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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DEFENDERS OF WILDLIFE, et al., Plaintiffs, vs. H. DALE HALL, et al., Defendants, and SAFARI CLUB INTERNATIONAL, et al., Defendant-Intervenors.	Case No. 08-14-M-DWM **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

This case challenges the decision of the U.S. Fish and Wildlife Service ("FWS") to revise the regulation that governs management of the reintroduced wolf populations of the northern Rocky Mountains ("10(j) regulation") under the Endangered Species Act ("ESA"). See 73 Fed. Reg. 4,720 (Jan. 28, 2008). If allowed to stand, the regulation could allow the killing of nearly two-thirds of the current wolf population of 1,700 wolves.

The regulation substantially and unjustifiably lowers the bar for killing endangered wolves in the name of protecting booming herds of elk, deer, and other ungulates. Indeed, even while asserting the necessity of the rule change to protect ungulates, primarily elk, FWS conceded in its environmental assessment of the 2008 10(j) regulation that "most elk herds in Idaho, Montana, and Wyoming are at or above State management objectives." AR 0600.

Despite the ESA's mandate that FWS conserve threatened and endangered species, see 16 U.S.C. §§ 1531(b), 1532(3), 1533(d), FWS offered no legitimate wolf conservation purpose for the 10(j) regulation. Because the 10(j) regulation threatens to decimate rather than conserve the northern Rockies wolf population, it unlawfully violates the ESA's most fundamental purpose.

In its haste to complete the 10(j) regulation, FWS failed to prepare a meaningful inquiry into the environmental consequences of the action, in violation

of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq. Despite evidence that the regulation would significantly impact northern Rockies wolves—and, consequently, the ecosystems of which wolves are an essential part—FWS failed to prepare an Environmental Impact Statement ("EIS"). Instead, FWS prepared an Environmental Assessment ("EA") that dismissed any suggestion that environmental effects might be significant. This result was pre-ordained by the agency; even before FWS commenced NEPA review, the agency intended to make a finding that the rule had no significant effects. FWS's decision to adopt the 2008 10(j) regulation based on inadequate environmental analysis violated NEPA. See 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9.

BACKGROUND

I. STATUTORY FRAMEWORK

Gray wolves are listed throughout the coterminous United States as endangered, except for Minnesota, where wolves are listed as threatened. See 43 Fed. Reg. 9,607 (March 9, 1978). To spur wolf recovery, FWS reintroduced 66 gray wolves into Yellowstone National Park and central Idaho in 1995 and 1996. See 73 Fed. Reg. at 4,720-21. Under ESA section 10(j), 16 U.S.C. § 1539(j), FWS classified these reintroduced populations as "nonessential experimental populations." See 59 Fed. Reg. 60,266 (Nov. 22, 1994).

The ESA provides that members of an experimental population must be

treated as "threatened" for most purposes. 16 U.S.C. § 1539(j)(2)(C). As with other threatened species, FWS may adopt "protective regulations" for such populations that FWS "deems necessary and advisable to provide for the conservation of such species." Id. § 1533(d); see 50 C.F.R. § 17.82 ("experimental population shall be treated as if it were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the Act").

II. THE 2005 10(j) REGULATION

In 2005, FWS adopted an ESA regulation allowing wolves within the reintroduced populations to be killed to address "unacceptable impacts" to wild ungulates. See 70 Fed. Reg. 1,286, 1,298 (Jan. 6, 2005). The 2005 regulation defined "unacceptable impact" as a "decline in a wild ungulate population or herd, primarily caused by wolf predation, so that the population or herd is not meeting established State or Tribal management goals." Id. at 1,307 (emphasis added).

In 2006, Idaho proposed to implement the 2005 10(j) regulation in the Clearwater region of northern Idaho, where the elk population did not meet Idaho's numeric management objectives. See AR 3589-663 (Clearwater proposal). Idaho's Clearwater proposal was intended to reduce the region's wolf population by 60- to 75-percent. AR 3595. The proposal was put on hold when Idaho "clearly concluded that wolf predation was not 'primarily' the cause of the elk populations' decline." 73 Fed. Reg. at 4,721. No wolf killing proposal was ever

implemented under the 2005 10(j) regulation because northern Rockies elk herds almost universally exceed current population objectives and wolves are not likely to ever "primarily" be the cause of elk population declines. See id. at 4,721, 4,723.

III. THE 2008 10(j) REGULATION

In early 2007, FWS proposed removing wolves from the endangered list throughout the northern Rockies. See 72 Fed. Reg. 6,106 (Feb. 8, 2007). Before FWS could include Wyoming in the delisting, however, FWS first had to ensure that Wyoming's newly revised wolf management statute was in place to provide adequate regulatory mechanisms. See id. at 6,127. Wyoming law required that several statutory conditions be satisfied by February 29, 2008 for Wyoming's wolf management statute to take effect. See Wyo. Stat. Ann. § 23-1-109(b), (c). One of those conditions required revisions to the 2005 section 10(j) regulation to allow greater wolf killing to address ungulate impacts. See id. § 23-1-109(c)-(e). FWS accordingly had to revise the 10(j) regulation by February 29, 2008 to proceed with its delisting plan.

FWS responded to Wyoming's demand by proposing revisions to the 10(j) regulation on July 6, 2007. See 72 Fed. Reg. 36,942 (July 6, 2007). On September 11, 2007, FWS published a Notice of Availability and opened a 30-day public comment period on its Environmental Assessment ("EA") for the proposed rule change. 72 Fed. Reg. 51,770 (Sept. 11, 2007). Throughout the revision process,

FWS staff scrambled to develop a schedule to publish the final revised 10(j) regulation in time to satisfy Wyoming's February 29, 2008 deadline. See, e.g., AR 0002, 2012, 2255, 2256. This "difficult if not impossible" task required reviewing 90,000 comments on the draft EA in just one month, AR 2386, and truncating review of the rule by the federal Office of Management and Budget ("OMB") from 90 days to a mere 30 days, AR 0015 (90-day OMB review period would make meeting Wyoming's deadline "unfeasible"); AR 2376-77 (OMB agreed to 30-day review period). See AR 2256 (email describing schedule as "difficult if not impossible" to meet).

The compressed schedule for environmental review of the rule allowed insufficient time to prepare an EIS. Instead, FWS determined that the 2008 10(j) rule would not "significantly affect the quality of the human environment within the meaning of [NEPA]." AR 0555-57. FWS published the final revised 10(j) regulation on January 28, 2008. See 73 Fed. Reg. at 4,720.

The 2008 10(j) regulation liberalizes the conditions under which states and tribes are permitted to kill wolves in the Yellowstone and central Idaho experimental population areas based on an alleged "unacceptable impacts" to ungulate populations or herds. Under the superseded 2005 regulation, states could establish an "unacceptable impact" only by documenting both: 1) a decline in a wild ungulate population; and 2) proof that wolves were the primary cause of the

population decline. See 70 Fed. Reg. at 1,307. The "unacceptable impact" definition adopted in the 2008 10(j) regulation eliminates both of these requirements. It requires only that a wild ungulate population is failing to meet state or tribal management objectives—however defined by the states—and that wolves are one of the major causes for that failure. See 73 Fed. Reg. at 4,736 (50 C.F.R. § 17.84(n)(3)). Under the new rule, a state or tribe may propose wolf killing to address whatever ungulate management goals a state determines are appropriate, including state objectives for population size, cow-calf ratios, nutrition, behavior, and movement. See id. at 4,722.

FWS stated that the rule change was necessary because the prior definition of "unacceptable impact" set an "unattainable" threshold for the killing of wolves. Id. at 4,721. "Wolf predation is unlikely to impact ungulate population trends substantially unless other factors contribute, such as declines in habitat quality and quantity, other predators, high harvest by hunters, weather, and other factors." Id. (citations omitted); see also AR 0579. The new definition responds to state pressures by allowing significant wolf killing even when those other factors impact the affected ungulate population as much as, or even more than, wolves.

Further, by modifying the definition of unacceptable impacts to include impacts to ungulate movements, behavior, feeding, and other characteristics beyond herd or population size, 73 Fed. Reg. at 4,722, the 2008 10(j) regulation

greatly expands the ability of states and tribes to kill wolves even in areas where elk, deer, and other wild ungulates are plentiful. See id. at 4,721-22 (regulation "expands the potential impacts for which wolf removal might be warranted beyond direct predation or those causing immediate population declines"). Under the 2008 10(j) regulation, FWS must accept a state or tribal determination of unacceptable impact. The regulation's only substantive constraints on wolf killing are that the Service must conclude that "wolf removal is not likely to impede recovery," and that the wolf population will not be reduced "below 20 breeding pairs and 200 wolves" in the affected State. Id. at 4,736. The rule creates the potential for States to kill all but 600 of the approximately 1,700 northern Rockies wolves.

The 2008 10(j) regulation applies only to experimental wolf populations in states with FWS-approved wolf management plans. Because FWS revoked its approval of Wyoming's wolf management plan as a result of this Court's 2008 preliminary injunction order, see Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160, 1163 (D. Mont. 2008), the 2008 10(j) regulation currently applies only in Idaho and Montana.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of an agency's compliance with the ESA and NEPA is governed by the Administrative Procedure Act ("APA"), under which agency

decisions are set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see Defenders of Wildlife v. Salazar, Nos. 09-CV-77-DWM, 09-CV-82-M-DWM, 2010 WL 3084194, at *6 (D. Mont. Aug. 5, 2010); Anderson v. Evans, 371 F.3d 475, 486 (9th Cir. 2004). "The review must not rubber-stamp ... administrative decisions that [the court deems] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Defenders of Wildlife, 2010 WL 3084194, at *6 (bracketed text in original; quotations omitted).

II. THE 2008 10(j) REGULATION VIOLATES THE ESA'S CONSERVATION MANDATE

FWS's 2008 wolf 10(j) regulation violates the ESA. The ESA requires FWS to conserve endangered and threatened species. See 16 U.S.C. §§ 1531(b), (c), 1533(d). Rather than conserve wolves, FWS has established a regulatory framework to potentially permit more than one thousand wolves to be killed. The regulation unjustifiably turns basic wolf behavior—i.e., predation on elk, wolves' native prey—into a basis for killing wolves.

A. The ESA Imposes A Duty To Conserve Threatened And Endangered Species

Congress enacted the ESA to "provide a program for the conservation of ... endangered species and threatened species" and to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be

conserved." 16 U.S.C. § 1531(b). "'Conservation' 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), amended by 387 F.3d 968 (quotation and citation omitted); see also Defenders of Wildlife, 2010 WL 3084194, at *1; see also 16 U.S.C. § 1532(3) (defining "conserve"). Thus, the ESA directs FWS to affirmatively promote recovery of listed species.

Consistent with this conservation mandate, ESA section 10(j) allows the Secretary to "authorize the release ... of any population ... of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species." 16 U.S.C. § 1539(j)(2)(A). ESA section 10(j) requires that in most cases, "each member" of an experimental population be treated as "threatened" under the ESA. See id. § 1539(j)(2)(C). Thus, for experimental populations, like other threatened species, the Secretary of the Interior must issue "protective regulations" that "he deems necessary and advisable to provide for the conservation of such species." Id. § 1533(d) (emphasis added); see also 50 C.F.R. § 17.82 ("experimental population shall be treated as if it were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the Act").

"USFWS has discretion to issue the regulations it deems necessary and advisable, but the regulation 'shall' provide for the conservation of such species." Defenders of Wildlife v. Tuggle, 607 F. Supp. 2d 1095, 1116-17 (D. Ariz. 2009) (citing 16 U.S.C. § 1533(d)). Accordingly, while a 10(j) regulation for managing an experimental population may "provide the flexibility of less restrictive taking prohibitions ... [i]t must contain applicable prohibitions, as appropriate, and exceptions to provide for the conservation of the species. ... In other words, [it] must comply with ESA section 4(d)'s mandate to provide for the conservation of the species." Id. at 1116 (quotations omitted); see also U.S. v. McKittrick, 142 F.3d 1170, 1174 (9th Cir. 1998) (the "flexibility" provided by 10(j) regulations "allows the Secretary to better conserve and recover endangered species"); id. ("the agency's implementation of section 10(j) ... effectuates the ESA's purpose").

B. The 2008 10(j) Regulation Impairs, Rather Than Serves, Wolf Conservation

FWS has failed to offer a conservation rationale for the 10(j) regulation, which could allow nearly two-thirds of the current wolf population to be killed. Instead, the purpose of the regulation was to appease states' desire to kill wolves to enhance already-abundant wild ungulate populations, particularly elk. See 73 Fed. Reg. at 4,721-22; Wyo. Stat. Ann. § 23-1-109(c)-(e) (demanding greater flexibility to kill wolves); AR 1309 (revision "would allow ID proposal or anyone's ... like it to be approved").

FWS abandoned its sole argument that the 2008 10(j) regulation might promote wolf conservation. In the proposed regulation, FWS asserted that a "potential benefit [of the 10(j) regulation] may be a lower level of illegal take of wolves due to higher local public tolerance of wolves resulting from reduced conflicts between wolves and humans." 72 Fed. Reg. at 36,946. In response to comments on the EA, FWS again asserted the revisions "are necessary for the continued enhancement and conservation of wolf populations because they foster local tolerance of introduced wolves." AR 0572. In essence, FWS asserted that it was necessary to kill the wolves in order to save the wolves. Yet FWS acknowledged in response to comments on the Final Rule that "data are not available to support or disclaim this premise." 73 Fed. Reg. at 4,729.

Regardless of the unavailability of supporting data, FWS's "kill wolves to save wolves" rationale fails as a matter of law. Humane Soc'y of U.S. v. Kempthorne, 481 F. Supp. 2d 53, 63 (D.D.C. 2006), vacated, 527 F.3d 181 (D.C. Cir. 2008).[1] Intentionally killing endangered wolves for the alleged purpose of "increas[ing] social tolerance for wolves ... does not comply with the text of the [ESA] on its face." Id.; see also See Sierra Club v. Clark, 755 F.2d 608, 613 (8th Cir. 1985) (regulation allowing sport hunting of threatened wolves violated the

[1] "Vacated opinions remain persuasive, although not binding, authority." Spears v. Stewart, 283 F.3d 992, 1017 n.16 (9th Cir. 2002).

ESA because it did not "constitute an act of conservation under the Act and [therefore fell] without the scope of authority granted to the Secretary").

Aside from FWS's abandoned and unlawful "kill wolves to save wolves" rationale, FWS proffered no wolf conservation purpose for the 2008 10(j) regulation. Without any such justification, the regulation cannot be upheld. See Sierra Club, 755 F.2d at 613; Defenders of Wildlife, 607 F. Supp. 2d at 1116 (protective regulations must provide for species conservation).

Far from conserving wolves, the 2008 10(j) regulation is likely to impede northern Rockies wolf recovery. The regulation may result in the killing of most of the current wolf population. FWS's own deficient wolf recovery standard requires a minimum of "[t]hirty or more breeding pairs … comprising some 300+ wolves in a metapopulation … with genetic exchange between subpopulations." 72 Fed. Reg. at 6,107 (emphasis added). FWS erroneously asserted in the final rule adopting the 10(j) regulation that the wolf population is "recovered" because it exceeds 300 wolves in 30 breeding pairs. 73 Fed. Reg. at 4,721. As this Court has noted, "the Service expressly rejected this numerical criterion in favor of recovery criteria that required not only numerical abundance, but also genetic exchange." Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160, 1170 (D. Mont. 2008). Thus, contrary to FWS's finding in the 10(j) regulation, the presence of 300 wolves in 30 breeding pairs is not alone determinative of wolf recovery; genetic connectivity is

essential. FWS acknowledged in its 2008 delisting northern Rockies wolves that the Yellowstone wolf subpopulation was most likely genetically isolated. See 73 Fed. Reg. 10,514, 10,553 (Feb. 27, 2008). In its preliminary injunction ruling on the 2008 delisting rule, this Court determined that FWS's recovery determination based solely on the wolf population's satisfaction of numeric criteria was arbitrary. Defenders of Wildlife, 565 F. Supp. 2d at 1171-72. Yet the challenged 10(j) regulation equally relies on FWS's myopic focus on the numeric recovery criteria to the exclusion of the genetic exchange requirement. See 73 Fed. Reg. at 4,721.

This problem is compounded by the 2008 10(j) regulation's allowance for the northern Rockies wolf population to drop below the size necessary for natural wolf dispersal and genetic connectivity. As this Court observed, "[g]enetic exchange that did not occur [with 1,513 wolves in 106 breeding pairs] is not likely to occur with fewer wolves and fewer breeding pairs." Defenders of Wildlife, 565 F. Supp. 2d at 1172; see also id. at 1171 ("fewer wolves means less opportunity for dispersal and hence less chance for genetic exchange").[2]

[2] A year after FWS published the 2008 10(j) regulation, FWS stated that it had new evidence that "4 radio-collared non-GYA wolves have bred and reproduced offspring in the GYA in the past 12 years." See 74 Fed. Reg. 15,123, 15,176 (April 2, 2009). This evidence does not appear in the 2008 10(j) rule record and thus cannot be a basis for affirmance. Two of the four wolves were artificially relocated to the Yellowstone region, see Ex. 1, and cannot demonstrate FWS' asserted natural connectivity. The other two wolves were apparently natural dispersals that occurred in 2002 and 2008, see id., when wolf population levels exceeded the 600-wolf standard embodied in the 2008 10(j) rule.

The 2008 10(j) regulation further violates FWS's "conservation" duty because it omits essential sideboards on state wolf killing. Most notably, the 10(j) regulation allows the states to define "unacceptable impacts," with no method for FWS to assess whether a state-defined ungulate management standard comports with the ESA's conservation mandate. As FWS Wolf Recovery Coordinator Ed Bangs stated, FWS's "role will be pretty much solely approving state proposal if they followed the process – not us further judging its merits." AR 1309.

The only substantive restraint the regulation imposes on FWS's approval of state wolf-killing proposals is the requirement that FWS determine that state actions "will not contribute to reducing the wolf population in the State below 20 breeding pairs and 200 wolves, and will not impede wolf recovery." 73 Fed. Reg. at 4,736. These minimal requirements are not sufficient to discharge FWS's conservation obligation. See 16 U.S.C. §§ 1531(b), 1532(3). First, even if state wolf-killing actions would not impede recovery, a program to kill members of an imperiled species is not permitted under the ESA unless it furthers a conservation purpose. See supra. Here, there is none. Second, the final rule maintains that recovery is met so long as states manage for at least 15 breeding pairs in mid-winter, so that "each State's share of the wolf population does not risk falling below the minimum recovery goal of 10 breeding pairs and 100 wolves." 73 Fed. Reg. at 4,722; see also AR 0590, 0601. Thus, as interpreted by FWS, the

requirement that wolf control actions not impede recovery provides even less protection for wolves than the requirement that the wolf population remain at or above 20 breeding pairs and 200 wolves. This requirement is inadequate to ensure that genetic connectivity among wolf subpopulations, an essential component of wolf recovery, is maintained. See Defenders of Wildlife, 565 F. Supp. 2d at 1172; see also infra. Accordingly, the 2008 10(j) regulation violates the ESA and should be set aside.

III. THE 10(j) REGULATION VIOLATES NEPA

FWS's 2008 10(j) regulation also violates NEPA. NEPA requires federal agencies to prepare an EIS in connection with all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "Where an agency is unsure whether an action is likely to have 'significant' environmental effects, it may prepare an EA: a 'concise public document' designed to '[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement ... .'" Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 993 (9th Cir. 2004) (quoting 40 C.F.R. § 1508.9). FWS prepared an EA, but not an EIS, for the 2008 10(j) regulation.

Courts review an EA "with two purposes in mind: to determine whether it has adequately considered and elaborated the possible consequences of the

proposed agency action when concluding that it will have no significant impact on the environment, and whether its determination that no EIS is required is a reasonable conclusion." Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1215 (9th Cir. 2008). FWS's analysis of the 2008 10(j) regulation failed to satisfy either of these NEPA requirements.

A. FWS Unlawfully Predetermined The Outcome Of Its NEPA Analysis

The only apparent basis for FWS's failure to prepare an EIS was the need for haste to satisfy Wyoming law. This does not constitute a "'convincing statement of reasons' to explain why [the 10(j) regulation's] impacts are insignificant." Id. at 1220 (citation omitted). FWS illegally predetermined the outcome of its NEPA review, because the agency had decided not to prepare an EIS before it had even begun drafting the EA.

Repeatedly in correspondence and internal agency briefings, FWS staff emphasized the need to publish the final 10(j) regulation before the deadline established in Wyoming law. See, e.g., AR 0010-11 (briefing paper describing need to publish rule before Wyoming's deadline); AR 0017 (same); AR 2255 (discussing "critical need to keep all aspects of the delisting package (including the 10(j) package) on a very tight timeline that will result in the 10(j) getting published in January and the delisting package published in February"). FWS had no time to prepare an EIS and still meet Wyoming's deadline, even if the EA demonstrated

that the 10(j) regulation may have significant environmental effects. See, e.g., AR 0010-11 (briefing paper stating that timeline necessary to including Wyoming in delisting rule provides only "1 month to review an expected 200,000 comments each for the 10(j) and EA, prepare responses, and submit a final package to the Arlington office" for final approval); AR 16 (timeline); AR 2256 (same).

An EA is supposed to inform the agency's decision whether to prepare an EIS. See 40 C.F.R. § 1501.4(c). In contrast, here, even before FWS commenced environmental review, it had determined that it would not prepare an EIS. "NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'" Blue Mountains Biodiversity Project, 161 F.3d at 1216 (citation omitted). It is for this reason that NEPA's implementing regulations prohibit agencies from taking actions that would "[l]imit the choice of reasonable alternatives" until the environmental review process is complete. 40 C.F.R. § 1506.1(a)(2).

Here, before FWS even began the EA for the 10(j) regulation, "the die already had been cast." Metcalf v. Daley, 214 F.3d 1135, 1144 (9th Cir. 2000) (agency failed to take a "hard look" at environment effects of proposal in light of "strong evidence that [it] made the decision to support the [proposal] ... before the

EA process began and without considering the environmental consequences thereof"); see also Save the Yaak Comm. v. Block, 840 F.2d 714, 718 (9th Cir. 1988) (agency failed to take a hard look where "reconstruction contracts were awarded prior to preparation of the EAs"); Davis v. Mineta, 302 F.3d 1104, 1112 (10th Cir. 2002) (affording diminished deference to agency decision not to prepare EIS where the agency employed a consultant specifically to prepare a Finding of No Significant Impact, creating a "bias" against preparation of an EIS).

Although Metcalf and Save the Yaak Committee both involved situations where agencies prejudged their environmental analysis by making premature contractual commitments, the principle announced in those cases applies equally here: by making an institutional commitment to a course of action before preparing an environmental analysis, agencies "seriously imped[e] the degree to which their planning and decisions could reflect environmental values." Save the Yaak Comm., 840 F.2d at 718-19. FWS made an institutional commitment not just to hastily finalize the proposed 10(j) regulation—an action required before FWS could complete its long-sought delisting rule—but also to forego an EIS to meet Wyoming's deadline. Where, as here, the agency predetermines the outcome of its environmental analysis, NEPA's purpose of fostering informed decisionmaking is unlawfully subverted. See Metcalf, 214 F.3d at 1145 ("NEPA's effectiveness

depends entirely on involving environmental considerations in the initial decisionmaking process.").

B. The Environmental Assessment Failed To Take A "Hard Look" At The Environmental Consequences Of The 10(j) Regulation

FWS also violated NEPA by failing to take a "hard look" at the likely effects of the proposed action. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1998). FWS was required to disclose and analyze "reasonably foreseeable" impacts of the 2008 10(j) regulation on northern Rockies wolves and their ecosystems. See 40 C.F.R. § 1508.8(b); see also id. § 1502.16; Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 973 (9th Cir. 2002) (NEPA analysis must "consider[] all foreseeable direct and indirect impacts").

FWS violated the "hard look" requirement by projecting impacts to wolves based only on the states' existing numeric ungulate herd objectives, even while permitting the states to adopt different management objectives that could justify higher levels of wolf killing. FWS asserted that "the likely level of wolf removal under [the 10(j) regulation] would not significantly impact the ... wolf population or compromise its recovery," but provided no support for this claim. AR 0604. The 2008 10(j) regulation gives states almost unlimited discretion to modify their ungulate management objectives—numeric and otherwise—yet the EA ignored entirely the prospect that states will do so. See AR 0587, 0601.

Changes in Wyoming law illustrate the problem with FWS's analysis. When FWS finalized the 2008 10(j) regulation, Wyoming already had adopted new categories of ungulate management objectives. Under the 2007 change to Wyoming law, an elk herd suffers unacceptable impacts if it is "in danger of" declining below population management objectives and is experiencing low elk calf recruitment rates (i.e., a low calf/cow ratio). Wyo. Stat. Ann. § 23-1-109(d) (emphasis added); see 2007 Wyo. Laws Ch. 168 (Mar. 2, 2007). The EA discussed Wyoming's proffered evidence of wolves' alleged impacts on elk calf/cow ratios in specific herds. AR 0580. Yet, while relying on this discussion to justify the 2008 10(j) regulation, FWS ignored Wyoming's new categories of management objectives when analyzing potential environmental impacts. See AR 0601-04. In failing to evaluate potential wolf killing to address existing and foreseeable state management objectives beyond numeric ungulate herd objectives existing when the 10(j) regulation was finalized, the EA failed to disclose and analyze the full extent of the wolf killing authorized by the regulation. See Blue Mountains Biodiversity Project, 161 F.3d at 1216.

Moreover, contrary to the EA's finding, the 2008 10(j) regulation will compromise wolf recovery in the northern Rockies. FWS's conclusion that the 2008 10(j) regulation would not disrupt genetic exchange was based on FWS's assumptions that wolf killing would not be widespread and that wolves will rapidly

recolonize areas from which they are removed. See AR 0602-03. Idaho's 2006 Clearwater proposal demonstrates that neither of these assumptions was reasonable. That proposal contemplated high levels of wolf killing—up to 75 percent in the first year—to maintain the Clearwater wolf population at just one-quarter of pre-removal levels for at least five years. See AR 3612. The 2008 10(j) regulation provides no safeguards against this kind of extreme approach elsewhere. See AR 1309. FWS's conclusion that genetic connectivity will not be affected under the 2008 10(j) regulation is based on assumptions that contradict record evidence.

FWS further asserts that population connectivity would not be disrupted because "core refugia would continue to supply dispersers … Therefore, gaps that could fragment populations and disrupt connectivity and genetic exchange are not likely to occur." AR 0602. Yet the sole wolf population floor established by the 10(j) regulation is 600 wolves. AR 0601. Even at the time the 2008 10(j) regulation was finalized and states were not killing wolves to address perceived ungulate impacts, the northern Rockies wolf population had not achieved substantial connectivity and genetic exchange. See Defenders of Wildlife, 565 F. Supp. 2d at 1172. Extensive wolf mortality under the 2008 10(j) regulation will further diminish the potential for genetic exchange between the three recovery areas. See id. at 1171 ("fewer wolves means less opportunity for dispersal and

hence less chance for genetic exchange"). The EA fails to analyze the impact of a potentially sizeable decrease of wolf populations on population connectivity and genetic exchange.

The EA is also inadequate because it fails to take a hard look at reasonably foreseeable state actions. For example, the EA acknowledged that Idaho's 2006 Clearwater proposal was "on hold" pending the 10(j) rule change. See AR 0579-80. The proposal's intense level of wolf removal was specifically designed to "maintain reduced wolf abundance" in that area over the long term. AR 3611. FWS Recovery Coordinator Bangs stated that the proposal will be allowed under the 2008 10(j) regulation.[3] See AR 1309. Yet FWS's EA failed to disclose the potential site-specific ecological impacts of the Idaho proposal. Such forecasting of site-specific impacts from reasonably foreseeable actions is required by NEPA. See Blue Mountains Biodiversity Project, 161 F.3d at 1216; Alaska Wilderness League v. Kempthorne, 548 F.3d 815, 828 (9th Cir. 2008), vacated as moot Alaska Wilderness League v. Salazar, 571 F.3d 859 (9th Cir. 2009) (EA "failed to take a 'hard look' under NEPA because it did not provide a well-reasoned analysis of site-specific impacts to the endangered bowhead whale population"); Anderson v. Evans, 314 F.3d 1006, 1021 (9th Cir. 2002), amended and superseded on other grounds by 371 F.3d 475 (9th Cir. 2004) (EA inadequate because it did "not

[3] Since the 10(j) rule change, Idaho has again sought approval of its Clearwater wolf-killing proposal. See Second MacFarlane Dec. ¶ 6.

adequately address the highly uncertain impact of the Tribe's whaling on the local whale population and the local ecosystem"); Fund for Animals v. Norton, 281 F. Supp. 2d 209, 232 (D.D.C. 2003) (agency must analyze impact "on the local level" of proposed take of 525 swans).

Likewise, FWS was required to analyze foreseeable site-specific ecological impacts of its action. FWS acknowledged the "[p]otential cascading ecological effects from the presence of wolves," AR 0605, but conclusorily asserted that "[t]he anticipated levels of wolf removal under [the 2008 10(j) regulation] would not result in disruption of ecosystem functions or meaningful impacts on other species that benefit from wolf presence." AR 0606. FWS's assertion ignores potentially significant local impacts, particularly in Idaho's Clearwater region, where wolf killing under the 2008 10(j) regulation may be widespread.[4] See Anderson, 314 F.3d at 1021.

Because FWS failed to take "a 'hard look' at the likely effects of the" 10(j) regulation in the EA, the EA violates NEPA and must be set aside. Blue Mountains Biodiversity Project, 161 F.3d at 1216.

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[4] Indeed, the very purpose of the 2008 10(j) regulation is to have significant localized impacts on ungulate herds. See AR 0580-81.

C. The 10(j) Regulation May Have Significant Environmental Effects, Thus Requiring The Preparation Of An EIS

FWS also violated NEPA by failing to evaluate fully the impacts of the 2008 10(j) regulation in an EIS. The 2008 10(j) regulation established a framework that would allow killing more than 1,000 northern Rockies wolves, and thus is a "major Federal action[] significantly affecting the quality of the human environment" requiring the preparation of an EIS. 42 U.S.C. § 4332(2)(C).

"An agency must prepare an EIS if substantial questions are raised as to whether a project" may have significant environmental effects. Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1219 (9th Cir. 2008) (quotation and citation omitted). "If an agency decides not to prepare an EIS, it must supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant. 'The statement of reasons is crucial to determining whether the agency took a "hard look" at the potential environmental impact of a project.'" Id. at 1220 (quoting Blue Mountains Biodiversity Project, 161 F.3d at 1212). NEPA regulations direct agencies to consider harm to threatened or endangered species in determining whether to prepare an EIS. 40 C.F.R § 1508.27(b)(9). Despite substantial questions whether the 2008 10(j) regulation will have significant adverse effects on endangered wolves, FWS failed to prepare an EIS.

1. FWS arbitrarily underestimated impacts to wolves

FWS's decision not to prepare an EIS was based on FWS's arbitrary conclusion that "the likely amount of take of wolves that the revised rule would authorize would be low and would not compromise recovery of the [Northern Rocky Mountain] wolf population." AR 0572. FWS reasoned that "many ungulate herds and populations in Idaho, Montana, and Wyoming are at or above State management objectives and most of those below management objectives are most affected by factors other than wolves. Therefore, wolf control actions are expected to be few and localized." AR 0601 (citation omitted).[5]

This justification contradicts the record. First, it ignores the substantial wolf killing that Idaho already had planned to address existing state management objectives in the Clearwater region. See supra. Second, it erroneously considers only the prospect of wolf control actions to address the current state management objectives based on population or herd size. See supra. The 2008 10(j) regulation, however "expand[ed] the potential impacts for which wolf removal might be warranted beyond direct predation or those causing immediate population declines." 73 Fed. Reg. at 4,722. Under the new rule, states may adopt management goals based on other factors, including: "calf/cow ratios, movements, use of key feeding areas, survival rates, behavior, nutrition, and other biological

[5] FWS's rationale for determining that impacts to wolves "would be low," AR 0601, contradicts FWS's given purpose for adopting the 2008 10(j) regulation.

factors." Id. The states are thus at liberty to establish any ungulate management goals they wish and kill wolves accordingly.

FWS may not assume the impacts of its action will be less than the full scope of impacts authorized by the decision. See State of Cal. v. Block, 690 F.2d 753, 765 (9th Cir. 1982) (scope of environmental review must match the scope of the proposed agency action). FWS's approach is particularly inappropriate since, at the time FWS finalized the 10(j) regulation, Wyoming had already adopted ungulate management objectives beyond numeric herd objectives. See supra; see also Wyo. Stat. Ann. § 23-1-109; AR 0580. Accordingly, there is no justification for FWS's assumption that states will not expand ungulate management objectives beyond current numeric herd objectives. FWS's failure to prepare an EIS based upon this erroneous assumption was arbitrary.

2. Potential wolf killing under the 10(j) regulation is a significant environmental impact

FWS's decision not to prepare an EIS was also arbitrary because it was based on the erroneous assumption that wolf killing is not a significant environmental impact so long as the "wolf control actions do not impede wolf recovery." AR 0573. Using FWS's reasoning, thousands of wolves could be killed without creating a significant environmental effect provided that wolves do

not slip below FWS's biologically inadequate recovery threshold. [6]

FWS erred in focusing on its recovery floor as the "significant effect" threshold. The relevant legal question is whether the regulation may significantly affect the environment. NEPA regulations are explicit that an agency must consider "the degree to which the action may adversely affect an endangered or threatened species" in determining whether to prepare EIS. 40 C.F.R. § 1508.27(b)(9); see also Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv., 373 F. Supp. 2d 1069, 1080-81 (E.D. Cal. 2004) ("NEPA's 'significant effect' analysis is guided by regulations which outline relevant factors for determining whether an action will be significant," including "the degree to which the action may adversely affect an endangered or threatened species").

FWS's NEPA inquiry is not limited to whether an action will significantly affect the population as a whole. In Anderson v. Evans, the Ninth Circuit concluded that removal of gray whales from one area may be a significant environmental impact, even if the action does not adversely impact the overall gray whale population. 314 F.3d at 1019-20. Likewise, in Fund for Animals, 281 F. Supp. 2d at 225, a district court held that plaintiffs were likely to succeed in their

[6] In their challenge to the 2009 Delisting Rule, plaintiffs argued that FWS's 300-wolf/30-breeding-pair wolf recovery standard for northern Rockies wolves is biologically inadequate. See Defenders of Wildlife v. Salazar, No. 09-77-M-DWM, Pls.' Mem. in Supp. of Mot. for Summ. J. at 10-16 [Doc. 105-1] (filed Oct. 26, 2009).

challenge to FWS's decision "not to proceed with an EIS further evaluating the environmental impacts of depredation permits allowing for lethal take of mute swans," an unlisted species. The court agreed with plaintiffs' contention that "even if the predicted impacts of the proposed take of 525 swans on the 3,600 strong swan population of the entire state ... are likely to be minimal, the impacts may be substantially greater on the local level." Id. at 232 (citing Anderson, 314 F.3d at 1019-20). Further, even where precise levels and locations of the killing are unknown, "uncertainty as to the impact of a proposed action on a local population of a species, even where all parties acknowledge that the action will have little or no effect on broader populations, is a basis for a finding that there will be a significant impact and setting aside a FONSI." Id. at 233 (citation omitted).

Here, FWS's failure to prepare an EIS to analyze and disclose the significant environmental impacts of killing more than 1,000 endangered wolves violated NEPA. See 42 U.S.C. § 4332(2)(C).

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CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motion for summary judgment be granted.

Respectfully submitted this 20th day of August, 2010,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing brief contains 6,443 words, in compliance with the Court's 6,500 word limit.

Dated: August 20, 2010

/s/ Jenny K. Harbine
Jenny K. Harbine