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U.S. DISTRICT COURT  
UNITED STATES DISTRICT COURT DISTRICT OF VERMONT  
FOR THE DISTRICT OF VERMONT FILED

2004 SEP 15 PM 4 05

National Wildlife Federation, Vermont  
Natural Resources Council, Maine Wolf  
Coalition, Environmental Advocates of New  
York, and Maine Audubon Society

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DEPUTY CLERK

Civil No. 1:03-CV-340

Plaintiffs,

vs.

Gale Norton, Secretary of the Interior,  
United States Department of the Interior and  
Steven Williams, Director, United States  
Fish and Wildlife Service,

Defendants.

**PLAINTIFFS' MEMORANDUM IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

**INTRODUCTION**

Few animals have engendered as much controversy as the gray wolf (*Canis lupus*). Revered by some, and reviled by others, the gray wolf is now the subject of a major delisting initiative by the United States Fish and Wildlife Service ("FWS" or the "Service"). Removing the Eastern Distinct Population Segment of the Gray Wolf From the List of Endangered and Threatened Wildlife, 69 Fed. Reg. 43663 (proposed July 21, 2004). In the face of political pressure, and in defiance of its biologists, peer reviewers, and the best available commercial and scientific information, FWS has issued a regulation that bypasses key steps that the Endangered Species Act requires to be taken before a species can be reclassified from endangered to threatened. See Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Establishment of Two Special Regulations for Threatened Gray Wolves, 68 Fed. Reg. 15804 (Apr. 1, 2003) (to be codified at 50 C.F.R. pt. 17) ("Final Rule"). The Final Rule, which creates a new Eastern Distinct Population Segment ("Eastern DPS") of the gray wolf in a twenty-one

state area stretching from the Dakotas to Missouri to Maine, effectively declares the wolf recovered and ready for delisting in that area based on the presence of wolves in three states in the Western Great Lakes. Significantly, FWS failed to provide the public with any notice or opportunity to comment on this arbitrarily drawn, unlawful “Eastern DPS”. Further, FWS abandoned efforts to develop a national recovery plan for the gray wolf and to establish a viable wolf population in the Northeast. For the reasons set forth below, this action violates the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000) (“APA”), and the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2000) (the “ESA” or “Act”).

## **BACKGROUND**

### **I. THE ENDANGERED SPECIES ACT**

The Supreme Court describes the Endangered Species Act as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978). Congress enacted the ESA based on the finding that many “species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation,” while other species “have been so depleted in numbers that they are in danger of or threatened with extinction.” 16 U.S.C. § 1531(a)(1)-(2). As the Court explains, “[t]he plain intent of Congress in enacting th[e] statute was to halt and reverse the trend toward species extinction, whatever the cost.” TVA v. Hill, 437 U.S. at 184. Agencies must afford endangered species the “highest of priorities.” Id. at 194.

#### *A. The Duty to Conserve*

With the passage of the ESA, Congress declared that “fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(3). The primary purpose of the ESA is to provide “a means

whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” Id. § 1531(b). 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 this [Act] are no longer necessary.” Id. § 1532(3).

To accomplish this, the Act further declares “that *all* Federal departments and agencies shall ... utilize their authorities in furtherance of the purpose of this [Act].” Id. § 1531(c) (emphasis added). This affirmative conservation duty applies with special force to the Secretary of the Interior, who along with the Secretary of Commerce implements key provisions of the Endangered Species Act.<sup>1</sup> See Defenders of Wildlife v. Andrus, 428 F. Supp 167, 169-70 (D.D.C. 1977) (holding that the Secretary has an affirmative duty to use “all methods necessary” to “increase the population of protected species”). Accord Sierra Club v Clark, 755 F.2d at 613; Nat’l Wildlife Fed’n v. Hodel, 23 Env’t Rep. Cas. (BNA) 1089 (E.D. Cal. 1985); Connor v. Andrus, 453 F. Supp. 1037, 1041 (W. D. Tex. 1978). Importantly, this conservation duty does not permit the Secretary to simply “write off” wolf recovery in the Northeast in the face of evidence that recovery is both feasible and necessary to meet biological standards for recovery of the gray wolf.

One of the most important ESA provisions defining the Secretary’s duty to conserve is section 4(f), which requires the Secretary to develop and implement recovery plans. 16 U.S.C. § 1533(f).<sup>2</sup> Although the Act does not define “recovery,” FWS has essentially defined the term to mean conservation. Compare 50 C.F.R. § 402.02 (2003) (defining recovery as “improvement in

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<sup>1</sup> The Secretary of the Interior has primary responsibility for implementing the ESA with respect to terrestrial species, and the Secretary of Commerce has such responsibility with respect to marine and anadromous fish species. 16 U.S.C. § 1532(15); 50 C.F.R. § 402.01(a). These responsibilities have been delegated to FWS and the National Marine Fisheries Service, respectively. 50 C.F.R. § 402.01(b).

<sup>2</sup> In addition, the Act obligates the Secretary to review and utilize programs administered by the Secretary to further the conservation purposes of the Act. 16 U.S.C. § 1536(a)(1).

the status of listed species to the point at which listing is no longer appropriate under the criteria set out in” the ESA) with 16 U.S.C. § 1532(3) (defining 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 this [Act] are no longer necessary.”). Thus, the recovery plan sets forth the objective, measurable criteria that must be satisfied before the Secretary can declare that the ESA’s ultimate goal of conservation and delisting of a species has been achieved. 16 U.S.C. § 1533(f).

*B. Provisions Governing Listing, Delisting and Reclassification*

The ESA requires the Secretary to protect “species”—defined to include species, subspecies, and “any distinct population segment of any species,” 16 U.S.C. § 1532(16)—whenever they are “endangered” or “threatened.” Id. § 1533(a)(1). A species is “endangered” whenever it is “in danger of extinction throughout all or a significant portion of its range.” Id. § 1532(6). A species is “threatened” whenever it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Id. § 1532(20).

Section 4(a) of the ESA sets forth five factors that the Secretary must consider in deciding whether to list a species as endangered or threatened, remove it from the list of threatened and endangered species, or reclassify it from endangered to threatened or vice versa:

- (1) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) Overutilization for commercial, recreational, scientific, or educational purposes;
- (3) Disease or predation;
- (4) The inadequacy of existing regulatory mechanisms; or
- (5) Other natural or manmade factors affecting its continued existence.

Id. § 1533(a)(1)(A)-(E). Each factor is equally important and a finding by the Secretary that a species is negatively affected by just one of the factors warrants a non-discretionary listing as either endangered or threatened. See 50 C.F.R. § 424.11(c); see also Carlton v. Babbitt, 900

F.Supp. 526, 530 (D. D.C. 1995). Thus, each factor must be weighed singularly and in combination with the others.

### *C. Distinct Population Segments*

As noted above, the definition of “species” includes “any distinct population segment of any species.” 16 U.S.C. § 1532(16). The ESA does not define “distinct population segment” (“DPS”), nor is it a term used in scientific literature. In 1996, FWS and National Marine Fisheries Service jointly published the Policy Regarding the Recognition of Distinct Vertebrate Population (“DPS Policy”) to “clarify their interpretation” of this term “for the purposes of listing, delisting, and reclassifying” species under the ESA. 61 Fed Reg. 4721 at 4722 (Feb. 7, 1996).

The DPS Policy provides FWS with management flexibility to recover a particular population of a taxon when that population is in danger. Congress added the concept of a DPS to the definition of “species” to provide protection for imperiled U.S. populations of species, like the wolf, that existed in abundance in Canada and Mexico. S. Rep. No. 96-151, at 7 (1979). FWS considers three elements when it designates a DPS under the DPS Policy: discreteness, significance, and conservation status. 61 Fed. Reg. at 4725.

#### 1. Discreteness

A population is discrete if it is either: (1) “markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors,” or (2) “delimited by international governmental boundaries” within which differences in control, management, conservation or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the ESA. Id. at 4725.

Under the first condition for discreteness, marked separation requires that a population be distinguished from other members of its species. Nat’l Ass’n of Home Builders v. Norton, 340

F.3d 835, 842 (9th Cir. 2003) (citing 61 Fed. Reg. 4724); see also, Ctr. for Biological Diversity v. Lohn, 296 F. Supp. 2d 1223, 1231 (W.D.Wash. 2003) (finding “Southern Resident” orca whales in the Northwest discrete from other killer whale populations based on Biological Review Team reliance on genetic data, data on intermixing with other populations and summer ranges of various populations).

With respect to the second factor used in determining discreteness, international boundaries, the courts have recognized that differences in legislation and policy between the U.S. and one of its neighbors can form the basis for creation of a DPS. See, e.g., Maine v. Norton, 257 F.Supp.2d 378, 395-96 (D. Me. 2003) (concluding that “differences in legislation and policy support the use of the United States/Canada international boundary as a measure of discreteness” in establishing the Gulf of Maine salmon DPS).

## 2. Significance

To determine the significance of a population to the taxon in which it belongs, the DPS Policy establishes four factors:

- (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon,
- (2) Evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon,
- (3) Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or
- (4) Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

61 Fed. Reg. at 4725. If any one of these factors is met, the population may be considered significant. Id. Courts reviewing FWS’s significance determination have regularly deferred to the Service, but only when it has provided a rational basis for the determination. See, e.g., Maine, 257 F.Supp.2d at 396-97 (upholding agencies’ finding of significance for Gulf of Maine salmon DPS); Nat’l Ass’n of Home Builders, 340 F.3d at 850 (dismissing FWS’s finding of

significance for Arizona pygmy owl DPS for failure to provide adequate rationale that the DPS was significant to the whole taxon); Ctr. for Biological Diversity, 296 F. Supp. 2d at 1231 (dismissing FWS's finding that South Resident orca whales DPS was insignificant because it was not supported by the best available scientific evidence).

### 3. Conservation Status

If a population segment meets the first two criteria, then it is evaluated for endangered or threatened status based on the five listing factors. 61 Fed. Reg. at 4725. The DPS Policy does not define "conservation status," but FWS adopted an informal definition of "the number of individuals left in the population." Nat'l Ass'n of Home Builders, 340 F.3d at 843.

## II. THE GRAY WOLF

### *A. Biology and Ecology of the Gray Wolf*

Gray wolves once ranged throughout most of North America. Final Rule at 15805; Administrative Record Document ("A.R.") 230 at 1043-1047; see also A.R. 261C at 2033, 2048; 261E at 2186; 964B at 13195. The pervasiveness of the gray wolf is due to its adaptability. "Gray wolves could live almost anywhere within their historic range where there is ungulate prey and where people will tolerate their presence." A.R. 56 at 260; see also Final Rule at 15805. European settlers and their progeny did not tolerate the gray wolf, and over time, its range decreased precipitously due to widespread poisoning, trapping, and shootings that were "spurred by Federal, State, and local government bounties." Final Rule at 15805. Human intolerance resulted in the extirpation of the gray wolf from over 95% of its historic range. Id. at 15805; see also A.R. 1194 at 21657. In 1973, when the Endangered Species Act was enacted, it is likely that only several hundred wolves remained. Final Rule at 15805.

*B. Listing the Gray Wolf*

FWS first listed the gray wolf as endangered in 1967 pursuant to the Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, §§ 1-3, 80 Stat. 926 (repealed 1973). Endangered Species List - 1967, 32 Fed. Reg. 4001 (Mar. 11, 1967). Upon the passage of the ESA, which superceded the earlier acts and listings, the Secretary listed four individual subspecies of the gray wolf in the 1970s.<sup>3</sup>

Through the 1970s, scientists recognized 24 subspecies as inhabiting the lower 48 states. A.R. 49 at 232. In 1978, experts realized the taxonomy upon which the earlier listings were based was outdated, and FWS moved away from listing at the subspecific level for convenience reasons. Id. Accordingly, FWS published a rule on March 9, 1978 to relist the gray wolf at the species level. Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9607 (Mar. 9, 1978). “[T]he Service wishes to recognize that the entire species *Canis lupus* is Endangered or Threatened to the south of Canada, and considers that this matter can be handled most conveniently by listing only the species name.” 43 Fed. Reg. at 9607. FWS stated that the reason for the relisting was “to eliminate problems with listing separate subspecies of the gray wolf and identifying relatively narrow geographic areas in which those subspecies are protected.” Final Rule at 15806. Under the 1978 rulemaking, the Service stated that “the gray wolf group in Mexico and the 48 conterminous states, other than Minnesota, is being considered as one ‘species’<sup>4</sup>, and the gray wolf group in Minnesota is being considered as another

<sup>3</sup> FWS listed as endangered : (1) the eastern timber wolf (*Canis lupus lycaon*) as endangered in Minnesota and Michigan in 1974; (2) the northern Rocky Mountain wolf (*C.l. irremotus*) in Montana and Wyoming in 1974; (3) the Mexican wolf (*C.l. baileyi*) in 1976 in Mexico, Arizona, New Mexico and Texas; and (4) the subspecies *C.l. monstrabilis* (identified only as Gray wolf) in Texas, New Mexico and Mexico. Final Rule at 15806.

<sup>4</sup> Prior to the 1978 amendments, the definition of “species” included “any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature.” 43 Fed. Reg. at 9610. In 1978, Congress amended the latter portion of the definition of “species” to



‘species.’” 43 Fed. Reg. at 9610. Pursuant to section 4(a)(1), the Service went through the five listing criteria and determined that the gray wolf warranted listing under factors 1, 2, and 4. *Id.* at 9610-11. As a result the gray wolf was listed as threatened in Minnesota and endangered in the remaining 47 conterminous states. *Id.* at 9610.

### *C. Gray Wolf Recovery Planning Process*

Contrary to the clear statutory requirement to prepare a recovery plan for the two listed entities, Minnesota *Canis lupus* and *Canis lupus*, FWS created recovery plans for three arbitrarily chosen taxonomic classifications. The first plan was designed for the Eastern Timber Wolf, which was thought to inhabit the geographic area triangulated by the states of Minnesota, Florida and Maine. A.R. 1194, 1198. This plan was released on May 2, 1978 and revised on January 31, 1992. *Id.* The second plan was the Northern Rocky Mountain Wolf Recovery Plan for “the gray wolves in the northern Rocky Mountains of the contiguous 48 states, *rather than to a specific subspecies*,” which was approved in 1982 and revised in 1987. A.R. 1197 at 21940 (emphasis added). The third was the Mexican Wolf Recovery Plan, approved in 1982, which combined *three* subspecies. A.R. 1196 (emphasis added).

In 1994, biologists at FWS recognized that the piecemeal approach was flawed and saw the need to create a national recovery plan for the entire species of the gray wolf, rather than have three separate recovery plans. *See* A.R. 1, 5, 13, 17. FWS commissioned Dr. David L. Mech, a leading expert on wolves, to write A Comprehensive Recovery Strategy for the Gray Wolf in the 48 Contiguous States. This document stated:

The Service has no national strategy or goal for the number and/or distribution of wolves that needs to be reestablished for its ESA responsibility to be met. Nor is there any strategy/policy that would address the above major issues. Instead, the Service seems to be on the course of developing or modifying a recovery plan to cover every place wolves show up. *This is a “strategy” of acquiescence rather*

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read “any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16) (2000), as amended by Pub. L. No. 95-632, 92 Stat. 3751(1978).

*than a deliberate proactive plan based on our best biological judgment of where wolves could or should live and be promoted as an important component of ecosystems. Clearly, there is a strong need to get ahead of the issue and establish a national plan for wolf recovery.*

A.R. 24 at 7-8 (emphasis added). The “National Recovery Plan” would serve as an umbrella plan for the three existing recovery plans and would provide a clear strategy and establish the necessary steps to recover the gray wolf. A.R. 17 at 65.

All six FWS Regions unanimously supported the proposal for a National Recovery Plan to recover the whole species of *Canis lupus*. A.R. 65 at 280. The National Plan was to be based on a taxonomic study published by Dr. Robert Nowak and commissioned by FWS, which reduced the number of subspecies of *Canis lupus* from 24 to 5. A.R. 967F at 13991-14013 (“Nowak study”). However, when the Nowak study was published in 1995, it concluded that the Eastern Timber Wolf had existed in Québec and northeastern parts of the U.S., while *the wolf subspecies in Minnesota and the Great Lakes was a different subspecies*. *Id.* (emphasis added). The Nowak study challenged the validity of the Eastern Timber Wolf Plan, because it included wolves in the Great Lakes, which were arguably not Eastern Timber Wolves, but rather buffalo or Great Plains wolves (*Canis lupus nubilus*). A.R. 1 at 1-2. In fact, the state management plans adopted by Minnesota, Michigan and Wisconsin identify this wolf as the buffalo or Great Plains wolf—not the Eastern Timber Wolf. A.R. 967E 13873, at 13884; 967D 3773, at 13785; and 967I 14497, at 14508 (respectively).

The Nowak study called into question all of the work that had gone into the three recovery plans. However, instead of undertaking a new recovery planning effort to correct the scientific errors identified by Nowak, FWS elected to abort the National Recovery Plan, and to proceed instead under the three flawed recovery plans. A.R. 49 at 232. During this same time frame, FWS proposed and adopted the new DPS Policy. 61 Fed. Reg. 4722. Using the DPS Policy, FWS then carved up the entire contiguous United States into three geographic regions to

roughly coincide with where wolf populations currently existed. A.R. 691. This strategy cleared the way for FWS to use the existing recovery plans as the basis for reclassifying the wolf from endangered to threatened, and to put delisting on a fast track.

On April 11, 2003, FWS issued its Final Rule, replacing the listing of the gray wolf at the species level with three new DPSs and reclassifying the wolves in the newly-created Eastern DPS from endangered to threatened. FWS reasoned that the recovery targets for the wolf in the twenty-one state area encompassed by the Eastern DPS had been satisfied by wolves in the Western Great Lakes states. Final Rule at 15857. However, FWS never prepared a recovery plan for either the Eastern DPS or the gray wolf species as a whole. In fact, its only basis for concluding that recovery targets had been satisfied was the 1992 Eastern Timber Wolf Recovery Plan – a plan with a geographic boundary that differs from the twenty-one state geographic boundary of the Eastern DPS, which does not take into consideration the growing taxonomic uncertainty. For example, the Eastern DPS includes North and South Dakota (a dispersal area for wolves in the Western Great Lakes), but those areas were never addressed in the Eastern Timber Wolf Recovery Plan or any other recovery plan.<sup>5</sup>

### III. THE GRAY WOLF IN THE NORTHEAST

#### *A. Ecological Significance*

Though questions remain regarding the precise genetic makeup of the wolf that once roamed the forests of the Northeast, there is no doubt that it played an essential ecological role. Final Rule at 15805; A.R. 967F at 14014; A.R. 967I at 14486; A.R. 968 at 14855. Northern New England and southeastern Canada are the southern limit of the boreal forest in North America. A.R. 856 at 11193. This ecosystem still supports moose and prior to colonial settlement also

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<sup>5</sup> The 1992 Eastern Timber Wolf Recovery Plan made part of the Administrative Record (A.R. 1198) is incomplete. Page 58 of the Plan depicts a map labeled Eastern Timber Wolf Area Status Map, which shows the original and current range of the eastern timber wolf. This page is not included in the Administrative Record. However, a virtually identical map made part of the 1978 Plan is part of the Administrative Record. A.R. 1194 at 21713

supported caribou. Id.; Declaration of Paul Nickerson (Nickerson Decl.), Exhibit D, ¶ 12. These large ungulates were suitable prey for the larger gray wolf, but not a smaller wolf that would be incapable of taking down such large prey. A.R. 856 at 11193. Accordingly, Dr. Daniel Harrison, a wolf expert in the Northeast, has consistently argued that the larger gray wolf was the ancestral wolf in the Northeast. Id.; see also A.R. 875 at 11257. While coyotes are predominant in the Northeast today, coyotes do not hunt in packs and prey on deer fawns and other smaller animals, not the moose that still range throughout the Northeast today. A.R. 1167 at 21448. The Northeast has ample wolf habitat and a solid prey base. Proposed Rule at 43473; Nickerson Decl. ¶ 12. Wolves were once at the top of the food chain in the Northeast. A.R. 875 at 11257. “Biological conditions have never been better for the wolf to complete that food chain.” Nickerson Decl. ¶ 14.

#### *B. Wolf Sightings*

Individual citizens and citizens’ organizations in Maine, including The Maine Wolf Coalition, Inc., have compiled documents reporting wolf sightings and wolf signs in the northeastern United States. A.R. 209 at 940-942; A.R. 210 at 946. One individual provided a summary of wolf activity in a twelve square mile area from 1994 through 1998 that included at least twelve to fifteen howling responses. A.R. 209 at 941. This individual conducted winter transects with Maine officials and reported that the tracks and stride length were consistent with that of wolves. Id. This report also reported observations of “dummy den(s)” burrowed in the snow, which indicated possible mating activity. Id. On August 10, 1998, John Glowa, then President of The Maine Wolf Coalition, Inc. sent a letter to Ronald Refsnider, FWS Region 3 and primary author of the Proposed and Final Rules, providing comments on a proposed wolf delisting. A.R. 210 at 946. In addition to the comments, Mr. Glowa provided Refsnider with copies of “more than 60” sighting reports of wolves or wolf-like animals from the late 70s

through June, 1998. Id. Only one of these more than 60 reports was included in the Administrative Record. Id. In addition to the sighting reports, Mr. Glowa indicated he had other names and addresses of individuals who verbally reported wolves in the Northeast. Id. Mr. Walter Pepperman, II, the Vice President of The Maine Wolf Coalition, Inc. also stated that he has received many reports of wolves in the Northeast. Declaration of Walter Pepperman, II (Pepperman Decl.), Exhibit E, ¶ 12.

The Administrative Record contains additional evidence of wolves or wolf-like canids in the Northeastern U.S. based on samples taken from slain wolves. In 1993, a confirmed female wolf was killed near Moosehead Lake in Maine. Final Rule at 15814; A.R. 1112 at 20867; A.R. 1131 at 20981; A.R. 1113 at 20869; A.R. 1114 at 20871; A.R. 1153 at 21036. In 1996, an 81 pound wolf-like canid was trapped and killed in central Maine. Final Rule at 15814. Tests done by FWS's Wildlife Forensics Lab determined that the animal's DNA was "similar to the [mitochondrial] DNAs of gray wolf and domestic dog," a "result consistent with a wolf, domestic dog, or wolf-dog hybrid origin." A.R. 1130 at 20978. In November 1998, a hunter killed a wolf-like canid in Glover, Vermont. Final Rule at 15814; A.R. 1149 at 21017. DNA test at a U.C.L.A. lab that "this [DNA] sequence matches that of the wolf (*Canis lupus lycaon*)."

A.R. 1163 at 21303.

In 2001, a coyote hunter shot a wolf in New York. Defs' Answer ¶ 65. FWS claims it learned of this killing in March 2003 (one month prior to its issuance of the Final Rule), and finally took samples for examination in September 2003. Id. In December 2003, the Service confirmed that the slain animal was a wolf. Id. None of this information was included in the Administrative Record.

In addition to evidence from dead animals, the Administrative Record contains other information relating to wolves in the Northeast. In March 1997, the tracks from a canid that

appeared larger than a typical coyote were observed near Jackman, Maine. A.R. 1127 at 20970. The observer documented the animals' tracks with casts and recorded howling. Id. Agency personnel went to the location and found additional tracks but could not confirm them as wolf tracks. Id. According to one email description in the Administrative Record: "Their tracks, step and stride were clearly larger than a coyote, but not so large as to be positively, unequivocally wolf, (*of course none of us has a great deal of wolf experience*)." (emphasis added). A.R. 1127 at 20970; see also A.R. 1147 at 21015.

In December 1998, two people reported seeing wolves along the New Hampshire and Maine border. A.R. 1150 at 21019. One observer reported seeing a single animal cross a frozen lake, and the other observer reported and sent FWS photographs of large canid tracks. Id.; A.R. 1132 at 20989. In July 1999, an individual reported seeing two wolves attacking a moose and calf. A.R. 1152 at 21032. In the summer of 1999, while he was on a 3-day camping trip near St. Francis, Maine, Martin Lowney, the Virginia State Director of U.S.D.A.'s Department of Wildlife Services and a wildlife professional who has experience tracking and identifying wolves and coyotes in the wild, reported discovering "canine-like tracks" and fresh scat. Based on his precise measurements, Mr. Lowney concluded that the tracks and scat could not have been left by coyotes. Mr. Lowney also reported hearing wolf responses to simulated coyote calls, once from a single animal and a second time from what he believed were two adult animals and several puppies. He described the calls as "deep in tone and definitely not coyotes." A.R. 1154 at 21039-40. Mr. Lowney estimated that the first animal he heard was ¼ mile to ½ mile away, and the second responses were 300-400 yards away. Mr. Lowney was confident enough in his report that he provided GPS coordinates and suggested FWS follow up on the report. Id.

In addition to reports of wolves in the Northeast, several confirmed wolves have been killed in Canada within 20 miles of the New Hampshire border. A.R. 806 at 10569; 1035 at

17677; 1179 at 21547. Another wolf was killed in February 2003 in Canada within 20 miles of the Maine border. A.R. 1176 at 21542.

### *C. Reclassification Process*

After years of discussing how to recover the gray wolf, FWS, faced with increasing pressure to delist wolves in the Western Great Lakes, A.R. 1040; A.R. 1018; A.R. 974 at 15316; A.R. 421 at 6969; A.R. 955B at 12847; A.R. 360 at 4284-85; A.R. 769 at 10251, published the Proposal to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Proposal to Establishment of Three Special Regulations for Threatened Gray Wolves, 65 Fed. Reg. 43450 (proposed July 13, 2000) (“Proposed Rule”). The Proposed Rule designated the Northeastern DPS and explored the possibility of reintroducing gray wolves in the Northeast. Proposed Rule at 43485-86. FWS explained that, “the existence of large areas of potentially suitable wolf habitat and prey resources in parts of New England, the possibility that wild wolves may exist in remote parts of Maine, and the presence of wolf populations in neighboring areas of eastern Canada form the basis for our consideration of a DPS for the gray wolf in the northeast.” *Id.* at 43473. The Proposed Rule noted that gray wolves “that may exist in Maine are discrete from gray wolves elsewhere in the lower 48 states” and stated that a population of wolves in the northeastern United States would be “significant” and would “contribute to the overall restoration of the species” because a separate form of the gray wolf historically occupied the northeastern United States and adjacent Canada.” Proposed Rule at 43473; see also A.R. 355 at 4272; A.R. 368 at 4449; A.R. 372 at 4590; A.R. 626 at 9815. All peer reviewers who addressed the issue of the proposed Northeastern DPS supported its inclusion in the Final Rule. Final Rule at 15820.

On April 1, 2003, the Service issued the Final Rule. The Final Rule eliminated the Northeastern DPS. Final Rule at 15859. The Service purported to justify this decision on the

grounds that there was no “conclusive” evidence of a “breeding population” of wolves in the Northeast and that there was “taxonomic uncertainty” over what kind of wolf once inhabited this region. *Id.* Oddly, FWS chose to simply combine the mystery wolves with the wolves in the Western Great Lakes and form a new Eastern DPS, rather than attempt to resolve the uncertainty. In fact, however, the Administrative Record reveals that the Final Rule was motivated by the need to claim a success under the ESA, A.R. 690 at 9996, as well as a desire to “get the policy and legal framework greased for wolf delisting,” and invite litigation to resolve legal issues prior to delisting. A.R. 974 at 15316-317.

### STANDARD OF REVIEW

Plaintiffs bring this action under the ESA citizen suit provision, 16 U.S.C. § 1540(g)(1)<sup>6</sup>, or alternatively under the APA, 5 U.S.C. § 702. Under Section 706 of the APA, courts must set aside agency actions that are arbitrary, capricious, or contrary to the ESA. Southwest Ctr. for Biodiversity v. U.S. Forest Serv., 307 F.3d 964, 975 (9th Cir. 2002). To determine whether the agency action was arbitrary and capricious, courts must decide whether the agency “considered the relevant factors and articulated a rational connection between the facts found and the choice made.” Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 105 (1983). An agency action must be reversed when the agency has “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

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<sup>6</sup> Pursuant to 16 U.S.C. § 1540(g)(2), a 60-day notice of intent to sue was sent to Defendants on September 25, 2003. Defs’ Answer ¶ 5. More than 60 days passed before the Plaintiffs served the Summons and Complaint on Defendants. Compl.



Summary judgment is appropriate where there is no genuine issue of material fact and the plaintiff is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Friends of the Earth v. U.S. Forest Serv., 114 F.Supp.2d 288, 289 (D. Vt. 2000) As this Court has said, “On a motion for summary judgment, the moving party has the initial burden of informing the Court of the basis for its motion and of identifying the absence of a genuine issue of material fact.” Forest Watch v. U.S. Forest Serv., 322 F.Supp.2d 522, 524 (D. Vt. 2004); see also Chambers v. TRM Copy Ctrs., Corp., 43 F.3d 29, 36 (2d Cir. 1994). “Summary judgment is an appropriate procedure for resolving a challenge to a federal agency’s administrative decision when review is based upon the administrative record, even though the court does not employ the standard of review set forth in Rule 56.” Maine v. Norton, 257 F.Supp.2d 357, 363 (D. Me. 2003). A genuine issue is only present if a reasonable trier of fact could return a verdict for the non-moving party with the evidence that has already been submitted through the record. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Friends of the Earth, 114 F.Supp.2d at 290.

## ARGUMENT

### I. PLAINTIFFS HAVE STANDING TO SUE

#### *A. Standing Requirements*

Article III of the U.S. Constitution requires that any person bringing an action have a sufficient stake in the outcome to establish a right to seek redress in Federal court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). To satisfy the Constitution’s standing requirements, a party must show that he “(1) suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” Friends of the Earth v.

Laidlaw Envtl. Servs. Inc., 528 U.S. 167, 180-181 (2000). Where Plaintiffs' procedural rights to protect their concrete interests are asserted, as in this case, the standards for redressability and causation are relaxed. Defenders, 504 U.S. at 573 n.7.

If a party is an organization or association that seeks to bring suit on behalf of its members, it must also show that (1) "its members would otherwise have standing to sue in their own right;" (2) "the interests it seeks to protect are germane to the organization's purpose; and" (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). Requirement (1) of standing for an association is met if "any one" of the association's members satisfies the Constitutional requirements referenced above. Warth v. Seldin, 422 U.S. 490, 511 (1975). If there is more than one plaintiff, once the court determines that one of the plaintiffs has standing, it need not decide the standing of the other plaintiffs. Carey v. Population Servs. Int'l, 431 U.S. 678, 682 (1977).

The ESA's citizen suit provision allows "any person" to commence a civil suit to enjoin any person, including a government agency such as FWS, "alleged to be in violation of any provision" of the Act or its regulations, and to commence an action "against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 of this Act which is not discretionary." 16 U.S.C. §§ 1540(g)(1)(A) and (C). The ESA's definition of "person" encompasses not only individuals, but also a "corporation, partnership, trust, association, or any private entity." Id. § 1532(13).

In addition to the claims under section 4 of the ESA, Plaintiffs allege other violations of the ESA not covered by the citizen suit provision that may be brought under the APA. Bennett v. Spear, 520 U.S. 154, 175 (1997). The APA grants standing to "[a] person...aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The Courts have

interpreted this provision in general APA review cases to contain two requirements: the identification of a “final agency action” that has aggrieved the plaintiff and a showing that “the interest sought to be protected...is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question... That interest, at times, may reflect ‘aesthetic, conservational, and recreational’ as well as economic values.” Ass’n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 153 (1970) (citing Scenic Hudson Pres. Conference v. FCC, 354 F.2d 608, 616 (2d Cir. 1965)).

Plaintiffs have prepared and attached as exhibits Declarations of members of its organizations which demonstrate that they have organizational standing. These Declarations are from Plaintiffs’ members who live in the Northeast and who have actively participated in the support of gray wolf protection for years, and who frequently visit, explore and enjoy gray wolf habitat in the Northeast while in search of the gray wolf.

*B. Standing Declarants*

1. Walter Pepperman

Mr. Pepperman, a Maine resident, is a member of Plaintiffs Maine Wolf Coalition, Inc. and the National Wildlife Federation, as well as being a member of numerous other wolf conservation organizations. Pepperman Decl. ¶¶ 1, 2, 3. He has lived in Maine for ten years, roaming the Maine northwestern woods searching for gray wolves, their tracks and signs on an almost daily basis. Id. ¶ 9. He has frequently visited and will continue to visit areas in Maine, New York, Vermont and New Hampshire where prime gray wolf habitat exists. Id. ¶¶ 9-11. His primary goal in visiting these areas is to be in the gray wolf’s natural habitat and to search for the gray wolf in the wild, benefiting environmentally, recreationally, and aesthetically. Id. ¶¶ 9-11. He actively participated in the Rulemaking process that is the subject of this lawsuit. Id. ¶ 15. He testified at the regional public hearings in Orono, Maine on the Proposed Rule, and submitted

written comments. Id. He also testified on several occasions before the Maine Legislature in support of gray wolf protection in Maine. Id. ¶ 6.

## 2. Warner Shedd

Mr. Shedd is a Vermont native and a current member of the National Wildlife Federation and the Vermont Natural Resources Council. Declaration of Warner Shedd (Shedd Decl.), Exhibit F, ¶¶ 1-3. He is a biologist, hunter, outdoorsman, and an author of two wildlife books, has specifically researched and written about gray wolves, and has a strong interest in the recovery of the gray wolf in the Northeast. Id. ¶¶ 4, 7. He lives, works and recreates in the Northern Forest ecosystem where he explores gray wolf habitat several times per month in search of this elusive animal, deriving environmental, recreational, and aesthetic benefits from his use of these areas and his study of the gray wolf in its natural habitat. Id. ¶ 6. He is a hunter and a biologist, and believes the Northern Forest ecosystem would benefit from the return of the wolf as a top predator of moose to help regulate and control moose populations. Id.

## 3. Robert Kimber

Mr. Kimber is a Maine resident who is actively involved in the Maine Audubon Society and supports its position on gray wolf recovery in Maine. Declaration of Robert Kimber (Kimber Decl.), Exhibit G, ¶¶ 1-3. He is an advocate for setting aside Maine forestland as wilderness preserves and considers the restoration of the gray wolf to Maine to be an integral part of wilderness preservation and restoration in Maine. Id. ¶ 4.

## 4. Margaret Struhsacker

Margaret Struhsacker lives in Vermont and is a longstanding member of three Plaintiff organizations – the National Wildlife Federation, Maine Audubon Society, and the Maine Wolf Coalition. Declaration of Margaret Struhsacker (Struhsacker Decl.), Exhibit H, ¶¶ 1-2. Ms. Struhsacker has had a life-long interest in gray wolves. Id. ¶ 5. Ms. Struhsacker is a biologist

and currently serves as the Wolf Recovery Program Coordinator for NWF. Id. ¶¶ 4, 7. On her personal time, because of her interest in and love for wolves, Ms. Strusacker hikes through wolf habitat in the Northeastern U.S. about five times per year. She will continue to do so for at least a few times per year, so long as she is able. Id. ¶ 10.

Apart from her job, Ms. Strusacker has also been a gray wolf activist for many years. Id. ¶13. She has personally submitted comments for the Northern Rockies Wolf Project, attended public hearings in Montana, and commented on aerial hunting of wolves in Alaska. Id. She has also attended a regional public hearing on the Proposed Rule, A.R. W-14955, and personally submitted comments to FWS regarding the Proposed Rule, A.R. W-13709.

### *C. Plaintiffs Have Standing*

#### 1. Plaintiffs Meet Article III Standing Requirements

As these declarations demonstrate, Plaintiffs' members meet the Article III standing requirements. The "injury in fact" requirement in an environmental case is satisfied if a party adequately shows that he has an aesthetic or recreational interest in a particular place or animal, and that that interest is impaired by a defendant's conduct." Friends of the Earth, Inc. v. Laidlaw, 528 U.S. at 183. Courts have also recognized that such an injury need only be "an identifiable trifle." Save Our Cmty. v. U.S. EPA, 971 F.2d 1155, 1161 (5th Cir. 1992). Plaintiffs' members have demonstrated far more than an "identifiable trifle." They have devoted substantial amounts of time in support of wolf recovery and in pursuit of the wolf throughout the Northeast. The fact that they have yet to actually see a wolf in the wild is of no consequence. Endangered species are, by definition, rare, and rarely seen. Actual observation of the species is not the test for standing in ESA cases.

*a. Plaintiffs Have Demonstrated Injury In Fact*

The members of the Plaintiff organizations, as represented by Declarants Pepperman, Shedd, Kimber and Struhsacker have articulated their cognizable interests by describing their frequent exploration, use and enjoyment of the areas where the gray wolf habitat exists, and their aesthetic and recreational interests in the wolf and the wolf's ecosystem. Plaintiffs' interests in wolf restoration are threatened by a federal decision, the Final Rule. The Supreme Court has expressly held that a 'threatened injury' will satisfy the 'injury in fact' requirement for standing. Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). There is indeed no requirement that there be actual evidence of environmental harm, but only "an increased risk based on a violation of [a] statute." Ecological Rights Found. v. Pacific Lumber Co., 230 F.3d 1141, 1151 (9th Cir. 2000). Therefore, based on their cognizable interests in a species which is threatened by extinction as described in their Declarations, these members of Plaintiffs meet the first prong of the Constitutional requirement of an "injury in fact."

In its Answer to Complaint, Defendants admit that "there have been several reported sightings of large unidentified canids, or their tracks, in Maine in recent decades and that there has been speculation about the possibility of wolves dispersing from Quebec," and that there was a "confirmed report of a gray wolf in Maine" shot in 1993. Defs' Answer ¶ 65. In the Proposed Rule, FWS commented on a radiotracked wolf from Wisconsin that spent several weeks near the town of Hugo (a town less than 20 miles from the center of downtown St. Paul) "without generating any reported sightings." Proposed Rule at 43459. As the Court noted in Southwest Ctr. for Biological Diversity, "(w)hen government action or inaction threatens a species of wildlife or a part of the environment that is too small, too few, too obscure or remote, or too imperceptible to be separated out from its environment by the common citizen who enjoys that

environment,” there is perceptible harm and a channel to relief. 90 F.Supp.2d at 1307.

Declarants suffer this perceptible harm and meet the first prong of the Constitutional requirement of an “injury in fact” because FWS’s Final Rule “threatens a species of wildlife” that is “too few,” “too remote” and/or “too imperceptible to be separated out from its environment by the common citizen who enjoys that environment.” Id.

Further, Declarants Pepperman and Struhsacker, both of whom participated in the administrative process at issue here, are particularly injured by the agency’s disregard of its statutory duties that rendered the rulemaking process unlawful and deprived Mr. Pepperman and Ms. Struhsacker of their rights to participate meaningfully. These violations include Defendants’ failure to provide adequate notice and opportunity to comment on the Proposed Rule, Defendants’ violation of its DPS Policy, Defendants’ unlawful determination that the gray wolf has “recovered,” Defendants’ failure to consider a source population of wolves immediately across the border in Canada, Defendants’ breach of their conservation duty, and Defendants’ failure to use the best available science in promulgating its Final Rule. “A participant in the agency’s decisional processes is actually and particularly injured by the agency’s disregard of its statutory duty....” Portland Audubon Soc’y v. Endangered Species Comm., 984 F.2d 1534, 1537 n.4 (9th Cir.1993); see also, N.Y. Public Interest Research Grp. V. Whitman, 321 F.3d 315, 326 (2d Cir. 2003). A “person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” Defenders, 504 U.S. at 573 n.7. Declarants thus satisfy the Constitutional requirements for individual standing.

*b. Plaintiffs’ Injuries Are Fairly Traceable to the Final Rule*

The second prong of the Constitutional requirements for standing requires a showing that a plaintiff’s injuries are fairly traceable to the challenged action of the defendants “rather than to

that of some other actor not before the court.” Defenders, 504 U.S. at 560. The Final Rule effectively means no recovery of the gray wolf in the Northeast, which completely frustrates the Plaintiffs’ goals and harms the Declarants’ enjoyment of the gray wolf. Plaintiffs’ injuries, traceable to the action of the Defendants, meet this second prong.

*c. Plaintiffs’ Injuries Will Be Redressed by a Favorable Decision from this Court*

The third prong of the Constitutional requirements for standing is whether Plaintiffs’ injuries will be redressed by a favorable decision. If the procedures required under the ESA and APA had been followed, the Northeastern DPS might well have been approved since it received the unanimous support from the peer reviewers as well as overwhelming support in the public comments. Thus, Plaintiffs’ injuries will be redressed by a favorable decision in the form of a judgment declaring the Final Rule invalid and an order remanding it to FWS for further consideration in conformance with the requirements of the ESA. See Sierra Club v. Glickman, 156 F.3d 606, 616 (5th Cir. 1998). In sum, Plaintiffs’ members satisfy all of the Article III requirements for standing.

2. Plaintiffs Meet All Representational Standing Requirements

Plaintiffs also meet all of the requirements for representational standing. The Plaintiffs meet the first requirement for an association based on the individual standing of at least one of its members as set out above. Plaintiffs meet the second requirement for an association because the interests Plaintiffs seek to protect are germane to the organizations’ purposes. Nat’l Lime Ass’n v. U.S. EPA, 233 F.3d 625, 636 (D.C. Cir. 2000). The subject of this litigation is the promulgation of a Final Rule that terminates gray wolf recovery in the Northeast. This Final Rule is certainly pertinent to Plaintiffs’ organizations and their members who have been actively involved in efforts to ensure the conservation and recovery of the gray wolf in the Northeast and who have cognizable interests in its existence there. Plaintiffs clearly meet the third requirement



as the action does not require the participation of any of its individual members. Therefore, through its members, Plaintiffs have standing to bring this suit.

### 3. Plaintiffs Meet All Standing Requirements Imposed by the ESA

Plaintiffs also clearly fall within the definition of “any person” under the ESA and meet its statutory standing requirement. 16 U.S.C. §§ 1532(13), 1540(g)(1). As further explained by the Supreme Court:

Our readiness to take the term “any person” at face value is greatly augmented by two interrelated considerations: that the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called “private attorneys general” ... Given these factors, we think the conclusion of expanded standing follows....

Bennett, 520 U.S. at 165. The Courts have also self-imposed limits on the exercise of federal jurisdiction in certain cases. Id. at 162. The prudential standing doctrine “applies unless it is expressly negated” by Congress. Id. at 163. The ESA’s citizen-suit provision with its language of “any person” negates this prudential standing doctrine and requires no further showing from Plaintiffs. Id.

### 4. Plaintiffs Meet All Standing Requirements Imposed by the APA

Finally, with respect to their APA claims, Plaintiffs meet the requirements for standing under section 702 of the APA. Plaintiffs have identified the final agency action in the form of the Final Rule which terminates gray wolf recovery in the Northeast. The interest they seek to protect, the recovery of the gray wolf, falls directly within the “zone of interests” sought to be protected by the ESA’s conservation goals. Therefore, Plaintiffs satisfy both the standing requirements of the ESA and those of the APA and have established their right to seek the assistance of this Court.

## II. THE SECRETARY FAILED TO PROVIDE THE PUBLIC WITH ADEQUATE NOTICE AND OPPORTUNITY FOR COMMENT ON THE EASTERN DPS

Under the APA, federal agencies are required to publish notice of a proposed rulemaking in the Federal Register to give interested persons an opportunity to comment and participate in the rulemaking. 5 U.S.C. § 553(b). If the final rule is not a “logical outgrowth” of the proposed rule, then the notice and comment requirements of the APA are unsatisfied. Shell Oil Co. v. EPA, 950 F.2d 741, 747 (D.C. Cir. 1991). The test for whether a final rule is a “logical outgrowth” is “whether [a member of the public] ex ante, should have anticipated that a [particular] requirement might be imposed.” Spirit of the Sage Council v. Norton, 294 F. Supp. 2d 67, 88 (D.D.C. 2003) (citing Small Refiner Lead Phase-Down Task Force v. U.S. EPA, 705 F.2d 506, 548-49 (D.C. Cir. 1983)); see also Natural Res. Def. Counsel v. U.S. EPA, 863 F.2d 1420, 1429 (9th Cir. 1988) (“The essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the draft....”); Fla. Power & Light Co. v. U.S., 846 F.2d 765, 771 (D.C.Cir.1988) (An agency fulfills the notice requirements of the APA if it “provide[s] sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.”); Nat’l Black Media Coalition v. FCC, 791 F.2d 1016, 1022 (2d Cir. 1986) (holding that “the notice given by the Commission was wholly inadequate to enable interested parties to have the opportunity to provide meaningful and timely comment on the proposal which culminated in the final decision of the agency”).

To ascertain whether the public reasonably anticipated the final rulemaking, courts look to the differences between the proposed and final rules and the content of the public comments to evaluate whether the public reasonably anticipated the change in the final rule from the proposal. Shell Oil, 950 F.2d at 751 (“Ambiguous comments and weak signals from the agency” are evidence that interested parties did not anticipate a change in a final rule.). In Shell Oil, the EPA’s rulemaking was challenged for including two new elements in its definition of “hazardous

waste,” which defined hazardous waste more broadly than the proposed rule. 950 F.2d at 746. The plaintiffs asserted that the proposed rule did not foreshadow the inclusion of these additional terms (“mixture” and “derived-from”) into the final rule and thus were not given adequate notice and opportunity for comment. Id. EPA argued that even though the two rules were not mentioned in the proposal, the final rule was foreseeable because certain comments appeared to anticipate the mixture and derived-from rules. Id. at 750. The court disagreed with EPA, stating that “an unexpressed intention cannot convert a final rule into a ‘logical outgrowth’ that the public should have anticipated. Interested parties cannot be expected to divine the [agency’s] unspoken thoughts.” Id. at 751; see also Nat’l Black Media, at 1023 (holding that the comments were “inadequate to supply notice” and that the agency “cannot bootstrap notice from a comment”).

In the present case, FWS proposed to reclassify the gray wolf by establishing the four DPSs within the conterminous 48 States and Mexico: Western Great Lakes DPS, Western DPS, Northeastern DPS, and Southwestern (Mexican) DPS. Proposed Rule at 43472-73. FWS also explained that it had considered, but rejected alternatives including “combinations of different geographic areas of coverage, changes in classification, and details and geographic areas of coverage of new special regulations.” Id. at 43475. FWS solicited public comments on the Proposed Rule and indicated a particular interest in comments relating to “(5) Information concerning the potential for recovery of gray wolves in the northeastern United States, and the potential involvement of the Service in such recovery activities.” Id. at 43491. FWS also requested comments on the “(9) Appropriateness of authorizing take in the Northeastern DPS in accordance with an approved State or Tribal Conservation Plan.” Id.

The public responded with “nearly 16,000 separate comments, including comments from 329 individuals who spoke at public hearings and comments from 11 peer reviewers.” Final

Rule at 15820. In addition, FWS “received form letters and ‘petitions’ with over 27,000 additional signatures. Id. In response to FWS’s specific requests for information, many comments addressed the Northeastern DPS and the proposed special regulation for that DPS. Id. at 15835-36. Notably, “of those who specifically commented on it, *all* peer reviewers *supported* the proposed establishment of a separate Northeastern DPS.” Id. at 15820 (emphasis added).

The fact that the public commented extensively on the Northeastern DPS and said nothing about an Eastern DPS is a clear indication that no reasonable person could have anticipated the outcome of this rulemaking. In fact, it has all the earmarks of a classic “bait and switch.” FWS attempts to gloss over this fact by stating in the Final Rule that it “specifically requested comments and additional information on the proposed Northeastern DPS and the associated proposed special regulation.” Id. at 15835-36. This is disingenuous at best. FWS received exactly the type of information it requested—information regarding recovery of wolves in the Northeast and the special regulation proposed for the *Northeastern DPS*. Id. at 15835. Moreover FWS explicitly stated that it had considered the alternative of “reclassifying a larger or smaller DPS in the eastern United States,” but had rejected that approach. Proposed Rule at 43475. To expect the public to comment on an alternative that the agency had already rejected flies in the face of the fair notice requirements of the APA. Nat’l Black Media, 791 F.2d at 1023 (“If this were enough notification of such intention, an agency could simply propose a rule and state that it might change that rule without alerting any of the affected parties to the scope of the contemplated change, or its potential impact and rationale, or any other alternatives under consideration.”); see also Spirit of the Sage Council, 294 F. Supp.2d at 89 (“Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking.”); Shell Oil, 950 F.2d at 751.

Courts have remedied violations of the APA notice provision in three ways: (1) vacating the regulation, see Small Refiner, 705 F.2d at 506 (vacating regulation) (2) remanding the rule for a second round of notice and comment, see Nat'l Black Media, 791 F.2d at 1024 (remanding proceeding to agency), or (3) both. Spirit of the Sage Council, 294 F. Supp. 2d at 90 (“the appropriate remedy is to vacate the rule and remand it to Services with instructions to truly begin anew the APA mandated notice and comment procedures, with the open mind required by the governing authorities.”). In this case, either remedy would allow the public a meaningful opportunity to comment on the alternatives considered by the Service.

### III. FWS'S CREATION OF THE EASTERN DPS AND ABANDONMENT OF THE NORTHEASTERN DPS VIOLATED THE DPS POLICY, THE ESA, AND THE APA

#### *A. FWS's Listing of the Eastern DPS Violates the DPS Policy*

The first element of the DPS Policy is the “discreteness of the population segment in relation to the remainder of the species to which it belongs.” 61 Fed. Reg. at 4725. “A population may be considered discrete if it ... is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors.” Id. The record does not support a conclusion that the wolves in the newly minted Eastern DPS are “markedly separated” from wolves in the other DPSs as a “consequence of physical, physiological, ecological, or behavioral factors.” In fact, there is no discussion in the record of these factors at all. The only thing that separates these wolf populations is distance. The Eastern DPS is based strictly on geography, not biology. It is obvious that the Service simply took out a map of the United States, divided it into four quadrants, designated three of them gray wolf DPS' and the fourth (Southeast) as being the range of the red wolf. A.R. 11 at 47; A.R. 27 at 166. This is clearly not what Congress had in mind when it cautioned the Service to use this tool “sparingly.” 61 Fed. Reg. at 4722. Under the Service's approach, a DPS could be established willy-nilly for any wide-ranging species.

Moreover, the Service itself rejected this kind of purely geographic approach when it adopted the DPS Policy. In responding to comments on the draft DPS Policy the Service rejected the idea of using “infra national boundaries as a basis for recognizing discrete entities for delisting.” Id. at 4724. Though the Service found this approach “attractive,” it ultimately rejected it as unlawful: “Particularly when applied to the ... reclassification of a relatively widespread species for which a recovery program is being successfully carried out in some states, recognition of state boundaries would offer attractive possibilities. Nevertheless, the Act provides no basis for applying different standards for delisting than those adopted for listing.” Id. Yet that is exactly what the Service did in this case. When it came to listing the gray wolf, the Service used the entire coterminous United States as the standard. But when it comes to reclassifying and delisting the wolf, the Service has come up with a different, more convenient, standard, an Eastern DPS comprised of twenty-one states. Nowhere does the Service acknowledge or attempt to explain this glaring inconsistency between the DPS Policy and the wolf reclassification.

In the Proposed Rule, the Service admitted that the Great Lakes and Northeast populations are separate and discrete, Proposed Rule at 43473, and so they cannot make up a single discrete population when combined. It found that the Northeastern DPS and the Great Lakes DPS are separated by “large areas that are not occupied by, and may not be suitable for, breeding populations of resident wolves.” Id. Further, FWS found that the Northeastern DPS and the Great Lakes DPS “are each being repopulated by wolves of distinct morphological characteristics which may represent different gray wolf subspecies.” Id. Further, the wolves that “may exist in Maine are discrete from gray wolves elsewhere in the lower 48 States.” Id. In addition, although taxonomic studies have provided conflicting conclusions regarding wolf taxonomy at the subspecies level, FWS explained in the Proposed Rule that “it is likely that a

separate form of the gray wolf historically occupied the northeastern United States and adjacent Canada.” *Id.* FWS did not refute these findings in the Final Rule, but rather simply stated that it would not create the Northeastern DPS for reasons unrelated to the issue of discreteness (addressed *infra*, in Section III.B. of this Memorandum). Final Rule at 15859.

Defending the Eastern DPS, the Service argued that in the face of taxonomic uncertainty, it would take “the conservative approach and . . . retain[] protection for any gray wolves that might remain in, or move to, the Northeastern States . . . .” Final Rule at 15859. However, there was no basis for its claim that this approach was conservative. In fact, at the same time FWS was purporting to continue protection of northeastern wolves, it simultaneously announced its intention to move forward with delisting of those very wolves based on the presence of wolves in the Great Lakes. Endangered and Threatened Wildlife and Plants; Removing the Eastern Distinct Population Segment of Gray Wolf From the List of Endangered and Threatened Species, 68 Fed. Reg. 15876 (Apr. 1, 2003). This parallel announcement revealed the real reason for abandonment of the proposed Northeastern DPS and the inclusion of northeastern wolves into the Eastern DPS—the desire to expedite delisting. A.R. 703. The design of the Eastern DPS had nothing to do with the DPS Policy or the science that must undergird implementation of that Policy.

#### *B. FWS Arbitrarily Abandoned Northeastern U.S. Wolf Recovery*

In the Final Rule creating the Eastern DPS, FWS abandoned efforts at wolf recovery in the northeastern U.S. and the Northeastern DPS because there allegedly is no breeding population of wolves there. Final Rule at 15814. As discussed in Part B.3., *infra*, FWS’s conclusion about the absence of a breeding population in the northeastern U.S. was arbitrary due to the absence of any analysis of the numerous wolf sightings in that region. In any case, whether a breeding population exists in the northeastern U.S. is irrelevant to the question of

whether wolf recovery is achievable in the region. The existence of a source population of wolves in an adjacent region of Canada means that wolf recovery is indeed achievable in the northeastern U.S. This failure to consider a binational approach to wolf recovery is particularly egregious considering that such an approach was taken by FWS with respect to the ESA classifications of both lynx and Mexican wolves. The Service's failure to consider the Canadian source population in deciding to abandon Northeastern wolf recovery amounts to a failure to consider relevant factors in violation of the APA.

1. FWS Failed to Consider a Relevant Factor - the Breeding Population in Canada

In classifying a binational population of lynx as threatened, FWS concluded that southeastern Canada, below the St. Lawrence River, and the northeastern U.S. comprise one ecological region. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Contiguous U.S. Distinct Population Segment of the Canada Lynx and Related Rule, 65 Fed. Reg. 16052 (Mar. 24, 2000) ("Lynx Proposed Rule"). Because the lynx southeast of the St. Lawrence River in Canada had the same habitat type as found in the northeastern United States, and because there were few barriers that would prevent migration, FWS included lynx on both sides of the U.S.-Canada border in defining the population. Id. at 16054.

The same considerations are present in the case of the wolves in the Northeast. In fact, FWS identified them in both the Proposed Rule at 43473, and the Final Rule at 15814. According to FWS, the existence of wolf populations in southeastern Canada south of the St. Lawrence River and the abundance of wolf habitat in the northeastern U.S. are unquestionable. Final Rule at 15819. Furthermore, the number of wolf sightings in the Northeast suggests that wolves are dispersing into the Northeast. A.R. 227, 477, 666, 707, 806, 834, 1032, 1124, 1127, 1128, 1131, 1132, 1145, 1147, 1149, 1150, 1152, 1154, and 1174.



Strikingly, FWS has already taken a binational approach to wolves – when it established a Southwestern DPS in April 2003 on the same day that it established the Eastern DPS challenged in this case. Final Rule at 15818. In establishing the Southwestern DPS, FWS included wolves in Mexico as well as those in the southwestern U.S. Id. at 15819. In fact, no population, breeding or otherwise, would exist today in the southwestern U.S. had the Service not included Mexico in an earlier version of the Southwestern DPS. In 1977, at a time when the gray wolf had been completely extirpated from the southwestern U.S. and perhaps as few as 50 wolves remained in Mexico, FWS worked with Mexico to capture individual Mexican wolves to start a captive breeding population in the U.S. A.R. 1196 at 21848.<sup>7</sup> The capture and breeding process took approximately 21 years and in 1998, FWS started releasing those captive-bred wolves from Mexico into the United States as part of its Mexican wolf reintroduction program. Final Rule at 15818. As of 1982, when the Mexican Wolf Recovery Program began, the only federal protections in Mexico were sporadic seasonal closures. A.R. 1196 at 21833. Experts were uncertain if the program would be a success, because some believed education, legislation and law enforcement measures in Mexico would not be enough to overcome hunting, poisoning and trapping. Id. at 21831.

Plaintiffs are not suggesting that the Service must conduct a similar operation in the Northeast. However, the APA requires that the Service consider relevant factors in determining whether there is a population of wolves to be protected and recovered. The availability of a source population of wolves in southeastern Canada is clearly such a relevant factor. The Service's failure to consider this population was arbitrary and capricious and violated the APA.

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<sup>7</sup> The earliest captive wolves included only one female. A.R. 1196 at 21849. Prior to 1981, FWS did not know whether she would breed in captivity. Id. The single, untested female wolf was the "sole 'hope'" of the program. Id.

## 2. FWS Violated the DPS Policy by Requiring a Breeding Population

FWS also stated that “at this time there is no firm evidence that a *breeding population* of wolves or wolf-like animals exists in the northeastern United States.” Final Rule at 15814 (emphasis added). FWS concluded that the absence of a breeding population in the northeastern U.S. meant that there could be no DPS designation in the Northeast. *Id.* at 15819. This conclusion is wrong for the following reasons.

First, the ESA does not limit its protections to breeding populations. The definition of species contains the phrase “which interbreeds when mature,” 16 U.S.C. § 1532(16), but the concept of interbreeding relates only to the proper classification of animals into species, subspecies, and distinct population segments. It does not limit the protections of the Act to breeding populations. Indeed, each and every member of a listed species is entitled to the protections of the Act. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 697 (1995)

Second, the DPS Policy does not require the presence of a breeding population. The DPS Policy states that “a population may be circumscribed by a set of experimental conditions, or it may approximate an ideal natural group of organisms with approximately equal breeding opportunities among its members, or it may refer to a loosely bounded, regionally distributed collection of organisms.” 61 Fed. Reg. at 4722. Under the possible definitions of “population” in the DPS Policy, there is no requirement for a breeding population. Indeed, in the Proposed Rule there was no mention of the need for a breeding population of wolves in the Northeast.

The breeding population requirement was added late in the game to justify abandoning the Northeastern DPS. *See* A.R. 664. The Washington Office of FWS came to its conclusion to eliminate the Northeastern DPS before assessing whether there was a population of wolves in the

Northeast under the terms of FWS's own DPS Policy, or determining exactly what constitutes a population.

Renne is concerned that NE wolf population is too poorly documented to justify a DPS. He feels it does not meet significance test of DPS policy. Without proof of wolves how do we establish a DPS? At beginning of the discussion on this issue, I believe that Renne had already made up his mind to eliminate the NE DPS. His staff had already prepared a map that recommended including NE and mid-atlantic in a coast to coast wolf listing that he said was not a DPS, but was a 'remainder.'

A.R. 664; see also A.R. 691 at 9998. This motivation resulted in the adoption of a more stringent standard than that found in the DPS Policy. "Having chosen to promulgate the DPS Policy, FWS must follow that policy." Nat'l Ass'n of Home Builders, 340 F.3d at 852.

The only context in which a breeding population is relevant involves the release of experimental populations under section 10(j) of the ESA. In connection with wolf reintroductions in Yellowstone National Park, the Service defined the term "population" as "'at least two breeding pairs of gray wolves that each successfully raise at least two young' yearly for two consecutive years." Wyoming Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224, 1234 n.3 (10th Cir. 2000) (citing 59 Fed. Reg. 60255, 60256). However, this definition is inapplicable in the context of the DPS Policy.

The DPS Policy contains the Service's criteria for a population. 61 Fed. Reg. at 4722. Evidence of breeding is not required, and a "loosely bounded, regionally distributed collection of organisms" will satisfy the criteria of a population. Id. FWS adopted a more restrictive definition of population that is not supported by the DPS Policy or the ESA. Therefore, the decision to abandon the Northeastern DPS for lack of a breeding population is arbitrary and capricious.

3. The Service Failed to Make a Rational Connection Between Its Conclusions and Evidence of Breeding Wolves in the Northeastern U.S., and Failed to Use the Best Science Available

In its Final Rule, FWS justified its abandonment of Northeast wolf recovery on the ground that “at this time there is no firm evidence that a breeding population of wolves or wolf-like animals exists in the northeastern United States.” *Id.* This conclusion was made despite evidence suggesting that there are indeed wolves or wolf like animals in the Northeast, and potentially enough to constitute a breeding population. *See, e.g.*, A.R. 666 at 19937 (listing confirmed wolves and several wolf reports); A.R. 834 at 10927 (identifying wolf killed 20 miles from New Hampshire border in 2002 and confirmed wolf in Vermont killed in 1997); A.R. 1032 at 17669 (reporting black wolf killed in Maine in 2003 and additional information on moose kills); A.R. 1145 at (reporting sightings and howling response of wolf and pups in Maine); A.R. 1154 (containing Martin Lowney report of wolf howling and scat); Defs’ Answer ¶ 65 (confirming wolf killed in New York). FWS’s arbitrary failure to analyze this evidence constitutes a failure to make the rational connection between conclusions and facts as required by the APA, *see Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and a failure to use best available science as required by the ESA, *see Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679-680 (D.D.C. 1997).

In its Final Rule, FWS simply assumes, without providing a rational explanation, that the majority of wolf sightings are not credible. This is not sufficient to meet the Secretary’s conservation duty under the Act. *See Defenders of Wildlife v. Andrus*, 428 F. Supp 167 (D.D.C. 1977). Nor does it pass muster under the APA. FWS has an obligation to support its conclusions about the lack of credibility of these reports with a rational explanation. *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43; *see also Ctr. for Biological Diversity v. Lohn*, 296 F. Supp. 2d 1223, 1226 (W.D. Wa 2003). FWS’s lack of a rational explanation is problematic for several

reasons. First, FWS does not systematically and regularly follow up on possible wolf sightings. Nickerson Decl. ¶ 13. The Administrative Record shows that there have been more than 60 reported sightings. Some of these reports were from knowledgeable individuals. For example, FWS failed to follow up on a detailed report by Martin Lowney, USDA-APHIS – Wildlife Services Chief in Virginia, regarding signs of adult wolves and pups in Maine. A.R. 1154. Mr. Lowney provided the Service with measurements of tracks, contents of scat, and comments on howling responses. A.R. 1154 at 21039-40. Mr. Lowney was confident enough in his report that he provided GPS coordinates and suggested FWS follow up on the report. Id. Mr. Lowney is paid by the U.S. Government to know the difference between wolves and coyotes and has received considerable training over the years to detect wolf signs. Id.

FWS has a duty to make decisions “on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). “The best available science standard gives ‘the benefit of the doubt to the species.’” Ctr. for Biological Diversity, 296 F.Supp.2d at 1239 (quoting Conner v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1988)). In this case, the best available commercial and scientific information indicates that there have been a number of confirmed wolves in the Northeast, and many more unconfirmed sighting reports. FWS concludes that the information is insufficient to find a resident wolf population in the Northeast, but provides no explanation as to why all of the information in the record is insufficient. However, best available does not mean the best science, it means the best of what is available. Southwest Ctr. for Biological Diversity v. Norton, No. CIV.A.98-934 (RMU/JMF), 2002 WL 1733618, at \*9 (D. D.C. Jul. 29, 2002) (stating that FWS “must rely on even inconclusive or uncertain information if that is the best available at the time of the listing decision”); see also Defenders of Wildlife v. Babbitt, 958 F.Supp. 670, 680 (D.D.C. 1997). Further, FWS has not provided any explanation. Instead, it arbitrarily concluded that there is no “breeding population”

in the northeastern U.S. See Carlton v. Babbitt, 900 F. Supp. 526, 533 (D.D.C. 1995) (agencies must arrive at their conclusions by a rational process that is explained either in the rule or the administrative record).

4. The Service Failed to Make a Rational Connection Between Its Conclusions and Evidence of the Significance of Northeastern Wolves, and It Failed to Use the Best Science Available

The Service eliminated the Northeastern DPS and thereby terminated efforts toward Northeastern wolf recovery because its Washington, D.C. office concluded that without a breeding population of wolves, the proposed Northeastern DPS did not meet the significance criterion under the DPS Policy. A.R. 698 at 10027. Yet FWS provided no rational explanation as to why the Northeastern DPS was not significant in light of all of the information in the Administrative Record, and its conclusion was at odds with all of the scientific input provided by FWS biologists. In addition, FWS's own hand-picked peer reviewers and scientific experts all strongly supported creating the Northeastern DPS as a vehicle for promoting Northeastern wolf recovery. Final Rule at 15820.

In 1999, when FWS decided to propose the Northeastern DPS, the goal was to prepare a separate recovery plan for the Northeastern DPS. A.R. 415 at 6948. In 2000, Refsnider told others within the Service that “[t]he purpose of establishing a NE DPS is to *keep all recovery options open there, and to set the stage for recovery planning and additional feasibility assessment.*” A.R. 498. On July 13, 2000, FWS published the Proposed Rule with the above-described DPSs. Proposed Rule at 43472-73. In listing these four DPSs, FWS found that “the gray wolf populations within each of these proposed DPSs are separated from gray wolf populations in the other DPSs by large areas that are not occupied by, and may not be suitable for, breeding populations of resident wolves.” *Id.* at 43473. FWS believed that the four areas satisfied the DPS Policy’s discreteness criteria due to the “the existing geographic isolation of

wolf populations between these four areas.” Id. FWS found each DPS to be significant and stated “*Without viable wolf populations in these four geographic areas the recognized historical range of the species within the 48 coterminous States would have extensive and significant gaps, possibly broader than the dispersal distance of the species...*” Id. With respect to the Northeastern DPS, the Service pointed to “the existence of large areas of potentially suitable wolf habitat and prey resources in parts of New England, the possibility that wild wolves may exist in remote areas of Maine, and the presence of wolf populations in neighboring areas of eastern Canada” as well as the belief that wolves in Maine are discrete from other wolves in the lower 48 states as the rationale for creating the Northeastern DPS. Id. The Service stated that wolf recovery required wolves in the Northeast, because they will “contribute to the overall restoration of the species.” Id.; see also A.R. 265; A.R. 707 at 10061. This proposal received unanimous support from the peer reviewers who commented on the Northeastern DPS. A.R. 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, and 557

Despite public support, adequate habitat, a healthy prey base, a source population in Canada, evidence of dispersing wolves, and support from peer reviewers, the Washington drums started beating. In March 1, 2001, Renne Lohoefer, FWS Recovery Division Chief, proposed eliminating the Northeastern DPS. A.R. 663. On June 7, 2001, Refsnider contacted FWS biologists Michael Amaral, FWS Region 5 Northeast Field Office, and Nickerson:

We spent 2 years developing and publicizing a national proposal based on the premise that a NE DPS was justified and appropriate . . . If we think that wolf recovery in the NE is needed for ESA recovery of the wolf, we need to justify it as a DPS during our current rulemaking. But with all [of] those past decision-makers and NE DPS supporters out of the picture, *we are on the verge of losing the NE DPS because of largely internal opposition to the idea.*

A.R. 703 at 10036.

Because the regional biologists knew that the Northeastern DPS was under attack from Washington, D.C., Refsnider and Amaral prepared numerous reports and briefing statements in

an effort to “convinc[e] Ren [sic] that a NEDPS is discrete and significant—especially significant.” A.R. 672 at 9954. The product that came out of this effort is a memorandum entitled “Evidence that Wolves Exist, or Recently Existed in New York, New Hampshire, Vermont and Maine.” A.R. 670, 674, 676, 684, 688; see also, 691, 695, 698, and 703. Paul Nickerson and T. J. Miller, Chief, Division of Endangered Species, Region 3, provided this document to the Chief, Office of Consultation, HCPs, and Recovery on May 9, 2001. A.R. 688. The memorandum concluded that the available evidence indicates that wolves in the Northeast differ significantly “from the gray wolves that currently are the subjects of other Service gray wolf recovery programs.” Id. at 9994. It recommends retaining the Northeastern DPS. Id.

Despite sharp disagreement within the Service, on July 17, 2001 Acting Director of FWS Marshall Jones made the final decision to drop the Northeastern DPS. A.R. 736 at 10170. There is no reference in the decision document to peer reviewer and FWS biologist support for the Northeastern DPS, or any of the wolf sightings or wolf specimens. Id. When the Service published the Final Rule, the Northeastern DPS and Western Great Lakes DPS had been combined into an Eastern DPS.

While a court “must defer to an agency’s expertise . . . such deference is warranted only when the agency utilizes, rather than ignores, the analysis of its experts.” Ctr. for Biological Diversity, 296 F.Supp.2d at 1239 (citing Northern Spotted Owl v. Hodel, 716 F.Supp. 479, 483 (W.D. Wa. 1988)). Here, because FWS ignored its peer reviewers and its own biologists, the Service’s decision is not entitled to deference. Ctr. for Biological Diversity, 296 F.Supp.2d at 1239; cf. Southwest Ctr. for Biological Diversity, 2002 WL 1733618, at \*9 (holding FWS was justified in deciding that “the goshawk is neither threatened nor endangered in southeast Alaska[ ]” because it relied on its experts).



The Secretary had a duty to do more than call balls and strikes when presented with evidence of the presence of wolves in the Northeast. She had a duty to explore feasible options for recovering wolves in the Northeast, and to provide reasoned explanations for why the effort must be abandoned now.

#### IV. FWS ARBITRARILY DETERMINED THAT THE GRAY WOLF IS NOT AT RISK IN A SIGNIFICANT PORTION OF ITS RANGE

When listing, reclassifying or delisting a species, the Secretary must determine whether a species is either endangered or threatened due to any of the five factors listed in the ESA. 16 U.S.C. § 1533(a)(1). The Secretary must also determine whether the species is either “in danger of extinction throughout all or a *significant portion of its range*,” or “likely to become an endangered species within the foreseeable future throughout all or a *significant portion of its range*.” *Id.* §§ 1532(6) & (20) (emphasis added). The question of what constitutes a “significant portion of the range” of a species, therefore, is critical and must be answered before a reclassification decision may be made.

When the Service implicitly determined in April 2003 that the gray wolf (as then listed across the lower 48 states) was no longer endangered except in the Southwest, it failed to consider what constitutes a significant portion of the range of this species. Likewise, when the Service determined that the gray wolf was threatened, not endangered, in the newly-created Eastern DPS, it failed to consider what constitutes a significant portion of the range of this DPS. Both were failures to consider relevant factors in violation of the APA and ESA.

##### *A. The Northeast Is Part of the Gray Wolf's Range.*

For purposes of determining a species' status, the threshold question is: what is the species' range? The ESA and FWS regulations do not define range. The legislative history sheds little light on this question. However, in the context of the 1978 amendments to the Act, the House stated that the term “‘range’ is used in the general sense, and refers to the *historical*

range of the species.” H.R. Rep. No. 14104, at 18 (1978), reprinted in 1978 U.S.C.C.A.N. 9468 (discussing the term range in the context of critical habitat amendments) (emphasis added).

Further, FWS acknowledges that the gray wolf once ranged throughout most of the North American continent. Final Rule at 15805; A.R. 230 at 1043- 1047; see also A.R. 261C at 2033, 2048; 261E at 2186; 964B at 13195. FWS also states that while “[a]uthors are inconsistent on their views of the precise boundary of historical gray wolf range in the eastern and southeastern United States . . . until additional data convincingly show that the gray wolves did not historically occur in the northeastern States, we will view the *historical* range of the gray wolf as including those areas north of the Ohio River, the southern borders of Pennsylvania and New Jersey, and southern Missouri.” Final Rule at 15806 (emphasis added).

*B. Significant Portion of the Range.*

The legislative history sheds minimal light on this question. In 1978, Senator Bartlett (R. Ok.) proposed an amendment to the terms “endangered species” and “threatened species” to replace “significant portion” with “essential portion” and effectively limit the area in which a species is at risk for purposes of the listing determination. Senate Consideration and Passage of S. 2899, with Amendments (July 19, 1978), reprinted in A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1978, 1979, and 1989, Congressional Information Service, Inc. CIS-1982-S322-4, Vol. 6, 1126. The Bartlett amendment was incorporated into Senate Bill 2899, which passed the Senate on July 19, 1978. *Id.* at 1169. The House rejected the Senate’s new narrower definitions for “endangered” and “threatened” and with it the notion that the determination of endangered or threatened should be limited to a review of the essential portion of the species range. 16 U.S.C. §§ 1532(6) & (20). Further, the ESA and the Service’s regulations do not define “significant portion of the range.” The Service has struggled to come up with a clear definition for the phrase, “a significant portion of the range,” or a conceptual

understanding of what the term means. See, e.g., A.R. 1003 (“I [Refsnider] simply can’t follow it, nor can Ed Bangs, and if we can’t understand it, how are we going to explain it to the public or a federal judge?”); 759 at 10232 (the “concept begs for a definition so we can decide if recovery has been achieved.”); 1004 at 16429 (“On the last conf [sic] call I [Ed Bangs, Western Gray Wolf Recovery Coordinator] was so confused I had to lay on the floor after we hung up.”); 1010 at 16448 (“Let’s do what we can to finesse any policy direction, given that we don’t have a policy and we don’t necessarily want to tie our hands/set precedent here in either direction.”).

Several courts have addressed this issue and held that where it is apparent from the record that the area in which the species is expected to survive is much smaller than its historical range, “the Service must, at a minimum, explain [its] conclusion that the area in which the [Lynx] can no longer live is not a ‘significant portion of its range.’” Defenders of Wildlife v. Norton, 239 F. Supp.2d 9, 21 (D.D.C. 2002) (internal citations omitted). In Defenders of Wildlife v. Norton, the Service, after some legal wrangling and a court-ordered stipulation, listed the U.S. DPS of the Lynx as threatened within the contiguous United States, doing away with two separate DPSs recommended by biologists. Id. at 16. The Lynx final rule stated that the Lynx was at risk in at least two of its historical ranges (Northern Rockies/Cascades), and that the species was either extinct or rare in the Northeast, Southern Rockies, and Great Lakes. Id. “Indeed, the Final Rule specifically concludes that, compared to these other three regions, the ‘Northern Rockies/Cascades Region supports the largest amount of lynx habitat and has the strongest evidence of persistent occurrence of resident lynx populations.’” Id. at 18-19. In the Lynx final rule, “the Service declared that ‘[c]ollectively, the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range of the DPS.’” Id. at 16-17 (quoting Lynx Final Rule, 65 Fed. Reg. 16052, 16066-67 (2000)). The plaintiffs challenged this determination as arbitrary and capricious and the court agreed. Id. at 18.

The court found that “FWS’ conclusion that these three, of the Lynx’s four regions, are collectively not a significant portion of its range is counterintuitive and contrary to the plain meaning of the ESA phrase ‘significant portion of the range.’” *Id.* at 19. The court relied on the *Webster’s Dictionary* definition of “significant” and concluded that “It is difficult to discern the logic in the Service’s conclusion that three large geographical areas, which comprise three-quarters of the Lynx’s historical regions, are not a ‘noticeably or measurably large amount’ of the species’ range.” *Id.* The court also found that FWS’s reliance on only one out of the four population areas was in contradiction to the ESA’s broad purpose of protecting endangered or threatened species. *Id.* FWS’s justification for only using one population area and disregarding the other three—because the Lynx was naturally rare in the other three population areas—contravenes the language of the ESA and again, is “contrary to the ESA’s broad purpose to protect wildlife that is ‘in danger of or threatened with extinction.’” *Id.* The Lynx final rule made clear that the Lynx is no longer viable in major geographical areas that it once was. *Id.* at 20. The court remanded the case back to FWS for further consideration and ordered that FWS must, at a minimum, explain its conclusion without relying on the Lynx’s perceived natural rarity. *Id.* at 21.

*C. The Northeast Is a Significant Portion of the Gray Wolf’s Range.*

1. FWS Improperly Limited its Inquiry to Current Range

In the Final Rule, FWS simply stated that because there is currently no wild wolf population east of the Great Lakes, “the area in the western Great Lakes States where the wolf *currently* exists represents the entire range of the species within the Eastern DPS.” Final Rule at 15810 (emphasis added). At a later point in the Final Rule FWS made another reference to “a significant portion of its current range.” *Id.* at 15857. These statements reveal the Service’s error in looking only at the *current* range of the species, rather than the historical range, for

purposes of making determinations under section 4 of the Act. See Defenders of Wildlife v. Norton, 239 F. Supp.2d at 19. This fatal mistake leads to a misinterpretation of the Act's requirements and an unlawful reclassification decision.

2. The Secretary Failed to Address Whether the Risk to the Wolf in the Northeast and Other Portions of the U.S. where the Wolf is not yet Restored Amounts to a Risk to the Wolf in a Significant Portion of Its Range

In the Final Rule, the Secretary declared the gray wolf no longer endangered in every part of the U.S. except the Southwest based on the presence of wolves in six states: Idaho, Montana, Wyoming, Minnesota, Michigan and Wisconsin. Final Rule at 15857. In making this reclassification decision, FWS never discussed what constitutes a significant portion of the range of the gray wolf in the lower 48 states (which was the listed entity at the time of its decision). This failure to consider whether the gray wolf remained at risk in a significant portion of the wolf's historic range in the lower 48 states was a failure to consider relevant factors in the violation of the APA and ESA. Defenders, 239 F. Supp.2d at 19.

Strikingly, FWS acknowledges that "[w]e listed [the gray wolf] across the 48 states, yet, we're recovering it in only three portions of that listed range. Even if the recovery criteria for all 3 recovery plans are fully met, we'll only have viable populations in 5-10 percent of the historical range." A.R. 778. Nowhere does FWS address whether the roughly 95 percent of its range where the wolf will remain extirpated constitutes a "significant portion of its range."

In creating the Eastern DPS, FWS asserted that the gray wolf "is not in danger of extinction in its entire range within the DPS" and the species "is not in danger of extinction in any significant portion of the range of the species within the DPS." Final Rule at 15857. FWS arbitrarily disregarded the recommendations of the biologists who peer reviewed the Proposed Rule and favored restoring the wolf in two DPSs in the eastern portion of the U.S. (the Western Great Lakes DPS and Northeastern DPS). Instead it arbitrarily relied solely on the presence of

wolves in the Western Great Lakes and supposed absence of wolves in the Northeast. As in the Lynx case, the Secretary was obligated to “at least explain its conclusion that the area in which the [species] can no longer live is not a ‘significant portion of its range.’” Defenders, 239 F.Supp.2d at 21. FWS failed to offer any such explanation.

The Final Rule asserts that “there is no convincing evidence in recent decades of another wild gray wolf population in the United States east of Michigan, so the wolves in the western Great Lakes States represents [sic] all the known gray wolf genetic diversity found in the Eastern DPS.” Final Rule at 15810. Later, the Final Rule states that “[t]he wolf’s progress toward recovery in the Eastern DPS, together with the threats that remain to the wolf within the DPS, indicates that the gray wolf is not in danger of extinction in its entire range within the DPS,” and points out that the success of the two wolf populations in the Midwest “demonstrates that the species is not in danger of extinction in any significant portion of the range of the species within the DPS.” Id. at 15810. FWS utterly fails to mention the Northeast, which comprises ten of twenty-one states in the Eastern DPS. If the only wolves discussed in a DPS listing are located in essentially three states out of twenty-one listed for the DPS, the Secretary is required to explain why the area represented by eighteen states is not significant.

#### V. FWS VIOLATED SECTION 4(F) OF THE ESA BY FAILING TO PREPARE A NATIONAL RECOVERY PLAN FOR THE GRAY WOLF AS LISTED

FWS violated section 4(f) of the ESA by failing to develop a recovery plan for the entire species of the gray wolf. FWS listed the entire species of *Canis lupus* as endangered, except in Minnesota where it was listed as threatened, under the five listing criteria of § 1533(a)(1). 43 Fed. Reg. at 9607. However, FWS never prepared a recovery plan for the listed species, but rather prepared three separate plans for several different subspecies of the gray wolf. The recovery plan is “supposed to be a basic road map to recovery, i.e., the process that stops or reverses the decline of a species and neutralizes threats to its existence.” Fund for Animals v.

Babbitt, 903 F. Supp. 96, 103 (D.D.C. 1995). FWS erred in not preparing such a road map for the gray wolf. Without a recovery plan for the listed entity, FWS had no basis for concluding that the gray wolf was no longer endangered in every region except the Southwest. Likewise, it had no basis for determining that the gray wolf has recovered to the point where reclassification to threatened in the Northeast is warranted. FWS's failure to prepare a recovery plan and its arbitrary reclassification decision are closely intertwined: the gray wolf's reclassification is not warranted until a recovery plan has been prepared for the species.

*A. Section 4(f) of the ESA Requires the Secretary to Prepare a Recovery Plan for Each Listed Species*

Section 4(f)(1) of the ESA states that "the Secretary shall develop and implement [recovery] plans for the conservation and survival of endangered species and threatened species listed pursuant to this section." 16 U.S.C. § 1533(f)(1). The "species listed pursuant to this section" is the species that FWS lists pursuant to the five criteria set forth in § 1533(a)(1)."

Defenders of Wildlife v. Babbitt, 130 F. Supp. 2d 121, 131 (D.D.C. 2001). The ESA's implementing regulations define "recovery" as the "improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act [§ 1533(a)(1)]." 50 C.F.R. § 402.02. Thus, to adequately "recover" a species under the Act, FWS must first identify how recovery can be achieved before it can determine whether or not the goals are met. See Defenders, 130 F. Supp. 2d at 131. Since FWS listed *Canis lupus*, it is required to prepare a recovery plan for *Canis lupus*.

In keeping with the ESA's mandate, the recovery plans that FWS has prepared over the years pursuant to section 4(f) have all been designed to recover the listed species or subspecies. The most relevant example in this case is the Red Wolf recovery plan. FWS listed the red wolf (*Canis rufus*) at the species level and wrote a recovery plan for the species. The red wolf has three subspecies located in the southeast U.S. but the recovery plan was written to address all

three subspecies under one Red Wolf Recovery Plan, not as three separate, piecemeal recovery plans for the three subspecies. U.S. Fish and Wildlife Serv., Red Wolf Recovery Plan 8-10 (1989).

This approach is crucial to satisfying the letter and spirit of the ESA. It ensures that FWS does not fail to address the question of whether protection of existing populations is sufficient to recover the species, or whether restoration of additional populations is needed for recovery of the species to be achieved. As a result of FWS's failure to prepare a recovery plan for *Canis lupus*, that fundamental question has never been asked or answered.

*B. FWS Has Recognized the Need for a National Recovery Plan for the Gray Wolf*

In 1995, biologists at FWS recognized that the piecemeal approach was flawed and saw the need to create a national recovery plan for the entire species of the gray wolf, *Canis lupus*, rather than have three separate recovery plans. See A.R. 1, 5, 13, 17. FWS commissioned Dr. David L. Mech, a leading expert on wolves, to write A Comprehensive Recovery Strategy for the Gray Wolf in the 48 Contiguous States, which revealed the Service's current recovery strategy as one "of acquiescence rather than a deliberate proactive plan based on our best biological judgment of where wolves could or should live and be promoted as an important component of ecosystems," and emphasized the need to "establish a national plan for wolf recovery." A.R. 24 at 7-8 (emphasis added). All six FWS Regions unanimously supported the proposal for a "National Plan" to recover the gray wolf. A.R. 65. The National Plan was to be based on the Nowak study, which reduced the number of subspecies of *Canis lupus* from 24 to 5. A.R. 4; A.R. 967F at 13991-14013.

*C. FWS Never Produced a National Recovery Plan for the Gray Wolf*

The results of the Nowak study called into question the validity of the Eastern Timber Wolf Plan, because arguably the wolves inhabiting the Great Lakes states and being recovered



under that plan were not eastern timber wolves at all, but rather the buffalo or Great Plains wolf. Id. In fact, the state management plans adopted by Minnesota, Michigan and Wisconsin all identify the wolf within their borders as the buffalo or Great Plains wolf—not the Eastern Timber Wolf. A.R. 967E 13873, at 13884; 967D 3773, at 13785; and 967I 14497, at 14508 (respectively). As a result, the gray wolf species wide recovery process halted, because the Nowak study caused the Service to question its existing plans. A.R. 49. In an effort to overcome the problem of changed taxonomy, and the obligation of preparing a new recovery plan for wolves in the Midwest, FWS attempted to reclassify the gray wolf as soon as possible using the three existing recovery plans and applying the DPS Policy as a geographic classification across all of the U.S. A.R. 691.

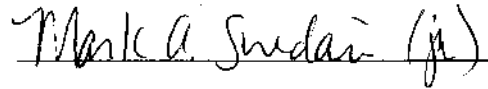
*D. The Piecemeal Approach to Recovery of the Gray Wolf Violates Section 4(f) of the ESA and Renders Reclassification Unlawful.*

A national recovery plan for the gray wolf would have established the objective, measurable criteria necessary for FWS to recover the listed gray wolf under the ESA. Because FWS failed to carry out its obligation under section 1533(f) to prepare a recovery plan for the gray wolf, reclassification is unlawful. The Final Rule to reclassify should thus be remanded and FWS be required to write a recovery plan for the gray wolf pursuant to the Act.

### **CONCLUSION**

For these reasons, Plaintiffs ask the Court to grant its motion for summary judgment, set aside FWS's Final Rule and remand the reclassification decision to the Service for reconsideration. Further, due to the complexity of the issues involved, Plaintiffs request the opportunity to present oral arguments in this case.

Respectfully submitted this 15<sup>th</sup> day of September, 2004

A handwritten signature in cursive script that reads "Mark A. Sinclair (jr)". The signature is written in dark ink and is positioned above the typed name and address.

Mark A. Sinclair, VT # 1977  
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Attorneys for Plaintiffs

## **DECLARATION OF PAUL NICKERSON**

1. I, Paul Nickerson, am 61 years old, and I am a resident of Londonderry, New Hampshire.
2. I acquired a Master's Degree in Forestry in 1970 from the University of New Hampshire and a Bachelor of Science Degree in Wildlife Management in 1966 from the University of Maine.
3. I retired from the U.S. Fish and Wildlife Service (FWS) on January 2, 2004 after 33 years of service. At the time of my retirement, I was the Chief of the Division of Endangered Species for the Northeast Region, Region 5, a position that I held for more than 28 years.
4. As the Chief of the Division of Endangered Species for the Northeast Region, I was responsible for all aspects of the Endangered Species program including listing, recovery, consultation, cooperation with the states, delisting, permitting and planning and budgeting for the States of Vermont, Maine, New Hampshire, New York, Connecticut, Delaware, Maryland, Massachusetts, New Jersey, Pennsylvania, Rhode Island, Virginia and West Virginia.
5. From 1993 until my retirement, I was an instructor for the national Endangered Species training courses for the FWS employees that included a

curriculum that I developed for the recovery and consultation sections. I continue to serve as a volunteer instructor of ESA related courses for FWS.

6. I co-sponsored a Northeast wolf symposium with Defenders of Wildlife at Pinkham Notch, New Hampshire to discuss and explain the pending proposal to reclassify wolves in the Northeast as threatened and review its implications for Maine, New Hampshire, Vermont and New York that was held in September 1998.
7. I have devoted most of my professional career carrying out the mandates of the ESA, including working to recover the gray wolf in the Northeast. I do not believe biological recovery will be achieved until there are breeding wolves in Northern New England.
8. In the early 1970s, the gray wolf was listed as four individual subspecies, including the eastern timber wolf (*Canus lupus lycaon*), the northern Rocky Mountain wolf (*C.l. irremotus*), the Mexican wolf (*C.l. baileyi*), and the Texas, New Mexico and Mexico subspecies (*C.l. monstrabilis*).
9. The FWS was concerned that these subspecies' classifications were narrowing the geographic areas for protection and hindering ultimate recovery of the gray wolf as a species throughout a significant portion of its range. Therefore, in 1978, the FWS relisted the gray wolf as endangered at the species level (*Canus lupus*) in the 48 conterminous states and Mexico with the exception of

the Minnesota gray wolf which was listed separately as a threatened species because of its specific progress towards recovery.

10. When a species has been listed as endangered under the ESA, the ESA requires the FWS to develop and implement a recovery plan for that species, the aim of which is to halt or reverse the decline of the species and provide a basic route to recovery. The initial plan, developed in 1978, set the criteria for recovery to be two viable populations of the Eastern Timber Wolf subspecies. In 1992, the FWS revised the plan and modified the criterion to reflect the objective of establishing the first viable population in Minnesota, while planning a second viable population to be either in Wisconsin/Michigan or in the Northeastern United States.
11. When the FWS revised the recovery plan in 1992, our success in the Western Great Lakes States, particularly the great population increases in Minnesota, caused us to focus more effort there and in Michigan and Wisconsin. While we were doing that, we failed to place enough emphasis on wolf recovery in the Northeast.
12. The Northeast has many millions of acres of suitable wolf habitat, an ample prey base consisting of moose, deer and beaver, and much of that area is sparsely populated by humans. The food chain is virtually complete except for a top predator capable of regularly preying on moose. Biological conditions have never been better for the wolf to complete that food chain.

In addition, there has been a report of a number of sightings in the Northeast within the last decade and a growing number of “observations and signs of large, unidentified canids in Maine during recent years.” 68 Fed. Reg. 15814. The Final Rule made note of the following: “in 1993 a single female wolf was killed in western Maine,...in 1996 a second wolf or wolf-like canid was trapped and killed in central Maine. Another wolf-like canid was mistaken for a coyote and killed in 1997 in northern Vermont. In early 2002 a...64 lb apparent wolf was killed by a trapper in southeastern Quebec, 20 miles from the New Hampshire border.” 68 Fed. Reg. 15814.

13. The FWS did not and does not consider follow-up of unconfirmed sightings of wolves to be its role or within its scope of responsibility. Thus, no formal process was developed to deal with evidence of unconfirmed sightings of wolves and the FWS did not routinely follow-up on such sightings.

14. It is my opinion that the Northeast constitutes a significant portion of the wolf's historic range, particularly when so much of the remainder of the range can no longer support wolves. Confining the recovery efforts to the Western Great Lakes States will not allow FWS to ever attain recovery over a significant portion of the range. The FWS has worked to recover two other wide-ranging species, the bald eagle, and the peregrine falcon over virtually all of their suitable former range. The wolf should be given the same level of effort.

15. There are differences of opinion as to the nature and genetic makeup of the ancestral wolf of the Northeast. I believe that it was a larger animal able to prey on moose and caribou, thus suggesting that it was different from wolves further west. Regardless of their makeup, they are gone now, and recovery will not be complete until they return.
16. The gray wolf was listed as an endangered species because it is “in danger of extinction throughout all or a significant portion of its range.” 16 USC § 1532(6). There are approximately 3800 gray wolves in the conterminous United States today, when the historical number was nearly 400,000. Current occupied wolf habitat in the conterminous United States, situated in eight states, amounts to approximately three percent of the wolf’s historic range. The Northeast is part of the gray wolf’s historic range and can accommodate the gray wolf back into its natural habitat. We need the Northeast populations as well as the Western Great Lakes populations as they each constitute an important part of the gray wolf’s range and are necessary to achieve recovery of the gray wolf in a “significant portion of its range.”
17. Based on my knowledge of and experience with the FWS, the reclassification of wolves in the Northeast will foreclose further discussions and/or decisions regarding any potential future recovery or reintroduction efforts for the gray wolf in the Northeast. ESA is a strong tool, perhaps the strongest environmental law we have, and it was designed to protect and restore species and their ecosystems. The northern forest ecosystem is in better condition

than it has been for many years, decades, even centuries. It only lacks a top predator...the wolf.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed this 10<sup>th</sup> day of September, 2004.

A handwritten signature in cursive script, reading "Paul Nickerson", written over a horizontal line.

Paul Nickerson



## **DECLARATION OF WALTER L. PEPPERMAN, II**

1. I, Walter L. Pepperman, II, am 64 years old, and I am competent to testify to all facts contained in this declaration. I reside at 3983 Main Street, Oquossoc, Maine 04964, which is in the heart of the western Maine mountains and ideal potential gray wolf habitat. I have no plans to move out of the northern New England region.
2. Because of my life-long interest in gray wolves, and the opportunity from The Maine Wolf Coalition, Inc. (MWC) to assist in gray wolf recovery in the northeastern U.S., I joined MWC as a member in 1994. In addition, I have been on MWC's Board of Directors since 1995, and presently am Vice President of the organization. As an attorney, I have also been Chairperson of MWC's Policy and Governmental Relations Committee since joining. MWC's mission is to promote gray wolf recovery in the State of Maine through research, education and protection.
3. I am also a long-standing member of the National Wildlife Federation (NWF). NWF has conservation of imperiled wildlife and wildlife habitats as part of its mission.
4. For at least 30 years, I have provided financial support to organizations that promote gray wolf recovery and protection. I make regular contributions to the MWC and other organizations that seek to protect gray wolves.

5. In addition to MWC and NWF, I am a member of Defenders of Wildlife, Wild Sentry, Loki Wolf Clan Refuge, Alaskan Wildlife Alliance, International Wolf Center, Wolf Haven, and Sierra Club. I am also the MWC contact person for the Coalition to Restore the Eastern Wolf.
6. I have actively participated at least once per month in MWC's public educational and research events, and I will continue to participate in such events at the same frequency in the future. I have also testified at least twelve (12) times before the Maine Legislature in support of gray wolf protection in Maine and related issues and will continue to do so when given the opportunity.
7. My life-long interest in gray wolves began when I was a young boy and I recall admiring them for their cunning, strength and a sort of mystery that surrounded them in my mind. During my life, I have traveled to Alaska, northern Minnesota, the Upper Peninsula of Michigan and Isle Royale with the primary goals of being in gray wolf habitats and seeing gray wolves in the wild.
8. I have been a gray wolf enthusiast for as long as I can remember.
9. I have lived in Oquossoc, Maine for ten years, and during this time, I have roamed the Maine northwestern woods searching for gray wolves, their tracks and signs on an almost daily basis when not traveling to other areas in the Northeast with gray wolf habitat. I will continue to do this at the same frequency in the foreseeable future.

10. Over the last 25 years, I have traveled and explored often in areas in the Northeast where prime gray wolf habitat still exists. I visit and explore for gray wolf habitat in New Hampshire about six to eight times per year; in Vermont, two to four times per year; and have visited and explored gray wolf habitat in the Adirondacks at least a dozen times. In the hope that wolves have begun to repopulate these areas, I always look for wolves or any signs of a wolf. I will continue to travel by and through this wolf habitat at the same frequency in the future.
11. Since moving to Maine ten years ago, I travel by and through wolf habitat almost daily. Specific areas which are prime wolf habitat in Maine which I have visited and continue to visit include (but are not limited to) the Greater Mooselookmeguntic Lake almost weekly; the watersheds of Chesuncook Lake and Namakanta Lake, and the Boundary Mountains twice within the last two years; the Moosehead Lake Region at least three times within the last five years; the Kennebago River watershed at least a dozen times per year over the last ten years; Aroostook County once in the last three years; Acadia at least a half dozen times within the last ten years; and the Flagstaff Lake and Dead River area once in the last ten years. In the next few years and throughout my lifetime, I will continue to travel by and through these places which contain prime wolf habitat with the same amount of frequency.

12. In the western mountains of Maine, I am called the “wolf guy” because of my long-standing interest in and advocacy for wolves. I also own the “WOLF” personal license plate in Maine. Based on my association with wolves, I am often told about wolf sightings. I have spoken with at least 50 people over the last ten years that have told me about wolves that they believe that they have seen in Maine. I have asked these people questions based on my knowledge of the wolf to determine the reliability of their statements and have been convinced that most of these 50 people had probably seen a wolf.
13. I am aware that the State of Maine provided optimal habitat for the gray wolf before it was extirpated. Living in the perfect habitat, the gray wolf flourished in this State. Today, suitable habitat still exists in western and northern Maine, as depicted on the map attached as Exhibit A, where there are vast forests, low road density, abundant prey and small human populations.
14. I am happy that such habitat exists because I get a personal sense of satisfaction of frequenting places where I know gray wolves can survive if they are permitted to return. For as long as I live, I will continue my efforts on behalf of gray wolves and go to where the gray wolves should be.
15. I have also been a gray wolf activist for many years. In Orono, Maine, I attended the regional public hearing regarding the Proposed Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, (65 Fed. Reg. 43450, July 13, 2000) (Proposed

Rule), at which I gave oral testimony. I have also written and submitted comments in the administrative process regarding this Proposed Rule. I am completely aware that the Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, (68 Fed. Reg. 15804, Apr. 1, 2003) (Final Rule), will mark the end of federal protection for gray wolves in northern New England and cause irreparable injury to all of the effort that has been expended by volunteer groups to achieve gray wolf recovery.

16. In essence, because of the Final Rule, the U.S. Fish & Wildlife Service's (FWS) plan to recover the eastern gray wolf is abandoned. I believe that there is absolutely no basis for the removal of the gray wolf from the Endangered Species List. Such protection is essential to foster gray wolf recovery in the northeastern U.S. portion of the gray wolf's range. Therefore, I support, without qualification, the lawsuit for which this declaration has been prepared.

17. The Final Rule eliminates the realistic potential for any gray wolf recovery in the northeastern states, and has personally and directly harmed my previously stated interests in recovering gray wolves to this significant portion of their range.

18. I have read the Complaint for Declaratory and Injunctive Relief, which alleges that FWS has violated the Endangered Species Act (ESA) as follows:

- a. The FWS has illegally terminated its planned gray wolf recovery.

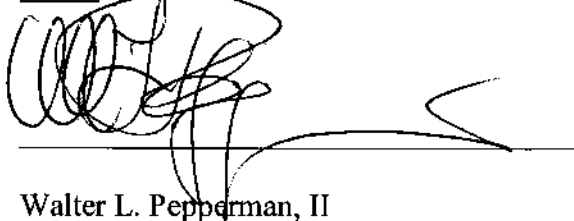
- b. The FWS has illegally applied the "Distinct Population Segment" (DPS) listing authority.
- c. The FWS has failed to take affirmative steps to restore the gray wolf to the northeastern U.S.
- d. The FWS has failed to use the best available science to make their decisions.

19. I believe that if FWS complied with the law, the gray wolf would be federally protected as an endangered species, and its recovery in the northeastern U.S. would be probable. Unless the court provides a remedy, FWS' violations will continue to injure my concerns for and interests in gray wolves indefinitely.

20. The relief requested by the MWC would redress my injuries because it would require that the Defendants, Gale Norton, Secretary of Interior, United States Department of Interior; and Steven Williams, Director of United States Fish and Wildlife Service, to comply with the ESA and the Administrative Procedure Act (APA). Again, this will likely result in greater protection and recovery assistance for the gray wolf population in the northeastern U.S. than is provided under the Final Rule.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on April

22, 2004



Walter L. Pepperman, II

## DECLARATION OF WARNER SHEDD

1. I, Warner Shedd, am 70 years old and am competent to testify to all facts contained in this declaration. I reside at 1058 Sand Hill Road, East Calais, Vermont, 05060. I am a sixth generation Vermonter and have no plans to move from Vermont.
2. I am retired from the National Wildlife Federation (NWF) where I worked as the Northeast Regional Executive for 20 years. I am also a current member of Vermont Natural Resources Council and have been since 1969.
3. I am a current member of the NWF and have been a member since 1962. The NWF promotes conservation of wildlife, including threatened and endangered species and the habitats upon which they depend, as part of its mission. I joined the NWF specifically because of my interest in wildlife conservation and protection of wildlife habitats. Through NWF I have monitored both state and federal legislation regarding gray wolf recovery in Vermont, Maine, New Hampshire and New York. I have been especially concerned about retaining the gray wolf's status as a federally listed endangered species. Federal listing of the wolf provides protection from human-caused mortality. Without federal protection, the wolf will not likely recover in the Northern Forest ecosystem.
4. I am an author of two wildlife books: Owls Aren't Wise & Bats Aren't Blind: A Naturalist Debunks Our Favorite Fallacies About Wildlife, Crown (2001) and The Kid's Wildlife Book, Williamson Publishing (1994). Each book contains a chapter

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devoted to wolves. I have specifically researched and written about the gray wolf. I have a strong interest in gray wolf recovery. I have researched, studied and followed all gray wolf recovery throughout the United States and the possibility for recovery in the Northern Forest ecosystem. I frequently contact wolf specialists in Vermont and discuss signs of gray wolf activity and the possibility of recovery in the Northern Forest ecosystem. I have lived long enough to witness the inadequate recovery of the wolf.

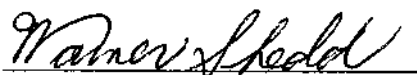
5. I am aware that the State of Vermont historically provided habitat for the gray wolf before it was extirpated. Suitable habitat still exists in the Northern Forest ecosystem (as depicted on the map attached as Exhibit A) including large blocks of potential core habitat, travel corridors and adequate prey.
6. I have been a gray wolf enthusiast for 20 years. My personal interests include hunting in gray wolf habitat in the Northern Forest ecosystem, specifically Vermont. I travel on or past such habitat several times per month. In hunting or fishing season, I frequent the area even more often. When traveling on or past these lands, I enjoy viewing gray wolf habitat. As long as gray wolf habitat exists in Vermont, I will continue to travel into suitable wolf habitat for the rest of my life. I consider it one of my life goals to encounter a gray wolf in the Northern Forest ecosystem.
7. As a hunter, and biologist by training, I understand the predator/prey relationship and its effects on the health of ecosystems. Without adequate control by predators, ungulates overgraze and damage the ecosystem. There is evidence of moose



overgrazing in the Northern Forest ecosystem. The wolf as a top predator would help to regulate and control moose populations, if it were returned to its former habitat.

8. I have had the opportunity to hunt deer in Quebec in an area known as Kenauk, the Seigneurie at Montebello. The area has a resident wolf pack and although I did not see or hear a wolf, the knowledge that I might encounter a wolf added greatly to my enjoyment of the hunt. Likewise, I saw wolf tracks in Northern Labrador, where I was hunting caribou; this was one of the most memorable aspects of my hunt. I similarly look forward to hunting in the Northern Forest and enjoying a similar experience in wolf habitat.
9. I am aware of what the Final Rule to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Coterminous United States, 68 Fed. Reg. 15804 (Apr. 1, 2003) ("Final Rule") means to gray wolf recovery in the Northern Forest ecosystem, specifically, Vermont, New Hampshire, Maine and New York. I am aware that the Final Rule abandons recovery of the gray wolf, and reclassifies the gray wolf from an endangered species to a threatened species.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on this 8<sup>th</sup> day of September, 2004.



Warner Shedd

## DECLARATION OF ROBERT BRUCE KIMBER

1. I, Robert Bruce Kimber, am 69 years old and competent to testify to all facts contained in this declaration. I reside at 130 Intervale Road, Temple, Maine, and have no plans to leave Maine.

2. I joined the Maine Audubon Society (MAS) as a member in the year 2000, and have remained as one since then. As part of its mission, MAS promotes conservation of imperiled wildlife and wildlife habitats. Prior to 2000, when MAS became an affiliate of the National Audubon Society (NAS), I had been a member of NAS for many years. I became a member in both organizations because I support the Audubon mission of environmental education and advocacy. Also, since 1998, I have been a board member of the Western Maine Audubon Society (WMAS), previously a chapter of NAS and now a chapter of MAS

3. Additionally, I have continuously provided financial support to the MAS and NAS in their efforts to promote environmental education and advocacy, including Maine Audubon's position on gray wolf recovery in Maine.

4. For the last twenty years, I have been actively involved with environmental issues in the State of Maine, advocating, in particular, for substantial set-asides of Maine forestland as wilderness preserves. Restoration of the gray wolf to Maine is, in my mind, an integral part of wilderness preservation and restoration in this State. Maine forestland did in the past support populations of gray wolves, and even now, there is suitable habitat for gray wolves both in Maine and across the northern forest of the northeastern states. Not many years ago, I spent a week snowshoeing in Minnesota's Boundary Waters Canoe Area Wilderness. In that time, I came across one wolf kill and numerous wolf tracks. If northern Minnesota can sustain a wolf population, so can the northern-forest region of the northeastern states. The restoration of the gray wolf to this region would be personally satisfying to me because it would indicate that we human beings had finally come around to welcoming back into our local biological community a magnificent animal that we had made the mistake of driving out in the past.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on the 5<sup>th</sup> day of April, 2004.

Robert Kimber

Robert Bruce Kimber

Robert Bruce Kimber

## **DECLARATION OF MARGARET STRUHSACKER**

1. I, Margaret Struhsacker, am 50 years old, and I am competent to testify to all facts contained in this declaration. I live at 676 Walton Rd, Morrisville, VT, which is in proximity to potential gray wolf habitat in northern New Hampshire and Maine. I have no plans to move.
2. I am a longstanding member of the National Wildlife Federation ("NWF"), the Maine Audubon Society, and Maine Wolf Coalition. I joined these organizations because of their dedication to conserving imperiled wildlife and habitats. I am particularly interested in their work to protect the wolf and its habitat.
3. I am also currently a member of International Wolf Center, High Country News, and the Wildlife Society and am a past member of the Greater Yellowstone Coalition, Predator Conservation Alliance, and the Vermont Natural Resources Council.
4. I am an environmental biologist and the Wolf Recovery Program Coordinator for NWF. As part of this position, I oversee NWF's national wolf program and develop, implement and coordinate the Northeast Wolf Project in NWF's Northeast Natural Resource Center.
5. Because of my life-long interest in gray wolves, I served as the education coordinator for Mission:Wolf, an educational wolf center, the executive director of the Lamoille County Nature Center, and an adjunct professor at Antioch New England Graduate School teaching a class on the wolves of Yellowstone.

6. I am a third generation Vermonter and my parents were instrumental for instilling a love of nature through camping, hiking and being exposed to the wonders of the Green Mountains. Wolves were always an interest, possibly because of my love for dogs and National Geographic Magazines. I spent hours pouring through National Geographic's that we received in the mail and stories about the "Wolves of Isle Royale" always fascinated me. My compassion for wildlife has moved me to work to preserve the underdogs – i.e., predators. When I attended college in Bozeman, Montana, the discussion was just starting on bringing wolves back to Yellowstone. Since my field of study took me into Yellowstone, I became enchanted with the park and its wildlife – the piece that was missing was the wolf at that time.
7. I graduated from Montana State in 1979 with a B.S. in Range Science. My studies involved the relationship of wildlife and livestock to the ecology of the western ecological system. Predators play a very large role and this relationship was of great interest to me. I was unable to practice my degree in the northeast, but managed to stay involved in environmental issues. When I became the Executive Director of the Lamoille County Nature Center – I became seriously involved in wolf recovery. During this time period, I met the wolves and staff from Mission: Wolf, a wolf refuge for ex-pet wolves and hybrids. I was able to look a wolf in the eyes. Seeing the intelligence in the eyes was all it took for me to become a total advocate to restore wolf populations to the wild where secure habitat is available, which we have here in our great north woods. I received a M.S. in Environmental Biology from Antioch New England Graduate School in

2001. My thesis was a stochastic computer model of the possible effects recolonizing wolves would have on the whitetailed deer, moose and coyote population in northern Maine.

8. During my life, I have traveled to Yellowstone National Park, Minnesota, Algonquin Provincial Park, Papeau-Labelle and the Laurentides Reserves, and northern Italy with the primary goal of being in gray wolf habitats and seeing gray wolves in the wild. I will continue to travel (often on my own time and expense) to such places for the purpose of looking for wolves at least once a year in the foreseeable future.
9. For the last three years, I have been spending countless hours responding to possible wolf sighting and surveying for wolves in northern New Hampshire, Vermont and Maine. I have assisted in training over 75 volunteers to assist in looking for naturally dispersing wolves. Within this three year period, I have taken photos of tracks, collected scat, had DNA tested and had howling surveys done. This work has all been done following acceptable scientific protocol.
10. On my own personal time and expense, I began hiking (at least a few times per year) through wolf habitat in the Northeastern U.S. in the 1990's. Because of the work I do with wolves, I now hike through this habitat about 5 times per year. Because of my personal interest in and love for wolves, I will continue to hike (at least a few times per year) throughout wolf habitat in the Northeastern U.S. for the rest of my life – or as long as I am physically able.
11. Even if wolves are not currently roaming in the northeastern US, I receive great pleasure in knowing that they could migrate to these areas from Canada. I remain

very hopeful that wolves will soon repopulate this region – either naturally or through reintroduction.

12. I am aware that Maine, New York, Vermont, New Hampshire and all of New England provided optimal habitat for the gray wolf before it was extirpated. Living in the habitat undisturbed by white settlers, the gray wolf flourished in these States. Today, potential core habitat still exists in 26 million acres throughout the western mountains and in northern Maine, northern and the White Mountain Range of New Hampshire, northeastern Vermont and the Adirondacks of New York. I am happy that such habitat exists because I get a personal sense of satisfaction of frequenting places where I know gray wolves can survive if they are permitted to return. For as long as I live, I will continue my efforts on behalf of gray wolves and go to where the gray wolves should be.
13. On my own time and apart from my job, I have been a gray wolf activist for many years and submitted comments for the Northern Rockies Wolf Project and attended public hearings in Montana. I commented personally on the 2000 Proposed Wolf Rule and have personally commented on aerial hunting of wolves in Alaska.
14. I attended the regional public hearing in Orono, Maine on October 12, 2000 regarding the Proposed Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, (65 Fed. Reg. 43450, July 13, 2000) (Proposed Rule), at which I gave oral testimony. I have also submitted comments in the administrative process regarding this Proposed Rule.

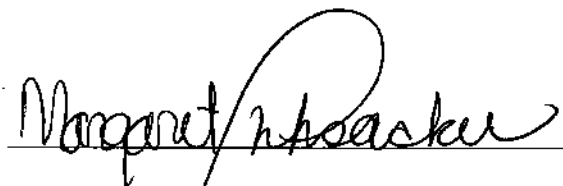
15. I am aware that the Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, (68 Fed. Reg. 15804, Apr. 1, 2003) (Final Rule), will mark the end of federal protection for gray wolves in northern New England and cause irreparable injury to all of the effort that has been expended by volunteer groups to achieve gray wolf recovery.
16. Under the Final Rule, the U.S. Fish & Wildlife Service's ("FWS") plan to recover the eastern gray wolf is terminated. I believe that there is absolutely no basis for the removal of the gray wolf from the Endangered Species List. Such protection is essential to foster gray wolf recovery in the Northeastern U.S portion of the gray wolf's range. Therefore, I support, without qualification, the lawsuit for which this declaration has been prepared.
17. The Final Rule eliminates the realistic potential for any gray wolf recovery in the Northeastern states, and has personally and directly harmed my previously stated interests in recovering gray wolves to this significant portion of their range.
18. I have read the Complaint for Declaratory and Injunctive Relief, which alleges that FWS has violated the Endangered Species Act ("ESA") as follows:
- The FWS has illegally terminated its planned gray wolf recovery.
  - The FWS has illegally applied the "Distinct Population Segment" (DPS) listing authority.
  - The FWS has failed to take affirmative steps to restore the gray wolf to the Northeastern U.S.



- The FWS has failed to use the best available science to make their decisions.

19. I believe that if FWS complied with the law, the gray wolf would be federally protected as an endangered species, and its recovery in the Northeastern U.S. would be probable. Unless the court provides a remedy, FWS' violations will continue to injure my concerns for and interests in gray wolves indefinitely.
20. The relief requested in this suit would redress my injuries because it would require that the Defendants (Gale Norton, Secretary of Interior, and Steven Williams, Director of United States Fish and Wildlife Service) comply with the ESA and the Administrative Procedure Act ("APA"). Again, this will likely result in greater protection and recovery assistance for the gray wolf population in the Northeastern U.S. than is provided under the Final Rule.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on September 15, 2004.



Margaret Struhsacker