



September 8, 2014

Todd K. Grimm, State Director
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VIA EMAIL AND CERTIFIED MAIL

Re: Idaho Wildlife Services compliance with NEPA, ESA

Dear Mr. Grimm:

In accordance with the 60-day notice requirement of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), Western Watersheds Project, WildEarth Guardians, the Center for Biological Diversity, and Friends of the Clearwater hereby provide notice of intent to sue for violations of the ESA relating to Idaho Wildlife Service’s ongoing operations and programs, as well as violations of compliance with the National Environmental Policy Act (“NEPA”).

NEPA ISSUES

The U.S. Department of Agriculture-Animal and Plant Health Inspection Service-Wildlife Services (“WS”) issued a Central and Northern Idaho Predator Control Environmental Assessment (“EA”) in 1996, along with a subsequent finding of no significant impact (“FONSI”) in 2004. It issued an EA and FONSI for Predator Damage Management in Southern Idaho in 2002, with a “five year update” in 2007 and another FONSI in 2008. A subsequent EA and FONSI issued in 2011 concerned Idaho wolf management only.

After examining these documents, it is apparent that WS’s operations in Idaho have been and are being conducted with either no or inadequate compliance with NEPA.

Because Idaho WS’s EAs tier to the outdated 1994/1997 Animal Damage Control Programmatic Environmental Impact Statement (“PEIS”), and because much of the literature upon which WS relies is outdated or uninformed by the best available science, we request that WS conduct a new environmental analysis – either new EAs or a cumulative environmental impact statement (“EIS”) for the State of Idaho, and that in the meantime it cease and desist all operations until adequate analyses are undertaken.

Please find enclosed a CD containing the following documents, which are incorporated herein:

- 1) Demand for Immediate Supplementation of the 1994/1997 Animal Damage Control PEIS (Keefover-Ring 2009a)
- 2) [War on Wildlife: The U.S. Department of Agriculture's 'Wildlife Services': A Report to President Barack Obama and Congress](#) (Keefover-Ring 2009b)
- 3) [Beaver and Climate Change Adaptation in North America: A Simple, Cost-Effective Strategy](#) (WildEarth Guardians 2011)
- 4) Declaration of Carter Clarence Niemeyer and Attachments, *Friends of the Wild Swan v. Vermillion*, 13-CV-66-M-DLC (D. Mont.) (March 6, 2014)
- 5) [Sixty-Day Notice of Intent to Sue for Violations of the ESA for Take of Canada Lynx Incidental to Authorized Recreational Trapping](#) (Center for Biological Diversity 2014) ("Lynx Notice Letter")
- 6) A folder of recent scientific literature relating to carnivores that should be considered in any updated NEPA analysis.

I. NEPA COMPLETION AND SUPPLEMENTATION

NEPA directs all federal agencies to prepare "a detailed statement . . . on the environmental impact of the proposed action" for every major Federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(c)(i). NEPA procedures insure that environmental information is available before decisions are made and before actions are taken. 40 C.F.R. § 1500.1(b), (c).

An agency has a continuing obligation to comply with NEPA and must prepare a supplemental NEPA document when "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" emerge. 40 C.F.R. § 1502.9(c)(1)(ii). WS has a continuing duty to gather and evaluate relevant new information. Even after the agency has begun to implement an approved project, it must supplement its analysis "if there remains major federal action to occur and the new information shows that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Or. Natural Res. Council Action v. U.S. Forest Serv.*, 445 F. Supp. 2d 1211, 1219 (D. Or. 2006) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989)). This duty to supplement applies whether the agency has prepared an EIS or an EA. *Idaho Sporting Congress Inc. v. Alexander*, 222 F.3d 562, 566 n.2 (9th Cir. 2000).

An agency must re-examine its decision when its analysis "rests on stale scientific evidence . . . and false assumptions." *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993). An agency also must supplement if an analysis makes "substantial changes" to the proposed action "that are relevant to environmental concerns." 40 C.F.R.

§ 1502.9(c)(1)(i); *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 560–61 (9th Cir. 2006). Such changes may include changes to the project design or relied-upon mitigation measures.

II. NEED TO COMPLETE AND SUPPLEMENT NEPA

Idaho WS's NEPA documents require immediate supplementation because a wealth of new information on myriad aspects of wildlife damage management shows that WS's ongoing actions are affecting the quality of the human environment in a significant manner and to a significant extent not already considered. Additionally, numerous components of the program are simply not analyzed at all in the existing NEPA documents, and require completion of an **initial** NEPA analysis.

A. Role of Carnivores and Beavers in Ecosystems; Risks of Removal

The EAs, FONSI, and reviews lack any up-to-date discussion of the role of carnivores in a healthy ecosystem or the environmental impacts of WS's removal of them. As described in War on Wildlife, carnivores have many complex and positive effects on the ecosystem, and their removal has many harmful impacts. War on Wildlife at 13-34. Many of the studies cited therein and attached were published subsequent to the Idaho WS NEPA documents.

For example, numerous recent studies discuss the concept of trophic cascades and how carnivore removal significantly alters native plant communities, wildfire, biogeochemical cycles, invasive species, and more. *E.g.*, Beschta, R.L., Ripple, W. J. Large predators and trophic cascades in terrestrial ecosystems of the western United States. *Biol. Conserv.* (2009); Estes et al. Trophic downgrading of planet earth. *Science* (2011) (attached). But the Idaho WS EAs do not even analyze this concept. A 2013 study enclosed concludes that WS predator damage management's "survival into the 21st century defies the consensus among ecologists that significant reductions in local populations of native primary consumers and apex predators has had far-reaching consequences on primary production, nutrient flows, disease incidence, and biodiversity at all levels and at all spatial scales." Bergstrom, et al. License to kill: reforming federal wildlife control to restore biodiversity and ecosystem function. *Cons. Letters* (2013) (citing literature). It recommends that WS adopt a more holistic, ecosystem-based approach, with priority given to: conducting full economic valuation of wildlife subject to lethal control; prioritizing nonlethal, preventive methods; and preparing an updated, peer-reviewed environmental impact statement on all WS lethal control programs using current science. *Id.*

New science questions the efficacy of predator control to help sage-grouse, which the Southern EA assumed was beneficial. Southern EA at 1-7, 1-8, 2-11. A 2006 study found that coyotes indirectly benefit sage-grouse in many ways, such as controlling the number of mesopredators (red foxes, badgers, and ravens) and jackrabbits. War on Wildlife at 18. The Sage-Grouse Monograph explains that there is little evidence to support broad-scale predator control. Hagen, C. A. 2011. Predation on Greater Sage-

Grouse: facts, process, and effects. Pp. 95–100 in S. T. Knick and J. W. Connelly (editors). Greater Sage-Grouse: ecology and conservation of a landscape species and its habitats. Studies in Avian Biology (vol. 38) (attached). There are also numerous, serious concerns about the efficacy of predator control that were not analyzed in the NEPA documents. War on Wildlife at 13-34.

The EAs, FONSI, and reviews lack **any** analysis of the role of beavers in the ecosystem or the myriad harmful environmental impacts of their removal. According to recent available documents, Idaho WS currently conducts an extensive beaver dam breaching program, detonating with explosives or otherwise removing about 100 dams every five years. It also traps dozens of beavers in the state every year. But neither the breaching program nor the trapping program are analyzed at all in the NEPA documents. There is no mention of beaver populations in either EA's section on Cumulative Impacts on Viability of Wildlife Populations. See Southern EA at 4-1 to 4-12; Northern/Central EA at 4-8 to 4-14. It therefore appears that WS's beaver dam breaching and beaver trapping programs are operating without any NEPA analysis whatsoever, and therefore must immediately cease until an analysis is complete.

An updated analysis must include analysis of the beneficial impacts of beavers to ecosystems and many species including listed salmonids, as summarized in Beaver and Climate Change Adaptation in North America (attached). It must analyze the impacts of beaver dam breaching and trapping upon beaver populations, stream conditions, amphibians (including Columbia spotted frog), and fish species (including ESA-protected species such as bull trout, salmon, and steelhead). The benefits of beavers to western ecosystems are well-documented and include stabilizing streams, slowing snowmelt runoff, capturing sediment, and increasing large woody debris in streams. *Id.* These effects are particularly beneficial to fisheries; beavers can create fish habitat where no suitable habitat previously existed. *Id.* at 23-24 (citing literature). They can increase low flows and make intermittent streams perennial. *Id.* at 24. Beaver ponds are important refugia for fish during drought times and winter, and critical rearing habitat for juveniles. *Id.* (citing literature).

B. Efficacy of Non-Lethal Control Methods

There is new research on the promising efficacy of non-lethal methods such as livestock husbandry, barriers, and scaring devices such as noisemakers and fladry. War on Wildlife at 35-36. Many of the studies cited therein were published subsequent to the 1996 and 2002 Idaho EAs. See also Lance, N.J. et al. Biological, technical, and social aspects of applying electrified fladry for livestock production from wolves (*Canis lupus*). Wildlife Res. (2010) (attached). An updated analysis needs to consider this new research, as it is relevant to the feasibility of alternatives to the lethal control favored by WS.

C. Efficacy and Risks of Lethal Control Methods

There is new research on the efficacy and risks of the lethal control methods employed by Idaho WS. War on Wildlife at 27-47. For example, new research

documents the stress to wildlife caused by the noise of low-flying planes conducting aerial gunning. *Id.* at 38. There have been several crashes of aerial gunning planes subsequent to the Idaho NEPA documents, showing that the safety analysis needs to be updated. *Id.* And there is new research on the environmental harm of lead ammunition on wildlife and the environment. *Id.* at 39-41.

With respect to impacts about Idaho WS programs on threatened and endangered species and other species of special concern (collectively, “TES”), the EAs simply refer to the agency’s then-in-effect ESA consultation, incorrectly assuming that consultation eliminated WS’s duty under NEPA to analyze impacts. Southern EA at 4-17, Northern/Central EA at 4-19. However, ESA consultation **does not** satisfy agency duties under NEPA. *See Ctr. for Biological Diversity v. BLM*, 422 F.Supp.2d 1115, 1164 (N.D.Cal. 2006). It therefore appears that WS’s programs are operating without any NEPA analysis whatsoever on TES species, and therefore must immediately cease until this occurs.

Even if the extraordinarily brief mentions of TES were to be considered analyses, they are inadequate and extremely out-of-date. For example, there is significant new information available on the impacts of trapping on wildlife, particularly forest carnivores such as lynx and wolverine. *See Lynx Notice Letter*; *War on Wildlife* at 42-47; *Niemeyer Declaration* (describing the significant, foreseeable risks of trapping lynx in modern traps intended for other species) (all attached).

Also, a great deal more analysis on cumulative impacts is needed in light of a recent surge in trapping activity in Idaho in recent years. Several lynx have been trapped in Idaho in the past three years alone, and agency officials admit incidental take is being underreported. *Lynx Notice Letter*.

Finally, additional analysis is needed to update the NEPA documents’ very brief mention of risks to domestic pets. The EAs dismiss this concern, stating that domestic pets can be released unharmed from traps, and that warning signs are “always” posted where traps are set. Southern EA at 4-16, Northern/Central EA at 4-18. These statements are no longer true, if they ever were; therefore the analysis must be updated with more recent information and research.

D. Efficacy and Risks of Toxicants

There is new research on the efficacy and risks of the toxicants used by Idaho WS. *War on Wildlife* at 47-70. New research about the humaneness of various rodenticides has been published subsequent to the Idaho NEPA analyses. *Id.* at 47-48. New research on anticoagulants shows it exacerbates mange. *Id.* at 48. New research on M-44s and sodium cyanide emphasizes the dangers to humans, and several instances of humans and dogs being poisoned occurred in the 2000’s. *Id.* at 52-55. A wolf was poisoned by Compound 1080 in Idaho in 2004, and new research shows it persists for months in the soil. *Id.* at 56-58. New research and observations on DRC-1339 shows that more species are susceptible than previously believed, and that bird deaths are not

being accurately tracked. *Id.* at 59-62. New research implicates pesticides in amphibian declines, raising fresh concerns about glyphosate. *Id.* at 62-63. New research questions the humaneness of zinc phosphide and describes higher than previously believed risks of secondary poisoning. *Id.* at 66-70. And the EPA has released numerous new registration documents on Starlicide and other avian poisons. *See* attached literature.

ESA ISSUES

Idaho WS recently consulted with U.S. Fish and Wildlife Service on its statewide wildlife damage management program. In September 2013, Idaho WS prepared a BA for the proposed action of continuing its statewide wildlife damage management actions. On July 1, 2014, FWS issued a biological opinion (“BiOp”) and incidental take statements (“ITSs”) for bull trout, grizzly bears, lynx, and wolverine (BiOp 14420-2014-F-0193). Wolverine have since been removed from the candidate list.

I. WS has Failed to Insure that its Programs Do Not Jeopardize Listed Species or Destroy or Adversely Modify their Critical Habitat.

The duty to comply with Section 7(a)(2) remains with WS even after the issuance of a BiOp. After the completion of consultation, the action agency must determine whether and in what manner to proceed with the action in light of its Section 7 obligations and the BiOp. 50 C.F.R. § 402.15(a). Here, the BiOp contains errors of a legal nature and of such gravity that WS should have known not to rely upon it to fulfill its Section 7 obligations. By continuing with its statewide wildlife damage management program in reliance on the BiOp, WS has failed and continues to fail to insure that the effects of its actions are not likely to jeopardize the survival and recovery of the bull trout, grizzly bear, and lynx and will not destroy or adversely modify their critical habitat, in violation of Section 7(a)(2).

Specifically, the BiOp fails to adequately analyze baseline conditions and the effects of the statewide wildlife damage management program added to that baseline on the survival and recovery of bull trout, grizzly bears, or lynx. The BiOp’s analysis is flawed for various reasons, including that it ignores numerous impacts, interrelated/interdependent actions, and cumulative effects, such as the impact of beaver dam removal on bull trout habitat, and the impacts of private trapping activities on lynx and grizzly bears. The BiOp relies on unsupported assumptions. For example, it relies heavily upon voluntary WS measures to protect the listed species and their critical habitat, particularly lynx and grizzly bear, but fails to acknowledge the unenforceability of those strategies, their ineffectiveness, and the agency’s history of noncompliance with such measures. Overall, the BiOp fails to provide a rational connection between its findings that the Idaho WS program will take the listed species at issue, with its conclusion that the action will not jeopardize survival and recovery or adversely modify the species’ critical habitat.

FWS failed to address recovery needs, a path to recovery, the tipping point for recovery, or how further habitat degradation and population loss are consistent with recovery for bull trout, lynx, or grizzly bear. And FWS’s ultimate jeopardy and adverse

modification conclusions for bull trout focus on the incorrect scale: the entire coterminous U.S., rather than the relevant Distinct Population Segments.

Because of these shortcomings and others, WS cannot rely on the BiOp to prevent jeopardy to bull trout, grizzly bears, or lynx or destruction or adverse modification of their critical habitats. WS is continuing to violate its ongoing duty to prevent jeopardy and adverse modification of the listed species by continuing its predator damage management program in Idaho in 2014 and future years.

II. WS is Violating the Section 9 Take Prohibition for Bull Trout.

Under § 9 of the ESA, it is unlawful for any person to “take” an endangered species, and this prohibition has been applied by rule to bull trout. 16 U.S.C. § 1538(a)(1), 50 C.F.R. § 17.31. Take is defined to include engaging or attempting to engage in conduct that will “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” members of a listed species. 16 U.S.C. § 1532(19). “Harm” includes any “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.

Thus, WS is liable for take that is not authorized by a valid ITS. An ITS must “set forth a ‘trigger’ that, when reached, results in an unacceptable level of incidental take . . . requiring the parties to re-initiate consultation.” *Az. Cattle Growers’ Ass’n v. FWS*, 273 F.3d 1229, 1249 (9th Cir. 2001); *see also* 50 C.F.R. § 402.16(a) (reinitiation of formal consultation required “if the amount or extent of taking specified in the incidental take statement is exceeded”).

The BiOp’s bull trout ITS authorizes take in the form of: 162 bull trout with impaired biological needs (from explosion shockwaves), as measured by more than 54 beaver dams being detonated in bull trout streams over five years. No Reasonable and Prudent Measures are imposed, nor are any Terms and Conditions beyond monitoring and reporting requirements.

The ITS does not authorize take of any life stage of bull trout via habitat impacts from beaver dam destruction. However, take via habitat destruction is occurring when Idaho WS detonates or hand-breaches beaver dams at its current pace of approximately 100 every five years. This is because, as noted above, salmonids including bull trout rear, feed, and overwinter extensively in the deep, slow, and complex pool and off-channel habitats created by beaver dams. *See* Beaver and Climate Change Adaptation in North America at 23-25. Breaching beaver dams and trapping beavers removes this essential habitat. Dams are also important for maintaining hydrology and high water tables that contribute to streamflows. Taking them out reduces late summer flows, which are important for bull trout. Since it is not covered by the ITS, WS is liable for such take.

The ITS is invalid for further reasons. For example, it fails to provide an effective trigger to reinitiate consultation or allow WS to gauge its compliance during the action.

Nor does the ITS provide a clear standard for determining when the authorized take of bull trout has been exceeded. Additionally, the Reasonable and Prudent Measures – or lack thereof – do not serve to “minimize” take as required.

For these reasons and others, WS is liable for the ongoing bull trout take that results from its statewide Idaho wildlife damage management actions. There is every indication that this unlawful take will continue in 2014 and future years, in violation of ESA Section 9.

PARTIES GIVING NOTICE

The contact information for the parties giving notice is as follows:

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RELIEF REQUESTED

As set forth above, Western Watersheds Project, WildEarth Guardians, the Center for Biological Diversity, and Friends of the Clearwater may pursue litigation in federal court following sixty days after this notice and may seek injunctive, declaratory, and other relief, including an award of expenses incurred in investigating and prosecuting this action. To avoid such litigation, WS should cease its Idaho predator damage management operations until conducting adequate, up-to-date NEPA analysis, as well as

cease its beaver dam elimination and wildlife trapping programs until a new and adequate ESA consultation and ITS is completed.

If you have any questions, wish to discuss this matter, or believe this notice is in error, please contact the parties or me at the address on the letterhead.

Sincerely,

s/ Kristin F. Ruether

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