THE HUMANE SOCIETY
OF THE UNITED STATES

October 15, 2012

Via Electronic and Certified Mail

Ken Salazar
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
exsec@ios.doi.gov

Dan Ashe
Director, U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240
Dan_Ashe@fws.gov

Re: Sixty-Day Notice of Intent to Sue Over Violations of the Endangered Species Act in Designating and Delisting the Western Great Lakes Distinct Population Segment of the Gray Wolf

Dear Secretary Salazar and Director Ashe,

Pursuant to 16 U.S.C. § 1540(g), this letter serves as The Humane Society of the United States' and the Fund for Animals' sixty-day notice of intent to sue the U.S. Fish and Wildlife Service ("FWS") for violations of the Endangered Species Act ("ESA"). 16 U.S.C. § 1531 *et seq*. The FWS's decision to simultaneously designate and delist the western Great Lakes population of gray wolf, (*see* Final Rule Designating the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment (DPS) and Removing the DPS From the Federal List of Endangered and Threatened Wildlife, 76 Fed. Reg. 81,666 (Dec. 28, 2011) ("Delisting Rule")), despite the fact that the wolf remains extirpated across 95 percent of its historic range and given that the agency's prior efforts to strip wolves of federal protections have been repeatedly rejected by the courts, is arbitrary, capricious, and violates the ESA and its

implementing regulations.

Specifically, the FWS's decision to remove federal protection from wolves in the Great Lakes region is arbitrary, capricious and not in accordance with the ESA because (1) the FWS cannot lawfully designate a DPS for the sole purpose of delisting the DPS; (2) the FWS cannot include significant portions of the wolf's range where wolves have not yet recovered within the delisted DPS, and must ensure that the boundaries of any DPS designation are based solely on biological factors; (3) the FWS fails to analyze threats to the wolf outside the DPS it created; (4) the FWS eliminates federal protections for gray wolves in the western Great Lakes despite the fact that wolves in the region continue to face significant threats to their survival, including hostile state management plans aimed at quickly and drastically reducing the wolf population; (5) the FWS's decision jeopardizes the continued existence of the wolf; and (6) the FWS's decision fails to use the best available science.[1]

Background

Gray wolves were once abundant across North America, with more than 350,000 individuals inhabiting the American West. However, with the European Settlers came the widespread persecution of wolves. Habitat destruction and government bounties that encouraged the poisoning, trapping and hunting of wolves resulted in their extirpation from more than 95 percent of their range in the lower 48 states. 68 Fed. Reg. 15,804, 15,805 (Apr. 1, 2003). According to the FWS, wolves were hunted and killed "with more passion and zeal than any other animal in U.S. history." FWS, *Gray Wolf*, http://training.fws.gov/library/Pubs/graywolf.pdf (July 1998). Recognizing that the species was near the brink of extinction, the gray wolf was one of the first species to be listed under the Endangered Species Preservation Act of 1966, the precursor to the ESA. 32 Fed. Reg. 4,001 (Mar. 11, 1967). These legal protections were limited, however, and it was the 1973 passage of the ESA and subsequent listing of various subspecies of wolves under the ESA in 1974 that marked the true beginning of the wolf's recovery.

Eventually, the FWS moved away from the protection of individual wolf subspecies and decided instead to list the gray wolf at the species level. Accordingly,

[1] The Humane Society of the United States and the Fund for Animals submitted comments on the original proposed delisting rule, 76 Fed. Reg. 26,086 (May. 5, 2011), and hereby incorporate those comments (attached herein) by reference.

in 1978 the FWS listed the gray wolf as endangered throughout the coterminous United States and Mexico, except in Minnesota, where wolves were listed as threatened. 43 Fed. Reg. 9,607 (Mar. 9, 1978). With the protection of the ESA, the wolf has made progress toward recovery in the Western Great Lakes region, the northern Rocky Mountains, and the Southwest, where the Mexican gray wolf was rescued from the brink of extinction. Nevertheless, even today wolves occupy only a small portion of their historic range. Viable populations are absent from vast swaths of habitat where wolves once lived and collectively could still recover, including within the Pacific Northwest and California, the Great Basin and Colorado Plateau, the southern Rocky Mountains, the Southwest, the Great Plains, and the forests of New England and upstate New York. Meanwhile, the existing wolf populations face ongoing threats to their long term survival, such as federal predator-control, state-sanctioned persecution, unlawful killing by the public, disease outbreaks, hybridization, and inbreeding depression.

Despite the wolf's continued imperilment, the FWS has repeatedly sought to remove the gray wolf in the western Great Lakes from the endangered species list. Because the wolf remains critically endangered, the FWS has tried to sidestep the statutory mandates of the ESA by using a legal tool designed to *increase* species protections – the "distinct population segment" or DPS – for the opposite purpose. Each attempt has been met with rebuke by federal courts and the reinstatement of federal protections for wolves. Undeterred, the FWS has yet again simultaneously designated and delisted a western Great Lakes DPS. Coupled with the delisting of wolves in Montana, Idaho, and Wyoming, the rule has the effect of removing the protections of the ESA from most of the gray wolves in the conterminous United States. Similar to its previous attempts, the FWS Delisting Rule runs afoul of the ESA and jeopardizes the continued existence of gray wolves.

The Delisting Rule is Arbitrary, Capricious, and Violates the ESA

I. The FWS Unlawfully Designated the Western Great Lakes DPS for the Sole Purpose of Delisting the DPS

The ESA's definition of "species" includes "any subspecies…and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). By amending this definition to include "distinct population segments," Congress extended the protections of the ESA to locally vulnerable populations of vertebrate fish and wildlife species in circumstances where the species as a whole is not endangered or threatened. The

plain language of the statute does not sanction the FWS's attempt to carve out a DPS from a species-level listing for the purpose of reducing the protections for a segment of a listed species.

In designating a new western Great Lakes DPS for the sole purpose of removing federal protections from wolves within that DPS, the FWS's Delisting Rule suffers from the same legal defects as the one vacated in *Humane Society of the United States v. Kempthorne*, 579 F.Supp. 2d 7 (D.D.C. 2008). In that case, the court questioned the agency's use of the DPS tool, finding that the text of the ESA "quite strongly suggests consistent with common usage – that the *listing* of any species (such as the western Great Lakes DPS) is a precondition to the delisting of that species." *Id*. at 17.

The agency's own DPS Policy likewise confirms that DPSs are a proactive measure to *prevent* the need for listing a species over a larger range. The DPS Policy provides that a vertebrate population must be both "significant" and "discrete" to be designated as a DPS. 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996). The requirement that a population segment be "significant" reflects how the DPS tool is to be properly used. Simply stated, the DPS Policy instructs that a DPS be designated only if the population segment is important enough to warrant protection. Like the ESA's restriction of the DPS tool to vertebrates, the Policy's restriction of DPSs to "significant" populations makes no sense if this tool could be used to remove protections from a population already protected by a listing. Under such a theory, the DPS Policy would allow the removal of federal protections from a "significant" population of an endangered species, while forbidding this option for non-significant populations.

As the DPS Policy explains:

> Listing, delisting, or reclassifying distinct vertebrate population segments may allow the Services to protect and conserve species and the ecosystems upon which they depend before large scale decline occurs that would necessitate listing a species or subspecies throughout its entire range. This may allow protection and recovery of declining organisms in a more timely and less costly manner, and on a smaller scale than the more costly and extensive efforts that might be needed to recover an entire species or subspecies.

61 Fed. Reg. at 4,725. In other words, the DPS tool is intended to be used to protect a population segment without having to list the entire species. Nowhere does the

Policy state or even imply that DPSs can be used to strip federal protections from a portion of a listed species.

Consistent with the language of the ESA and the FWS's DPS Policy, several federal courts have concluded that DPSs should be used only when listing a species or subspecies is not warranted, but a local population of the species is facing additional threats. *See Defenders of Wildlife v. U.S. Dept. of Interior*, 354 F.Supp. 2d 1156, 1169 (D.Or. 2005) ("[I]f a distinct and significant population of an unlisted species is struggling while other populations are faring well, FWS may designate the struggling population as a DPS and list it as endangered."); *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 842 (9th Cir. 2003) (noting that under the DPS Policy "[t]he FWS does not have to list an entire species as endangered when only one of its populations faces extinction").

Moreover, by delisting wolves in the western Great Lakes (in conjunction with the delisting in the northern Rocky Mountains), the FWS has effectively abandoned its duty to recover the species across a significant portion of its range, as mandated by the ESA. 16 U.S.C. § 1532(6), (20). Without federal protection, wolves in the delisted populations have essentially no chance of successfully dispersing into portions of the historical range outside the DPSs, and little chance of restoring this top predator to additional ecosystems. In short, Congress never intended that a DPS could be used as a delisting tool, because to do so would hinder species recovery rather than promote it.

II. The Boundaries of the DPS Are Arbitrary and Capricious and violate the ESA

Even if a DPS could be created for delisting purposes – which, for the reasons stated above, it cannot – the boundaries should include, at most, core areas in which a population has fully recovered. It is essential to the continued conservation of the species that further expansion of the species beyond the core recovery area be allowed. However, a DPS that includes portions of the species' range where the species has not yet recovered would preclude any natural expansion of the species, and thus fail to recover wolves to all significant portions of the range, as the ESA requires. 16 U.S.C. § 1532(6). Although wolves are found in only parts of Minnesota, Wisconsin, and Michigan, the FWS's western Great Lakes DPS designation includes the entirety of these states, as well as portions of six other states. To reach protected areas, wolves must travel hundreds of miles across a "wolf movement zone" within which states and individuals will have broad authority to kill

dispersing wolves. These expansive boundaries sever crucial dispersal corridors leading from the core population to unoccupied portions of the historic range. The FWS does not adequately explain why these areas of suitable wolf habitat should be included within the DPS and removed from areas available for protection of wolves.

Courts have rejected previous attempts by FWS to reduce protections by creating DPSs with expansive boundaries. When FWS created three DPSs to downlist wolves in the 2003 rule, the agency drew boundaries that went far beyond the core wolf populations. The courts rejected this effort to remove ESA protections from such wide swaths of the wolf's historic range. As the District of Vermont held, the "FWS simply cannot downlist or delist an area that it previously determined warrants an endangered listing because it 'lumps together' a core population with a low to non-existent population outside of the core area." *Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553, 565 (D.Vt 2005). The loss of federal protections within the DPS boundaries in the Delisting Rule arbitrarily and capriciously confines the wolf to the core areas where recovery has already begun and hampers dispersal into nearby unoccupied but significant portions of the species range. In addition, the FWS's arbitrary DPS boundaries fail to comply with the ESA's mandate that delisting determinations be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A), (c)(2).

III. The FWS Has Not Conducted the Proper Delisting Analysis

In its decision, the FWS fails to analyze threats to the wolf across the conterminous United States and ignores the dramatic loss of the gray wolf's historic range – the first of the five factors the agency is required to consider under the terms of the ESA, *see* 16 U.S.C. § 1533(a)(1)(A) – and improperly relies on the Recovery Plan for the Timber Wolf. The FWS's Delisting Rule is therefore arbitrary, capricious, and not in accordance with the ESA.

A. The FWS Must Analyze Threats to the Wolf Across the Conterminous United States

The FWS's final delisting rule violates the ESA because it fails to analyze threats to wolves across the conterminous United States as a whole, and instead focuses only on impacts to wolves in the western Great Lakes. Under the ESA, a species can be delisted only if the species is neither endangered nor threatened because it is extinct, because it has recovered, or because the original listing decision was in error. *See* 50 C.F.R. § 424.11(d). Decisions to reclassify an already-

listed species are governed by the same standards as listing a species[2] and thus the FWS must conduct the same Section 4(a)(1) threats analysis before removing a species from the endangered species list as it does when listing the species. 16 U.S.C. § 1533(c)(2)(B); *see also Defenders of Wildlife v. Babbitt,* 130 F.Supp. 2d 121, 133 (D.D.C 2001) (noting that "the same five statutory factors must be considered in delisting as in listing") (citations omitted). A species has not recovered, and cannot be delisted, "until the threats to the species as analyzed under section 4(a)(1) of the Act have been removed." 51 Fed. Reg. 19,926, 19,935 (June 3, 1986).

As such, when deciding whether to delist a species, the FWS must conduct the analysis of the Section 4(a)(1) listing and delisting factors *on the species level*. *See* 16 U.S.C. § 1533(a) (the FWS may determine "whether any *species* is an endangered species or threatened species" on the basis of the five factors) (emphasis added). Because the previous listing consisted of the conterminous United States, the FWS must make its delisting determination based on an analysis of threats to the originally listed entity. Yet, in the Delisting Rule, the FWS only analyzed threats to wolves within the DPS it created, irrespective of the status of the entity listed in 1978, and failed to adequately explain why the conterminous United States (or any region outside of the western Great Lakes area on which the delisting rule is focused), is no longer the appropriate geographic context for measuring the gray wolf's condition.

In addition, the FWS failed to adequately analyze whether wolves remain threatened or endangered within a "significant portion" of their range." *See* 16 U.S.C. § 1532(6). Instead of considering the wolves' historic range – as required by the statute, the Service limited its "range" analysis to that portion of the DPS known to be presently occupied by the species – thereby discounting the large unoccupied (and rarely occupied) region where wolves were once viable. This limitation conveniently ignores the first listing factor and the fact that the wolf

---

[2] The five listing factors are:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1).

remains extirpated throughout 95 percent of its historic range. *See* 16 U.S.C. § 1533(a)(1)(A). Moreover, in concluding that the western Great Lakes wolf population is recovered in a "significant portion" of its range, the FWS failed to adequately justify the "insignificance" of the potential habitat lying outside the boundaries of the DPS.

B. The FWS Cannot Rely on the Recovery Plan for the Eastern Timber Wolf

In an attempt to justify the delisting, the FWS relies heavily on the Recovery Plan for the Eastern Timber Wolf. This outdated Plan, issued in 1978 and revised in 1992, focuses on the eastern timber wolf (*Canis lupus lycaaon*), a subspecies that lost relevance as a listed entity when the FWS listed the gray wolf at the species level in 1978. Indeed, in its delisting rule, the FWS states that it now believes that all wolves in the western Great Lakes are gray wolves (*Canis lupus*) – and that gray wolves and eastern wolves do not coexist in the region as it had indicated in the proposed rule – and de-listed them as such. 76 Fed. Reg. at 81,688. The FWS cannot rely on a recovery plan for what it now believes may be a separate species to delist gray wolves in the Great Lakes. The FWS's reliance on the Recovery Plan for the Eastern Timber Wolf to delist the gray wolf in the western Great Lakes is thus arbitrary and capricious, and fails to comply with the requirement that de-listing decisions be based solely on the best available science, in violation of the ESA. 16 U.S.C. § 1533(b)(1)(A), (c)(2).

IV. The Gray Wolf Does Not Meet the Statutory Criteria for Delisting

Setting aside the FWS's improper use of the DPS tool, as explained above, a species has not recovered, and cannot be delisted, "until the threats to the species as analyzed under section 4(a)(1) of the Act have been removed." 51 Fed. Reg. at 19,935. Thus, because a species can be listed solely on the basis of "the inadequacy of existing regulatory mechanisms," 16 U.S.C. § 1533(a)(1)(D), a species cannot be delisted unless adequate regulatory measures exist to protect the species and ensure its long-term conservation after federal protections are removed. The FWS's decision to de-list wolves in the western Great Lakes in the face of inadequate regulatory mechanisms, and its determination that such management measures are in fact adequate, is arbitrary, capricious and violates the ESA, 16 U.S.C. § 1633.

As an initial matter, six of the nine states within the FWS's designated DPS have no wolf management plan at all. These states include North Dakota, South Dakota, Iowa, Illinois, Indiana and Ohio. The existing (or rather non-existing) regulatory mechanisms in these areas are thus woefully inadequate and fail to

ensure the continued survival of wolves that travel into these areas. Indeed, the FWS expressly acknowledges in its Delisting Rule that wolves will receive little to no protection in these areas. *See e.g.*, 76 Fed. Reg. at 81,713 ("federally delisted wolves that might disperse into Indiana and Ohio would lack State protections there…"). Despite this, the FWS arbitrarily and capriciously concludes that the existing regulatory mechanisms in these areas are sufficiently protective of wolves.

The regulatory mechanisms of the three states that at least have wolf management plans – Minnesota, Wisconsin, and Michigan – also fail to adequately protect wolves. In its analysis of the regulatory mechanisms in Minnesota, Wisconsin, and Michigan, the FWS gives short shrift to consideration of the effects of sport hunting and trapping because the wolf management plan of each state did not include provisions for a public hunt immediately following delisting. Indeed, Minnesota's Wolf Management Plan included a five-year moratorium on recreational killing following federal de-listing. However, recent action by the states of Wisconsin and Minnesota not only break promises made in their wolf management plans, but betray their continued hostility toward the presence of wolves in the region.

For example, last summer, the Minnesota legislature revoked the Minnesota's Wolf Management Plan's five-year moratorium on recreational killing following federal de-listing, authorizing the state wildlife agency to establish rules for an open season on wolves. Minn. Stat. § 97B.645. This summer, following de-listing, the Minnesota Department of Natural Resources established a public hunting and trapping season via emergency rules and set the quota at 400 wolves – roughly 13 percent of the states estimated wolf population. Similarly, the Wisconsin legislature rushed through legislation in April of this year that mandated the Wisconsin Department of Natural Resources establish hunting and trapping regulations, and that it do so for the 2012-2013 season via emergency rule. *See* Wis. Act 169. This summer, the state wildlife agency finalized the emergency rules and set the quota at 201 wolves, roughly 24 percent of the estimated wolf population in the state. However, this quota fails to properly account for the fact that recent studies indicate that human-caused mortality is highly additive and fails to account for level of impact from illegal takes, depredation controls, and vehicle collisions. When these deaths are added to the hunting quota, the 2012-2013 wolf hunt could actually result in a total death toll of 490 wolves, or 57 percent of the wolf population – well above the 25-29 percent of human-caused mortality the best available science indicates the population can withstand, thereby threatening the continued existence of the wolf population.

Other aspects of Minnesota and Wisconsin's wolf management scheme are inadequate to ensure the survival of gray wolves. For example, in Wisconsin, the wolf management plan sets a target goal of 350 wolves. *See* Wisconsin Wolf Management Plan Addendum at 3 (2006). The fact that Wisconsin has a target goal – rather than a statewide minimum number of wolves – makes a significant decline in its wolf population inevitable. In addition, private individuals are permitted to kill wolves attacking domestic animals and could receive permits to kill wolves in areas of previous wolf depredation. In Minnesota, landowners within approximately 60 percent of the state may kill a wolf to "protect[] livestock, domestic animals, or pets" even when there is no immediate threat. *See* Minnesota Wolf Management Plan (February 2001). The Minnesota Plan also authorizes the establishment of "predator control areas" to take wolves near a depredation site; it resurrects the old bounty system by paying state-certified predator controllers for each wolf killed. *Id.*

Michigan's wolf management scheme is also similarly lacking. For example, wolves are threatened by laws passed in 2008 that liberalize their control in that state. *See* MICH. COMP. LAWS §§ 324.95153, 324.95163. These laws significantly weaken of the protections for wolves provided by the Michigan Wolf Management Plan that was approved by the state in July of the same year. By example, the Michigan wolf management plan prohibited lethal control of wolves by livestock producers when problems could be addressed by other non-lethal means. But the state law removes this restriction on lethal control, allowing livestock and dog owners to use lethal means as a first resort when a gray wolf preys upon their animals. *Id.*. The expansive language of these laws does not limit lethal control to wolves in the act of attacking an animal and places no limit on how wolves can be killed. *Id.* Even wolves on public lands can be killed. *Id.*

The FWS's decision to delist the gray wolf despite these regulatory mechanisms that allow significant levels of human-caused mortality, the effects of which it has failed to properly analyze, is arbitrary, capricious and contrary to the ESA, 16 U.S.C. § 1533. Similarly, the FWS's decision to delist wolves in the western Great Lakes in light of inadequate funding for enforcement, the study and monitoring of wolves and wolf mortality, and other aspects of the states' management plans, as well as extant threats from disease, hybridization and habitat loss, is arbitrary, capricious and violates the ESA, 16 U.S.C. § 1633

V. The FWS's Decision to Delist Wolves in the Western Great Lakes Jeopardizes the Continued Existence of Wolves

The ESA requires that the FWS ensure that its actions do not jeopardize the continued existence of any listed species. 16 U.S.C. § 1536(a)(2). The Delisting Rule violates this mandatory duty by jeopardizing the continued existence of the remnant population. Stripping wolves of federal protection in the Great Lakes – a source of wolves necessary for the recolonization of the rest of the wolf population – subjects these wolves to widespread killing under hostile state management plans, essentially eliminating the prospect of wolves dispersing out of the DPS-boundary and recolonizing suitable habitat within the remnant population. Without a stable source population of wolves, the viability of the species that occupies the non-DPS remnant is jeopardized. Moreover, the FWS failed to engage in Section 7 consultation or otherwise analyze how the Delisting Rule would impact the non-DPS remnant, in violation of the ESA. *Id.*

In addition, the FWS's decision to delist wolves in the western Great Lakes before completing a status review of wolves in the eastern 29 states is arbitrary, capricious and not in accordance with the ESA. In the proposed rule, the FWS indicated that both gray wolves and a new species – the eastern wolf – occupied the Great Lakes area, and that the FWS was initiating a status review for the eastern wolf. 76 Fed. Reg. 26,086 (May 5, 2011); 76 Fed. Reg. 53,379 (Aug. 26, 2011). Then, in the Delisting Rule, the FWS stated it had reconsidered its position and determined that the wolf population in the western Great Lakes consisted of only the gray wolf, but that it would make a subsequent decision at an as yet unspecified time as to the status of wolves—whether they are gray wolves or a separate species—in the other 29 eastern states. 76 Fed. Reg. at 81,687-88. The FWS must resolve the question of what species of wolves now occupy and have historically occupied the western Great Lakes region and areas of the eastern U.S. outside that region before delisting wolves in the Great Lakes. The FWS's decision to delist wolves in the western Great Lakes without an adequate understanding of the status of wolves in the remnant population jeopardizes the continued existence of wolves both inside and outside the line the agency created through creation of the western Great Lakes DPS.

Conclusion

For the foregoing reasons, the FWS's decision to eliminate federal ESA-protections for the gray wolf in the western Great Lakes is arbitrary, capricious, and otherwise not in accordance with the ESA and its implementing regulations. If

the FWS does not withdraw its delisting rule within sixty days, The Humane Society of the United States and the Fund for Animals will initiate litigation in federal court to resolve the matter.

Sincerely,

Kristen Monsell
Attorney for
The Humane Society of the United States and
The Fund for Animals
2100 L Street, NW
Washington, D.C. 20037
kmonsell@humanesociety.org

ATTACHMENT

THE HUMANE SOCIETY
OF THE UNITED STATES

July 5, 2011

Via Federal eRulemaking Portal
Public Comments Processing
Attn: FWS–R3–ES–2011–0029
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

Re: Comments on Proposed Rule to Revise the List of Endangered and Threatened Wildlife for the Gray Wolf (*Canis lupus*) in the Eastern United States, Initiation of Status Reviews for the Gray Wolf and for the Eastern Wolf (*Canis lycaon*)

On behalf of the Humane Society of the United States (HSUS), the Fund for Animals, (The Fund), and our nearly 11 million members and supporters nationwide, we submit the following comments on the United States Fish and Wildlife Service's (FWS) proposed rule to revise the listing status of gray wolves (*Canis lupus*) in the eastern United States, and to initiate a status review for gray wolves and the newly recognized eastern wolves (Canis lycaon).

We are concerned that these actions, and indeed, the entirety of the FWS's new national wolf strategy, are designed to effectively delist gray wolves, and any subspecies thereof, throughout the lower 48 states, with the possible exceptions of the Pacific Northwest and Southwest regions, despite the fact that gray wolves occupy a fraction of their historic range and continue to be threatened by habitat loss and human persecution.

Further, the FWS's proposal to remove of protections for the gray wolf in 29 eastern states is based on unsettled science with respect to the recognition of a new species of wolf, the eastern wolf, and removes protection from wolves in the Northeast prior to FWS's completion of a status review for the eastern wolf, which could result in the listing and reintroduction or other recovery

efforts for eastern wolves within these states. The FWS should not remove protections from any portion of the eastern United States until the agency has thoroughly reviewed the science concerning the wolf species in the eastern United States, their individual abundance and sustainability, and any interaction between different species of wolves. This is especially true with respect to the western Great Lakes region, where the FWS has indicated that gray wolves and eastern wolves, which are essentially indistinguishable on sight, coexist at present. In short, the delisting of gray wolves in the western Great Lakes region cannot be finalized, and should not have been proposed, prior to completion of the status reviews for gray wolves and eastern wolves.

Finally, we specifically oppose delisting of wolves in the western Great Lakes region at this time. We recognize that significant gains toward recovery of wolves in this region have been made, and we applaud the FWS for its role in this process. However, the FWS cannot delist a species in one portion of its historical range while the species remains endangered of extinction throughout the remainder of its historical range, and where viable habitat for the species exists such that further recovery within its historical range can be promoted. Further, current state management plans for wolves in the western Great Lakes region are hostile to wolves and insufficient to ensure that the long-term survival of wolves in the region. Thus removal of federal protections for wolves in the western Great Lakes region at this time is premature, unlawful, and imprudent.

I. Wolves Should Be Protected Throughout the Lower 48 States, Including the 29 Eastern States in which the FWS Intends to Remove Protections for Gray Wolves

In its proposed rule, the FWS makes clear that it now plans to abandon the listing of wolves throughout the lower 48 states, despite admitting that areas which would be left out of the FWS's new regional approach "are within the species' historical range." (76 FR 26090). The Endangered Species Act (ESA) requires listing of a species if it is endangered or threatened "throughout all or a significant portion of its range." 16 U.S.C. § 1532 (6), (20). The FWS attempts to justify this decision by finding, solely for the purposes of this rulemaking and inconsistent with prior agency rulemakings, that "a portion of a species' range [is] significant if it is part of the current range of the species." (76 FR 26140).

Several federal courts have rejected agency attempts to limit consideration of listing to the current range of a species. *See National Wildlife Federation v. Norton*, 386 F. Supp. 2d 553, 566 (D. Vt. 2005) ("The Final Rule makes all other portions of the wolf's historical or current range outside of the core gray wolf populations insignificant and unworthy of stringent protection. The Secretary's conclusion is contrary to the plain meaning of the ESA phrase "significant portion of its range," and therefore is an arbitrary and capricious application of the ESA."); *Defenders of Wildlife v. Norton*, 239 F.2d 9 (D.D.C. 2002) (FWS's focus on "only one region of the Lynx's population--the Northern Rockies/Cascades--to the exclusion of three-quarters of the Lynx's historical regions is antithetical to the ESA's broad purpose to protect endangered and threatened species"); *see also Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870 (9th Cir. 2009); *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001). As such, the FWS's decision to interpret the ESA so as to facilitate removal of federal protections for wolves outside of their current range is patently unlawful.[1]

Further, areas which will, or may be, left out of the FWS's new regional approach currently, such as the Northeastern United States and the southern Rocky Mountains, include viable wolf habitat. *See*, *e.g.*, D.J. Mladenoff & T.A. Sickley. *Assessing potential gray wolf restoration in the northeastern United States: A spatial prediction of favorable habitat and potential population levels*, JOURNAL OF WILDLIFE MANAGEMENT, 62: 1-10 (1998) (using logistic regression to model wolf habitat in the Northeast and determining that habitat from upstate New York to Maine could support a population of 1,312 wolves); 71 Fed Reg. 15279 (discussing unoccupied wolf habitat in Michigan and North Dakota); 65 Fed. Reg. 43474 (noting that "there is certainly habitat that could support wolves" in western states such as Oregon, Utah, and Colorado). Indeed these areas may provide valuable habitat corridors for dispersal of wolves to and from different pack units, a behavior that is essential for wolf survival.

Thus, a region by region approach to the application of the ESA to wolves is not only unlawful, it is not scientifically justifiable. Wolves cannot adequately disperse, and new breeding populations cannot be established, if protections for wolves are not maintained in suitable habitat and migratory corridors for wolves.

---

[1] In fact, the FWS's "current range" interpretation of the ESA would likely have prevented the reintroduction of wolves in the Yellowstone area, an effort which has allowed wolves to once again occupy a large portion of the viable wolf habitat in the northern Rocky Mountains region.

Among those areas in which gray wolves would never again be considered for listing are 29 eastern states outside the western Great Lakes, which have until now been considered a part of the historic range of gray wolves, and in which gray wolves are currently listed as endangered. The FWS's conclusion that gray wolves never existed in these 29 states, and that a newly recognized species, the eastern wolf, was the only wolf species to ever occupy these states, is a matter of continuing scientific debate. Removal of federal protections for wolves in these 29 states is therefore premature, and certainly must await completion of the status reviews for gray wolves and eastern wolves.

While some scientific studies have concluded that the eastern wolf, previously considered a subspecies of gray wolves known as the eastern timber wolf, is actually a separate species, *see* Fain et al. 2010; Wilson et al. 2000, the FWS admits that other reputable scientific studies have reached contrary conclusions, *see* vonHoldt et al. 2011; Koblmuller et al. 2009; Nowak 2009; Leonard and Wayne 2008; Nowak 2003; Lehman et al. 1991.[2] (76 FR 26093). These studies question whether gray wolves and eastern wolves are separate species, or whether they are simply different ecotypes of the same species (i.e., the product of phenotypic variation among different populations of the same species). Some of these studies attribute observed variation among wolf populations to hybridization with other canids, such as coyotes.

Further, even assuming the FWS's recognition of a new wolf species is accurate, the possibility of a second wolf species in the eastern United States also has significant implications for the FWS's delisting plans in the western Great Lakes region. The FWS has indicated that it believes that both gray wolves and eastern wolves presently coexist in the region, and that these wolves are essentially indistinguishable on sight. As such, the FWS's abundance data for gray wolves in this region may be skewed. In fact, the FWS has indicated that it believes that a majority of wolves in the western Great Lakes region are likely to be eastern wolves. Thus, reported numbers of gray wolves in the region are likely to be

[2] Indeed, Wayne, Pollinger and vonHoldt have also submitted comments to the proposed rule stating that the taxonomic revision proposed by the FWS is not based on the best available science. Further, U.S. Geological Survey biologist L. David Mech has submitted comments noting that the existence of a separate wolf species is in question within the scientific community.

overstated, and the recovery goals for this region, established nearly two decades ago, are likely to be inaccurate.

In addition, the presence of a second wolf species in the western Great Lakes region would require that information regarding the true range of gray wolves in the region, pack dispersal behavior, sufficiency of genetic exchange between members of the same species, the amount of suitable habitat necessary to support both species, and other issues important to the survival of gray wolves in the region all need to be considered prior to any effort to delist gray wolves in the region. Certainly it would be completely arbitrary for the FWS to proceed in an effort to delist gray wolves prior to completing a status review for the newly recognized eastern wolves occupying the same region.

Moreover, the FWS's admission that both gray wolves and eastern wolves presently occupy portions of the western Great Lakes region makes delisting of gray wolves imprudent at this time. If the eastern wolf is listed under the ESA in this region, gray wolves would also need to be listed because of the similarity of appearance of the two wolf species. *See* 16 U.S.C. § 1533(e).[3]

Wolves continue to face significant threats over the entirety of their range, including disease, hybridization, habitat loss, and human persecution. Maintaining a listing framework over all of the lower 48 states, and certainly in all areas of wolves' historical range may be crucial to ensuring their survival. Wolves remain at risk in the 29 eastern states in which delisting is proposed, and federal protections for gray wolves should be maintained throughout this area at this time.

II. Gray Wolves Should not be Delisted in the Western Great Lakes Region at this Time

The HSUS and The Fund have several concerns about FWS's proposal to remove federal protection from wolves in the Great Lakes region. First, the FWS cannot

[3] FWS officials at the public meetings in Ashland, Wisconsin on May 18, 2011 and Grand Rapids, Michigan on June 14, 2011 stated that wolves in the western Great Lakes region will be managed as one entity, and that the FWS will not list one species without listing the other. This again begs the question why the agency is proceeding with a delisting effort for gray wolves in the Great Lakes region while the status review for eastern wolves in the same region is still pending.

lawfully designate a DPS for the sole purpose of delisting the DPS, which is contrary to the ESA and the agency's own DPS policy. Second, the FWS cannot include significant portions of the wolf's range where wolves have not yet recovered within the delisted DPS, and must ensure that the boundaries of any DPS designation are based solely on biological factors. Finally, wolves in the western Great Lakes region continue to face significant threats to their survival, including hostile state management plans aimed at quickly and drastically reducing the wolf population.

The HSUS and The Fund also incorporate into this comment letter the comments that the HSUS submitted on October 26, 2010 in response to the FWS's 90-day finding on several petitions to delist gray wolves in the western Great Lakes region, which was published in the Federal Register on September 14, 2010. (75 FR 55730).

A. The FWS Unlawfully Designated the Western Great Lakes DPS for the Sole Purpose of Delisting the DPS

The ESA's definition of "species" includes "any subspecies . . . and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). By amending this definition to include "distinct population segments," Congress extended the protections of the ESA to locally vulnerable populations of vertebrate fish and wildlife species in circumstances where the species as a whole is not endangered or threatened. The plain language of the statute does not sanction the FWS's attempt to carve out a DPS from a species-level listing for the purpose of reducing the protections for a segment of a listed species.

In designating a new western Great Lakes DPS for the sole purpose of removing federal protections from wolves within that DPS, the FWS's proposed rule suffers from the same legal defects as the one vacated in *Humane Society of the United States v. Kempthorne*, 579 F.Supp. 2d 7 (D.D.C. 2008). In that case, the court questioned the agency's use of the DPS tool, finding that the text of the ESA "quite strongly suggests consistent with common usage – that the *listing* of any species (such as the western Great Lakes DPS) is a precondition to the delisting of that species." *Id*. at 17.

The agency's own DPS Policy likewise confirms that DPSs are a proactive measure to *prevent* the need for listing a species over a larger range. The DPS Policy

provides that a vertebrate population must be both "significant" and "discrete" to be designated as a DPS. (61 FR 4725). The requirement that a population segment be "significant" reflects how the DPS tool is to be properly used. Simply stated, the DPS Policy instructs that a DPS be designated only if the population segment is important enough to warrant protection. Like the ESA's restriction of the DPS tool to vertebrates, the Policy's restriction of DPSs to "significant" populations makes no sense if this tool could be used to remove protections from a population already protected by a listing. Under such a theory, the DPS Policy would allow the removal of federal protections from a "significant" population of an endangered species, while forbidding this option for non-significant populations.

As the DPS Policy explains:

> Listing, delisting, or reclassifying distinct vertebrate population segments may allow the Services to protect and conserve species and the ecosystems upon which they depend before large scale decline occurs that would necessitate listing a species or subspecies throughout its entire range. This may allow protection and recovery of declining organisms in a more timely and less costly manner, and on a smaller scale than the more costly and extensive efforts that might be needed to recover an entire species or subspecies.

(61 FR 4725). In short, the DPS tool is intended to be used to protect a population segment without having of list the entire species. Nowhere does the Policy state or even imply that DPSs can be used to strip federal protections from a portion of a listed species.

Consistent with the language of the ESA and the FWS's DPS Policy, several federal courts have concluded that DPSs should be used only when listing a species or subspecies is not warranted, but a local population of the species is facing additional threats. *See Defenders of Wildlife*, 354 F.Supp. 2d at 1169 ("[I]f a distinct and significant population of an unlisted species is struggling while other populations are faring well, FWS may designate the struggling population as a DPS and list it as endangered."); *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 842 (9th Cir. 2003) (noting that under the DPS Policy "[t]he FWS does not have to list an entire species as endangered when only one ofits populations faces extinction"); *Friends of the Wild Swan*,12F.
Supp. 2d at 1133.

In sum, Congress never intended that a DPS could be used as a delisting tool, because to do so would hinder species recovery rather than promote it.

B. The Boundaries of the DPS Unlawfully Include Significant Portions of the Species' Range Where Wolves have Not Yet Recovered and do Not Promote Species Protection

Even if a DPS could be created for delisting purposes – which, for the reasons stated above, it cannot – the boundaries should include, at most, core areas in which a population has fully recovered. It is essential to the continued conservation of the species that further expansion of the species beyond the core recovery area be allowed. However, a DPS that includes portions of the species' range where the species has not yet recovered would preclude any natural expansion of the species, and thus fail to recover wolves to all significant portions of the range, as the ESA requires. 16 U.S.C. § 1532(6).

ESA protections enabled gray wolves in the western Great Lakes to disperse from Minnesota to Wisconsin and the Upper Peninsula of Michigan. Now wolves in the Upper Peninsula are serving as a source population for the Lower Peninsula of Michigan. Recovery in this area has just begun. Last year, researchers confirmed the presence of a breeding pair of wolves with pups in the Lower Peninsula of Michigan for the first time in decades. *See* Michigan Department of Natural Resources, *Wolf Pup Captured and Released in the Northern Lower Peninsula* (July 27, 2010), *available at* https://www michigan.gov/dnr/0,1607,7-153-10371_10402-241284-,00.html. Yet, the FWS's proposed delisting rule would include the northern Lower Peninsula of Michigan in the western Great Lakes DPS (in addition to the separate proposal to remove the listed status of gray wolves outside of this DPS), and thus fail to encourage further recovery of the species into areas of viable wolf habitat.

Courts have rejected previous attempts by FWS to reduce protections by creating DPSs with expansive boundaries. When FWS created three DPSs to downlist wolves in the 2003 rule, the agency drew boundaries that went far beyond the core wolf populations. The courts rejected this effort to remove ESA protections from such wide swaths of the wolf's historic range. As the
District of Vermont held, the "FWS simply cannot downlist or delist an area that it previously determined warrants an endangered listing because it 'lumps together' a core population with a low to non-existent population outside of the core area." *Nat'l*

Wildlife Fed'n, 386 F. Supp. 2d at 565. The loss of federal protections within the DPS boundaries in the proposed rule, together with the lack of any real protections under state law, would effectively confine the wolf to the core areas where recovery has already begun and hamper dispersal into nearby unoccupied but significant portions of the species range.

In sum, any delisted DPS that includes unoccupied areas of significant habitat would be unlawful, because this would hinder further expansion and recovery of the species, rather than promote it.

C. Delisting is Imprudent Where Current State Management Plans Encourage Dramatic Reductions in Wolf Populations

In addition to extant threats from disease, hybridization and habitat loss, wolves in the western Great Lakes are threatened by hostile state wolf management plans and state laws governing the take of wolves in Minnesota, Wisconsin, and Michigan, which would allow intensive killing of wolves.

Upon delisting of wolves in the Great Lakes, the wolves would lose all federal protection and would be subjected to state management (or the lack thereof). Severe population decline is a virtual certainty. The killing of wolves would immediately begin under intensive depredation control programs in Minnesota, Wisconsin, and Michigan. Hunting of wolves would soon follow. Collectively, the plans in these three states would permit a 50 percent decline in the Great Lakes wolf population. *See* 75 Fed. Reg. 55734 (summarizing the state plans that provide a minimum population of 1600 in Minnesota, a 350 population target for Wisconsin, and minimum population of 200 in Michigan). This drastic population decline would not only threaten the Great Lakes population, but it would also prevent this population from serving as a source of dispersing wolves that could repopulate unoccupied portions of the wolf's range.

In Minnesota, an increase in the number of wolves killed will occur under state management. Because wolves in Minnesota are currently listed as a threatened species under the ESA, private individuals cannot legally kill depredating wolves. See 50 C.F.R. § 17.40(d) (Oct. 1, 2005). Upon delisting, landowners within approximately 60 percent of the state may kill a wolf to "protect[] livestock, domestic animals, or pets" even when there is no immediate threat. *See* Minnesota Wolf Management Plan (February 2001). The Minnesota Plan also authorizes the

establishment of "predator control areas" to take wolves near a depredation site; it resurrects the old bounty system by paying state-certified predator controllers $150 for each wolf killed. *Id.* In Minnesota, eight wolves were killed in the first two weeks of state management under the (later vacated) 2009 delisting rule. Continuation of that intensive level of take would result in significant declines in the wolf population over time.

In Wisconsin, the wolf management plan sets a target goal of 350 wolves. The fact that Wisconsin has a target goal – rather than a statewide minimum number of wolves – makes a significant decline in its wolf population inevitable. Because more than 350 wolves inhabit Wisconsin, upon delisting "proactive control" of wolves by government trappers would be authorized statewide. *See* 1999 Wisconsin Wolf Management Plan; Wisconsin Wolf Management Plan Addendum 2006 and 2007. Even wolves in wild areas that have not caused depredations would be killed, as the goal of the trapping program is to reduce the number of wolves statewide by over half to just 350 wolves. Private individuals would be permitted to kill wolves attacking domestic animals and could receive permits to kill wolves in areas of previous wolf depredation. *Id.*

In Michigan, wolves would be threatened by laws passed in 2008 that liberalize their control in that state. *See* MICH. COMP. LAWS §§ 324.95153, 324.95163. These laws result significantly weaken of the protections for wolves provided by the Michigan wolf management plan that was approved by the state in July of the same year. For example, the Michigan wolf management plan prohibited lethal control of wolves by livestock producers when problems could be addressed by other non-lethal means. But the state law removes this restriction on lethal control, allowing livestock owners to use lethal means as a first resort when a gray wolf preys upon livestock. MICH. COMP. LAWS § 324.95153. The expansive language of these laws does not limit lethal control to wolves in the act of attacking an animal and places no limit on how wolves can be killed. MICH. COMP. LAWS §§ 324.95153, 324.95163. Even wolves on public lands can be killed. *Id.*

Respectfully submitted,

Ralph E. Henry
Senior Attorney, Wildlife
The Humane Society of the United States