UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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

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.

Civil No. 1:03-CV-340

PLAINTIFFS' REPLY MEMORANDUM

ORAL ARGUMENT REQUESTED

INTRODUCTION

Defendants try to downplay the significance of this case by characterizing the Final Rule at issue here[1] as nothing more than a "modest step of *reclassifying* the gray wolf... from *endangered* to *threatened*...." Defs' Mem. Supp. Mot. J. ("Defs' Mem.") at 1-2 (emphasis in original). In truth, however, the Final Rule goes far beyond that.[2] First, it adopts a species classification scheme, the so-called Eastern Distinct Population Segment ("EDPS"), so different from what was proposed that the public was effectively denied notice and any opportunity for

[1] 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").

[2] At the same time the Final Rule was published, Defendants published an Advanced Notice of Proposed Rulemaking to delist the EDPS entitled: Removing the Eastern Distinct Population Segment of Gray Wolf From the List of Endangered and threatened Species, 68 Fed. Reg. 15876 (Apr. 1, 2003). True to their word, on July 21, 2004 Defendants published the proposed delisting rule. Removing the Eastern Distinct Population Segment From the List of Threatened and Endangered Wildlife. 69 Fed. Reg. 43664 ("Delisting Proposal"). As soon as the Delisting Proposal becomes final, gray wolves in the Northeast will no longer be protected under the ESA.

meaningful comment. Second, the Final Rule adopts an unreasonably broad interpretation of the key statutory term "distinct population segment" that flies in the face of Congressional intent. Third, the Final Rule adopts an unreasonably narrow interpretation of another key statutory term, "significant portion of the range," that contravenes Congressional intent and undermines the conservation purposes of the Endangered Species Act, 16 U.S.C. §1531-1544 (2000) ("ESA" or "the Act"). Fourth, the Final Rule jettisons the proposed Northeastern DPS ("NEDPS") in spite of the best available scientific information, the unanimous support of the peer reviewers, overwhelming public support, and clear statutory authority. Fifth, the Final Rule effectively dooms any hope for wolf recovery in the Northeast, and truncates the recovery of the entire species of gray wolf throughout its historic range.

In sum, Defendants have utterly failed in discharging their conservation duties under the ESA. At every turn, Defendants have misinterpreted the law and ignored the facts to thwart recovery of the wolf in the Northeast. They deny that wolves exist when the evidence shows they do. They ask wolf experts, like Dr. David Mech, for advice on a recovery strategy, and then ignore his recommendation to prepare a national plan. They ask for peer review of the proposed NEDPS, and then ignore the unanimous recommendations in favor of it. They ask for public comment on 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 Establish Three Special Regulations for Threatened Gray Wolves, 65 Fed. Reg. 43450 (proposed July 13, 2000) ("Proposed Rule"), then ignore strong public support for it and adopt something entirely different. They recognize the need for further public comment but decide it will take too long. They acknowledge the legislative directive to use the DPS authority "sparingly" then proceed to use it sweepingly. They acknowledge that Congress intended the term "range" to

mean "historic range," then proceed to use "current range" in making the determination that the Northeast is no longer a significant portion of the wolf's range. They cite uncertainty about wolf taxonomy as a reason to abandon the Northeast DPS, then turn around and lump the Northeast and Midwest wolves together into one enormous Eastern DPS.

In their rush to delist wolves in the Western Great Lakes, Defendants have made a mess of the recovery process under the ESA and a mockery of the public comment process under the Administrative Procedure Act, 5 U.S.C. § 701-706 (2000) ("the APA"). Their decision should be set aside and remanded.

ARGUMENT

I. PLAINTIFFS HAVE A CLEAR STAKE IN THIS CONTROVERSEY

A. Plaintiffs Have Suffered the Requisite "Injury-in-Fact."

Plaintiffs, a coalition of five environmental organizations, have unequivocally established that they have a sufficient stake in the outcome of this case to stand before this Court. Pls' Mem. Supp. Mot. Summ. J. ("Pls' Mem.") at 17-25. Plaintiffs meet the tests for organizational standing, because their members regularly use wolf habitat for a variety of recreational activities, including searching for signs of wolves and the chance to observe them in the wild. Id. Plaintiffs and their members also have a direct stake in the administrative proceeding that is the subject of this lawsuit, having participated in this rulemaking as well as pursuing other avenues to restore the wolf to the Northeast. Id.; Lujan v. Defenders of Wildlife, 504 U.S. 555, 573, n.7 (1992); Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1537 n.4 (9th Cir. 1993); Decl. of Walter Pepperman ("Pepperman Decl."), Ex. E, ¶15; Decl. of Margaret Struhsacker ("Struhsacker Decl."), Ex. H, ¶¶13, 14. Both Mr. Pepperman and Ms. Struhsacker not only commented, but also gave oral testimony at a regional public hearing regarding the

Proposed Rule. Pls' Mem. at 19, 21, 23. "[A] participant in the agency's decisional processes is *actually and particularly injured* by the agency's disregard of its statutory duty." Portland Audubon at 1537 n.4 (emphasis added); see also N.Y. Pub. Interest Research Grp. v. Whitman, 321 F.3d 316, 326 (2d Cir. 2003) ("because NYPIRG properly asserts a violation of a specific procedural right under § 505(b)(2), a lesser showing of immediacy and redressability is required."); Pls' Mem. at 23.

Defendants completely ignore these facts and the law and instead attempt to persuade this Court that Plaintiffs have not met their burden to establish standing.[3] Fed. Defs' Mot. J. and Mem. Supp. and Opp. Pls' Mot. J. ("Defs' Mem.") at 22-26. Defendants' arguments are completely feckless. For instance, Defendants' comparison of Plaintiffs to those in Lujan and Mountain States mischaracterizes the facts and misinterprets the law. In Lujan, the plaintiffs failed to obtain standing because they did not have specific plans as to when they might revisit places outside of the United States to observe rare species (the "some day" issue). Lujan, 504 U.S. at 564. In the case at bar, Plaintiffs live in the Northeast and visit frequently, some Declarants even daily, gray wolf habitat. Pepperman Decl., Ex. E, ¶9; Decl. of Warner Shedd ("Shedd Decl."), Ex. F, ¶6; Struhsacker Decl., Ex. H, ¶¶ 1, 10. The plaintiffs are clearly distinguishable in these two cases. The plaintiffs in Lujan, without a specific plan in place as to when they intended to revisit the habitat of the rare species in which they had an interest, failed to meet the standing requirements. Lujan, 504 U.S. at 564. Plaintiffs in the case at bar, with frequent forays into gray wolf habitat, meet the standing requirements. Pls' Mem. at 17-25.

[3] Safari Club International and Safari Club International Foundation, whose "eleventh-hour" request for leave to participate as *amici* has not been granted as of the date of this filing, make similar meritless arguments. Amici's Br. Supp. Fed. Defs. at 9-15.

Contrary to Defendants' claim, the appellate court in Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1236-37 (D.C. Cir. 1996) did not hold "that plaintiffs cannot claim an injury to their ability to enjoy the presence of a species, when the species is not in the area to begin with." Defs' Mem. at 24. Mountain States simply held that the plaintiffs in that case had failed to "explicitly advance[]" a "concrete interest" in protecting grizzly bears, and only asserted "a mere expression of enjoyment of all things sylvan," and thus failed to show their interests were "'directly' affected." Mountain States, 92 F.3d at 1236-37. This holding is wholly consistent with Plaintiffs' argument that they have suffered an "injury-in-fact." Pls' Mem. at 19-23. Plaintiffs' Declarants have demonstrated a *concrete interest* in the wolf, do believe that there are wolves in the area, have been interested in wolves and *protecting the wolf* through wolf recovery currently and in the past, and anticipate enjoying the presence of gray wolves in the future. Id. Plaintiffs' interest is not a general one "of all things sylvan;" the interest at stake is the protection and preservation of the gray wolf in the Northeast.[4] Id.

Contrary to Defendants' assertions, Plaintiffs do not "contend that there is 'no requirement that there be any actual evidence of environmental harm' and that they need only demonstrate a violation of the ESA to establish standing." Defs' Mem. at 24. Instead, Plaintiffs state "(t)here 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

[4] *Amici* argue that there must be an existing wolf population to support the injury-in-fact requirement. Amicus Br. at 11. However, as documented in numerous places, dispersing wolves are entering the Northeast. Pls' Mem. at 12-14, 19-23, 32. The gray wolf, prior to the Final Rule, was listed as an endangered species in the Northeast and throughout most of the United States. Id. at 8-9. As such, its rarity is to be expected. Whether there is one or one hundred, those who strive to preserve and protect the gray wolf and who live in the States where it is listed as endangered or threatened, have a concrete and particularized interest in its wellbeing. Id. at 19-23. The Plaintiffs have offered to this Court more than a sufficient basis to "stand" before this Court. Id.

Lumber Co.230 F.3d 1141, 1151 (9th Cir. 2000)." Pls' Mem. at 22. What is required, and what Plaintiffs have clearly demonstrated, is that there is "an increased risk" of harm to Plaintiffs, not the environment, based on Defendants' violation of the ESA. Id. at 22-23.

Defendants also inaccurately claim that the Final Rule "does not harm Plaintiffs' interest in wolf recovery." Defs' Mem. at 25. The Service, in its Final Rule and in practice, focused on the recovery of the gray wolf in the Western Great Lakes area. As explained by Paul Nickerson, a retired FWS Chief of Endangered and Threatened Species for the Northeast Region and a wolf recovery specialist:

> 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.

Decl. of Paul Nickerson ("Nickerson Decl.") Ex. D ¶ 11. The creation of a huge DPS merging the Western Great Lakes States, where recovery efforts have met with success, with the Northeastern States, where implementation of FWS's recovery responsibilities have barely begun, ensures that recovery of the gray wolf in the Northeast will continue to be neglected.

In fact, in direct contradiction with Defendants' assertions throughout their Memorandum about leaving the option open to create a Northeastern DPS, Defendants have definitively stated in a series of Federal Register notices that recovery throughout the East is completed and that Defendants' duties in this regard have been fulfilled. The most recent example of this is FWS's recently-issued proposed rule to delist the Eastern DPS of the gray wolf. Removing the Eastern Distinct Population Segment of the Gray Wolf From the List of Endangered and Threatened Wildlife, 69 Fed. Reg. 43664 (proposed July 21, 2004), Ex. I ("Delisting Proposal"). Defendants claim in the Delisting Proposal that they have been successful in their recovery of the gray wolf

in the Eastern DPS and that delisting throughout the East is therefore warranted. Id. at 43690. This may be true for wolves in the Western Great Lakes, but nowhere in the Delisting Proposal is there any suggestion that Defendants are leaving open the option of continuing to pursue recovery in the Northeast.

In summary, Defendants' creation of a fictional Eastern DPS has indeed caused Plaintiffs to suffer an injury-in-fact.

B. Plaintiffs' Injuries Are Fairly Traceable to the Final Rule and Are Redressable.

The second prong of the Constitutional standing requirements requires a showing that it is the action of the Defendants, not a third party, which is fairly traceable to Plaintiffs' injuries. Lujan, 504 U.S. at 560. Defendants contend that there is no difference between the Eastern DPS and the proposed Northeastern DPS as far as wolf protection is concerned. Defs' Mem. 18-19. Defendants gloss over the fact that by eliminating the Northeast DPS and replacing the previous nationwide listing, they have effectively ended wolf recovery in this region, frustrating years of effort by Plaintiffs and practically insuring that Plaintiffs' members will never enjoy the sight of wolves on the land. Obviously, the Service understands that there is a difference between the chance of recovery for the Northeastern DPS gray wolf under the original proposed Northeastern DPS and the Eastern DPS because it claims to have left open the option of "initiat[ing] new gray wolf recovery programs in... the Northeast." Final Rule at 15825. As explained earlier, the Service's decision to focus solely on the success of gray wolf recovery in the Western Great Lakes States, and to disregard the tenuous situation of wolves in the Northeast, has paved the way for the Delisting Proposal to delist the gray wolf in the entire Eastern DPS, and sounded the final death knell for wolf recovery in the Northeast. Delisting Proposal at 43690. The FWS claims that "[g]ray wolf recovery in the eastern United States has been achieved by restoring the

species to its core recovery areas within the EDPS, consisting of Minnesota, Wisconsin, and Michigan, to the point where it is not in danger of extinction now or in the foreseeable future. We do not need to recover the wolf in other areas of the eastern United States to delist the EDPS." Id. at 43672-3. Plaintiffs' injuries meet the requirement of being fairly traceable to Defendants' actions of eliminating the proposed Northeastern DPS and new recovery efforts in the Northeast and of creating the larger Eastern DPS, including the Western Great Lakes area, which was, and would continue to be, the focus of its recovery actions.

Plaintiffs meet the third prong of the Constitutional standing requirements of redressability. A favorable decision by the Court would invalidate the Final Rule and remand it to FWS for further consideration in compliance with the requirements of the ESA and the APA. Such a decision would redress Plaintiffs' injuries by affording Plaintiffs with their first opportunity to be heard on the creation of an Eastern DPS and would afford the FWS an opportunity to establish a separate DPS for which a recovery plan would be developed and implemented for the gray wolf in the Northeast, or leave the 1978 listing in place with respect to the Northeast.

In the Lujan case, the Supreme Court recognized that causality and redressability requirements should be relaxed where, as here, procedural rights were being asserted. Lujan, 504 U.S. at 573, n 7. Plaintiffs have more than satisfied this lesser standard of causality and redressability.

II. THE SECRETARY FAILED TO PROVIDE THE PUBLIC WITH ADEQUATE NOTICE AND OPPORTUNITY FOR COMMENT ON THE DECISION TO ABANDON THE PROPOSED NORTHEAST DPS AND CREATE AN EASTERN DPS

Defendants claim that the Proposed Rule "fairly apprised" the public of the subject of the proposed rulemaking, and that the Final Rule's adoption of a newly minted "Eastern DPS" was

simply a "logical outgrowth" of the rulemaking process. Defs' Mem. at 27.[5] Neither the record nor the law supports this assertion.

Out of approximately 16,000 comments submitted on the Proposed Rule, Defendants did not (and cannot) point to a single comment that advocates for the creation of the Eastern DPS. A.R. 564. None of the scientists asked to peer review the Proposed Rule said anything about an Eastern DPS. A.R. 547-557. The idea for this massive, 21 state "DPS" was presented to the public for the first time in the Final Rule. Final Rule at 15804. Indeed, the record reveals that FWS knew that the Final Rule was a substantial departure from the Proposed Rule, engaged in a year-long debate over what to do about it, and ultimately rejected, for political reasons, a staff recommendation to extend the comment period by six months to allow the public the opportunity to comment on this radical new approach. See Pls' Reply, supra, at II.C. Had Defendants followed the proper course of action and provided notice and an opportunity to comment on the Eastern DPS, Plaintiffs, wolf experts and the public would have been able to present evidence showing that the concept is scientifically flawed and legally suspect.

In short, Defendants deprived the public of adequate notice of, and a meaningful opportunity to comment on, what it was it was proposing to do. Accordingly, the Final Rule must be set aside and remanded for a new rulemaking. Nat'l Black Media Coalition v. FCC, 791 F.2d 1016, 1024 (2d Cir. 1986).

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[5] Defendants' charge that Plaintiffs failed to allege a violation of §553 of the APA is without merit. Defs' Mem. at 26. In their Complaint, Plaintiffs sought declaratory and injunctive relief for, *inter alia*, violation of the "Administrative Procedure Act, 5 U.S.C. §§ 553-559, 701-706." Pls' Compl. ¶¶ 3,4 (emphasis added). Further, Plaintiffs specifically allege that the "Final Rule departs substantially from the Proposed Rule," Pls' Compl. ¶ 79, and restate and reallege that allegation. Pls' Compl. ¶ 90. The Federal Rules of Civil Procedure set forth liberal notice pleading rules. Fed. R. Civ. P. 8(f). Kalsi v. N.Y.C. Transit Auth., 62 F. Supp.2d 745 (E.D.N.Y. 1998), cited by Defendants, Defs' Mem. at 26, is inapposite.

A. The Record Does Not Support Defendants' Contention that the Public Was Afforded a Meaningful Opportunity to Comment on the Decision to Create an Eastern DPS.

Defendants assert that "the public commented extensively on the creation of the Northeastern DPS and the establishment of a larger DPS for the Eastern United States." Defs' Mem. at 28. Defendants are half right. The public did indeed comment "extensively" on the creation of the Northeast DPS, and supported it overwhelmingly. Final Rule at 15835-36. However, *nobody* commented on the establishment of the Eastern DPS. A.R. at 564. The documents cited by Defendants, Defs' Mem. at 28, simply do not say what Defendants would like them to say. Rather, the documents reflect the comments of state officials and others who were critical of the proposal to establish a Northeastern DPS. None of these comments cited by Defendants even mention, let alone support, the creation of an Eastern DPS, or any other DPS configuration. A.R. W-13710; A.R. W-14420; A.R. 565 at 9476. The state officials were more concerned with defending their turf from FWS' "big stick" than they were with creating a bigger DPS, A.R. W-13073, and the other commentators favored delisting the wolf altogether, A.R. W-14420, A.R. W-13710.

Defendants also argue that the Proposed Rule noted "several alternatives that [FWS] had considered in order to ensure that the public would be aware of those alternatives and have the opportunity to comment on them." Defs' Mem. at 27. What Defendants fail to mention, however, is that FWS had already rejected these same alternatives. Proposed Rule at 43475. Moreover, none of the "other alternatives considered" included the idea of creating a massive Eastern DPS spanning 21 states. Id. at 43475-78. Further, the reference to these "other alternatives" was buried in the preamble accompanying the Proposed Rule, and provided no details that would enable the public to assess their merits. Id.

Defendants assert that the Proposed Rule invited comments on "alternatives that [FWS] had considered." Defs' Mem. at 27. However, the Proposed Rule does not describe these alternatives and provides no useful information to inform the public of what Defendants had in mind. Proposed Rule at 43475-78. "Interested parties cannot be expected to divine the [agency's] unspoken thoughts." Shell Oil Co. v. EPA, 950 F.2d 741, 751 (D.C. Cir. 1991). The fact that virtually no comments were submitted in response to this oblique invitation is proof that interested parties had no idea what Defendants were thinking. Further, there is no basis for Defendants' suggestion that because they considered "numerous combinations" of DPSs and classifications, interested parties should have known that comments were being solicited on every conceivable DPS configuration. As the Second Circuit has said, "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." Nat'l Black Media, 791 F.2d at 1023.

The record demonstrates that the public commented on exactly what the FWS *proposed*, namely four specific DPSs; and the overwhelming majority of commentators and peer reviewers supported all four DPSs, including the Northeastern DPS. Final Rule at 15820. If Defendants had wanted comments on an Eastern DPS, or any other specific alternative, all they had to do was ask. Spirit of Sage Council v. Norton, 294 F. Supp. 2d 67, 89 (D.D.C. 2003) ("Agency notice must describe the range of alternatives being considered with reasonable specificity.").

In sum, the record as a whole demonstrates overwhelming public support for the proposal to create a Northeastern DPS, and a deafening silence when it comes to the idea of creating an

Eastern DPS. That silence is proof positive that the public had no idea where the rulemaking was headed.

B. The Final Rule Is Not a Logical Outgrowth of the Rulemaking.

As discussed in Plaintiffs' Memorandum, Pls' Mem. at 26-29, the controlling authority on the logical outgrowth issue is Nat'l Black Media. 791 F.2d at 1022. In that case, the FCC proposed rules to govern allocation of radio station licenses. Id. at 1018. In the notice, FCC proposed to use "non-technical criteria" requiring an applicant to "locate its station in an unserved or underserved location." Id. The FCC "proposed to adopt the non-technical criteria" or a similar alternative. Id. at 1019. The proposal garnered 34 comments, some in favor, some opposed. Id. at 1020. In the final rule, FCC did not adopt either the proposed non-technical criteria or an alternative to address the underserved location issue. Id. National Black Media challenged the order on the grounds that the FCC failed to provide sufficient notice of the Commission's decision to abandon the non-technical criteria. Id. The Second Circuit agreed and held that "[i]t is clear that here 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 delete the non-technical requirements." Id. at 1022. The Second Circuit found convincing the fact that the proposal stated that the Commission intended to adopt the non-technical criteria, yet the final rule "took a contrary position." Id.

That is exactly what happened here. Defendants proposed a Northeast DPS, received overwhelming public support for it, and then abruptly abandoned it in favor of a concept that no one suggested. In Nat'l Black Media, the FCC attempted to justify this result on the ground "that interested parties were invited to submit *other proposals* and that the Notice" alluded to the

possibility of promulgating varying or modified rules. Id. at 1022-1023 (emphasis added). The Second Circuit rejected this rationale, finding that such statements "can hardly be said to have apprised interested parties of the Commission's intention to abandon the non-technical requirements." Id. at 1023. For the same reasons, Defendants' argument that interested parties were invited to comment on "other alternatives" must fail as a justification for abandoning the NEDPS in Proposed Rule.

Defendants' reliance on Riverkeeper Inc. v. EPA, 358 F. 3d 174 (2d Cir. 2004), is misplaced. Defs' Mem. at 27. At issue there was an EPA rule under the Clean Water Act to regulate new cooling water intake facilities. Id. at 181. The proposed regulations also required the new facilities to comply with more stringent state law requirements. Id. at 183. The plaintiff-intervenor argued that the EPA failed to provide notice and opportunity for comment concerning the additional state law requirements incorporated into the final rule. Id. at 202. The Second Circuit, citing Nat'l Black Media, rejected this claim. Id. (holding that the proposed rule, which expressly required the permitting authority to include such stricter requirements, together with the statute authorizing states to promulgate those requirements, fairly apprised the public). Here, by contrast, the Final Rule *abandoned* the Proposed Rule in favor of a new DPS classification that was not even mentioned in the proposal. Further, unlike Riverkeeper, there is no statutory provision that would put the public on notice that an Eastern DPS was in the offing. Defendants' attempt to hide behind the vague language of several, *rejected* possibilities that were listed in the "Other Alternative Considered" section of the Proposed Rule fails the test set forth in Nat'l Black Media, 791 F.2d at 1023.

In sum, the Final Rule cannot be a "logical outgrowth" of the rulemaking because the EDPS was not part of the Proposed Rule, was not raised by any of the comments, and runs

counter to the strong support that the Proposed Rule received. The Final Rule is not the product of notice and comment. It is an "about face" with no clear explanation. Nat'l Coalition Against the Misuse of Pesticides v. Thomas, 809 F.2d 875, 883 (D.C. Cir. 1987) (finding EPA's decision to establish tolerance for pesticide applied to mangoes arbitrary and capricious).

C. The Record Shows that FWS Itself Recognized the Need for a New Round of Public Comment but Opted for Expediency over Fairness.

The Administrative Record is rife with evidence that the FWS knew its Final Rule was a stark departure from the Proposed Rule. For over a year following the close of the comment period, FWS wrangled over what to do about all the issues that had surfaced. A.R. 703 at 10036 (noting "substantial *internal disagreement over the interpretation of the data and our DPS policy*.") (emphasis added). Several of the key people involved in the rulemaking argued for coming out with a new proposal and taking more public comment on the disputed issues. A.R. 698; 714; 717; 726; 724; 723; 765; 768. Ultimately, Defendants chose political expediency over the procedural requirements of the APA. A.R. 725, 779.

The Final Rule went through many iterations, from retaining the NEDPS as endangered, to dropping the NEDPS but retaining protection for the states formerly included in the NEDPS. A.R. 659; 734. The record shows that these potential changes caused some in the Service to wonder whether the changes were significant enough to warrant withdrawing the Proposed Rule and publishing a new notice, or issuing a new notice requesting additional comments. A.R. 659; 663; 698; 735.

Initially, Ronald L. Refsnider, the primary author of the Proposed and Final Rules, FWS Region 3, opposed withdrawing the Proposed Rule and re-proposing a new rule. A.R. 690. The candid statements in the record make it clear that Refsnider's main concern was getting a Final Rule out regardless of the merits of the various issues being debated, or what was in the best

interest of the gray wolf. See A.R. 690 (expressing concern that: the ESA would be viewed as "non-functional"; the Service would be viewed as unwilling to delist or reclassify charismatic megafauna; to wait would interfere with delisting proposals; the states would be outraged, etc.). As the Final Rule began to diverge more sharply from the Proposed Rule and as the internal disagreement regarding the fate of the NEDPS intensified, Refsnider had a change of heart and proposed publishing "a 6-month extension for the gray wolf proposal in July [2001], based upon internal FWS disagreement...The extension notice would open a comment period (30-45 days) and ask for information on 8 or so issues that would help with our decision on the NE DPS." A.R. 708; see also A.R. 698; 707 at 10057; 708 at 10066; 735. Refsnider prepared several drafts of an extension notice and received approval to proceed with the extension. A.R. 698; 707; 714; 717; 718; 720.

In July 2001, just as the professional staff reached a consensus that an extension was necessary, the Acting FWS Director, Marshall Jones, stepped in and announced that the NEDPS should be eliminated and the Final Rule finalized immediately, squelching any further consideration of a withdrawal and re-proposal. A.R. 736 at 10170-71. However, in September 2001, the Service was still debating how to handle the changes between the Proposed Rule and the Final Rule. Gary D. Frazer, FWS Asst. Director for Endangered Species, suggested the Service simply "reopen the comment period rather than repropose." A.R. 768 at 10249. However, Refsnider was skeptical about the ability to simply "reopen" the comment period and was concerned that the Service would be deluged with comments, which would cause the Service to incur in excess of $200,000 in costs to compile and process the comments. Id. By early October 2001, Frazer instructed Refsnider to finalize the rule nationally, despite all of the unresolved conflicts and concerns. A.R. 775 at 10262. The Final Rule appeared in the Federal

Register on April 1, 2003, nearly two years past the date mandated by the Act. 16 U.S.C. § 1533(b)(6)(A).

D. Defendants Failure to Provide Notice and Comment on the Decision to Abandon the Northeast DPS in Favor of an Eastern DPS Is Not "Harmless Error."

Defendants argue that "no procedural error need be found" because a new round of public comment would not produce any "new and different criticisms which the agency might find convincing." Defs' Mem. at 28, citing Ass'n of Battery Recyclers v. EPA, 208 F.3d 1047, 1059 (D.C. Cir. 2000). The short answer to this assertion is that, unless Defendants have a crystal ball, they cannot know what the public would say about the Final Rule, and they ought not to prejudge the outcome. More to the point, Defendants have once again ignored important facts and misread the law.

First, Defendants themselves acknowledged that the public would "deluge[] us with comments" in another round of public comment; indeed that was a major reason why Defendants opted not to withdraw the Proposed Rule and re-notice a new proposal—or simply reopen the comment period. A.R. 768 at 10249[6].

Second, Battery Recyclers is distinguishable from the present case, because the plaintiffs' concerns had been heard during the course of the protracted rulemaking in that case. In Battery Recyclers, EPA published notices of proposed rulemaking concerning the disputed issue (EPA's Land Disposal Regulation ("LDR") standards for soil) *three* separate times: in 1991, 1993, and 1996. 208 F.3d at 1058. The petitioners claimed that the adoption of the LDR standards in the final rule violated the notice and comment provision of the APA. The D.C. Circuit, persuaded

[6] Defendants cite to A.R. 768 in support of the contention that Plaintiffs have not offered anything that FWS had not already considered. Defs' Mem. at 29. A.R. 768 does not support that proposition. In fact, it reveals that FWS knew the public would want to comment on the changes to the Proposed Rule.

by the fact that EPA published three separate notices of proposed rule, found that the public had "numerous opportunities" to comment on how the LDR standards would affect their processes. Id. Furthermore, the petitioners' argument as to what new information would be "convincing" to the agency if the court ordered a new round of notice and comment was already addressed in the 1996 proposed rule. Id. at 1059. Thus, the court concluded that since the petitioners did not identify any "relevant information they might have supplied had they anticipated EPA's final rule," the EPA complied with the notice and comment requirements of the APA. Id.

The difference between the EPA's rulemaking in Battery Recyclers and FWS' rulemaking in the present case is dramatic. First, the interested parties in Battery Recyclers were given three separate opportunities to comment on EPA's LDR standard proposal. Here, there has been only one rulemaking that culminated in a decision to abandon the Proposed Rule. Further, the record here, unlike that in Battery Recyclers, clearly shows that FWS knew there was a problem with adopting a final rule that was substantially different than what had been proposed. A.R. 698; 707; 708; 718 at 10087-10088. FWS openly admitted that comment on the eight issues in the 6-month extension would give FWS more relevant data on the NEDPS that FWS needed to make a decision based on the best available science. Since FWS went to the trouble of actually drafting a notice to solicit additional comments, it obviously thought there was something useful to be gained from the exercise. The only reason FWS did not go through with an additional comment period was because of time, money and political pressure from Washington. A.R. 717 at 10080; 768 at 10249. Delisting wolves in the Midwest was the highest priority and FWS was unwilling to delay. A.R. 721; 733.

Second, in Battery Recyclers, EPA specifically addressed the issue in its proposed rulemaking that became the issue in the subsequent legal challenge-the LDR standards. 208 F.3d

at 1057. Interested parties had over seven years and three different opportunities to address the pros and cons of various versions of the proposed standards. Id. at 1058. By contrast, interested parties have not had even one opportunity to comment on the matter in dispute here—the creation of the Eastern DPS.

Finally, Plaintiffs can, in fact, point to "new and different criticisms" of the Final Rule. Whether Defendants would find them "convincing," of course, depends on how open Defendants are to considering them on the merits. In response to Defendants' empty challenge that Plaintiffs can offer no convincing information to the Service, Plaintiffs offer the declaration of Jim Hammill. Decl. of James Hammill, Ex. J ("Hammill Decl."). Jim Hammill, who retired after 32 years with the Michigan Department of Natural Resources ("MIDNR"), was the MIDNR Wildlife Management Unit Supervisor in charge of the wolf recovery in Michigan for 19 years. Hammill Decl. ¶ 2. In addition to his duties at MIDNR, Mr. Hammill was a member of the Michigan Wolf Recovery Team and the Eastern Timber Wolf Recovery Team. Id. ¶ 5. Mr. Hammill's declaration directly addresses the eight issues FWS identified in its Draft Extension Notice, A.R. 735 at 10166-67.[7] His intimate knowledge of and involvement with the restoration of wolves to Michigan makes him uniquely suited to point out the similarities between the events that took place in Michigan prior to wolves recolonizing the Upper Peninsula of Michigan and the events that have been taking place over the past several years in the Northeast. Id. ¶ 10-12. Mr. Hammill would have counseled against combining the NEDPS and the WGLDPS, pointing out that the resulting EDPS is not biologically sound and would not further the conservation

[7] In Hammill's Declaration: para. 10 addresses (1), (3), (4), and (5) of the 6-month extension notice; para 11 address (1), (4), (5), and (6); para. 12 addresses (3) and (4); para. 13 addresses (5) and (8); para. 14 addresses (8); para. 15 addresses (1); para. 16 addresses (2); para. 17 addresses (5) and (8); para. 18 addresses (8); para. 19 addresses (3), (4), (6), (7) and (8).

biology principles that Defendants now vigorously claim have been satisfied, Defs' Mem. at 49-50. Hammill Decl. ¶¶ 17, 19. The fact that Mr. Hammill, the peer reviewers, other experts[8] and the public were not allowed to comment on the effects of combining the Northeast wolves into a large, scientifically unsound Eastern DPS violated the notice and comment provision of the APA.

III. DEFENDANTS' APPLICATION OF THE DPS POLICY TO CREATE THE EASTERN DPS EXCEEDS THE AUTHORITY GRANTED BY CONGRESS UNDER THE ESA AND UNLAWFULLY TERMINATES WOLF RECOVERY IN THE NORTHEAST

As a preliminary matter, Defendants argue that their interpretations of the DPS Policy are entitled to Chevron deference. Defs' Mem. at 42. Defendants are incorrect as a matter of law. Their interpretations may only be afforded a minimal degree of deference if they are persuasive. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). In this case, the interpretations violate both Congressional intent and the DPS Policy, and are not entitled to any deference. Id.; Christensen v. Harris County, 529 U.S. 576, 587 (2000). Further, the Secretary violated the DPS Policy when she designated the Eastern DPS. She also violated the DPS Policy when she elected to abandon the proposed NEDPS. Defendants trivialize Plaintiffs' argument and the core issue in this case when they state that Plaintiffs simply objected to the elimination of the NEDPS and creation of the EDPS in its place. Defs' Mem. at 30-31. Plaintiffs challenge the Secretary's illegal use of the DPS Policy to terminate recovery of wolves in the Northeast.

A. FWS' Interpretation of the DPS Policy Is Not Entitled to *Chevron* Deference.

Defendants contend that their authority to administer the ESA and designate DPSs entitles FWS to the highest degree of deference that can be afforded to an agency. Defs' Mem.

[8] Notably, FWS never asked the Eastern Timber Wolf Recovery Team to comment on the continuing applicability of the Eastern Timber Wolf Recovery Plan to the EDPS.

at 6, citing Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984). They are incorrect. The DPS Policy is just that, a *policy* created by the FWS. It is not a rule carrying the force of law, and thus Chevron deference is not warranted. See U.S. v. Mead Corp., 533 U.S. 218, 226-227 (2001). Further, Defendants' interpretation of the DPS Policy in this case, leading to the abandonment of the NEDPS and creation of the EDPS is unreasonable because it exceeds the limited discretion granted to the Service by Congress.

1. The DPS Policy Is Not Entitled to Chevron Deference.

In Christensen v. Harris County, the Supreme Court held that "[i]nterpretations such as those in opinion letters—like interpretations contained in *policy statements*, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference." 529 U.S. at 587 (emphasis added). Instead, interpretations contained in policy statements are "entitled to respect," but only to the extent that those interpretations have the "power to persuade." Skidmore, 323 U.S. at 140. Because FWS' interpretation of the DPS Policy violates Congress' intent, it is not persuasive and carries no weight. See Pls' Reply, supra, at III.A.2.

2. FWS' Interpretation of the DPS Policy Violates Congressional Intent.

Plaintiffs challenge the creation of the EDPS on the grounds that it violates Congress' directive that FWS use discrete population segments "*sparingly* and only when the biological evidence warrants it." S. Rep. No. 96-151, at 7 (1979) (emphasis added). Defendants suggest that the second DPS Policy criterion (significance) sufficiently addresses Congress' concern, and that Congress' intent need not be carried out in implementing the first DPS Policy criterion (discreteness). However, every aspect of the DPS Policy must comport with Congressional intent, *when the DPS Policy post-dates the amendment to the ESA by nearly 20 years.*

Defendants also claim that the EDPS is based on biology. Defs' Mem. at 31. In fact, rather than relying on science, Defendants use a results-oriented approach. For example, Defendants cite to uncertainty over the existence of a population in the Northeast and its genetic makeup as the primary obstacle to creating the NEDPS. Final Rule at 15814, 15829, 15859. However, this same uncertainty did not pose an obstacle for Defendants to lump the Northeast in with wolves in the Midwest to create the EDPS. If FWS's approach was truly scientific, its uncertainty over whether the wolf in the Northeast was a gray wolf should have prevented it from including the Northeast in the EDPS.[9] Its handling of scientific uncertainty was based not upon the consistent application of any principle, but upon the desire to achieve a particular result.[10] Defendants' citation to Maine v. Norton, 257 F.Supp.2d 357 (D. Me. 2003), is inapposite. In that case, FWS did not include a segment of the salmon population in *any* DPS due to biological uncertainty. Id. at 395. That case does not support the Defendants' decision to simply lump the Northeast in with the Midwest and create the EDPS until the uncertainty is resolved. Defendants' decision is the essence of arbitrary.

When viewed in light of the actions Defendants have taken since finalizing the Final Rule—namely proposing to delist the newly designated EDPS—the politically-motivated

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[9] The record reveals that FWS intentionally downplayed in the text of the Final Rule the role that taxonomic/genetic uncertainty played in its decision to eliminate the NEDPS, because it recognized that the very same uncertainties exist with respect to gray wolves in the Midwest. A.R. 860 at 11198-199. It could also have an impact on FWS' red wolf recovery program—an issue the Service did not want to have to address. A.R. 904. Had FWS officially stated that the scientific uncertainty played a large role, then it would have jeopardized the Service's ability to downlist and delist wolves in the Midwest, which was of paramount concern to FWS. A.R. 733.

[10] Contrary to Defendants' argument, this situation is distinguishable from the facts in Maine v. Norton, 257 F.Supp.2d 357 (D. Me. 2003). In that case, FWS did not include a segment of the salmon population in *any* DPS due to biological uncertainty. Id. at 395. That case does not support the FWS' position to simply lump the Northeast in with the Midwest and create the EDPS until the uncertainty is resolved.

rationale for Defendants' approach toward scientific uncertainty becomes particularly clear. Delisting Proposal at 43664. By combining these two regions of the country (Northeast and Midwest) into one EDPS, Defendants could declare victory for wolves in the EDPS and terminate any recovery efforts in the Northeast. Id. The Eastern DPS is clearly at odds with the Congressional mandate to use the designation "sparingly" and based upon "biological evidence," S. Rep. No. 96-151, at 7, and is therefore not entitled to deference. Mead, 533 U.S. at 226-227.

B. The Eastern DPS Violates the DPS Policy.

Defendants argue that the EDPS does not violate the DPS Policy for two reasons: (1) the distance between the EDPS and the other DPSs created in the Final Rule satisfy the "marked separation" factor; and (2) the EDPS is delimited by an international boundary. Defs' Mem. at 30-31. However, the EDPS is not discrete, and Defendants' arguments further reveal their misapplication of the DPS Policy in contravention of Congress' exhortation to designate "distinct population segments" sparingly and only when the biological evidence warrants it. S. Rep. No. 96-151, at 7; DPS Policy at 4725; see also, Hammill Decl.

First, Defendants claim, without authority, that because vast distances separate the three DPSs designated in the Final Rule, the EDPS is discrete and complies with the DPS Policy. Defs' Mem. at 30. Nothing in the DPS Policy allows FWS to substitute distance between DPSs for the kind of biological evidence Congress intended. The DPS Policy requires the DPS to be "markedly separate from other *populations* of the same taxon," DPS Policy at 4725 (emphasis added), not just other *DPSs*, which are, in essence, man-made and artificial designations.[11]

[11] A population, unlike a DPS, is a term "used in scientific discourse." Defs' Mem. at 39. "FWS's generic regulatory definition of population" is "'a group of fish or wildlife...in common spatial arrangement that interbreed when mature,' 50 C.F.R. § 17.3." Id. In contrast, a DPS is an
Footnote continued on next page.

Wolves in the Northeast and southeastern Canada are a different population, yet Defendants arbitrarily included them in the same DPS with wolves from the Midwest. Final Rule at 15810, 15814. Therefore, the EDPS cannot by its very nature be markedly separate from other populations, because the EDPS *combines* two populations.

Second, Defendants assertion that the international boundary with Canada separates the Eastern DPS from the Western DPS is simply wrong as a matter of geography and cannot be the basis for a discreteness determination in this case. Defs' Mem. at 31. Defendants argue that because the EDPS is delimited by the international boundary with Canada, the EDPS is *de facto* discrete. Id. This argument is illusory. The boundary to the north with Canada, by itself, does not distinguish the EDPS from the Western DPS, since they both share the same northern boundary. The Canadian border also does not make the EDPS discrete from any other populations within the U.S., as they, too, are all on the same side of the border. Therefore, Defendants cannot rely on the international boundary with Canada to find that the EDPS is discrete.

Third, the southern and western boundaries of the EDPS are delimited by infra-national political boundaries—*i.e.* state boundaries. Defendants attempt to characterize the state boundaries as "well-defined" geographic boundaries, and to compare state boundaries with "rivers and long stretches of desert...." Defs' Mem. at 30. However, Defendants did not use a river, mountain range or other geographic feature to delineate the three DPSs.. Defendants provide no biological explanation for the boundaries of the EDPS. In fact, an FWS employee admitted that "as I started drawing the lines on a map it really became a struggle trying to stick

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invention of Congress that has been interpreted by FWS in a variety of ways, and requires findings of discreteness and significance. See Defs' Mem. at 5-7.

with wolf biology and the DPS policy, as well as keeping it simple to understand and easy for law enforcement." A.R. 662 at 9907. The use of infra-national boundaries in this context is a violation of the DPS Policy, and ignores Congress' command to use the designation "sparingly" and only when biologically warranted. DPS Policy at 4724, 4725.

Finally, Defendants' argument that they were forced to choose between including the Northeast in the EDPS and delisting it is disingenuous. Defs' Mem. at 44. The ESA and the DPS Policy do not force this choice. Nothing prevents Defendants from maintaining its nationwide species listing and establishing DPSs in areas where the Service needs the kind of flexibility the DPS designation provides[12]. Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 842 (9th Cir. 2003). Defendants cite to two documents in the record, A.R. 862 and 663, in support of this notion that "'the entire previously listed range...must be included in the resulting DPSs.'" Defs' Mem. at 43. The two documents cited are memoranda written by FWS biologist Refsnider expressing his personal thoughts on the DPS Policy and they provide no explanation or statutory support for this theory.[13] This theory also contravenes case law, which recognizes that the ESA allows Defendants to provide varying levels of protection based on biological evidence. Defenders of Wildlife v. Norton, 258 F.3d 1136, 1144-45 (9th Cir. 2001); Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv., 12 F.Supp.2d 1121, 1133 (D. Or. 1997).

C. Defendants Arbitrarily Abandoned Northeastern U.S. Wolf Recovery.

[12] This is essentially what the Service did in 1978 when it listed the gray wolf as endangered in 47 of the lower 48 states and as threatened in Minnesota. See Pls' Mem. at 8-9.

[13] In fact, "career biologist, Renne Lohoefner in the Washington Office," who thought the NEDPS was not significant, Defs' Mem. at 40, advocated for a listing that would keep wolves in the Northeast protected as threatened under the existing species-wide listing and create DPSs only in the Midwest and the Southwest. A.R. 659; 664.

Defendants argue the decision to abandon the NEDPS was not arbitrary or capricious. However, Defendants failed to consider the best available scientific and commercial data and ignored relevant factors when making the decision to eliminate the NEDPS on the grounds that it was not significant. Further, Defendants fail to provide a rational explanation as to why the approach taken in the Northeast conflicts with the way it has interpreted and applied the DPS Policy to wolf recovery in the Southwest and with recovery approaches for other endangered and threatened species. Each of these failures violates the ESA and APA and lead to the unlawful abandonment of wolf recovery in the Northeast.

1. Defendants Failed to Use the Best Available Commercial and Scientific Data Concerning Wolves Dispersing Out of Canada.

Wolves are pack animals. Final Rule at 15805. As pack dynamics change or prey in a particular area becomes scarce, lone wolves will move into new areas to either establish a new pack or locate prey for survival in a phenomenon called dispersal. Id. Dispersing wolves may form new packs in areas where they had been extirpated, in a process called recolonization. A.R. 967J at 14808.

Contrary to Defendants' attempts at obfuscation, Defs' Mem. at 33-36[14], the best available data shows that there are wolves in the Northeast that are dispersing out of Canada. To begin with, there have been four *confirmed* wolves in the Northeast and southeastern Canada south of the St. Lawrence River. In addition, the best available commercial and scientific data

[14] Defendants distort a statement in 1996 by the Commissioner of the Maine Department of Inland Fisheries and Wildlife. Defs' Mem. at 33. Mr. Owen did not deny the existence of a wolf population in Maine—he stated "there is no strong indication of wolf occurrence." A.R. 1114. Defendants also cite A.R. 565 to support this statement, but that document has nothing to do with Mr. Owen's opinion on wolves in Maine. A.R. 565.

reveals that there have been at least 60 unconfirmed wolf reports in the Northeast[15]—some even reporting packs or signs of reproduction. See Pls' Mem. at 12-15; A.R. S0000180-273. Moreover, contrary to their assertion, Defs' Mem. at 36, there are wolves in southeastern Canada—both above and below[16] the St. Lawrence River in Québec. Final Rule at 15814; Hammill Decl. ¶ 11. Further, Defendants grossly distort the facts by stating that "*To date*, these [winter tracking] surveys have 'found no strong indication of wolf occurrence.'" Defs' Mem. at 40 (emphasis added). This misstatement is based on outdated information from a statement made in *1996*. By contrast, the best available commercial data from the Québec Government shows that trappers are reporting sales of between 7 and 15 wolf pelts each year since 2000 from wolves trapped in the regions of Québec lying south of the St. Lawrence. Hammill Decl. ¶ 11.

The ESA requires that listing and reclassification decisions must be made based "solely on the basis of the best scientific and commercial data available at the time the decision is made." 16 U.S.C. § 1533(b); see also, Bennett v. Spear, 520 U.S. 154, 176-177 (1997); San Luis v. Badgley, 136 F.Supp.2d 1136, 1147 (E.D. Cal. 2000), citing Conner v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1988). The trapping data on wolves south of the St. Lawrence was both "available" and the "best" data on the presence of wolves in this region and was therefore

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[15] Defendants claim these reports were untimely, as if somehow the blame lies with the public, and severely distort the evidence in the record about what steps FWS was taking to follow up on reports. Defs' Mem. at 40. In the document to which Defendants cite regarding follow up, it addresses only one event and one FWS participant stated "none of us has a great deal of wolf expertise." A.R. 1127.

[16] Defendants cite to A.R. 1179 in support of the conclusion that there has only been one wolf south of the St. Lawrence in the last 100 years. Defs Mem. at 33. This is a gross exaggeration. The report simply states that "it is unclear whether wolves have begun re-establishing in the Eastern Townships." A.R. 1179. In addition, in response to this report, Michael Amaral, FWS Region 5, stated "there are reported to be other large canids in the area." A.R. 1035.

required to be considered by Defendants. Nat'l Wildlife Fed'n v. Babbitt, 128 F. Supp.2d 1274 (E.D. Cal. 2000).

By contrast, Defendants' statement that "there is no known population of gray wolves south of the St. Lawrence River," is based on two scientific studies that do not even support that conclusion. Defs' Mem. at 36. Instead, these studies focus on the barriers to dispersal from wolves in Ontario north of the St. Lawrence. A.R. 967C at 13590; A.R. 967J at 14810. Defendants' failure to obtain and consider the most recent trapping data showing a strong presence of wolves in southern Québec violates the ESA. While the Secretary is not obligated to supplement the best available commercial and scientific data with independent studies, she is "prohibit[ed]...from disregarding *available* scientific evidence that is in some way better than the evidence [s]he relies on. Even if the available scientific and commercial data were quite inconclusive, [s]he may—indeed must—still rely on it at that stage." Southwest Ctr. for Biological Diversity v. Babbitt, 215 F.3d 58, 60 (D.C. Cir. 2000), quoting City of Las Vegas v. Lujan, 891 F.2d 927, 933 (D.C. Cir. 1989); see also Defenders of Wildlife v. Babbitt, 958 F.Supp. 670, 679-681 (D.D.C. 1997). Further, the Secretary must actively pursue the best available data and cannot simply sit back and wait for the information to appear. See Roosevelt Compobello Int'l Park Comm'n v. U.S. E.P.A., 684 F.2d 1041, 1052-53 (1st Cir. 1982) (holding that an agency can be required to conduct studies to meet ESA's "best available information" standard.).

2. Defendants Failed to Consider Wolves in Canada as a Source Population for the Northeast DPS.

Defendants miss the point of Plaintiffs' argument regarding the Service's failure to consider the significance of wolf dispersal out of Canada in the context of applying the DPS Policy to the Northeast.. Defs' Mem. at 36-38. Plaintiffs do not argue "that the Defendants

failed to consider Canadian wolves in its decision making process." Defs' Mem. at 37. Instead, Plaintiffs allege that Defendants never examined whether, if it considered wolves in Canada together with the evidence of dispersing wolves in the Northeast, there would be a population of wolves that would satisfy the significance criterion of the DPS Policy. The APA requires that the Service consider "relevant factors" in determining whether there is a population of wolves to be protected and recovered. See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29, 43 (1983). A source population of wolves in southeastern Canada is clearly such a relevant factor. Because Defendants failed to consider this relevant factor, its entire analysis of and conclusions relating to the NEDPS are flawed and should be remanded.

In their attempt to downplay the fact that Defendants failed to consider this relevant factor, Defendants speculate that it would not have made a difference. Defs' Mem. at 37. In the process, Defendants conflate the requirements of the discreteness, significance and conservation status in the DPS Policy and distort legislative intent. They argue that the wolves in Canada would have to qualify as either threatened or endangered before the DPS could be established. Id. This conclusion is simply wrong. Nothing in the Act or the DPS Policy requires that a population of a species in another country be threatened or endangered before a U.S. population of the same species can be listed or designated as a DPS. Indeed Defendants have consistently interpreted the DPS Policy to apply in precisely the situation where a species, including the gray wolf, is abundant outside the U.S. See, e.g., Endangered Status for the Peninsular Ranges Population Segment of the Desert Bighorn Sheep in Southern California, 63 Fed. Reg. 13134, 13136 (Mar. 18, 1998) (finding Bighorn sheep in California part of a larger population extending into Mexico, but because of the difference in conservation status, FWS delineated the DPS at the international border); see also, Pls' Reply infra at III.C.4. Congress made clear its intent that the

DPS designation be used to avoid a situation where an endangered species in the United States would otherwise be "permitted to go extinct simply because the animal is more abundant elsewhere in the world." S. Rep. No. 96-151, at 7. However, in the present case, Defendants have taken the opposite approach and use the international border with Canada as an excuse to eliminate the NEDPS and allow wolves in the Northeast to be extirpated.

3. Plaintiffs Are Not Barred from Challenging Defendants' Failure to Consider Relevant Factors.

Defendants also argue that Plaintiffs are barred from challenging Defendants' action because they failed to do so during the comment period on the Proposed Rule. Defs' Mem. at 38. This argument lacks merit.

First, Plaintiffs do not argue that Canadian territory must be included in the NEDPS, only that the Service failed to consider the wolves in Canada as part of the population to be evaluated under the DPS Policy. Pls' Mem. at 32-33. Indeed, as Defendants acknowledge, the Proposed Rule suggested that Defendants were considering the role Canada would play in wolf recovery in the Northeast. Defs' Mem. at 38. All Plaintiffs have done is point out that Defendants failed to follow through and actually do the required analysis.

Second, the cases Defendants rely on are inapposite.[17] Defs' Mem. at 38. Plaintiffs are not barred from challenging the agency action on this point, because (1) the Proposed Rule did not suggest there was any question about the connection between the wolves in Canada and the

[17] Defendants cite to cases requiring either statutory or regulatory exhaustion. Defs' Mem. at 38. Exhaustion is not the issue in this case. See Vt. Public Interest Research Grp. v. FWS, 247 F.Supp.2d 495, 515-516 (D. Vt. 2002) (holding exhaustion only necessary when required by statute or agency rule); Lands Council v. Vaught, 198 F.Supp.2d 1211, 1241 (E.D. Wash. 2002) (holding exhaustion not required when the plaintiff lacked meaningful opportunity to challenge action due to inadequate notice).

Northeast or (2) that Defendants questioned the existence or relevance of the source population in Canada. Proposed Rule at 43473, 43477.

4. Defendants' Approach to Wolf Recovery in the Northeast Is Inconsistent and Arbitrary.

Defendants unsuccessfully attempt to distinguish the situation in Mexico from the situation in Canada. Defs' Mem. at 37. Defendants assert that the difference in treatment is justified by the fact that Mexico has always been part of the range of the Mexican wolf, whereas Canada has never been included in the range of the gray wolf. Id. However, the timing of the Service's consideration of wolves in Mexico versus wolves in Canada is irrelevant. Upon proposing reclassification and new DPS designations, Defendants should have considered whether Canada should be included in the DPS covering the Northeast—or whether wolves in Southeastern Canada should be counted for purposes of determining whether the population in the region is significant.

Low numbers of documented wolves in the U.S. did not prevent the Defendants from initiating wolf recovery in the past. FWS commenced Mexican Wolf recovery when there were *no* wolves remaining in the U.S., using a completely extraterritorial source population. Pls' Mem. at 33. In 1977, in the case of the Mexican wolf, FWS looked across the border into Mexico, plucked out the few remaining wolves, started a captive breeding population in the U.S., and released the captives into the U.S. as an experimental population in 1998. See Pls' Mem. at 33. This approach to recovery is consistent with the agency's conservation obligation under the ESA. 16 U.S.C. § 1531(c). In contrast, Defendants have turned their backs on wolves in the Northeast when they failed to work with Canada (despite encouragement and an opportunity,

A.R. S000155; 1219; 1220[18]), ignored the best available commercial data regarding wolves in Southeastern Canada, Hammill Decl. ¶ 11, and used the international border to slice through this population when determining *significance* in violation of the DPS Policy. Defendants' abandonment of the gray wolf recovery in the Northeast is inconsistent with their historical approach and is in contravention of the requirements of the ESA. Defendants have failed to provide a rational explanation for this inconsistency.

Defendants also maintain that the lynx example is "inapt" because lynx south of the St. Lawrence "can and have easily dispersed into northern Maine." Defs' Mem. at 36. However, there is evidence of the existence of a wolf population south of the St. Lawrence. Hammill Decl. ¶ 11. Further, wolves have demonstrated an ability to disperse across great distances, Final Rule at 15805, overcoming many perceived barriers, and there is no reason to conclude otherwise. Hammill Decl. ¶ 12. Defendants cannot explain, and Plaintiffs fail to see, how wolves would be prevented from dispersing into the northeastern U.S., given what wolves have already proven they can do. Id.

IV. DEFENDANTS' DETERMINATION OF WHAT CONSTITUES A SIGNIFICANT PORTION OF THE RANGE IS BASED ON AN ERRONEOUS LEGAL STANDARD, CIRCULAR REASONING, AND POST HOC RATIONALIZATION.

Defendants assert that "FWS fully addressed what constitutes a 'significant portion of [the wolf's] range.'" Defs' Mem. at 45. This argument fails for several reasons. First, Defendants used the wrong legal standard in determining what constitutes a "significant portion" of the wolf's range. Though they vigorously deny it now, Defs' Mem. at 48, Defendants clearly used the wolf's "current range" in making the "significant portion" determination. Final Rule at

[18] Despite references to conversations and meetings with Canadian officials in 1997, A.R. 1220 at 22730-31, these occurrences are not documented in the Administrative Record provided to Plaintiffs by Defendants, and there appears to be no follow up based on the record.

15857 ("[W]e believe that when an endangered species has recovered to the point where it is no longer in danger of extinction throughout all or a significant portion of its *current range*, it is appropriate to downlist the listed species to threatened...." (emphasis added); see also, A.R. 628 at 9820; 630 at 9830. The proper legal standard is "historic range," not "current range." See Pls' Mem. at 41-42. Defendants cannot simply disavow their decision now that it has been challenged. Nor can defense counsel supply the reasoning, post hoc, that the record fails to provide. Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 462 U.S. 29, 50 (1983).

Second, Defendants' reasoning is circular.[19] Defendants acknowledge that FWS did not use the wolf's historic range as the starting point for its analysis. Defs' Mem. at 48-49. Instead, FWS zeroed in on those areas it considered "important and necessary." Id. By that, it meant areas with established wolf populations (*i.e.* current range). A.R. 628 at 9820; 630 at 9830. Thus, an area such as the Northeast that was once a significant portion of the wolf's historic range was considered unimportant and unnecessary because Defendants do not believe there is any wolf population here. Defs' Mem. at 38. By that logic, only Minnesota would have qualified as a significant portion of the range when the wolf was considered for listing in 1978 because it had been eliminated everywhere else. Applying that logic further, if the Service determined in 1978 that the wolf was not at risk of extinction across a significant portion of Minnesota, the species would never have been listed. In 1978, Congress rejected a similar

[19] Defendants' reasoning is reminiscent of the classic tautology: Why is the sky blue? Because it reflects the ocean. Why is the ocean blue? Because it reflects the sky. Similarly, why is the Great Lakes DPS significant? Because there are wolves there. Why are there wolves there? Because it is significant.

attempt to limit the scope of the analysis in the manner Defendants now suggest. See Pls' Mem. at 42.

Third, contrary to their assertion, Defendants' interpretation of "significant portion" is not entitled to any deference because it was adopted in an *ad hoc* fashion,[20] without the "indicia of formality," including public notice and comment, required to establish Chevron deference. Mead, 533 U.S. at 226-227. Moreover, the interpretation is unreasonable because, as shown above, it conflicts with legislative intent and is inconsistent with statutory purposes. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 845 (1984); Defenders of Wildlife, 258 F.3d at 1146 n. 11 (9th Cir. 2001) ("Lizard Case"); see Int'l Longshoremen's Ass'n, AFL-CIO v. National Mediation Bd., 870 F.2d 733, 736 (D.C.Cir.1989).

Fourth, Defendants misapply the applicable caselaw. Defendants chiefly rely on Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835 (9th Cir. 2003) ("Home Builders"), in support of their interpretation of "significance." Defs' Mem. at 45. However, that case is not germane. The question in Home Builders was whether a distinct population of pygmy owls in Arizona met the test of "significance" under the DPS Policy. Home Builders, 340 F.3d at 844. In that context, the Ninth Circuit held that significance had to be measured in relation to the entire taxon of the species including populations in Mexico. Id. at 845. The Ninth Circuit did review cases interpreting "significant portion of the range" but in the end its decision was based on what the term significant meant in the specific context of the DPS Policy. Id. The resolution of that issue

[20] The record shows just how confused the process was. See Pls' Mem. at 43. Defendants point to the so-called Marymount Meeting in November, 2000 as a critical moment in the development of FWS' approach to the significant portion issue. Defs' Mem, at 47-48. However, more than two years elapsed between that meeting and the publication of the Final Rule during which the debate over how to define significant portion continued to rage. See Pls' Mem. at 42-43. Ultimately, the Final Rule did not adopt the methodology discussed at the Marymount Meeting. A.R. 995 at 16017, 16058

has no bearing on the question presented here, which is how to define the *statutory* term "significant portion of the range."

Defendants also misconstrue two decisions that are directly on point. Plaintiffs have already discussed these cases in detail, Pls' Mem. at 43-44, and will briefly summarize them here. In the first case, the Ninth Circuit overturned the Secretary's determination that areas no longer occupied by the species (flat tailed lizard) would not be considered a "significant portion of the range." Lizard Case, 258 F.3d. at 1145. ("[W]here, as here, it is on the record apparent that the area in which the lizard is expected to survive is much smaller than its historical range, the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a 'significant portion of its range.'"). In the second case, the court held that the Secretary erred in excluding three out of four areas historically occupied by the Canada lynx from the determination whether the lynx was threatened or endangered within a significant portion of its historic range. Defenders of Wildlife v. Norton, 239 F.Supp.2d. 9, 18-20 (D.D.C. 2002) ("Lynx Case").[21] The court said that, "[a]t a minimum, the Service must explain such an interpretation that appears to conflict with the plain meaning of the phrase 'significant portion'." Id. at 19. Similarly, Defendants have not explained their conclusion that the Northeast is not significant, nor have they explained how their interpretation of "significant portion" can be squared with the statute's plain meaning.

The record does not support Defendants' conclusion that the Northeast is no longer a significant portion of the wolf's historic range. In the Proposed Rule, Defendants stated: "we

[21] Defendants inaccurately claim that Plaintiffs "espouse" a strictly quantitative approach to determining what constitutes a significant portion of the range. Defs' Mem. at 46. Plaintiffs do no such thing. Plaintiffs simply point out that the Secretary never performed the analysis required by the ESA and the courts. Pls' Mem. at 41-46.

have also determined that a population of gray wolves in this portion of the lower 48 is significant and will contribute to the overall restoration of the species." Proposed Rule at 43473, 43477. Defendants do not explain how the Northeast went from being significant to insignificant between the Proposed Rule and Final Rule, except to claim that the standard is "flexible." Defs' Mem. at 45-46. The facts, however, are not that flexible. The Northeast still contains suitable habitat, ample prey and a source population for wolves. Hammill Decl. ¶ 11; Nickerson Decl. ¶ 12. Wolf recovery is still a feasible option. Id. The only thing that has changed is Defendants' position on wolf recovery in the Northeast, and that is not a sufficient reason to write off a significant portion of the wolf's historic range.

V. DEFENDANTS VIOLATED SECTION 4(f) OF THE ESA BY FAILING TO PREPARE A COMPREHENSIVE RECOVERY PLAN FOR THE ENTIRE GRAY WOLF SPECIES

As explained in Plaintiffs' Memorandum, the ESA requires that a recovery plan be developed and implemented for each listed endangered or threatened species. 16 U.S.C. § 1533(f)(1); Pls' Mem. at 47-49. Recovery plans must spell out "objective, measurable criteria" addressing each species' recovery needs. 16 U.S.C. § 1533(f)(1)(B)(ii); see Fund for Animals v. Babbitt, 903 F. Supp. 96, 111 (D.D.C. 1995); Pls' Mem. at 46-49. In other words, the recovery plan must be prepared for the entity that is listed, not some other entity devised by the Service outside the formal listing process. Yet Defendants have not done this for the wolf. The recovery plans prepared by Defendants, taken together, do not encompass the full range of the wolf and do not address what "objective, measurable criteria" must be satisfied to recover the species as a whole.

In 1978, Defendants consolidated previous listings of wolf subspecies into a single national listing designating the entire species of gray wolf (*Canis lupus*) as endangered

throughout the lower 48 states, except for the Minnesota population which was listed as threatened. 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); see also, Pls' Mem. at 8 n.3. Thus, Defendants are required to develop a plan to recover the entire gray wolf species, not just representative samples. Pls' Mem. at 46-49. FWS acknowledged the need for a national recovery plan when it commissioned Dr. David Mech, one of the nation's leading wolf experts, to help FWS develop one. Pls' Mem. at 9-10, 48. Dr. Mech advised the Service that "[c]learly, there is a strong need to get ahead of the issue and establish a *national* plan for wolf recovery." Id. at 10 (emphasis added); A.R. 24 at 7-8.

Instead of heeding Dr. Mech's advice, FWS continued to rely on piecemeal recovery plans for individual, fragmented wolf populations with no consideration of the entire range of the listed species and no criteria for recovering the entire species. Pls' Mem. at 46-49. Each of these recovery plans is administered by teams that are composed of different members with little or no coordination and no overall strategy for recovery of the gray wolf. A.R. 1194, 1198, 1195, 1196. This frustrated both the purposes of ESA § 4(f) and the goal of the 1978 consolidated listing, which was designed to correct the problem of pursuing a fragmented recovery strategy for many different subspecies and "identifying relatively narrow geographic areas in which those subspecies are protected." Final Rule at 15806, Pls' Mem. at 8-9. In the Final Rule at issue here, Defendants have gone right back to the failed strategy of basing listings and recovery on yet another formulation of "distinct geographic areas"[22] rather than developing a national recovery plan based on the entire range of the gray wolf. Pls' Mem. at 41-45.

[22] "We have avoided the subspecies quicksand by reclassifying on the basis of geographically delineated DPSs...." A.R. 981 at 15658.

Instead of developing one unified recovery plan, or even multiple, *coordinated* plans with a common goal, Defendants have opted for three plans that do not add up to recovery for the species as a whole. A.R. 1194, 1198, 1195, 1196. Not one of the existing plans matches any of the three DPSs that Defendants have adopted in the Final Rule. Id.; Final Rule at 15862. Twelve states within the boundaries of the newly designated DPSs are completely excluded from the recovery plans and two other states within the DPS boundaries are only partially included. Id.

Defendants misleadingly refer to the three recovery plans as an "Eastern Recovery Plan," a "Western Recovery Plan' and a "Southwestern Recovery Plan." Defs' Mem. at 54. The labels would suggest that the plans cover the three DPSs created in the Final Rule. Peel away the lawyers' post-hoc rationalizations, however, and it turns out that these plans are actually the Eastern Timber Wolf Recovery Plan, the Northern Rocky Mountain Wolf Recovery Plan and the Mexican Wolf Recovery Plan, all of which were developed long before the three new DPSs were created.[23] See A.R. 1194, A.R. 1198, A.R. 1195, A.R. 1196. These recovery plans do not match the three DPSs that Defendants have created, nor do they add up to a national recovery plan that covers the entire species of gray wolf as required by law. Id.; Final Rule at 15862.

Defendants cite two District Court cases for the proposition that Defendants' decision to proceed with three recovery plans instead of a national plan satisfies the requirement of Section 4(f) of the ESA. Defs' Mem. at 54 citing Strahan v. Linnon, 967 F. Supp. 581 (D. Mass. 1997), aff'd 187 F.3d 623 (1st Cir. 1998) and Oregon Natural Res. Council v. Turner, 863 F. Supp. 1277 (D. Or. 1994). However, these cases are clearly distinguishable from the case at bar. Both involved situations where no recovery plan had been developed for the listed species at all.

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[23] The record reflects that FWS never asked the Eastern Timber Wolf Recovery Team to comment on the EDPS or to determine if the Eastern Timber Wolf Recovery Plan was sufficient to recover the EDPS. See also, Hammill Decl. ¶¶ 14, 18.

Strahan, 967 F.Supp. at 597; Oregon Natural Res. Council at 1282. The cases turned on how much discretion the Secretary has in setting priorities for developing recovery plans. Id. Neither had anything to do with the question in this case, which is whether the Service has the authority to prepare piecemeal recovery plans that do not match the listed entity. Not surprisingly, Defendants have failed to cite to any authority for that dubious proposition.

In summary, Defendants' failure to develop a recovery plan, or a set of recovery plans, for the gray wolf exactly as it was listed in 1978 is arbitrary and capricious and a violation of the ESA.

CONCLUSION

For the reasons set forth above and in Plaintiffs' opening memorandum, Plaintiffs request summary judgment in their favor.

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Respectfully submitted,

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