S.C. § 1533(b)(1)(A) in a second respect, making a political decision as opposed to one grounded solely in science.

IV. Wolves in Wyoming and the Northern Rockies DPS Remain Threatened by Genetic Isolation

FWS has repeatedly stated that establishing a metapopulation (i.e. one with genetic exchange) among the three wolf populations in Wyoming, Montana, and Idaho, and with wolf populations in Canada is essential to the long-term viability of the Northern Rockies DPS. This conclusion does represent the best available science. FWS maintains in its delisting decision that such necessary genetic connectivity currently exists. Though this could certainly be disputed, such dispute is not necessary because FWS’s delisting rule makes a more fundamental error. FWS has failed to evaluate whether whatever genetic connectivity currently exists will be maintained under State management of wolves in Wyoming, Montana, and Idaho. It is readily apparent that because all three states intend to reduce their wolf populations from those that currently exist that current genetic connectivity will also be reduced. Metapopulation connectivity is a function of both subpopulation *size and distribution*. As to subpopulation size both Idaho and Montana have established liberal wolf hunting and trapping regulations designed to reduce wolf populations, and which involve greater quotas, season lengths and hunting and trapping techniques than those FWS has analyzed. The same fate awaits Wyoming’s wolf population. Because the three subpopulations will be reduced in size they will provide fewer dispersing wolves and exhibit less genetic connectivity than they have in the past. Additionally, as to population distribution, the shrinking subpopulations in the three states will suffer range contractions and thus any dispersing wolves will necessarily have to travel greater distances between subpopulations and suffer greater mortality during dispersal. This will further reduce genetic connectivity.

FWS attempts to address this problem by explaining that it believes Wyoming, Montana

and Idaho will maintain wolf populations above the recovery goals and perhaps as many as 1,000 wolves will continue to exist in the three states under state management. This belief is unfounded. As a result, FWS analysis of future genetic connectivity is based on a fictional world view. Both Idaho and Montana have committed to maintaining only 15 breeding pairs and approximately 150 wolves. Wyoming has committed to maintaining only 10 breeding pairs and 100 wolves outside of Yellowstone National Park and the Wind River Reservation¹, with a goal, but not a commitment, to maintaining 15 breeding pairs and 150 wolves in the State, including the Park and Reservation.² Thus, at best, the three states have committed only to maintaining approximately 150 wolves each – or 450 wolves total – not the 1,000 FWS uses to support its analysis of genetic connectivity. Thus, FWS has utterly failed to look at what is actually required, but instead performed an analysis based on a world that is only a hoped for potential, but very unlikely, reality. Again, this is a failure to use the best available science as required by 16 U.S.C. § 1533(b)(1)(A).

In a last-ditch effort to buttress its unsustainable conclusion that adequate genetic connectivity will exist under state management, FWS points to Wyoming’s representation that it will implement a human-assisted migration program to achieve at least one effective migrant per generation. The idea that human-assisted translocation of wolves is necessary for a “recovered” population turns the ESA upside down. The ESA defines the conservation of a species as the “use ... [of] all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] *are no longer necessary*.” 16 U.S.C. § 1532(3)(emphasis added). A species which no longer needs the measures provided by the ESA, is a recovered species. Among the measures the ESA provides to conserve (i.e. recover) a species is transplantation. *Id.* Thus, an acknowledgement that “human-assisted translocation” for a species may be necessary in the future is, at base, an acknowledgement that the species has not in fact recovered, because it still needs one of the measures provided by the ESA to ensure its survival. Accordingly, FWS has again violated the ESA by determining the Northern Rockies DPS is recovered while acknowledging that human-assisted translocation will be used to ensure genetic connectivity.

V. FWS’s Conclusion that Adequate Regulatory Mechanisms Exist in Wyoming is Unsound

FWS previously rejected a Wyoming wolf plan that proposed to maintain seven breeding pairs of wolves outside of both Yellowstone and Grand Teton National Parks. 74 Fed. Reg. 15123. FWS has now accepted a Wyoming wolf plan that proposes to maintain 10 breeding pairs of wolves outside of Yellowstone National Park and the Wind River Reservation. This is essentially the same thing. The Wind River Reservation rarely contains a breeding pair of wolves. Thus, by moving Grand Teton National Park, an area that may well contain the three “new” breeding pairs, from one column to the other Wyoming has simply re-worked the math, but has not made any “new” commitment that can turn what was once an inadequate regulatory

¹ Note, wolves in Grand Teton National Park and on the National Elk Refuge count towards the State’s total commitment.

² Wyoming cannot manage wolves on either the Wind River Reservation or in Yellowstone National Park. Thus, Wyoming’s representations about how many wolves may exist in these areas is not a commitment, but only an aspiration.

measure into an adequate one.

More importantly, Wyoming's commitment to maintaining 10 breeding pairs and at least 100 wolves outside Yellowstone and Wind River is completely undercut by a separate statutory provision authorizing and even promoting unrestricted killing of wolves doing "damage to private property." Wyo. Stat. § 23-3-115. This statute allows a property owner or employee or lessee of the property owner to "immediately" kill any wolf "doing damage to private property," which under the statute means attacking or threatening farm or ranch animals or dogs. This statute even allows intentional baiting of wolves. The Wyoming Game and Fish Department has stated that people may lawfully bait and kill wolves in Wyoming by, techniques including staking out dogs to be attacked by wolves or leaving out animal carcasses to encourage wolves to feed on domestic animals or bait them to be killed by humans. Thus, this statute not only allows, but encourages, unlimited wolf killing. Importantly, this blanket exception allowing the "immediate" killing of wolves "doing damage to private property" is not suspended if Wyoming's wolf population falls to, or below, 10 breeding pairs or 100 wolves. Accordingly, there is no effectively regulation in Wyoming that will actually ensure that 10 breeding pairs and 100 wolves can, in fact, exist outside of Yellowstone National Park and the Wind River Reservation. The lack of such a regulation violates 16 U.S.C. § 1533(a)(1)(D).

VI. Wolves Are Still Endangered in a Significant Portion of Their Range

FWS has previously identified Wyoming as a significant portion of the range of the Northern Rockies Wolf DPS. 74 Fed. Reg. 15123. FWS acknowledges that under Wyoming's wolf plan wolves will not be allowed to survive in the vast majority of the State – outside the northwest corner. Because all of Wyoming is included in the DPS and because FWS has found Wyoming is a significant portion of the DPS's range, FWS's conclusion that Wyoming's plan, which will allow wolves to live in only approximately 15% of the State, does not ensure that the Northern Rockies DPS does not remain endangered or threatened in a significant portion of its range in violation of the ESA's definition of either a threatened or endangered species. 16 U.S.C. §§ 1532(6) & (20).

VII. The States Lack Effective Mechanisms to Monitor the Status of Wolves Post Delisting

16 U.S.C. § 1533(g) requires FWS to "implement a system in cooperation with the States to monitor effectively for not less than five years the status" of the species. FWS's system to monitor the status of wolves post delisting is premised upon accurate counting to determine that the States to do not breach their commitments to maintain certain numbers of both wolves and breeding pairs. However, the best available science indicates that the State's wolf counting methods are suspect. A recent scientific review of State data collection methods showed that they "did not follow a scientific protocol" and "resulted in flawed and often blatantly incorrect data," and that consequently wolf counts are inaccurate. (Mallonee 2011). Accordingly, the fundamental safety net FWS relies upon, minimum wolf population counts, is premised upon a monitoring system that is both unscientific and flawed. This is a violation of 16 U.S.C. § 1533(g).

CONCLUSION

As stated at the outset, this letter is provided to FWS pursuant to the 60-day notice requirement of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g)(2)(C). If FWS does not take prompt action to correct the above-described violations of the ESA, WildEarth Guardians, Alliance for the Wild Rockies, Biodiversity Conservation Alliance, Conservation Congress, Friends of Animals, Friends of the Clearwater, National Wolfwatcher Coalition, and Western Watersheds Project intend to file suit to enforce the law. However, litigation is not our preference. The purpose of the 60-day notice provision in the ESA is for violators of the law to come into compliance, therefore avoiding the need for suit. Accordingly, if you have any plans to reverse your decision removing the Gray Wolf in Wyoming from the federal list of endangered and threatened wildlife please inform us within 60 days. If you have any questions concerning the above discussion, have difficulty locating any of the sources cited, believe anything we have stated is incorrect or inaccurate, or would like to discuss this matter with the parties providing this notice, please contact them through undersigned counsel as indicated in the signature block below.

Sincerely,

/s/ James J. Tutchton

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