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Joe Martens
Commissioner

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Public Comments Processing

Attention: FWS-R3-ES-2011-0029

Division of Policy and Directives Management

US Fish and Wildlife Service

4401 N. Fairfax Drive

MS 2042-PDM

Arlington, VA 22203

Re: 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 Eastern Wolf (*Canis lycaon*)

Dear Sir or Madam:

This letter and the attachments hereto constitute the comments of the New York State Department of Environmental Conservation (NYSDEC) regarding the above-referenced proposed rule by the US Fish and Wildlife Service (Service), 76 Fed. Reg. 26086 (May 5, 2011).

Preliminary Statement

As proposed by the Service, the new rule would (i) identify the Minnesota population of gray wolves (*Canis lupus*) as a Western Great Lakes (WGL) Distinct Population Segment (DPS) and remove the WGL DPS from the list of endangered and threatened wildlife; (ii) revise the range of the gray wolf (*Canis lupus*) by removing all or parts of 29 eastern states, including the entirety of New York State, from the range and removing the gray wolf from the list of endangered and threatened species in those areas, including the entirety of New York State; (iii) elevate the gray wolf subspecies *Canis lupus lycaon* to full species status as *Canis lycaon*; (iv) initiate a status review for the Service's proposed new species, *Canis lycaon*, throughout its purported range in the United States and Canada, including New York State;¹ and (v) establish a new National Wolf Strategy that is based on significant and far-reaching changes to longstanding principles of wolf taxonomy, would leave wolves in the Northeast without any federal protection, and would essentially abandon the possibility of wolf recovery in the Northeast.

At the outset, NYSDEC objects to the Service's refusal to extend the public comment period as requested by New York. The proposed rule represents a fundamental, complex and far-reaching shift in federal wolf policy and in the Service's implementation of the Endangered Species Act.

¹ The Service also proposes to initiate status reviews specific to gray wolves in the Pacific Northwest and Mexican wolves in the Southwest United States and Mexico. NYSDEC has no comments on those aspects of the proposed rule.



The proposed rule seeks to significantly alter fundamental precepts of wolf taxonomy based on a handful of genetic studies that do not enjoy broad support in the scientific community. The Service also proposes, for the first time, a new National Wolf Strategy that represents a dramatic departure from federal wolf management strategies that have existed for decades. The proposed National Wolf Strategy is based on the Service's proposed massive re-ordering of wolf taxonomy; it would also, for the first time in more than thirty years, remove federal protection from gray wolves in the Northeast and essentially abandon the Service's longstanding commitment to wolf recovery in the Northeast. Given the complexity of the genetic studies bearing on the Service's proposed changes to wolf taxonomy and the major shift in policy represented by the proposed National Wolf Strategy, NYSDEC believes that the 60-day comment period provided by the Service was inadequate and that the Service's denial of New York's request for a 30-day extension of the comment period was unreasonable.

Furthermore, the Service has failed to coordinate and consult with the states during the development of its proposed National Wolf Strategy as required by the Service's *Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities* (59 CFR 34275, July 1, 1994). Inasmuch as the proposed National Wolf Strategy has significant implications for the management of wildlife in and by the states, and inasmuch as states have primary responsibility for the management and conservation of their wildlife, it is imperative that the Service coordinate and consult with the states prior to undertaking activities under the ESA.

NYSDEC opposes the Service's proposed rule because (i) it is based on the erroneous and scientifically insupportable premise that *Canis lupus* never inhabited the Northeast, including New York State; (ii) the proposed removal of the Northeast, including New York State, from the range of *Canis lupus* ignores documented evidence that gray wolves occasionally enter the Northeast, including New York State; (iii) the proposed removal of the Northeast, including New York State, from the range of *Canis lupus* would remove all federal protection from wolves that enter the Northeast, including New York State, thereby undermining the recovery of wolves in the Northeast; (iv) the proposal to elevate a gray wolf subspecies (*Canis lupus lycaon*) to full species status in the face of substantial scientific uncertainty and disagreement concerning wolf taxonomy generally, and this specific taxonomic change in particular, is unprecedented and not supported by a consensus of the scientific community; (v) the most recent, comprehensive genetic study of wolves supports the retention of *Canis lupus* on the list of endangered and threatened wildlife in the Northeast, including New York State, and refutes the Service's proposal that *Canis lupus lycaon* be elevated to full species status as *Canis lycaon*; (vi) the Service's proposed National Wolf Strategy is inconsistent with results and recommendations of the state participants (including New York) in the 2010 Wolf Structured Decision-Making Workshop; and (vii) the Service's proposed National Wolf Strategy essentially abandons the possibility of wolf recovery in the Northeast in contravention of the Endangered Species Act.

For the reasons identified above and discussed in detail below, NYSDEC urges the Service to withdraw those portions of the proposed rule that would delist *Canis lupus* in the Northeast, establish *Canis lycaon* as a new species, and initiate a range-wide assessment of *Canis lycaon*. NYSDEC further proposes that the Service withdraw its proposed National Wolf Strategy and convene a meeting with affected states and Indian nations to develop a national strategy for wolf recovery that reflects the most recent genetic and taxonomic information.²

² NYSDEC supports that part of the proposed rule that would delist the WGL DPS.

I. The Service's Assumption That *Canis lupus* Has Never Inhabited the Northeast is Erroneous Because it is Based on Flawed Genetic Analysis

Since 1978, the Service has correctly assumed that the gray wolf, *Canis lupus*, historically occupied the eastern United States, including New York State. Consequently, for more than 30 years, gray wolves in the Northeast have enjoyed federal protection under the Endangered Species Act.

In its proposed rule, the Service now seeks to abandon this longstanding, scientifically vetted assumption and the federal wolf protections that go with it. Citing a handful of genetic studies with limited scope and sampling, the Service now claims that "the best available taxonomic information . . . indicates that *C. lupus* historically did not occupy large portions of the eastern United States." 76 Fed. Reg. at 26088. The taxonomic information relied on by the Service in reaching this conclusion are genetic studies that purport to show that a newly proposed wolf species, *Canis lycaon*, occupied the eastern United States instead of *C. lupus*. However, the genetic studies relied on by the Service are the subject of debate among scientists, and are refuted by the most recent comprehensive genetic analysis of wolves.

As set forth in the annexed letter from Dr. Roland Kays, New York State Mammologist, the best available taxonomic information shows that *Canis lupus lycaon*, a subspecies of *Canis lupus*, formerly occupied the eastern United States. (Letter dated June 29, 2011 from Dr. Roland Kays, New York State Mammologist, annexed hereto as Attachment A). Dr. Kays points out the significant flaws in the genetic studies relied upon by the Service in proposing *C. lycaon* as a new species, including that (i) the studies confirm that other haplotypes found in eastern wolves "shows the hybrid nature of the region's canids, not only in modern animals, but also in historic specimens;" (ii) a modern population that is genetically distinct from others is not a basis for designating it a species, especially when hybridization is known to have occurred; (iii) if *C. lycaon* is a valid taxa resulting from 150,000 to 300,000 years of isolated evolution, then it would have many unique nuclear genetic markers not found in *C. latrans* or *C. lupus*, but no such markers have been found; (iv) despite concluding that modern eastern wolves are hybrids between *C. lycaon*, *C. lupus*, and *C. latrans*, none of the proponents of the *C. lycaon* hypothesis have been able to satisfactorily partial out the genetic components of their proposed parental species in a structure analysis of microsatellites; and (v) the geographic sampling in each of the studies was limited, with most comparing only within a limited region, and none including the full variety of *Canis* species and subspecies for proper comparison.

Moreover, as Dr. Kays points out, the Service's proposed reclassification of *Canis lupus lycaon* to *Canis lycaon* "is not supported by recent high-resolution genetic studies." A new study by vonHoldt et al (2011), which came out after the Service's proposed rule, addresses all of the shortcomings of the genetic studies relied upon by the Service. This study used over 48,000 nuclear SNP markers to analyze 259 animals, making it the largest genetic study of any vertebrate group. The study analyzed a global sample, with all major Eurasian and North American populations of wolves and coyotes represented. This study provides unparalleled genetic resolution as well as a global framework with which to compare populations. Thus, if *C. lycaon* did originate as an independent offshoot of coyotes, a Structure analysis of these data should group the populations of coyotes and eastern wolves at lower K, and show a unique coyote-like component within eastern wolves at higher K, even if modern animals have since hybridized with other species.

However, the Structure analysis in the study found no support for a unique eastern wolf species (vonHoldt et al 2011, figure 4). Indeed, the population of Great Lakes Wolves is less distinct than many other *C. lupus* subspecies, and both the WGL and Algonquin wolves were better characterized as hybrids between *C. lupus* and *C. latrans*, as was the red wolf. A more detailed analysis of this hybridization (Saber analysis, figure 6 in vonHoldt et al 2011) was able to show exactly which haplotype blocks on which chromosome of an individual animal originated from *C. latrans* and *C. lupus*, producing estimates of the overall genetic composition (e.g. Algonquin animals 58.1% *C. lupus* and 41.9% *C. latrans*), as well as the age of hybridization (e.g. 546 to 963 years ago in the WGL). The results of this new study, which presents unmatched genetic resolution and taxon sampling to evaluate the wolf taxonomy hypotheses, provides compelling support for retaining *C. lupus* as the wolf species that historically occupied the Northeast and provides no support for the recognition of *C. lycaon* as a unique species.

NYSDEC further opposes the Service's designation of a new species because the scientific community has not reached consensus – and in fact is seriously divided – on wolf taxonomy in general and on the *C. lycaon* hypothesis in particular. Consequently, the proposed delisting fails to meet the regulatory requirement that “a species may be delisted only if [the best available] data substantiate that it is neither endangered or threatened,” because it is extinct, recovered, or the original data for classification were in error. 50 CFR § 424.11; (emphasis added).

As the Service concedes in the proposed rule, “the taxonomic classification of wolves in the western Great lakes region is one that has been, and will continue to be, of great debate in the scientific community.” 76 Fed. Reg. at 26093. NYSDEC believes that it is inappropriate for the Service to impose its interpretation of this hotly debated matter on the scientific community without benefit of reasoned, thorough and objective analysis of the genetic evidence. Such an evaluation is particularly crucial now in light of the most recent comprehensive genetic study which seriously undermines the Service's interpretation of the genetic evidence. Accordingly, NYSDEC proposes that the Service convene a scientific conference to objectively review the available genetic evidence and make recommendations to the Service and affected states and Indian nations concerning how to resolve wolf taxonomy issues.

Moreover, NYSDEC believes that the Service's proposal contravenes the Endangered Species Act because it is very similar to a prior rulemaking that was soundly rejected by two federal courts as violating the Act. In 2003, the Service issued a final rule that, among other things, reclassified the gray wolf in the Northeast from endangered to threatened based on the Service's creation of a new Eastern DPS consisting of Northeastern and Western Great Lake states. In striking down the rule, the United States District Court for the District of Vermont stated:

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. Because the FWS expanded the boundaries of the DPS in the Final Rule, it is bypassing the application of the ESA in the non-core population areas.

National Wildlife Federation v. Norton, 386 F.Supp.2d 553, 565 (D. Vt. 2005); *see also* Defenders of Wildlife v. Secretary, 354 F.Supp.2d 1156, 1171-72 (D. Oregon 2005). Here, the Service appears to be making the same error it did in the 2003 rule by proposing to delist *Canis lupus* in the Northeast and conduct a rangewide assessment for *Canis lycaon* that will “lump together” non-core areas in the Northeast with core areas in the Western Great Lakes and Canada.

II. The Service's Proposal to Delist *Canis lupus* in the Northeast Ignores Documented Evidence that Wolves Enter the Northeast, and Would Leave Wolves Entering the Northeast Without Federal Protection

As noted above, since 1978 gray wolves in the Northeast, including New York State, have enjoyed federal protection under the Endangered Species Act. The Service's proposal to delist *Canis lupus* in the Northeast would, for the first time in more than 30 years, leave wolves entering the Northeast without any federal protection.³ This is despite documented evidence that gray wolves enter the Northeast, including New York State.

As stated by Dr. Roland Kays, New York State Mammologist, modeling studies have shown that there is substantial suitable wolf habitat in Northern New York and New England that could support a viable population of wolves (Harrison and Chapin 1998; Mladenoff and Sickley 1998). See Attachment A. The distance between surviving wolf populations in Canada and suitable habitat in northeastern states is relatively small when compared with potential wolf dispersal distances (70-230 km, Harrison and Chapin 1998). This suggests that wolves could disperse into the Northeast and, in fact, documented evidence shows that they have.

As Dr. Kays notes, at least eight large wolves were shot and recovered in the Northeast between 1984 and 2001 (Kays and Feranec In Press). Each of these animals was substantially larger than eastern coyotes and classified as a wolf (*C. lupus*) or possible wolf hybrid by state and/or federal wildlife officials. In two cases, physical conditions suggested the animals had been in captivity, but no evidence of a captive past was noted for the others (USFWS 1993, USFWS 1997, USFWS 2002, USFWS 2004). Isotopic tests later support the conclusion that three of these animals had not been raised in captivity (Kays and Feranec In Press).

Given this evidence that it is feasible for wolves to disperse into the Northeast from Canada, it is imperative that federal protections for these wolves remain in place. As the Service has recently noted, "any wolf found in the Northeast is still classified as endangered . . . Therefore, should one or more wolves disperse into the Northeast from Canada, the protections of the [Endangered Species] Act would apply." 75 Fed. Reg. 32869-72, (June 10, 2010). Unfortunately, the Service's proposed rule would remove those protections.

The Service attempts to justify this action by concurrently announcing initiation of a status review for a proposed new species, *Canis lycaon*, throughout its purported range in the United States and Canada, including New York State. However, the proposed status review does nothing to address the underlying loss of federal protection for wolves dispersing into the Northeast; such wolves would have no federal protection during the period of time it takes to complete the review.

The proposed delisting of wolves in the Northeast is also a radical departure from past Service practices. To date, the Service has delisted seven species based on taxonomic revisions. In each of those cases, the Service did not remove federal protection for the subject species until after a status review had determined that the revised taxonomic group was not in need of federal

³ Although the Service is not explicitly proposing to delist *Canis lupus* in the Northeast, it is proposing to revise the range of *C. lupus* by removing all or parts of 29 eastern states, including the entirety of New York State, from the range. This proposal has the practical effect of delisting *C. lupus* in the Northeast.

protection. See U.S. Fish and Wildlife Service, Delisting Report, http://www.fws.gov/ecos/ajax/tess_public/DelistingReport.do (June 27, 2011). This marks the first time that the Service is proposing to remove federal protection for a listed species due to a taxonomic revision without first having conducted a status review determining that the new taxonomic group (in this case *Canis lycaon*) no longer requires such protection.⁴

Additionally, there is no guarantee that federal protection would be restored upon completion of the status review because the review could conclude that *C. lycaon* does not warrant listing as an endangered species, or may exclude the Northeast from the range that is listed. The Service explicitly acknowledges this in the proposed rule (“A determination as to whether to proceed with any *C. lycaon* listing action – and, if listing is warranted, whether or not to include the northeastern United States in the listed range – will depend on the results of the status review.” 76 Fed. Reg. at 26090).

The Service’s proposed removal of federal protection for wolves in the Northeast will undermine natural recovery of wolves in the Northeast and is inconsistent with the Service’s *Recovery Plan for the Eastern Timber Wolf* (1992) (“Recovery Plan”). The Recovery Plan states that its “primary objective” is to “maintain and reestablish viable populations of the eastern timber wolf in as much of its former range as feasible.” Recovery Plan at 24; (emphasis added). Indeed, the Recovery Plan specifically identifies northern New York as one of the areas that could support a viable wolf population:

The Plan’s basic approach to eastern timber wolf recovery is, and has always been, to try to ensure that there be at least two viable populations of wolves within the historic range in the United States. The requirement for more than a single recovery population stems from the basic concept of conservation biology that a species can never be assumed to be secure from extinction if only a single population exists . . . The only satisfactory means of reducing the threat of extinction from an unexpected catastrophe is to ensure that more than a single population is established prior to declaring the species recovered . . . The Eastern Timber Wolf Recovery Team has always recognized that the Minnesota population represents a viable population . . . [T]he Eastern Timber Wolf Recovery Team . . . recommended . . . characterizing “viable population” in two different ways: (1) A population of at least 200 wolves established at a distance greater than 200 miles from the Minnesota population (e.g., northern New York or northern Maine) . . . (2) a smaller population (greater than 100 wolves) in Wisconsin/Michigan

Recovery Plan at 24-25; (emphasis added).

As the Service has previously acknowledged, there would be “extensive and significant gaps” in the wolf’s range without a wolf population in the Northeast; thus, removing federal protection for wolves in the Northeast – and in New York in particular -- as the Service now proposes would undermine the Recovery Plan’s “primary objective” to reestablish wolf populations in as much of its former range as possible.

⁴ As discussed above, NYSDEC believes that a taxonomic revision is neither necessary nor justifiable, and thus the current protections for *Canis lupus* should remain in place.

III. The Service's Proposed National Wolf Strategy is Inconsistent With the Results and Recommendations of the Wolf Structured Decision-Making (SDM) Workshop Held in August 2010 and Contravenes the Endangered Species Act

As noted in the proposed rulemaking, in August 2010 the Service convened a wolf structured decision-making (SDM) workshop that was attended by most of the states, including New York, that are involved in gray wolf conservation and recovery.⁵ The Service includes as part of the proposed rulemaking a proposed National Wolf Strategy that “focuses on conservation of the four extant gray wolf entities identified through the structured decision-making process” 76 Fed. Reg. 26089. The Service identifies the four extant gray wolf entities as the WGL DPS; the Northern Rocky Mountains DPS; gray wolves in the Pacific Northwest; and Southwestern population of Mexican wolves. *Id.*

The Service's proposed National Wolf Strategy is inconsistent with the results and recommendations of the wolf SDM workshop insofar as it focuses solely on conservation of four extant wolf populations. The wolf SDM workshop considered issues of wolf recovery throughout the historic range of wolves in the coterminous United States, and did not eliminate areas without extant wolf populations from the analysis and recommendations. Thus, the proposed National Wolf Strategy does not accurately or fully represent the assumptions, results and recommendations of the SDM workshop.

The proposed National Wolf Strategy also contravenes the Endangered Species Act by rendering significant portions of the wolf's historic range outside the four identified extant populations superfluous to wolf recovery. This approach has already been rejected by the courts as an arbitrary and capricious application of the Endangered Species Act. National Wildlife Federation, 386 F.Supp.2d at 566; Defenders of Wildlife, 354 F.Supp.2d at 1166. As stated by the court in National Wildlife Federation:

The viability of this population, therefore, renders all areas outside the Western Great Lakes region insignificant, even though the FWS acknowledged in the Proposed Rule that there would be “extensive and significant gaps” in the wolf's range without a wolf population in the Northeast 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.

386 F.Supp.2d at 566; (emphasis added).

Furthermore, the states were not consulted during development of the proposed National Wolf Strategy nor was there concurrence by the affected states prior to the release of the Strategy. This is inconsistent with the Service's policy regarding the role of the states in implementing the Endangered Species Act. *Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities* (59 CFR 34275, July 1, 1994).

⁵ The proposed rulemaking incorrectly states that “tribal representatives declined to participate.” 76 Fed. Reg. at 26089. In fact, the Service acknowledged during the SDM workshop that none of the then seven (now eight) federally recognized Indian nations in New York were invited to attend the workshop.

By focusing recovery efforts on four extant wolf populations and removing federal protection for wolves throughout a significant portion of their historic range (by delisting *Canis lupus* in all or portions of 29 states), the National Wolf Strategy adopts the same approach to wolf recovery that has already been expressly rejected by the courts. The proposed Strategy impermissibly “appears to be a tactic for downlisting areas the FWS has already determined warrants listing, despite the unabated threats to low and non-existent populations outside core areas.” Defenders of Wildlife, 354 F.Supp.2d at 1171.

Consequently, the proposed National Wolf Strategy should be withdrawn and affected states and Indian nations consulted prior to any revisions being drafted.

IV. NYSDEC Supports Delisting the WGL DPS

NYSDEC concurs with the assessment that WGL wolves are a DPS of the gray wolf (*Canis lupus*). As discussed by Dr. Kays, this conclusion is supported by a new study presenting the most detailed genetic study of the region’s canids (vonHoldt et al. 2011). See Attachment A. In that study, the WGL wolf samples formed a contiguous population in overall genetic similarity, analogous to other established wolf populations around the world (vonHoldt et al 2011, figure 3). The WGL wolf population was less unique than many other subspecies of wolves, emerging as the 10th most distinct genetic group in this global comparison (vonHoldt et al 2011, figure 4). This is consistent with their recognition as a DPS, and possibly a subspecies, but certainly not a unique species, as some have argued based on more limited sampling and more limited genetic data (Wilson et al. 2000).

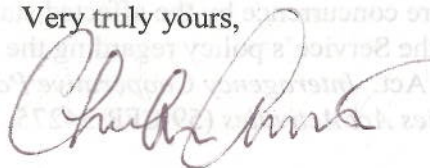
NYSDEC also concurs with the Service’s conclusion that the WGL DPS meets the criteria for delisting.

Conclusion

For the reasons discussed above, NYSDEC urges the Service to withdraw those portions of the proposed rule that would delist *Canis lupus* in the Northeast, establish *Canis lycaon* as a new species, and initiate a range-wide assessment of *Canis lycaon*. NYSDEC further proposes that the Service withdraw its proposed National Wolf Strategy and convene a meeting with affected states and Indian nations to develop a national strategy for wolf recovery that reflects the most recent genetic and taxonomic information and addresses wolf recovery throughout a significant portion of its historic range.

NYSDEC thanks the Service for this opportunity to provide comments on the proposed rule.

Very truly yours,



Christopher A. Amato