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December 15, 2017

SENT VIA E-MAIL AND U.S. POSTAL (Delivery Confirmation)

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Re: Second Sixty-day notice of intent to sue for violating the Endangered Species Act when issuing a final recovery plan for the Mexican wolf (*Canis lupus baileyi*).

Dear Sec. Zinke, Acting Dir. Sheehan, and Reg. Dir. Lueders:

The Western Environmental Law Center ("WELC") hereby provides this second sixty-day notice of intent to sue for violations of Section 4 of the Endangered

Species Act ("ESA"), 16 U.S.C. §1533, when issuing a final recovery plan for the Mexican wolf (*Canis lupus baileyi*).

This notice is provided by WELC on behalf of WildEarth Guardians ("Guardians"), Western Watersheds Project ("WWP"), Wildlands Network, and the New Mexico Wilderness Alliance. Guardians, WWP, Wildlands Network, and the New Mexico Wilderness Alliance have significant, concrete interests in ensuring the long-term survival and recovery of Mexican wolves in the contiguous United States and ensuring the U.S. Fish and Wildlife Service ("the Service") utilizes the best available science and complies with the ESA when preparing a recovery plan for the Mexican wolf.

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA v. Hill*, 437 U.S. 153, 179 (1978). The ESA was enacted to forestall the extinction of species and allow a species to recover to the point where it may be de-listed. *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059, 1070 (9th Cir. 2004); *see also* 16 U.S.C. § 1532(3) (defining "conservation" as all methods that can be employed to "the point at which measures provided pursuant to [the ESA] are no longer necessary"). Survival and conservation (recovery) of listed species are the "two different (though complimentary) goals of the ESA." *Id*. Integral to achieving the ESA's goals is the preparation and implementation of science-based recovery plans.

Section 4(f) of the ESA directs the Service to "develop and implement [recovery] plans . . . for the conservation and survival of endangered species and threatened species . . . unless [the Service] finds that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f)(1). In preparing recovery plans, the Service is to give priority to those listed species that "are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity." *Id*. at § 1533 (f)(1)(A).

The ESA mandates that all recovery plans include, to the maximum extent practicable: (a) a description of the site-specific management actions necessary to achieve the recovery plan's conservation and survival goals; (b) objective, measurable criteria which, when met, would result in a determination that the species be removed from listing; and (c) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and the intermediate steps towards that goal. 16 U.S.C. §§ 1533(f)(1)(B)(i) - (iii).

The Service considers recovery plans to be an essential tool for conservation. The Service's own recovery planning guidance (version 3.1), *see* https://www.fws.gov/endangered/esa-library/pdf/NMFS-FWS_Recovery_Planning_Guidance.pdf (hereinafter "recovery guidance"), for example, explain that recovery plans are extremely important because they are road maps to recovery, i.e., they spell out where the Service needs to go and how best to get there. Recovery plans ensure sound scientific and logistical decision-making throughout the recovery process. Specifically, recovery plans delineate those aspects of the species' biology, life history, and threats that are pertinent to its endangerment and recovery, outline necessary strategies and actions, and identify goals and criteria by which to measure progress. Recovery plans also serve a number of additional functions, including but not limited to, guiding the Service's compliance with Section 7 consultations (including the Service's obligation under Section 7(a)(1) to carry out programs for the conservation of the species and obligation to consult on federal projects and avoid jeopardy under Section 7(a)(2)), serving as a tool for outreach, stakeholder engagement, recovery monitoring, and federal/state funding.

On November 28, 2017, the Service, including the Regional Director for the Service's Southwest Region, signed, approved, and issued a final Mexican Wolf Recovery Plan (First Revision) (hereinafter "final recovery plan"). Public notice and release of the final recovery plan occurred on November 29, 2017.

With this letter, the Service is hereby put on notice that the final recovery plan for Mexican wolves violates the ESA and is arbitrary and capricious for the following nine reasons.

First**,** the Service's final recovery plan fails to include the necessary site-specific management actions and objective, measurable criteria for delisting as required by the ESA.

Pursuant to the ESA, recovery plans must provide for the conservation of listed species and include, to the maximum extent practicable, site-specific management actions necessary to conserve the species and objective, measurable criteria which, when met, would result in delisting. 16 U.S.C. §§ 1533(f)(1)(A), (B). The Service concedes that this is a mandatory, statutory requirement – a "sideboard" on recovery planning – that cannot be ignored. *See* Recovery Guidance at Section 1.2 (describing elements from the ESA that must be included in a recovery plan); *id.* at Section 5.1.8.3 (developing objective and measurable criteria is a statutory requirement in the ESA for recovery plans)

Here, the Service's final recovery plan violates Section 4(f) of the ESA by: (a) failing to include site-specific management actions necessary to conserve Mexican wolves (as revealed by the best available science – see below); and (b) failing to include objective, measureable criteria that, when met, would warrant delisting. Nor has the Service demonstrated that providing such management actions and criteria would be impracticable. Also missing from the final recovery plan are adequate performance standards or benchmarks necessary to ensure success.

Notably, the downlisting and delisting criteria provided in the final recovery plan is neither "objective" or adequately measureable (using the Service's methods). And, even if one assumes the criteria provided is objective and measureable (it is not), if the criteria is met, the best available science reveals it would not result in a determination that Mexican wolves be removed from the ESA, as required by the statute (see below).

Second, and related to one above, the Service's final recovery plan conflicts with the best available science. Pursuant to the ESA, the Service's implementing regulations, and the Service's own recovery guidance, all decisions regarding the downlisting, delisting, and recovery of a listed species must be based on the best available science. *See* 50 C.F.R. § 424.11.

Here, the Service's recovery findings for the Mexican wolf in the final recovery plan, including but not limited to, the Service's proposed site-specific management actions, downlisting and delisting criteria, and methods used to evaluate risk, conduct a population viability analysis ("PVA"), measure recovery, and ensure compliance with the plan conflict with the best available science.

For example, the best available science – including Carroll (2006), Wayne and Hedricks (2010), Carroll (2014), as well as the Service's 2012 draft recovery plan and 2010 Mexican wolf conservation assessment – are all in agreement that conserving Mexican wolves requires the establishment of at least three subpopulations of Mexican wolves connected to one another by dispersal, with each population simultaneously having approximately 250 animals for a minimum of eight years (two generations). Using a sophisticated landscape analysis, Carroll (2006), Wayne and Hedrick (2010), and Carroll (2014) recommend these three Mexican wolf populations include: (1) the current population in the Blue Range Recovery Area; (2) a second population near the north rim of the Grand Canyon in Arizona (north of Interstate 40); and (3) a third population in north-central New Mexico's and southern Colorado's San Juan and Sangre de Cristo Mountains. The

Service's final recovery plan does not even come close to meeting these conservation recommendations.

The Service's final recovery plan also fails to utilize the best available science by: (a) relying on a flawed biological report (June, 2017) and supporting technical analysis; (b) relying on a flawed PVA that, among other flaws, was constructed to produce a desired outcome (two populations at a specific size), includes problematic parameters (that impact the outcome, e.g., percentage of females pairing), fails to account for inbreeding depression (documented in the population), includes a "management target" or population cap chosen by the Service, incorporates incomplete and uncertain data, includes inaccurate assumptions about mortality rates, and downplays the effects of inbreeding depression; (c) relying on a flawed habitat suitability analysis ("HSA") and model that, among other things, excludes suitable habitat in the United States, fails to account for changes to habitat from climate change, and assumes – in the absence of any meaningful data, information on available prey density, and analysis – that Mexico possesses sufficient habitat to support restoration efforts; (d) relying on a flawed and more geopolitically based study on the Mexican wolf's historic range (i.e., Hefflefinger et al., (2017)) while ignoring the science-based peer-reviewed studies by Carroll, Fredrickson, the peer-reviewers, and Hendricks et al., (2017), which squarely rebut the Hefflefinger paper; (e) failing to properly analyze and address the questions of probability and certainty (how likely will extinction be?), how long it will take, and what degree of risk is acceptable *even if* the final plan's criteria are met; (f) relying on flawed population abundance, geographic distribution, and genetic criteria determinations, including a flawed definition of "surviving to breeding age" that requires no evidence of breeding in the wild and flawed data and science on the number of "effective releases" needed to ensure adequate genetic representation in the two wild populations; (g) ignoring the impacts of building a border wall that will effectively prevent any connectivity between the United States and Mexican populations and assuming – in the absence of any science or data – that Mexico provides high quality habitat for wolves, including sufficient public lands and ungulate populations; (h) failing to recognize that under the ESA's best available science standard, relatively minor flaws in scientific data or the absence of "precise mechanisms" and/or "definitive conclusions" do not render that information unreliable; and (i) failing to incorporate the valid, scientific based concerns raised by many of the peer reviewers and leading experts, including but not limited to Mike Phillips, Dr. Carlos Carroll, David Parsons, Dr. Richard Fredrickson, and the American Society of Mammalogists and the Society for Conservation Biology. In the absence of this analysis and information, including proper models and application of

the best available science, the Service simply cannot put forth a valid road map to recovery, as required by the ESA.

Third, the Service's final recovery plan fails to properly define "conservation" under the ESA. To "conserve" means to use any and all methods necessary to bring a listed species to the point at which the measures provided by the ESA are no longer required. 16 U.S.C. § 1532 (3). Use of the term conservation therefore includes a recovery component and the need to get the subspecies to the point to ensure its long-term survival and recovery (de-listing) in the wild. *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059, 1069 (9th Cir. 2004). A species requires more area – more habitat and more populations – for recovery than just survival. *Id*. In the final recovery plan, however, the Service fails to take the needs Mexican wolf recovery into account, focusing solely on populations and "occupied" areas deemed important to the subspecies survival, i.e., the populations and areas necessary to ensure the species "persists" in the wild. This is a violation of the ESA.

Relatedly, the Service's final recovery plan also fails to properly define what "recovery" means for the Mexican wolf subspecies. Under the ESA, the Service can only delist Mexican wolves if the best available science reveals Mexican wolves are fully "recovered." 50 C.F.R. 424.11(d)(2). Mexican wolves can only be deemed "recovered" under the ESA if they are no longer in need of ESA protections because they no longer qualify as a "threatened" or "endangered" species, as defined by the ESA. *See* 16 U.S.C. §§1532(6),(20). As such, if the Mexican wolf subspecies remains: (a) in danger of extinction throughout all or a significant portion of its range (endangered); or (b) likely to become endangered in the foreseeable future throughout all or a significant portion of its range (threatened), it is technically not "recovered" under the ESA and could not be delisted. The Service's final recovery plan, however, never undertakes this analysis (including a significant portion of its range analysis) and allows downlisting from endangered to threatened and delisting well before recovery – as defined and understood by the ESA - occurs. This violates the ESA and is arbitrary and capricious.

The Service's final plan, for example, allows the Agency to declare victory, declare Mexican wolves "recovered," and delist the subspecies even if the subspecies remains threatened or endangered in the foreseeable future throughout all or a significant portion of its range. Only two isolated populations –a single subpopulation in the contiguous United States of approximately 320 wolves and a Mexican subpopulation of 200 –is required for delisting pursuant to the final plan. This is arbitrary and conflicts with the ESA's mandate to conserve/recover the Mexican wolf subspecies "throughout all or a significant portion of its range" and the

Service's own definition of recovery. If Mexican wolf numbers in Mexico increase to 200 but the subspecies remains limited to a single isolated population in the contiguous United States, then Mexican wolves are not "recovered" under the ESA. There is not a single published-peer reviewed paper that would suggest otherwise.

Fourth, the Service's final recovery plan violates the ESA's conservation mandate by failing to provide for the conservation of Mexican wolves in areas of suitable but currently unoccupied habitat in the contiguous United States, including areas north of Interstate 40 in Arizona and New Mexico. Again, the final plan focuses solely on a single population in the contiguous United States (the experimental population) where the subspecies currently resides and is restricted (Mexican wolves that disperse from this restricted area are captured and returned pursuant to the Service's Section 10(j) rule and related Section 10(a)(1)(A) permit). Other areas – including those identified in the scientific literature (Carroll (2006), Wayne and Hedrick (2010), and Carroll (2014)) – are never analyzed and evaluated for recovery purposes. Indeed, the scope of recovery plan is too narrow – focused on experimental population managed by Section 10(j), not the recovery of the subspecies throughout all or a significant portion of its range in the contiguous United States. This is arbitrary and conflicts with the ESA's conservation mandate.

Fifth, the Service's final plan fails to adequately analyze and address the probability that the Mexican wolf subspecies will become extinct (or endangered) in the foreseeable future based even if the adopted criteria in the draft plan is met. What is the probability that a single isolated population of 320 Mexican wolves in the contiguous United States will become extinct in the foreseeable future? As discussed above, the population viability analysis ("PVA") relied on by the Service conflicts with the best available science. The best available science suggests that an isolated population of wolves with the genetic composition of the current population shows a "relatively high extinction rate, long term decline in population size in those populations that did not go extinct, as well as decline in mean heterozygosity and other metrics of genetic viability." Carroll *et al.,* (Dec. 19, 2014 letter to the Service)(on record with the Service at J015414). The Service is also using a disturbingly high threshold for acceptable extinction risk that conflicts with the Service's own policy, the ESA, and the Service's previous determinations with respect to acceptable risk with respect to Mexican wolves and other listed species.

Sixth, the Service is arbitrarily abdicating is federal, recovery responsibilities for Mexican wolves under the ESA by handing over too much authority and control to states and relying too heavily on "conservation" efforts in Mexico. This includes, but is not limited to: (a) surrendering too much authority to determine the timing,

location and circumstances of any releases of captive born wolves into the wild to the states of New Mexico and Arizona (two states which have and continue to demonstrate a long track record of opposing Mexican wolf conservation in the southwest); and (b) arbitrarily relying on the largely voluntary and highly speculative actions taken by Mexico to conserve the species. The Service's decision to rely on efforts in Mexico is particularly egregious considering the veritable lack of necessary data, public lands, suitable prey (ungulate) populations, enforceable capacity, and binding accountability to the subspecies' recovery in Mexico.

As noted by Mike Phillips (E.D. of the Turner Endangered Species Fund), the biological requirements for Mexican wolves are well understood, as are the socio-political requirements for population persistence and eventually recovery. Those requirements are "large tracts (millions of acres) of federal public lands, robust populations of widely distributed prey, relative scarcity of livestock (cattle and sheep), and properly constructed and enforced wildlife protection laws (e.g., the ESA)." Notably, none of those essential requirements are found in Mexico. Further, the Service has absolutely no authority over Mexican wolf recovery actions in Mexico and there is no statutory or legal mandate to even recover the subspecies. As noted above, the Service has also failed to account for the building of a proposed border wall which will inhibit natural disbursement and connectivity among wolf populations in the region and on either side of the wall.

Seventh, the Service's final recovery plan fails to account for and consider the implications of projected climate change on Mexican wolf recovery efforts. As noted by Dr. Carlos Carroll (August 28, 2017 comments on the draft recovery plan), although "Mexican wolves, like other wolf subspecies, are relatively generalist in their habitat preferences, increased aridity due to climate change (Notaro et al. 2012), especially in the southern portion of the range, might be expected to decrease forage and prey abundance. This implies that recovery plans should consider the role of areas to the north of Interstate 40, within the zone of historic genetic integration between Mexican wolves and northern wolves, in increasing resilience of recovery efforts to climate change.

Eighth, the Service's final recovery plan and related findings are unsupported by reliable and meaningful data. Pursuant to the ESA and APA, the Service's findings – including findings regarding the downlisting or delisting of a species – must be supported by reliable and meaningful data and evidence and there must be a rational connection between the facts found in the record and the ultimate choice made. *See Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670 (D.D.C. 1997). Here, the Service's decision fails to utilize the best available science (as outlined above) and

provide biological support and data for its conclusion that the recovery plan includes the necessary actions and criteria for recovery and eventual downlisting or delisting of the species. While the Service can "draw conclusions based on less than conclusive scientific evidence, it cannot base its conclusions on no evidence." *National Assoc. of Home Builders v Norton*, 340 F.3d 835, 847 (9th Cir. 2003).

Ninth, the Service's recovery plan fails to provide any explanation for why it disregarded habitat in the recovery plan. The draft plan admits that the Draft Biological Report considers "adequate habitat availability/suitability" to be one of four stressors and then promptly dismisses it as a threat to be considered within the context of the plan. The decision to ignore this stressor and not include habitat expansion, improvement, and diminished habitat threats as important to the recovery strategy (i.e. resiliency, redundancy) is unexplained in the final recovery plan. There is no reason provided in the plan for omitting this important part of the problem of Mexican wolves (i.e. reducing other land uses that impair conservation/recovery through prey displacement and social intolerance) from the potential actions necessary to achieve the conservation and recovery of the species. There are notably no habitat-based objectives in the plan, such as protecting denning habitat from livestock threats, minimizing the threats of increased predation through carcass disposal, etc.

The Service also arbitrarily determined that habitat destruction, modification and curtailment are not threatening or endangering Mexican wolf. But, in so doing, the Service failed to consider that curtailment by its own northern boundary is a threat. Given the scientific evidence that expanded ranges and numerous core populations must occur to ensure the viability of the species, the limitation that the Service has imposed on Mexican wolves is indeed a threat.

Finally, and related to the above, the Service must provide (but has failed to provide) a valid, reasonable, and rational explanation for why this final recovery plan for Mexican wolves differs significantly from the Service's 2010 Mexican wolf Conservation Assessment (which was specifically designed to acquire the best available science for recovery planning) and from the Service's previous, 2012 draft recovery plan for Mexican wolves.

As explained by the Ninth Circuit, "[u]nexplained inconsistency between agency actions is a 'reason for holding an interpretation to be arbitrary and capricious." *Organized Village of Kake v. US Dept. of Agriculture*, 795 F. 3d 956, 966 (9th Cir. 2015) (citation omitted). Agencies are entitled to change their policies, but must provide "good reasons" for the new policy and if it rests on "factual findings

that contradict those which underlay its prior policy," the Agency "must include 'a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* A policy change violates the law if "the agency ignores or countermands its earlier factual findings without [providing a] reasoned explanation for doing so . . ." *Id.* (citation omitted). This is precisely what the Service is failing to do here.

The Service's 2012 draft recovery plan included specific criteria regarding population size and number and metapopulation size, population trend, population connectivity (including releases from captive to wild population), amelioration of human-caused losses, post de-listing monitoring, and regulatory mechanisms. The 2017 draft and final recovery plan, however, either changes or abandons this criteria without any explanation as to why it chose to do so and without providing any supporting data or science. This is arbitrary.

The 2012 draft recovery plan, for example, discussed and incorporated the best available science on the conservation/recovery needs of the Mexican wolf, including the Carroll and Wayne and Hedrick papers cited above. The 2012 draft recovery plan notes that delisting could not occur unless the Mexican wolf subspecies obtained an adequate population size in the wild that was well connected. An adequate population would need to include – at a minimum – a metapopulation of at least 750 individuals containing a minimum of 3 primary core populations in the wild, that have persisted for 2 successive generations (8 successive years) with a census population of at least 250 individuals each. This "adequate" population would also need to be connected with adequate dispersal, demonstrate a stable population trend, and be carefully monitored, post-delisting.

The Service's final plan's recovery criteria falls well below this threshold and also conflicts with the Service's 2010 Mexican wolf Conservation Assessment. Yet, the Service has provided no reasoned explanation or rationale for the radical change in its recovery criteria or departure from the 2010 Mexican wolf Conservation Assessment and 2012 draft recovery plan. This is arbitrary.

Wherefore, this second sixty day notice letter serves to put the Service on notice of its liability for violating the ESA and inform the Agency of our intent to file a citizen suit under the ESA seeking the appropriate relief.

This notice is provided pursuant to, and in accordance with, Section 11 (g)(2) of the ESA, 16 U.S.C. § 1540(g)(2).

Sincerely,

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