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## INTRODUCTION

This case challenges the decision of the U.S. Fish and Wildlife Service (“FWS”) to revise the regulation that governs management of the reintroduced wolf populations of the northern Rocky Mountains (“10(j) regulation”). See 73 Fed. Reg. 4,720 (Jan. 28, 2008). If allowed to stand, the regulation may result in the killing of well over half of the current wolf population.

By the 1930s, wolves were all but eradicated from the West through poisoning, trapping, and shooting. FWS listed gray wolves in the lower-48 states as an endangered species in 1974, but it was not until FWS reintroduced wolves into Yellowstone National Park and central Idaho in 1995 pursuant to section 10(j) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1539(j), that significant wolf recovery began in the northern Rocky Mountains. Since reintroduction, the northern Rockies wolf population has grown from 30-40 wolves to approximately 1,500 today.

On January 28, 2008, FWS adopted a final rule revising the section 10(j) regulation that governs management of the reintroduced wolf populations in the central Idaho and greater Yellowstone wolf recovery areas. See 73 Fed. Reg. 4,720. The regulation substantially and unjustifiably lowers the bar for killing wolves in the name of protecting herds of elk, deer, and other wild ungulates that are booming despite the presence of a recovering wolf population. Despite the

ESA's mandate that FWS conserve threatened and endangered species, FWS has cited no endangered species conservation purpose for the 10(j) regulation. See 16 U.S.C. §§ 1531(b), 1532(3). Rather than conserving wolves, the regulation will potentially allow nearly 1,000 northern Rockies wolves to be killed. Because the 10(j) regulation threatens to decimate, rather than conserve the northern Rockies wolf population, it violates the ESA's most fundamental purpose and is unlawful.

In its haste to complete the 10(j) regulation, FWS failed to complete a meaningful inquiry into the environmental consequences of the action, in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq. Instead, FWS prepared an Environmental Assessment ("EA") that dismisses any suggestion that environmental effects might be significant. This result was pre-ordained by the agency; the record demonstrates that even before FWS commenced NEPA review, the agency intended to make a finding that the rule had no significant effects. Despite evidence that the regulation would significantly impact the northern Rockies wolf population, FWS failed to prepare an Environmental Impact Statement ("EIS"). FWS's decision to adopt the 10(j) regulation based on inadequate environmental analysis violated NEPA. See 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9.

## BACKGROUND

### I. GRAY WOLVES IN THE NORTHERN ROCKIES

Gray wolves were among the first species to be listed by the Secretary of Interior as endangered after Congress enacted the ESA. See 39 Fed. Reg. 1,171 (Jan. 4, 1974). In 1987, FWS finalized a recovery plan for the northern Rockies gray wolf establishing a recovery goal of 10 breeding pairs of wolves for three consecutive years in each of three northern Rockies recovery areas. See AR 6588. FWS later clarified that these criteria require “thirty or more breeding pairs ... comprising some 300+ wolves in a metapopulation ... with genetic exchange between subpopulations.” 73 Fed. Reg. 10,514, 10,520-21 (Feb. 27, 2008).

Gray wolf recovery began in earnest in 1995 and 1996, when FWS reintroduced 66 gray wolves into Yellowstone National Park and central Idaho. See 73 Fed. Reg. at 4,720-21. Under ESA section 10(j), 16 U.S.C. § 1539(j), FWS classified these reintroduced populations as “nonessential experimental populations.” Id. The northern Rockies wolf population currently numbers approximately 1,500 wolves.

On February 27, 2008, just one month after it finalized the challenged section 10(j) regulation, FWS issued a final rule removing wolves in the northern Rockies from the list of federally protected threatened and endangered species. See 73 Fed. Reg. 10,514. Conservation organizations challenged the delisting. On

July 18, 2008, this Court determined that the plaintiffs were likely to succeed on the merits of their claim that the delisting violated the ESA. See Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160, 1163 (D. Mont. 2008). This Court ruled that FWS arbitrarily determined that the northern Rockies wolf population is recovered notwithstanding the current lack of evidence of genetic exchange and that adequate regulatory mechanisms are in place to protect the population. See id. at 1171-72, 1175-76. Rather than defend the delisting rule on the merits, FWS moved the Court to vacate the rule and remand it to the agency. This Court granted FWS's motion on October 14, 2008, and wolves in the northern Rockies were returned to the list of endangered species.

## **II. THE SECTION 10(j) REGULATION**

### **A. The 2005 Section 10(j) Regulation**

The ESA provides that members of a 10(j) experimental population must be treated as “threatened” for most purposes. 16 U.S.C. § 1539(j)(2)(C).

Accordingly, under an ESA provision addressing threatened species, FWS may adopt “protective regulations” for such populations that FWS “deems necessary and advisable to provide for the conservation of such species.” Id. § 1533(d). In 2005, FWS adopted an ESA regulation allowing wolves to be killed to address “unacceptable impacts” to wild ungulates. See 70 Fed. Reg. 1,286 (Jan. 6, 2005).

The 2005 regulation defined “unacceptable impact” as a “decline in a wild

ungulate population or herd, primarily caused by wolf predation, so that the population or herd is not meeting established State or Tribal management goals.”

Id. at 1,307.

In 2006, Idaho proposed to implement the 2005 10(j) regulation in the Clearwater region of northern Idaho, where the elk population did not meet Idaho’s numeric management objectives. See AR 3589-3663 (Clearwater proposal). Idaho’s Clearwater proposal was intended to reduce the region’s wolf population by as many as 43 wolves, to just 25 to 40 percent of then-existing levels. AR 3595. The Clearwater proposal was put on hold when Idaho “clearly concluded that wolf predation was not ‘primarily’ the cause of the elk populations’ decline.” 73 Fed. Reg. at 4,721. No wolf killing proposal was ever implemented under the prior section 10(j) regulation because northern Rockies elk herds almost universally exceed current population objectives and wolves are not likely to ever “primarily” be the cause of elk population declines. See id. at 4,721, 4,273.

#### **B. The 2008 Section 10(j) Regulation**

In early 2007, FWS proposed removing wolves from the endangered list throughout the northern Rockies. See 72 Fed. Reg. 6,106 (Feb. 8, 2007). Before FWS could include Wyoming in the delisting, however, FWS first had to ensure that Wyoming’s newly revised wolf management statute and state plan were in place to provide regulatory mechanisms to protect the population. See id. at 6,127.

In order for Wyoming's wolf management statute to take effect, Wyoming law required that several statutory conditions had to be satisfied by February 29, 2008. See Wyo. Stat. § 23-1-109(b), (c). One of those conditions required revisions to the 2005 section 10(j) regulation to allow for greater wolf killing to address ungulate impacts. See id. § 23-1-109(c)-(e). In sum, Wyoming law required the 10(j) regulation to be revised to allow for greater wolf killing to address ungulate impacts before Wyoming's wolf management regime would become effective, as FWS needed it to be to proceed with the agency's delisting plan.

FWS responded to Wyoming's demand by proposing revisions to the 10(j) regulation on July 6, 2007. See 72 Fed. Reg. 36,942 (July 6, 2007). On September 11, 2007, FWS published a Notice of Availability and opened a 30-day public comment period on its Environmental Assessment ("EA") for the proposed rule change. 72 Fed. Reg. 51,770 (Sep. 11, 2007). Throughout the revision process, FWS staff scrambled to develop a schedule to publish the final revised 10(j) regulation in time to satisfy Wyoming's demand. See, e.g., AR 0002, 2012, 2255, 2256. This "difficult if not impossible" task required reviewing 90,000 comments on the draft EA in just one month, AR 2386, and truncating review of the revised rule by the federal Office of Management and Budget ("OMB") from 90 days to a mere 30 days, AR 15 (stating that 90-day OMB review period would make meeting Wyoming's deadline "infeasible"); AR 2376-77 (OMB agreed to 30-day

review period). See AR 2256 (email describing schedule as “difficult if not impossible” to meet).

FWS did not conduct a comprehensive review of the environmental impacts of the revision of the wolf-killing rule in an EIS. Indeed, the compressed schedule that FWS demanded for environmental review of the rule allowed insufficient time to undertake the more extensive analysis required for an EIS. Instead, FWS determined that the 2008 10(j) rule would not “significantly affect the quality of the human environment within the meaning of [NEPA]” and issued a Finding of No Significant Impact on January 18, 2008. AR 555-57. FWS published the final revised 10(j) regulation on January 28, 2008. See 73 Fed. Reg. 4,720.

The 2008 section 10(j) regulation liberalizes the conditions under which states and tribes are permitted to kill wolves in the Yellowstone and central Idaho experimental population areas based on an alleged “unacceptable impact” to wild ungulate populations or herds. Under the superseded 2005 regulation, states could establish an “unacceptable impact” due to wolves only by documenting both: 1) a decline in a wild ungulate population; and 2) proof that wolves are the primary cause of the population decline. See 70 Fed. Reg. at 1,307. The “unacceptable impact” definition adopted in the 2008 10(j) regulation eliminates both of these factors, requiring only that a wild ungulate population is failing to meet state or tribal management objectives and that wolves are one of the major causes for that

failure. See 73 Fed. Reg. at 4,736 (50 C.F.R. § 17.84(n)(3)). Under the new rule, a state or tribe may propose wolf killing to address whatever ungulate management goals a state determines are appropriate, including state objectives for population size, cow-calf ratios, nutrition, behavior, and movement. See id. at 4,722.

FWS states that the rule change is necessary because the prior definition of “unacceptable impact,” which required a determination that wolves are the primary cause of the decline of a wild ungulate population, set an “unattainable” threshold for the killing of endangered wolves. Id. at 4,721. “Wolf predation is unlikely to impact ungulate population trends substantially unless other factors contribute, such as declines in habitat quality and quantity, other predators, high harvest by hunters, weather, and other factors.” Id. (citations omitted); see also AR 579. In sum, the new definition responds to ungulate management issues by allowing the killing of members of the ESA-listed wolf population even though other factors, including hunting and habitat degradation, are impacting the affected ungulate population as much as, or even more than, wolves.

Further, by modifying the definition of unacceptable impacts to include impacts to movements, behavior, feeding, and other characteristics beyond herd or population size, 73 Fed. Reg. at 4,722, the 2008 10(j) regulation greatly expands the ability of states and tribes to kill wolves even in areas where elk, deer, and other wild ungulates are plentiful. See id. at 4,721-22 (regulation “expands the

potential impacts for which wolf removal might be warranted beyond direct predation or those causing immediate population declines”). Under the 2008 10(j) regulation, FWS must accept a state or tribal determination of unacceptable impact. The only substantive constraints on wolf killing that are available to FWS under the rule are that the Service must conclude that “wolf removal is not likely to impede recovery,” and that the wolf population will not be reduced “below 20 breeding pairs and 200 wolves” in the affected State. *Id.* at 4,736 (50 C.F.R. § 17.84(n)(4)(v)(B)). Thus, the rule creates the potential for States to kill all but 600 out of the approximately 1,500 wolves that currently inhabit the northern Rockies.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

This court recently summarized the standard for judicial review of an agency’s compliance with the ESA under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706:

Agency decisions can only be set aside under the APA if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” ... When an agency action is challenged, a court must ask “whether the [agency’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment ... [The court] also must determine whether the [agency] articulated a rational connection between the facts found and the choice made. [The] review must not rubber-stamp ... administrative decisions that [the court deems] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.”

Defenders of Wildlife, 565 F. Supp. 2d at 1166 (alterations in original; citations omitted).

The APA's "arbitrary and capricious" standard of review likewise applies to plaintiffs' NEPA claims. See Anderson v. Evans, 371 F.3d 475, 486 (9th Cir. 2004). When reviewing actions under NEPA, courts look to the administrative record to determine whether the agency has taken a "hard look" at the environmental consequences of its action. See id.

## **II. THE SECTION 10(j) RULE VIOLATES THE ESA'S CONSERVATION MANDATE**

The ESA requires FWS to conserve endangered and threatened species, including the central Idaho and greater Yellowstone experimental wolf populations. See 16 U.S.C. § 1531(b), (c). Rather than conserve wolves, FWS has established a regulatory framework to potentially permit more than half of the northern Rockies wolf population to be killed. In essence, the regulation allows states to turn basic wolf behavior—i.e., impacts on elk movements and behavior—into a basis for killing wolves. Because the 10(j) regulation could diminish the potential for wolf recovery, the regulation violates FWS's conservation mandate.

### **A. The ESA Imparts A Duty To Conserve Threatened And Endangered Species**

The ESA was enacted to "provide a program for the conservation of ... endangered species and threatened species" and to "provide a means whereby the

ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). To receive the full protections of the Act, a species must first be listed by the Secretary of the Interior as “endangered” or “threatened” pursuant to ESA section 4. Id. § 1533.

ESA section 10 allows the Secretary to “authorize the release ... of any population ... of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.” 16 U.S.C. § 1539(j)(2)(A). ESA section 10(j) requires that in most cases, “each member” of an experimental population be treated as “threatened” under the ESA. See id. § 1539(j)(2)(C). Thus, experimental populations are subject to the ESA’s mandate to “conserve” threatened species.

Because experimental populations are treated as threatened species, the Secretary must issue “protective regulations” that “he deems necessary and advisable to provide for the conservation of such species.” Id. § 1533(d) (emphasis added); see also 50 C.F.R. § 17.82 (“experimental population shall be treated as if it were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the Act”). Congress defined the terms “conserve,” “conserving,” and “conservation” in the ESA to mean “to use and 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 chapter are no longer necessary.” See 16 U.S.C. § 1532(3).

“‘Conservation’ is a much broader concept than mere survival. The ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species.” Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv., 378 F.3d 1059, 1070-71 (9th Cir. 2004) (quotation and citation omitted). Thus, under the express mandates of the ESA, FWS is obliged to affirmatively promote recovery of listed species until they are fully recovered and removed from the list of endangered species. See 16 U.S.C. § 1532(3).

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

FWS has offered no plausible argument that the 10(j) regulation—which may allow more than half of the current wolf population to be killed—promotes wolf conservation as required by the ESA. Instead, the purpose of the regulation was to appease states’ desire to kill wolves to enhance already-abundant wild ungulate populations, particularly elk. See 73 Fed. Reg. at 4,721-22 (rule “expands the potential impacts for which wolf removal might be warranted beyond direct predation or those causing immediate population declines”); Wyo. Stat. Ann. § Wyo. Stat. Ann. § 23-1-109(c)-(e) (demanding greater flexibility to kill wolves).

Indeed, FWS has abandoned its sole argument that the 10(j) regulation might promote wolf conservation. In the proposed 10(j) regulation, FWS asserted that a

“potential benefit [of the 10(j) regulation] may be a lower level of illegal take of wolves due to higher local public tolerance of wolves resulting from reduced conflicts between wolves and humans.” 72 Fed. Reg. at 36,946. In response to comments on the EA, FWS again asserted the revisions “are necessary for the continued enhancement and conservation of wolf populations because they foster local tolerance on introduced wolves.” AR 572. In essence, FWS asserted that it was necessary to kill the wolves in order to save the wolves. Yet separately, in response to comments on the Final Rule, FWS acknowledged that “data are not available to support or disclaim this premise.” 73 Fed. Reg. at 4,729; see also Humane Soc’y of U.S. v. Kempthorne, 481 F. Supp. 2d 53, 63 (D.D.C. 2006) (rejecting FWS’ theory that authorized killing of wolves actually protects wolves from illegal killing by building social tolerance), vacated, 527 F.3d 181 (D.C. Cir. 2008).<sup>1</sup> Aside from this abandoned rationale, FWS proffers no wolf conservation purpose for the 10(j) regulation. See Sierra Club v. Clark, 755 F.2d 608, 613 (8th Cir. 1985) (regulation allowing sport hunting of threatened wolves violated the ESA because it did not “constitute an act of conservation under the Act and [therefore fell] without the scope of authority granted to the Secretary”).

In fact, the wolf killing contemplated under the 10(j) regulation is likely to

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<sup>1</sup> “Vacated opinions remain persuasive, although not binding, authority.” Spears v. Stewart, 283 F.3d 992, 1017 n.16 (9th Cir. 2002).

impede gray wolf recovery in the northern Rockies. The regulation may result in the killing of most of the current wolf population, which is already insufficient to ensure long-term viability. FWS's wolf recovery standards require a minimum of "thirty or more breeding pairs ... comprising some 300+ wolves in a metapopulation ... with genetic exchange between subpopulations." 72 Fed. Reg. at 6,107 (emphasis added). FWS erroneously asserted in the final rule adopting the 10(j) regulation that the wolf population is "recovered" because it exceeds 300 wolves in 30 breeding pairs. 73 Fed. Reg. at 4,721. As this Court noted, "in 1994, the Service expressly rejected this numerical criterion [requiring 300 wolves in 30 breeding pairs] in favor of recovery criteria that required not only numerical abundance, but also genetic exchange." Defenders of Wildlife, 565 F. Supp. 2d at 1170. Thus, the presence of 300 wolves in 30 breeding pairs is not alone determinative of wolf recovery; genetic connectivity is essential. FWS acknowledged in its final rule delisting the northern Rockies wolf population—one month after it published the 2008 10(j) regulation—that the Yellowstone wolf subpopulation was most likely genetically isolated. See 73 Fed. Reg. at 10,553. Subsequently, this Court determined that FWS's recovery determination based solely on the wolf population's satisfaction of numeric criteria was in error. Defenders of Wildlife, 565 F. Supp. 2d at 1171-72.

Where, as here, wolves have not met FWS's recovery criteria, FWS cannot

legitimately contend that increased wolf killing under the 10(j) regulation will not impede wolf recovery. FWS acknowledges that the 10(j) regulation “will likely result in more wolf control than is currently occurring.” 73 Fed. Reg. at 4,722.

The regulation will allow small core populations of wolves to become even smaller and thus will further inhibit dispersal and genetic connectivity that the FWS has recognized is necessary for wolves’ long-term survival and recovery. As this Court observed, “[g]enetic exchange that did not occur [with 1,513 wolves in 106 breeding pairs] is not likely to occur with fewer wolves and fewer breeding pairs.” Defenders of Wildlife, 565 F. Supp. 2d at 1172; see also id. at 1171 (“fewer wolves means less opportunity for dispersal and hence less chance for genetic exchange”).

The 10(j) regulation further violates FWS’s “conservation” duty because it fails to include essential oversight or substantive sideboards on state actions to kill wolves. Most notably, the 10(j) regulation allows the states to define “unacceptable impacts” to ungulates, with no method for FWS to assess whether a state-defined ungulate management standard comports with the ESA’s conservation mandate. See AR 1309 (email from Ed Bangs: “The USFWS role will be pretty much solely approving state proposal if they followed the process – not us further judging its merits”).

The only substantive restraint the challenged regulation imposes on FWS’s approval of state wolf-killing proposals is the requirement that FWS determine that

the wolf killing “will not contribute to reducing the wolf population in the State below 20 breeding pairs and 200 wolves, and will not impede wolf recovery.” 73 Fed. Reg. at 4,736 (50 C.F.R. § 17.84(n)(4)(v)(B)). These minimal requirements are not sufficient to discharge FWS’s ESA obligation to conserve—i.e., recover—wolves. See 16 U.S.C. §§ 1531(b), 1532(3); Gifford Pinchot Task Force, 378 F.3d at 1070-71. First, even if state wolf-killing actions would not impede recovery, as defined by FWS, a program to kill imperiled species is not permitted under the ESA absent a conservation purpose. Here, there is none. See supra at 12-13. Second, and more fundamentally, the final rule maintains that recovery is met so long as states manage for at least 15 wolf breeding pairs in mid-winter, so that “each State’s share of the wolf population does not risk falling below the minimum recovery goal of 10 breeding pairs and 100 wolves.” 73 Fed. Reg. at 4,722; see also AR 601. Thus, as interpreted by FWS, the requirement that wolf control actions not impede recovery provides no greater protection for wolves than the requirement that the wolf population remain at or above 20 breeding pairs and 200 wolves. This requirement is inadequate to ensure that genetic connectivity among wolf subpopulations, an essential component of wolf recovery, is maintained. Accordingly, the 2008 10(j) regulation violates the ESA and should be set aside.

### III. THE 10(j) REGULATION VIOLATES NEPA

In addition to violating the ESA's "conservation" mandate, FWS's revised 10(j) regulation violates NEPA's environmental analysis requirement. NEPA requires federal agencies to prepare an environmental impact statement ("EIS") in connection with all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

Where an agency is unsure whether an action is likely to have "significant" environmental effects, it may prepare an EA: a "concise public document" designed to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement... ." 40 C.F.R. § 1508.9. If the EA concludes that the action will not have a significant effect on the environment, the agency may issue a Finding of No Significant Impact and may then proceed with the action. 40 C.F.R. § 1508.13.

Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 993 (9th Cir. 2004). This is the route FWS pursued here.

FWS's review of the 10(j) regulation violated NEPA because FWS failed to fully disclose and adequately analyze the environmental consequences of the regulation in the EA. FWS further violated NEPA by failing to prepare an EIS, because the record demonstrates that the 10(j) regulation will result in significant environmental effects due to the potential killing of more than half of the current northern Rockies wolf population.

**A. The Environmental Assessment Violates NEPA Because It Does Not Take A “Hard Look” At The Environmental Consequences Of The 10(j) Regulation**

FWS violated NEPA by failing to take “a ‘hard look’ at the likely effects of the proposed” action. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir.1998); see id. (A hard look requires “a thorough environmental analysis.”). FWS was required to prepare an EA that discloses and accurately describes “reasonably foreseeable” impacts of the 2008 10(j) regulation on the northern Rockies wolf population. See 40 C.F.R. § 1508.8(b); see also 40 C.F.R. § 1502.16; Idaho Sporting Congress, Inc. v. Rittenhouse, 305 F.3d 957, 973 (9th Cir. 2002) (NEPA analysis must “consider[] all foreseeable direct and indirect impacts”). FWS asserts that “the likely level of wolf removal under [the 10(j) regulation] would not significantly impact the [northern Rockies] wolf population or compromise its recovery.” AR 604. However, the EA provides no support for this claim. FWS’s analysis of potential wolf killing under the 10(j) regulation focuses exclusively on potential state actions to remove wolves impacting numeric herd management objectives that the states have already established. See AR 601. The 2008 10(j) regulation gives states almost unlimited discretion to modify management objectives—numeric and otherwise—yet the EA ignores entirely the prospect that states will do so. See AR 587, 601.

Indeed, Wyoming already had adopted new categories of ungulate management objectives beyond existing population objectives. Wyoming considers an elk herd to suffer unacceptable impacts if it is in danger of declining below population management objectives and is experiencing low elk calf recruitment rates (i.e. a low calf/cow ratio). See Wyo. Stat. Ann. § 23-1-109(d). Unacceptable impacts in Wyoming also include situations where wolves affect elk movement and behavior on or near state operated feedgrounds. Id. § 23-1-109(e).

The EA discusses Wyoming's proffered evidence of wolves' alleged impacts on elk calf/cow ratios in specific herds. AR 580. Yet, while relying on this discussion to justify the purported need for the 10(j) regulation, FWS ignores Wyoming's new categories of management objectives when analyzing potential environmental consequences of the regulation. See AR 601-04. In failing to analyze the impact of wolf control actions to address state management objective beyond the current rules regarding numeric ungulate herd objectives, the EA fails to disclose the full extent of the wolf killing authorized by the 2008 10(j) regulation. See Blue Mountains Biodiversity Project, 161 F.3d at 1216.

Moreover, contrary to the EA's finding, the 2008 10(j) regulation will compromise the recovery of wolves in the northern Rockies. The EA concludes that the 10(j) rule will not disrupt genetic exchange because FWS does not foresee widespread wolf killing, and anticipates that wolves will rapidly recolonize areas

from which they are removed. See AR 602-03. FWS's optimistic projection papers over the significant prospect that state wolf-killing proposals may reduce connectivity. For example, Idaho's 2006 Clearwater proposal contemplated high levels of killing to maintain the wolf population in that region at just one-quarter of pre-removal levels for at least five years. See AR 3612. The 2008 10(j) regulation provides no explicit safeguards against this kind of extreme approach. Indeed, FWS's Wolf Recovery Coordinator Bangs stated that the 2008 10(j) regulation "would allow ID proposal or anyone's ones [sic] like it to be approved." AR 1309. FWS's assumption that the wolf population will not be appreciably reduced and that genetic connectivity will not be affected under the 2008 10(j) regulation is not supported by the record.

FWS further asserts that population connectivity will not be disrupted because "core refugia would continue to supply dispersers ... Therefore, gaps that could fragment populations and disrupt connectivity and genetic exchange are not likely to occur." AR 602. FWS fails to confront the fact that, even while states are not killing significant numbers of wolves to address perceived ungulate impacts, the northern Rockies wolf population has not achieved substantial connectivity and genetic exchange. See Defenders of Wildlife, 565 F. Supp. 2d at 1172. Extensive wolf mortality under the 2008 10(j) regulation will further diminish the potential for genetic exchange between the three recovery areas. See id. at 1171 ("fewer

wolves means less opportunity for dispersal and hence less chance for genetic exchange”). The EA fails to analyze the impact of a potentially sizeable decrease in the central Idaho and Greater Yellowstone wolf populations on connectivity and genetic exchange between wolves in northwestern Montana, central Idaho, and Yellowstone.

The EA is also inadequate because it fails to take a hard look at reasonably foreseeable state actions to implement the 10(j) regulation. For example, the EA discusses Idaho’s 2006 proposal, which was “on hold” pending the rule change at issue, to kill 75 percent of wolves in the Lolo zone of north central Idaho. See AR 579-80. Idaho submitted a detailed proposal “to reduce the wolf population in the Lolo Zone [of Idaho’s Clearwater region] by up to 75% (no more than 43 wolves) of the current mid-point wolf population estimate (58) during year one, and maintain the population at 25-40% of pre-removal wolf abundance for 5 years.” AR 3612. This intense level of wolf removal is specifically designed to “maintain reduced wolf abundance” over the long term in the targeted area. AR 3611. Now that the rule change is effective, Idaho is again seeking approval of its Clearwater wolf-killing proposal. FWS Wolf Recovery Coordinator Bangs has suggested that the proposal will be allowed under the revisions to the 10(j) regulation. See AR 1309. Yet the EA fails to disclose the number of wolves that would be killed and the potential site-specific ecological impacts of the Idaho proposal. Such

forecasting of impacts from reasonably foreseeable actions is required by NEPA.

See Blue Mountains Biodiversity Project, 161 F.3d at 1216

Because FWS failed to take “a ‘hard look’ at the likely effects of the” 10(j) regulation in the EA, the EA and Finding of No Significant Impact violate NEPA and must be set aside. Id.; see 40 C.F.R. § 1508.9(b).

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

FWS also violated NEPA by failing to fully evaluate the impacts of the revised 10(j) regulation in an EIS. The Finding of No Significant Impact endorsed an alternative with the potential to authorize killing of all but 200 wolves each in each of three states: Montana, Idaho, and Wyoming. This extensive wolf killing would have significant adverse effects both on the northern Rockies wolf population, which is still recognized as endangered, and on the ecosystem of which the wolves are a part. The killing of nearly 1,000 wolves, as potentially permitted under the 10(j) regulation is a “major Federal action[] significantly affecting the quality of the human environment” requiring the preparation of an EIS. 42 U.S.C. § 4332(2)(C).

“An agency must prepare an EIS if substantial questions are raised as to whether a project” may have significant environmental effects. Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin., 538 F.3d 1172, 1219 (9th Cir. 2008) (quotation and citation omitted). “If an agency decides not to prepare an

EIS, it must supply a ‘convincing statement of reasons’ to explain why a project’s impacts are insignificant. ‘The statement of reasons is crucial to determining whether the agency took a “hard look” at the potential environmental impact of a project.’” Id. at 1220 (quoting Blue Mountains Biodiversity Project, 161 F.3d at 1212). NEPA regulations direct agencies to consider harm to threatened or endangered species in determining whether to prepare an EIS. 40 C.F.R § 1508.27(b)(9). Despite substantial questions whether the 10(j) regulation will have significant adverse effects to wolves, FWS failed to prepare an EIS.

1. FWS unlawfully predetermined the outcome of its NEPA analysis.

FWS illegally predetermined the outcome of its NEPA review, because the agency had decided not to prepare an EIS to examine the environmental consequences of the 10(j) regulation before it had even begun drafting the EA. Repeatedly in correspondence and internal agency briefings, FWS staff emphasized the need to publish the final 10(j) regulation before the deadline established in Wyoming law. See, e.g., AR 10-11 (briefing paper describing need to publish rule before Wyoming’s deadline); AR 17 (same); AR 2255 (discussing “critical need to keep all aspects of the delisting package (including the 10(j) package) on a very tight timeline that will result in the 10(j) getting published in January and the delisting package published in February”). Under these circumstances, FWS had no time to prepare an EIS, even if the EA demonstrated

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

The environmental analysis in EA is supposed to inform the agency’s decision whether to prepare an EIS. See 40 C.F.R. § 1501.4(c). In contrast, here, even before it conducted any environmental review, FWS had determined that would not undertake any further environmental analysis. “NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that ‘the agency will not act on incomplete information, only to regret its decision after it is too late to correct.’” Blue Mountains Biodiversity Project, 161 F.3d at 1216 (emphasis added). It is for this reason that NEPA’s implementing regulations prohibit agencies from taking actions that would “[l]imit the choice of reasonable alternatives” until the environmental review process is complete. 40 C.F.R. § 1506.1(a)(2). Here, by the time FWS completed the EA for the 10(j) regulation, “the die already had been cast.” See Metcalf v. Daley, 214 F.3d 1135, 1144 (9th Cir. 2000) (agency failed to take a “hard look” at environment effects of proposal in light of “strong evidence that [agency] made the decision to support the [proposal] ... before the EA process

began and without considering the environmental consequences thereof”); see also Davis v. Mineta, 302 F.3d 1104, 1112 (10th Cir. 2002) (affording diminished deference to agency decision not to prepare EIS where the agency employed a consultant specifically to prepare a Finding of No Significant Impact, creating a “bias” against preparation of an EIS). When, as here, the agency predetermines the outcome of its environmental analysis, NEPA’s purpose of fostering informed decisionmaking is unlawfully subverted. See Metcalf, 214 F.3d at 1145 (“NEPA’s effectiveness depends entirely on involving environmental considerations in the initial decisionmaking process.”).

2. FWS violated NEPA by failing to prepare an EIS.

Despite FWS’s premature determination not to prepare an EIS, an EIS was required here by evidence that the section 10(j) regulation will have significant impacts on wolves. In response to public comments on the EA, FWS asserted that “the likely amount of take of wolves that the revised rule would authorize would be low and would not compromise recovery of the [Northern Rocky Mountain] wolf population.” AR 572. FWS reasoned that “many ungulate herds and populations in Idaho, Montana, and Wyoming are at or above State management objectives and most of those below management objectives are most affected by factors other than wolves. Therefore, wolf control actions are expected to be few and localized.” AR 601 (citation omitted). This justification erroneously considers

only the prospect of wolf control actions to address the current state management objectives based on population or herd size. As explained in the final rule, however, the revisions to the section 10(j) regulation “expand[] the potential impacts for which wolf removal might be warranted beyond direct predation or those causing immediate population declines.” 73 Fed. Reg. at 4,722. FWS acknowledges that states may now adopt management goals based on other factors, including: “calf/cow ratios, movements, use of key feeding areas, survival rates, behavior, nutrition, and other biological factors.” Id. The states are thus at liberty to establish any ungulate management goals they wish and kill wolves accordingly. FWS is not permitted to assume the impacts of its action will be less than the full scope of impacts authorized by the 10(j) regulation. See State of Cal. v. Block, 690 F.2d 753, 765 (9th Cir. 1982) (scope of environmental review must match the scope of the proposed agency action). This analysis is particularly appropriate here, where FWS is well aware of Wyoming’s intent to adopt management objectives beyond numeric ungulate herd objectives. See supra at 19; see also Wyo. Stat. Ann. § 23-1-109; AR 580. Accordingly, there is no justification for FWS’s assumption that states will not expand ungulate management objectives beyond current numeric herd objectives.

FWS further contends that the northern Rockies wolf population will not suffer significant effects “because the revised rule requires that wolf control

actions do not impede wolf recovery.” AR 573. FWS defines recovery as “a minimum of 10 breeding pairs and 100 wolves in each State.”<sup>2</sup> Id. FWS therefore requires that control actions pursuant to the 10(j) regulation must leave 20 breeding pairs and 200 wolves in each state, a buffer FWS maintains is adequate to ensure the minimum recovery levels are met. AR 574. However, FWS erred in focusing on whether the 10(j) regulation will drive the northern Rockies wolf population below minimum levels necessary for viability. “[F]or purposes of NEPA, a project need not jeopardize the continued existence of a threatened or endangered species to have a ‘significant’ effect on the environment.” Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv., 373 F. Supp. 2d 1069, 1080-81 (E.D. Cal. 2004); see also Greater Yellowstone Coal. v. Flowers, 359 F.3d 1257, 1275-76 (10th Cir. 2004) (FWS’s “no jeopardy” opinion as to bald eagles is not determinative of whether project will have significant effects for NEPA purposes); Makua v. Rumsfeld, 163 F. Supp. 2d 1202, 1218 (D. Haw. 2001) (“no jeopardy” does not equate to “no effect”). The relevant legal question is whether the regulation may significantly affect wolves. See 40 C.F.R. § 1508.27(a) (agency must consider “the degree to

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<sup>2</sup> FWS’s minimum numeric recovery goal of 300 wolves in 30 breeding pairs is inadequate to ensure wolf survival. See AR 6771 (VonHoldt 2007) (“populations of this size [100 wolves in 10 breeding pairs] that remain isolated will lose genetic variation and become inbred over the long term”); AR 2218 (FWS Wolf Recovery Coordinator Bangs that “most conservation biologists would say [the FWS wolf recovery standard] is probably too low”).

which the action may adversely affect an endangered or threatened species” in determining whether to prepare EIS).

The 2008 10(j) regulation will have significant adverse impacts to the endangered northern Rockies wolf population. The only basis demonstrated in the record for FWS’s failure to prepare an EIS is the need for haste to satisfy Wyoming law. This does not constitute a “convincing statement of reasons’ to explain why [the 10(j) regulation’s] impacts are insignificant.” Ctr. for Biological Diversity, 538 F.3d at 1220 (citation omitted). FWS’s failure to prepare an EIS to analyze and disclose the significant environmental impacts of the section 10(j) rule change violated NEPA. See 42 U.S.C. § 4332(2)(C). Accordingly, FWS’s Finding of No Significant Impact violates NEPA and must be set aside.

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## CONCLUSION

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

Respectfully submitted this 2nd day of February, 2009,

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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing brief contains 6,486 words, in compliance with the Court's 6,500 word limit.

Dated: February 2, 2009

/s/ Jenny K. Harbine  
Jenny K. Harbine