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July 1, 2022

Sent via U.S. Mail (Delivery Confirmation) and E-mail

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RE: Sixty-day Notice of Intent to Sue – Final Rule – Endangered and Threatened Wildlife and Plants; Revision to the Nonessential Experimental Population of the Mexican Wolf, 87 Fed. Reg. 39,348 (July 1, 2022)

Dear Secretary Haaland, Director Williams, Regional Director Lueders, and Recovery Coordinator McGee:

Pursuant to section 11(g)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g)(2), the Western Environmental Law Center ("WELC") provides this sixty-day notice of intent to sue the U.S. Department of the Interior and U.S. Fish & Wildlife Service (hereinafter referred to jointly as "the Service") for failing to comply with the ESA when it published the final management rule for the experimental population of the Mexican wolf (hereinafter "Final Rule")[1], associated Section 10(a)(1)(A) permit, and Final Supplemental Environmental Impact Statement ("FSEIS") prepared pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331 *et seq.*[2]

This notice is submitted by WELC on behalf of WildEarth Guardians, Western Watersheds Project, Wildlands Network, New Mexico Wild, and the Grand Canyon Wolf Recovery Project.

[1] Dep't of the Interior, Fish & Wildlife Serv., Endangered and Threatened Wildlife and Plants; Revision to the Nonessential Experimental Population of the Mexican Wolf; Final Rule, 87 Fed. Reg. 39,348 (July 1, 2022).
[2] U.S. Fish & Wildlife Serv., Final Supplemental Environmental Impact Statement, Proposed Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf (May 2022).

Collectively, these organizations represent over 500,000 members and supporters who adamantly support the science-based restoration and recovery of critically imperiled Mexican wolves to the American southwest. Each of these organizations is actively engaged in ensuring Mexican wolves are rightfully recovered to the point at which the protections of the ESA may no longer be required. Their many members, supporters, staff, and board members have sincere aesthetic, educational, recreational, scientific, and spiritual interests in seeing Mexican wolves fully restored to the wild. This notice of intent – and the subsequent legal action to follow, if necessary – is being submitted in furtherance of these organizations and their members' interests.

On July 1, 2022, the Service published a final rule revising the management rule for the experimental population of Mexican wolves and associated Section 10(a)(1)(A) permit ("Final Rule"). This Final Rule is the result of successful litigation on behalf of the organizations submitting this notice (and others) on the Service's 2015 Section 10(j) management rule.[3] In *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 (D. Ariz., Mar. 31, 2018), the Federal District Court for the District of Arizona (Tucson Division) held the 2015 10(j) rule was arbitrary and capricious and remanded the rule to the Service to remedy violations of the ESA, including: (1) the rule's failure to further the species' recovery, and (2) the Service's failure to make a new determination whether the experimental population is "essential" or "nonessential." *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *17, *19, *23. The litigation raised a number of additional issues, that – while unaddressed by the court in its order – remain highly relevant here.[4]

WELC submitted detailed scoping comments for the agency's consideration on behalf of the aforementioned organizations on June 15, 2020, and substantive legal and scientific comments on the Service's Draft Rule on January 27, 2022.[5]

BACKGROUND | THE ENDANGERED SPECIES ACT

"The Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The primary purpose of the ESA is to "provide a program for the conservation of . . . endangered and threatened species." 16 U.S.C. § 1531(b). To receive the full protections of the ESA, a species must first be listed by the Secretary of the Interior as "endangered" or "threatened" pursuant to ESA section 4. 16 U.S.C. § 1533. The ESA defines an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened species" is "any species which 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(20). The term "species" is defined to include "any subspecies of . . . wildlife." 16 U.S.C. § 1532(16).

The ESA mandates that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of" the ESA.

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[3] Dep't of the Interior, Fish & Wildlife Serv., Endangered and Threatened Wildlife & Plants; Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf; Final Rule, 80 Fed. Reg. 2,512 (Jan. 16, 2015), *as corrected in* 80 Fed. Reg. 4,807 (Jan. 29, 2015) [hereinafter "2015 10(j) rule"].

[4] For example, Plaintiffs WildEarth Guardians et. al, raised a number of issues that the court failed to address upon finding the rule violated the ESA and APA as a whole, including: the underlying biological opinion and associated "no jeopardy" finding violated the ESA; the 2014 EIS violated NEPA for failing to evaluate a reasonable range of alternatives; and the Service violated NEPA by failing to provide a supplemental EIS despite significant changes in the final rule. *See Center for Biological Diversity*, 2018 WL 1586651 at *23.

[5] Grand Canyon Wolf Recovery Project submitted its own draft rule comments on January 27, 2022.

16 U.S.C. § 1531(c)(1). The ESA defines conservation 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 pursuant to [the ESA] are no longer necessary." 16 U.S.C. § 1532(3). The goal of conserving species "is a much broader concept than mere survival. The ESA's definition of 'conservation' speaks to the recovery of a threatened or endangered species." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (quotations and citation omitted).

The ultimate goal of the ESA is not merely to temporarily save endangered and threatened species from extinction, but to *conserve and recover* these species to the point where they are no longer in danger of extinction and thus no longer need ESA protection. This requirement to recover protected species is the foundational mandate of the ESA, and the standard against with the Service's actions must be judged.

Once species are listed, the ESA provides strong legal protections to encourage their recovery. These protections are largely set forth at ESA sections 4, 7, and 9. Section 4 requires the Secretary of the Interior, acting through the Service, to designate critical habitat for all threatened and endangered species concurrently with their listing and to subsequently develop recovery plans for such species. *See* 16 U.S.C. §§ 1533(a)(3), (f). Section 7 requires all federal agencies to "carry out programs for the conservation" of listed species to consult with the Service in order to ensure that their actions are "not likely to jeopardize the continued existence" of such species or "result in the destruction or adverse modification" of their critical habitat. 16 U.S.C. §§ 1536(a)(1), (a)(2). Section 7 also requires that federal agencies "use the best available scientific and commercial data" when evaluating impacts to listed species. 16 U.S.C. § 1536(a)(2). Section 9 prohibits any person from "taking" a listed species or causing another to "take" such species. 16 U.S.C. §§ 1538(a)(1)(B), (g). To "take" a species means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

Section 10(j) provides an affirmative mechanism for species recovery: reintroduction. Under Section 10(j), the Service may authorize the release of any population of a listed species into an area outside of that species' current range. *See* 16 U.S.C. § 1539(j)(2)(A); 50 C.F.R. § 17.81(a). Section 10(j) authorizes the Service to release a population as experimental when "such release will further the conservation of the species" and "only when, an at such times as, the population is wholly separate geographically from nonexperimental populations of the same species," 16 U.S.C. §§ 1539(j)(2)(A), (j)(1). For each population released pursuant to Section 10(j), the Service must by regulation delineate a population boundary and determine whether the population is "experimental" and whether it is "essential to the continued existence" of the species in the wild. 16 U.S.C. § 1539(j)(3); 50 C.F.R. § 17.81(c)(2). The Service has labeled *every* population of endangered species ever reintroduced pursuant to section 10(j) as "experimental, nonessential."

The purpose of section 10(j) is to encourage reintroduction, and therefore, recovery of the species. *See Wyoming Farm Bureau v. Babbitt*, 199 F.3d 1224, 1231–32 (10th Cir. 2000). While "experimental, nonessential" populations must be managed to "further the conservation of the species," the Service has more flexibility in managing a reintroduced "experimental, nonessential" population than it would if the individuals occurred naturally, without a reintroduction. 16 U.S.C. § 1539(j)(2)(A); 50 C.F.R. § 17.81(b). As an example, the Service may alter one or more of the ESA's protections, including the Section 9 take prohibition, for an "experimental, nonessential" population. *See* 16 U.S.C. § 1539(a)(1); 50 C.F.R. § 17.82. The Service sets forth any alterations to the ESA's protections in a species-specific section 10(j) rule. *See* 50 C.F.R. § 17.81(e). *See also generally* 50 C.F.R. § 17.84 (setting forth all species-specific section 10(j) rules to date).

Section 10(a)(1)(A) of the ESA authorizes the Service to issue permits for a "take" of a protected species that would otherwise be prohibited. 16 U.S.C. § 1539(j)(2)(A); 50 C.F.R. § 17.81(b). The Service issues these permits "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 experimental populations pursuant to subsection (j) of this section." 16 U.S.C. § 1539(a)(1)(A). As with all of the ESA's provisions, the Service may issue a Section 10 permit only if it "will be consistent with the purposes and policy set forth in Section 1531" of the ESA. 16 U.S.C. § 1539(d). Section 1531 explains the purpose of the ESA is "to provide a means whereby ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . . ." 16 U.S.C. § 1531(b). Along with all federal departments and agencies, the Service "shall seek to conserve endangered and threatened species and shall utilize their authorities in furtherance of the purposes" of the ESA. 16 U.S.C. §1531(c). The Service, therefore, must ensure that in designating a Section 10(j) species as "experimental, nonessential," in issuing the resulting section 10(j) rule, and in issuing a section 10(a) permit, the agency utilizes its authorization to further the purposes of the ESA. As set forth in more detail below, the Service has failed to ensure its actions will conserve and recover the Mexican wolf.

BACKGROUND | MEXICAN WOLVES

Mexican wolves historically numbered in the thousands and were distributed across large portions of the Southwest, mostly in mountainous terrain that supports populations of deer and elk. By the mid-1900s, however, government and private eradication efforts effectively wiped out the native population.[6] By the 1970s, the Mexican wolf was extirpated from the United States, and by the 1980s, it was considered extirpated from Mexico.

In 1976, the Mexican wolf was listed as an endangered subspecies of gray wolf under the ESA, even though no wild populations were known to remain. In 1978, the Mexican wolf was reclassified and listed as a gray wolf in the contiguous United States. After the ESA listing, the Service initiated recovery programs for gray wolves in three geographic areas, including the Southwest.[7] In 1982, the Service prepared a recovery plan for southwestern wolf recovery. However, the 1982 recovery plan did not contain recovery criteria because the status of the species at the time "was so dire that the recovery team could not foresee full recovery and eventual delisting." The 1982 recovery plan focused instead on the wolf's "immediate survival." The objective was to start a captive breeding program with the hopes of reestablishing a viable, self-sustaining population of Mexican wolves in the wild. In accordance with the plan, the Service initiated a captive-breeding program "with the capture of the last remaining Mexican wolves in the wild in Mexico and subsequent addition of wolves from captivity in Mexico and the United States." All Mexican wolves alive today descend from the seven founding wolves of the captive-breeding program.

In 1998, the Service established an experimental population of Mexican wolves to pursue the primary objective of the 1982 Recovery Plan. In 2015, the Service issued a final rule reclassifying the Mexican wolf as a distinct subspecies of gray wolf. The revised listing removed the Mexican wolf from the broader gray wolf listing and identified the Mexican wolf as a distinct subspecies qualifying for "endangered" status by itself. Simultaneously, the Service also finalized a revised experimental population rule for Mexican wolves, prepared a new Environmental Impact Statement ("EIS"), released a new Section 10(a)(1)(A) permit, and prepared a biological opinion for the revised rule pursuant to Section 7 of the ESA.

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[6] Dep't of the Interior, Fish & Wildlife Serv., Endangered and Threatened Wildlife & Plants; Endangered Status for the Mexican Wolf; Final Rule, 80 Fed. Reg. 2,488 at 2,505 (Jan. 16, 2015) [hereinafter "2015 listing rule"].
[7] *Id.* at 2,489.

The Service's 2015 Section 10(j) rule revised the regulations for the experimental population in an attempt to improve the effectiveness of the reintroduction program and management of the experimental population.

Yet now, despite well over twenty years of captive breeding and reintroduction efforts, the Mexican wolf remains one of the most critically endangered species in North America still. Today, there are only roughly 186 individuals in the wild, and the species' ability to survive and fully recover as envisioned by the ESA remains uncertain. This is due to the population's low genetic diversity and small population size, excessive human-caused losses (including illegal killings and agency removals, primarily due to livestock conflict), inadequate regulatory protections, and other threats. While experts confirm that the recovery of the Mexican wolf is still possible within the next several decades, this is only true if the Service moves quickly to alleviate threats. The best way to do this is by ensuring: (1) adequately sized and genetically diverse populations in the wild (the genetic health of the captive population continues to decline, so time is of the essence); (2) multiple populations exist that are separated but connected to one another through effective natural migration; (3) wolves are protected from human-caused mortality and removal from the wild; and (4) sufficient, suitable habitat is made available for Mexican wolves to roam.

With the promulgation of this revised Section 10(j) rule, the Service needs to act ***now*** to ensure that these threats are adequately addressed and that its management of the species furthers the long-term conservation and recovery of Mexican wolves in the wild. However, as explained below, the Service's Final Rule fails to meet the requirements of the Court's remand and violates the ESA.

LEGAL VIOLATIONS

The Service's Final Rule, associated Section 10(a)(1)(A) permit, and FSEIS fail to comply with the ESA's best available science standard, are inconsistent with statutory language, do not further the conservation of the species, and are arbitrary, capricious, and otherwise not in accordance with the ESA and the Service's regulations.

I. The Service Has Interpreted the Scope of the Remand Far too Narrowly and is in Violation of the Court's March 2018 Order

The Service has inappropriately interpreted and limited the scope of the remanded rulemaking, contrary to the Court's order in *Center for Biological Diversity v. Jewell*. The Court's 2018 order remanding the 2015 10(j) rule held that the rule "fails to further the conservation of the Mexican wolf," 2018 WL 1586651 at *13. This finding faulted the Service for its arbitrary and capricious population cap of only 300-325 wolves, which the Court found was based on a grave misinterpretation of the science and provided for only short-term survival, while the ESA demands the rule provide for the long-term conservation of the species. 2018 WL 1586651 at *14. The Court also reproached the Service for the 2015 rule's expanded take provisions, which both fail to consider the impact on the species' dire genetic health and also operate as a disadvantage to the species, contrary to Section 10(d) of the ESA. 2018 WL 1586651 at *15. But the Final Rule fails to also correct the many and varying additional errors as identified by the Court.

a. The Court Ordered the Service to Address the 2015 Rule's Wholescale Failure to Ensure the Long-term Survival and Recovery of the Species

The Service should have conducted its remand in light of the 2015 10(j) rule's wholesale failure to further the conservation and recovery of the Mexican wolf. 2018 WL 1586651 at *13, *17. The Service's revised rule must further the *long-term* conservation of the species in the wild. But, in the Final Rule and

FSEIS, the Service's limited interpretation of the remand fails to achieve this important mandate. The Final Rule includes only three, limited substantive revisions to the 2015 10(j) rule: (1) modification of the population cap/objective; (2) establishment of a genetic objective, and (3) temporary modifications to three of the 2015 10(j) rule's take provisions. While our primary, substantive concerns with these three revisions are addressed further below, the Service's limited scope of the remand fails to remedy the Court's concerns that the rule fails to ensure the *long-term* recovery of the Mexican wolf altogether. 2018 WL 1586651 at *13, *17.

b. The Court Ordered the Service to Reassess the Geographic Boundaries of the 2015 Rule's MWEPA

Notably, the Court faulted the Service for including a purely politically-based geographic boundary that serves only to limit the species' chances for survival in the wild, a holding the Service chooses to wrongly ignore in the Final Rule. In faulting the Service for the 2015 rule's failure to further the conservation needs of the species, the Court noted that the northern geographic boundary of Interstate 40 for the MWEPA was focused on ensuring only short-term survival, rather than long-term conservation. 2018 WL 1586651 at *14, n. 13. Specifically, the Court stated:

> *[A]lthough FWS acknowledges that territory north of I-40 will likely be required for future recovery and recognized the importance of natural dispersal and expanding the species' range, it nevertheless imposed a hard limit on dispersal north of I-40. Any wolves that venture outside the MWEPA will be captured and returned. The agency again relied on the limited scope of the rule to justify this provision, stating that the purpose of the rule is to improve the effectiveness of the reintroduction project and citing to the recovery plan as the likely means of addressing the insufficient geographic range that is provided by the present rule.*

Id. Yet, here, on remand, the Service once again fails to address this crucial concern.

While the Service attempts to justify maintenance of the Interstate 40 northern boundary based on the 2017 Recovery Plan,[8] and the habitat suitability analysis upon which the recovery plan relies (Martinez-Meyer 2017), this wholly ignores the Court's finding that the boundary itself fails to meet the long-term recovery requirements of the ESA. 2018 WL 1586651 at *14, n. 13. The Final Rule must be based solely on the best available science. 16 U.S.C. § 1539(j)(2)(B); 50 C.F.R. § 17.81(c)(2). But by refusing to revise the northern boundary of the MWEPA and by placing a "hard limit" on any establishment of Mexican wolves north of Interstate 40, the Service is arbitrarily basing the Final Rule on social and/or political considerations, not the biological needs of the species as the ESA demands. The Service's failure to modify the northern boundary of the MWEPA in the Final Rule fails to comport with the best available science, and is arbitrary and capricious and a direct violation of the ESA and the Court's order for remand.

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[8] U.S. Fish & Wildlife Serv., 2017 Mexican wolf Recovery Plan, First Revision (Nov. 2017) [hereinafter "2017 Recovery Plan"). See *infra* Section III (noting that continued litigation on the 2017 Recovery Plan remains pending in the Court of Appeals for the Ninth Circuit. *WildEarth Guardians et al. v. Haaland, Case No. 22-15029; Center for Biological Diversity et al. v. Haaland, Case No. 22-15056.* The primary issue on appeal in the *WildEarth Guardians* case is whether a recovery plan must be based on the best available science. As the U.S. District Court for the District of Arizona held at the motion to dismiss stage of the proceedings that recovery plans do not need to be based in the best available science, *see Center for Biological Diversity v. Zinke,* 399 F. Supp. 3d 940, 949 (D. AZ 2019), an outstanding question remains whether the 2017 Recovery Plan is based in the best available science (which, we argue it is not). Accordingly, the argument remains that the Service cannot base the revised 10(j) rule, which *must* be based solely on the best available science (16 U.S.C. § 1539(j)(2)(B); 50 C.F.R. § 17.81(c)(2)), on a document and provisions that are *not* based on the best available science).

c. The Service Erroneously Eliminated from Consideration Numerous Viable Alternatives and Recommendations as Provided in Scoping Comments Based on its Erroneously Narrowed Interpretation of the Remand

Commenters provided the Service with numerous viable approaches for consideration in producing a revised rule that aids the recovery program for Mexican wolves during the scoping period, but instead of analyzing new (and improved) options, the Service eliminated many of these suggestions by employing a limited set of criteria for the SDEIS's alternatives analysis. SDEIS at 14–21. The Service should have used this rulemaking opportunity to actually take a close look at and fully reassess the recovery program's successes and failures though. The Service was required to publish a rule that furthers the conservation of the species on the whole, which necessarily includes all aspects of the federal recovery effort. But instead of considering many suggestions offered by commenters here, and by scientists and the broader public, the Service simply dismissed many viable options for improving the recovery program via the new Section 10(j) management rule because they believed these options "do not promote management flexibility."[9] The Service's refusal to assess different approaches during this public process was a huge disservice to the Mexican wolf recovery program overall, and is contrary to the ESA's mandate that the management rule be based on the best available science. 16 U.S.C. § 1539(j)(2)(B); 50 C.F.R. § 17.81(c)(2).

In short, the Service's narrow interpretation of the scope of the remand order is arbitrary and capricious and violates the intent of the ruling in *Center for Biological Diversity v. Jewell*.

II. The Service's "Experimental, Non-Essential" Determination is Arbitrary and Violates the ESA

In the Final Rule, the Service states that it has decided to maintain the Mexican wolf's designation as a "non-essential" experimental population. In other words, in accordance with Section 10(j)(2)(B) of the ESA, the Service has determined, based on its review of the best available science, that the roughly 186 Mexican wolves in the wild – the *only* population in the wild in the United States – is not essential to the continued existence of the subspecies in the wild. 16 U.S.C. § 1539(j)(2)(B). This means the loss of the *entire* population of Mexican wolves in the wild in the United States would not "be likely to appreciably reduce the likelihood of the survival of the species in the wild." 50 C.F.R. § 17.80(b). The loss of the *entire* Mexican wolf population in the wild in the United States would not put the "species as a whole" – which presumably includes both wolves in captivity and those in the wild – in imminent danger of extinction. In support of this "non-essential" finding, the Service provides a number of rationales in the Final Rule, none of which have merit, and all of which violate the ESA and APA.

a. The Service's Finding is Premised on Non-biological Factors

In the Final Rule, the Service explains why its non-essential designation will benefit the conservation of the species, give it more flexibility and control over management (and relatedly, largely relieve the agency of its Section 7 consultation and critical habitat obligations), and "mitigate fears" of private landowners, states, and other private parties about the reintroduction program and re-establishing Mexican wolves in their historic range in Arizona and New Mexico.

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[9] *See e.g.,* SDEIS at 18 (eliminating an alternative that includes no take/removal provisions for natural wolf predation on wildlife, including elk/deer); *Id*. at 19 (eliminating an alternative that allows for take only in cases where a wolf has threatened human safety); *Id*. (eliminating an alternative that does not allow for take for wolf predation on livestock on public lands while the permittee/agent is not present and aware of wolf presence); *Id.* at 20 (eliminating an alternative that includes a provision, to the extent feasible, that allows for replacement of wolves unlawfully killed in the wild).

An essentiality finding under the ESA, however, must be premised solely on biological factors after taking into consideration the best available science, not the socio-economic or policy reasons put forth by the Service in the Final Rule. *See* 16 U.S.C. § 1539(j)(2)(B) (explicitly stating that the essentiality finding is based *solely* on the best available science); 50 C.F.R. §17.81(c)(2) (finding must be "based solely on the best scientific and commercial data available" on whether the population is essential); 49 Fed. Reg. at 33,888 (describing the "biological facts" that must support an essentiality finding). As such, the Service's "nonessential" determination based on non-biological factors is arbitrary and capricious, and violates the ESA.

b. The Service Cannot Use the Captive Breeding Population to Avoid an Essentiality Finding

Second, the Service maintains that that only Mexican wolf population in the wild is "non-essential" because if completely lost, the remaining wolves in the captive breeding program could replace them. As explained by the Service in the Final Rule: Even if the entire population in the wild in the United States died, animals from captivity would be available to reintroduce to the wild and reestablish the population. This approach – which relies solely on a captive breeding program to replace the only wild population in the United States – is arbitrary and conflicts with the ESA.[10]

The ESA's primary goal is to get listed species off of the life-support system of human intervention and preserve their ability to survive and recover in the wild, on their own. *See* 16 U.S.C. § 1531(b) (purpose of ESA is to conserve "ecosystems" upon which species depend); 16 U.S.C. § 1532(3) (defining "conservation" as using all methods necessary to bring listed species to the point at which the measures provided by the ESA are no longer necessary); H.R. Rep. No. 95-1625, at 5, reprinted in 1978 U.S.C.C.A.N. at 9455 (discussing ESA's focus on natural populations); *Cal. State Grange v. Nat'l Marine Fisheries Serv.*, 620 F.Supp.2d 1111, 1156–57 (E.D. Cal. 2008) (goal of the ESA is to establish self-sustaining populations in the wild, not in captivity); *Trout Unlimited v. Lohn*, 559 F.3d 946, 957 (9th Cir. 2009) ("ESA's primary goal is to preserve the ability of natural populations to survive in the wild.").

This is why species' recovery under the ESA takes place in the wild, not in captivity. *See* 50 C.F.R. § 17.80(b); 50 C.F.R. § 402.02 (defining "jeopardize the continued existence of a species"). This is also why, when making an essentiality finding, Congress directed that the Service "consider whether the loss of the experimental population would be likely to appreciably reduce the likelihood of survival of that species *in the wild* . . . ." H.R. Conf. Rep. 97-835 at 33–34, reprinted in U.S.C.C.A.N. 2860, 2874–75 (Sept. 17 1982) (emphasis added); *see also* 50 C.F.R. § 17.80(b) (noting same when defining essential populations).[11]

Captive breeding programs cannot be used as an end-run around the ESA's substantive directives, mandates, or prohibitions. For example, captive breeding programs and the ability to release more individuals to replace those lost in the wild cannot be used to avoid formal consultation pursuant to Section 7 of the ESA, avoid a jeopardy finding in a Biological Opinion (which uses a similar definition and

[10] The Service discusses how "extremely unlikely" it would be to lose the entire population of Mexican wolves in the wild, but the likelihood of such losses is irrelevant to the essentiality determination. 50 C.F.R. § 17.80(b). For an essentiality finding, the Service must assume that such losses would occur and then determine whether it would appreciably reduce the likelihood of the subspecies' survival in the wild. *Id.*

[11] Note also that the "essential" definition for Section 10(j) ("whether loss would appreciably reduce likelihood of survival of species in the wild etc..") is nearly identical to the "jeopardy" definition for Section 7 purposes and as such, at the very least, any such analysis for essentiality should carefully consider and evaluate the same factors used for a jeopardy finding – i.e., careful review of the current status of the sub-species (in the wild), the environmental baseline for the action area, the effects of the action (Section 10(j) rule), and the cumulative effects as defined by the Service's Section 7 regulations and handbook.

standard as essentiality under Section 10(j) of the ESA), or avoid an essentiality determination under Section 10(j) of the ESA.

Yet, in the Final Rule the Service does just that. The Service insists the wild population of Mexican wolves in the wild is not "essential" to the conservation of the subspecies and its loss would not "appreciably reduce" the likelihood of the subspecies survival in the wild or put the subspecies in imminent danger of extinction because the wild population is replaceable with wolves in captivity. 86 Fed. Reg. at 59,967. But this approach turns the ESA and its objective to conserve species *in the wild* on its head.

It also reads the phrase "in the wild" out of Section 10(j) of the ESA. Consistent with the ESA's recovery goals, a determination on "essentiality" is premised on the impact the population in the wild, if lost, would have on the species in the wild, not on the number of wolves in captivity or zoos available for future release. *See* 50 C.F.R. §§ 17.80(b), 17.81(c)(2). Indeed, Section 10(j) of the ESA directs the Service to determine whether the experimental population is "essential" to the continued existence of the species *in the wild*. 50 C.F.R. § 17.80(b); *see also* Fed. Reg. at 33888 (citing H.R. Conf. Rep. No. 835 at 34). If the only population of a listed subspecies in the wild in the United States – here, a single population of Mexican wolves that only exists in portions of Arizona and New Mexico – is lost, it would do more than "appreciably reduce the likelihood of" the subspecies' survival in the wild; it would eliminate it altogether.

Finally, if one assumes that the reliance on a captive breeding program to replace all wolves lost in the wild is a valid approach, the Service must (but has failed) to explain why and how the captive population of aging wolves is capable of replacing the roughly 186 wolves in the wild, and why doing so would not appreciably reduce the likelihood of the subspecies' survival in the wild. But in the Final Rule (nor the FSEIS), there is no analysis, no evaluation, no population viability analysis or model supporting this finding.

The Service's opinion, therefore, that the wild population is "non-essential" because the captive breeding program is capable of replacing the wild population is just that: an opinion and one that is unsupported by the best available science as required by the ESA. Indeed, not a single scientific study, paper, population viability model, or analysis supports this opinion, and what scientific evidence exists, *i.e.*, the best available science, reveals the captive population of Mexican wolves is likely incapable of replacing the 186 Mexican wolves in the wild without significant, adverse effects to the recovery effort. To our knowledge, such an analysis has never been done, and nor have the SSP weighed in on the feasibility or validity of using the current captive population as such a backstop against extinction. Accordingly, the Service's "nonessential" determination based on the captive population's *potential* ability to replace wolves in the wild if they are lost is arbitrary and capricious, and violates the ESA.

c. The Service's Reliance on Reintroduction Efforts in Mexico is Misplaced

Third, the Service suggests the only population of Mexican wolves in the wild in the United States does not qualify as essential because a second population has been established in Mexico and a loss of wolves here – in the United States – "would not disable Mexico's ability to achieve recovery . . ." 86 Fed. Reg. at 59,968. The Service's reliance on a second "population" in Mexico to avoid an essentiality finding is misplaced and violates the ESA.

The ESA is focused on ensuring the conservation (recovery) of listed species – like Mexican wolves – in the United States, not in foreign nations. *See* 16 U.S.C. § 1531(a)(1) (Congress noting that the statute is in response to various species being rendered extinct in the United States); 16 U.S.C. § 1531(a)(5) (noting that the statute was designed to better safeguard and conserve the Nation's heritage in fish, wildlife

and plants). In *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 684-85 (D.D.C. 1997), the Service sought to avoid listing the Canada lynx as threatened due to its status in Canada. The court rejected this argument, however, noting that it could not dismiss the contiguous United States population's status just because it was plentiful elsewhere. Likewise, in *Center for Biological Diversity v. Kempthorne*, 607 F. Supp. 2d 1078 (2009), the court rejected the Service's attempt to avoid preparing a recovery plan for the jaguar on the same grounds. The same logic applies here: the Service cannot avoid making an essentiality finding for the only Mexican wolf population in the wild in the United States because a second "population" exists in Mexico.

In sum, the Service's determination that the experimental population of Mexican wolves is "non-essential" under Section 10(j) is arbitrary and capricious and violates the ESA.

III. The Service Erroneously Relies on the Legally Deficient 2017 Recovery Plan throughout the Final Rule, Which Violates the ESA's Mandate that the Rule be Based Solely on the Best Available Science

The Service repeatedly justifies the Final Rule's proposed revisions by referencing the 2017 Recovery Plan for Mexican wolves. But, as noted previously, the revised 10(j) rule must be based on the best available science – 16 U.S.C. § 1539(j)(2)(B); 50 C.F.R. § 17.81(c)(2) – and the 2017 Recovery Plan is not.

As an initial matter, the Service is well aware that the 2017 Recovery Plan is being legally challenged, with appeals currently pending before the Ninth Circuit. *WildEarth Guardians et al. v. Haaland*, Case No. 22-15029 (filed Jan. 7, 2022); *Center for Biological Diversity et al. v. Haaland*, Case No. 22-15056 (filed Jan. 13, 2022). Plaintiffs (including many of the organizations submitting these comments, and others), have raised serious allegations regarding the 2017 Recovery Plan's validity under the ESA. In particular, the primary question on appeal in the *WildEarth Guardians et al.* matter is whether a recovery plan must be based on the best available science. This is a question that has yet to be decided in the Ninth Circuit and will set important precedent for the future of the Mexican wolf recovery program regardless of the outcome on appeal.

As previously described in our comments, Carroll (2019) offered an analysis comparing the 2017 Recovery Plan to its prior, draft iteration in 2012/2013, and outlining a number of very serious concerns with the 2017 Recovery Plan, including the fact that the recovery criteria are not based solely on science, but instead are based on a selective interpretation of the science that has been deemed acceptable on political bases. These comments remain valid and the Service has failed to adequately respond to the criticisms provided by Carroll (2019).

Additionally, reliance on its recovery plan for provisions of the revised 10(j) rule is directly contrary to the Court's order on remand. In *Center for Biological Diversity v. Jewell*, the Court explicitly cautioned the Service not to rely on the contents of its recovery plan to justify the provisions of the 10(j) rule, stating:

> *The Court concludes that the substance or terms of future recovery actions do not relieve [the Service] of its obligations under Section 10(j). Moreover, provisions of a recovery plan are discretionary, not mandatory. Thus, even if the recovery plan contained all terms promised by [the Service] here, there is no guarantee that those terms will protect against the harms that the Court finds presented by the 10(j) rule.*

2018 WL 1586651 at *15. The 10(j) rule is legally enforceable and must be based on the best available science, 16 U.S.C. § 1539(j)(2)(B); 50 C.F.R. § 17.81(c)(2). Recovery plans are subject to different standards

than experimental population management rules under the statute. *See* 16 U.S.C. § 1533(f). Accordingly, it is an error for the Service to use the 2017 Recovery Plan as the basis for the revised Section 10(j) rule because such conduct violates the ESA's best available science mandate for the revised rule.

IV. The Final Rule's Genetic Objective is Ineffective, Unsupported by the Best Available Science, and Will Not Address the Genetic Threats Facing the Subspecies

In the Final Rule, the Service explains its inclusion of a new genetic objective that tracks the 2017 Recovery Plan's genetic delisting criteria by committing the agency to conduct a sufficient number of releases from captivity to result in 22 released wolves "surviving to breeding age." This genetic objective, however, falls short of actually addressing the genetic threats facing Mexican wolves and Mexican wolf recovery.

First, the objective only requires effort (releases), not results. No actual breeding or influx of genetic material is required based on the current definition of "surviving to breeding age." And, as the Service is well aware, simply releasing more wolves is insufficient and, in some circumstances, can harm (not improve) the genetic diversity of wolves in the wild and increase relatedness depending on which wolves are released. Data from the studbooks over the years reveals this may already be occurring.

Second, there is not a single genetic metric or way to measure the genetic fitness or improvement in the genetic health of the wild population in the Final Rule's genetic objective (same for the genetic criterion in the 2017 Recovery Plan). This is so despite extensive research and evaluation of such metrics by the Service and SSP program and despite the availability of such metrics in the scientific literature.

Third, the Service's objective is premised on a population viability model (Miller 2017) that the best available science reveals is littered with problems, incorporates non-biological policy and socio-economic parameters, underestimates the effects of inbreeding depression (thereby underestimating the need for additional releases and genetic threats in general), and cannot be used to predict changes in genetic health of the wild population. Again, Carroll (2019) elaborates on some of these issues.

Finally, even if one assumes the model used to create the genetic objective is valid and accurate, the model itself reveals releasing enough wolves to result in 22 released wolves surviving to breeding age will not address the genetic threats facing Mexican wolves in the wild and will have very little impact on the expected gene variation of the wild population and may actually result in lower FGE and higher mean kinship.

In short, the Final Rule's genetic objective is ineffective, not based in the best available science, and will not address the genetic threats facing Mexican wolves, and therefore, is arbitrary and capricious and violates the ESA.

V. The Final Rule's Population Objective is Insufficient, Unsupported by the Best Available Science, and Fails to Ensure the Biological Recovery of the Species

In the Final Rule, the Service changes the 2015 10(j) rule's population "cap" to an "objective." While no longer a "cap," per se, the Final Rule still maintains the population at an "objective" of 320 individuals in the wild. This population objective, however, still fails to ensure the long-term conservation of the species in accordance with the best available science. *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *14 ("The rule's provision for a single, isolated population of 300-325 wolves . . . does not further the conservation of the species").

As described in our comments, the best available science provides that a minimum population of at least 750 Mexican wolves existing in a metapopulation consisting of three connected subpopulations of at least 200 Mexican wolves each is necessary for the species to recover. But instead of remedying the scientific error identified by the Court, the Service attempts a linguistic work-around to avoid applying the best available science and to instead uphold its prior negotiated commitments to the States. Again, the Final Rule must be based solely on the best available science though. 16 U.S.C. § 1539(j)(2)(B).

The Service again points to the 2017 Recovery Plan to justify its so-called "revised" "objective." But, as explained above, the 2017 Recovery Plan is not based in the best available science, and the Miller (2017) PVA, in particular, has been deeply criticized for its many flaws (*e.g.*, Carroll 2019).

In short, the revised population objective of the Final Rule fails to ensure that the species will ever be brough to the point at which the Act's protections are no longer necessary, is not based on the best available science, and thus, is arbitrary and capricious and violates the ESA.

VI. The Final Rule's Revised Take Provisions are Insufficient to Remedy the Severe Defects as Explained in the Court's March 2018 Order

In the Final Rule, the Service modifies three allowable forms of take[12] of Mexican wolves included in the 2015 10(j) rule. The Service explains that take of Mexican wolves on federal and on non-federal lands will be temporarily restricted until certain genetic objectives have been met. The Final Rule also removes the provision allowing for take in response to unacceptable impacts to wild ungulate herds until the proposed genetic objective (the release of captive wolves results in 22 surviving to breeding age) has been met. While these revisions may aide in the recovery of the species on some level, the temporary nature of the proposed revisions are insufficient to promote the long-term recovery of the species as the law demands. *Center for Biological Diversity v. Jewell*, 2018 WL 15886651 at *15. And again, the agency fails to remedy the Court's concern. *Id.* Instead of restricting these forms of take only temporarily, a permanent restriction on these forms of take would be more prudent to allow the Service to carry out its overarching conservation mandate, 16 U.S.C. § 1536(a)(1). While it is understood that take authorizations are based primarily on the Service's need to coordinate with affected stakeholders, such coordination cannot override the fundamental conservation purposes of the ESA and serve to the disadvantage of the species' recovery overall. *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *15. These only "temporary" restrictions do not go far enough to address the Court's concern that the Service failed to include sufficient protections from the loss of genetic diversity that is serving as a primary threat to the species' survival and recovery overall. *Id.* As such, the revised take provisions are arbitrary and capricious, and violate the ESA.

VII. The Service Failed to Include a Provision to Address Human-Caused and Illegal Killings, as well as Lethal Management Removals, in the Revised Rule

Notably absent from the Final Rule is any provision for addressing the leading threat faced by Mexican wolves in the wild – the devastating amount of human-caused mortality and illegal killings the species faces. Human-caused mortality and removal of Mexican wolves from the wild population is the leading threat facing the species' recovery overall. *See e.g.,* 80 Fed. Reg. 2,512; Carroll (2019). As we explained in our comments, the revised rule should have included a mortality limit in order to alleviate this severe threat and further the long-term conservation and recovery of the species. Carroll (2019). The Service

[12] 16 U.S.C. § 1532(19) (defining "take" to mean "to harass, harm, pursue, hunt, shoot, wound, capture, or collect, or to attempt to engage in any such conduct."; 50 C.F.R. § 1784(k)(3)(same).

has provided similar mortality limits in management rules and/or delisting criteria for other species (*e.g.*, grizzly bears). Yet, for Mexican wolves, the Service has refused – once again – to include any binding mechanism to address this primary threat based solely on politics and its desire to reach an acceptable agreement with select stakeholders. This is a violation of the ESA. *See* 16 U.S.C. § 1539(j)(2)(B); *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *17.

The Final Rule also neglects to address the mortality threats to Mexican wolves posed by lethal management removals. While focusing instead on human-caused and illegal killing, the Service has failed to acknowledge that it has no specific protocol for preventing management removal of genetically-significant wolves from the wild. The 2018 Court order notes that the take provisions of the 2015 rule failed to contain adequate protection for the loss of genetically valuable wolves; this failure has an analog in the Service's own unrestricted ability to lethally remove any wolf, a failure the Final Rule does not address and which subverts the statutory mandate to further the recovery of the species. The Service's decision is thus arbitrary and capricious, and violates the ESA.

VIII. The Service's Section 7 Consultation Violates the ESA

To achieve the ESA's recovery goal, Congress directed federal agencies to engage in consultation with the Service to ensure any actions it funds, authorizes or carries out are "not likely to jeopardize the continued existence" of any listed species. 16 U.S.C. §1536(a)(2). Actions that are "likely to adversely affect a listed species" must obtain a biological opinion from the Service discussing the effects of the action and including a finding whether the action "is likely to jeopardize the continued existence" of the species. 16 U.S.C. §1536(a)(2); 50 C.F.R. § 402.14. Similar to the essentiality finding, the phrase "jeopardize the continued existence of" means to engage in an action that appreciably reduces the likelihood of the survival and recovery of a listed species in the wild. 50 C.F.R. § 402.02. Impacts to both survival and recovery must be addressed in the biological opinion's jeopardy finding. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008). The jeopardy finding must also be based on the best available science. *Id.*; 50 C.F.R. § 402.14(g)(8). This standard does not require the Service to conduct "new tests or make decisions on data that does not yet exist," *Center for Biological Diversity v. USFWS*, 807 F.3d 1031, 1047 (9th Cir. 2015) (citation omitted), but it does prohibit the agency from "disregarding available scientific evidence that is in some way better than the evidence [it] relies on." *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006).

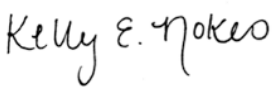
For the previous, 2015 10(j) rule, the Service engaged in intra-agency conferencing and consultation on its rule for the experimental population of Mexican wolves and its related Section 10(a)(1)(A) permit authorizing take of Mexican wolves traveling north of Interstate-40. This consultation resulted in the issuance of a biological opinion and finding that the revised rule and Section 10(a)(1)(A) permit, as proposed, are not likely to jeopardize the continued existence of the Mexican wolf.

As previously argued and explained in the *Center for Biological Diversity v. Jewell* case, this "no jeopardy" finding was arbitrarily premised on the agency's unsupported non-essential finding, failed to address and consider important aspects of the revised rule that will likely impact recovery efforts, and failed to utilize the best available science on the recovery needs of Mexican wolves. The biological opinion relied on by the Service also didn't properly define and analyze the proposed action for the 10(j) rule or the "action area" for the 10(j) rule. The biological opinion also failed to properly define and evaluate the environmental baseline for the 10(j) rule, the effects of the action, or cumulative effects as defined by the Service's consultation handbook and implementing regulations. As such the revised rule and associated Section 10(a)(1)(A) permit violate the ESA.

CONCLUSION

Wherefore, this 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 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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