



April 18, 2023

Via: <https://www.regulations.gov>

Public Comments Processing
Attn: FWS-R6-ES-2022-0100
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Safari Club International Comments on “Establishment of a Nonessential Experimental Population of the Gray Wolf in Colorado” and “Draft Environmental Impact Statement Colorado Gray Wolf 10(j) Rulemaking”

Dear U.S. Fish and Wildlife Service:

Safari Club International (“SCI”) appreciates the opportunity to comment on the U.S. Fish and Wildlife Service’s (“Service”) proposed rule to establish a nonessential experimental population (“NEP”) of the gray wolf in Colorado (“proposed rule”) and associated Draft Environmental Impact Statement (“DEIS”).

SCI opposed and continues to oppose the forced introduction of wolves to Colorado. This is especially true because wolves are already naturally expanding their range from Wyoming into Colorado. Further, SCI firmly believes that wildlife management decisions should be made based on science, by wildlife management professionals, in support of management objectives. SCI opposes “ballot box biology,” including the forced reintroduction of wolves to Colorado by a proposition which narrowly passed, without the support of the counties into which wolves will be introduced. Despite this opposition, SCI and its chapters have cooperated with Colorado Parks and Wildlife (“CPW”) to ensure that the forced introduction of wolves, unlike the referendum, relies on the best available science as well as important input from the stakeholders who will be most affected by an increasing wolf population.

SCI encourages the Service to continue its collaboration with the State of Colorado to implement the State’s management plan for wolves, and to ensure the forced introduction of wolves does not negatively impact Colorado’s elk, deer, sheep, moose, and other wildlife populations. SCI appreciates that the Service is willing to work with CPW to ensure the State has the flexibility to manage an increasing wolf population. Generally, SCI supports adoption of a statewide 10(j) rule, which is labeled as Alternative 1 in the DEIS, and SCI strongly agrees with the Service’s determination that the experimental population would be “nonessential.” Of the considered alternatives, Alternative 1 will provide the most flexibility and consistency for wolf management in Colorado. However, SCI urges the Service to make significant and important changes to the proposed rule before finalizing, as explained below.

Safari Club International

Safari Club International, a nonprofit IRC § 501(c)(4) corporation, has approximately 50,000 members and advocates worldwide, many of whom live or hunt in Colorado. SCI also has many members who guide hunts in Colorado and depend on guiding for their livelihoods. SCI has four chapters in Colorado and multiple chapters in the surrounding states.

SCI has submitted numerous public comments regarding the federal listing status and management of wolves in the United States. SCI has also participated in numerous cases in which SCI has defended state management authority and science-based decision-making involving wolves in the United States. For example, SCI intervened to defend the delisting of the Western Great Lakes Distinct Population Segment wolves, Northern Rocky Mountains Distinct Population Segment wolves, and Wyoming wolves. *E.g.*, *Humane Soc’y of the U.S. v. Kempthorne*, 579 F. Supp. 2d 7 (D.D.C. 2008); *Defs. of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008); *All. for the Wild Rockies v. Salazar*, 672 F.3d 1170 (9th Cir. 2012); *Humane Soc’y of the U.S. v. Jewell*, 76 F. Supp. 3d 69 (D.D.C. 2014); *Defs. of Wildlife v. Zinke*, 68 F.Supp.3d 193 (D.D.C. 2014).

SCI is currently defending the 2020 delisting of gray wolves in the lower 48 States from the Endangered Species Act (“ESA”) lists of endangered and threatened species. SCI believes that the Service correctly removed wolves from the ESA’s protections—recognizing, once again, that gray wolves have exceeded recovery criteria for decades. SCI was the first party to appeal the U.S. District Court for the Northern District of California’s vacatur of that 2020 rule. That appeal is currently stayed pending the Service’s species status review.

Management Flexibility for the State and Tribes

- a. The 10(j) rule should provide full and unencumbered management authority to the State and Tribes.*

On November 3, 2020, Coloradoans narrowly passed Proposition 114, a ballot initiative directing the CPW Commission to develop a plan to introduce gray wolves west of the Continental Divide. CPW is in the final stages of developing an adaptive management plan for the introduction of wolves on the Western Slope, and to govern wolf management in the state. The process has been guided by both expert and stakeholder input.

Although the proposed rule and DEIS suggest the Service’s intent is to turn over management of the reintroduced wolves to the State and Tribal authorities, the proposed rule does not go far enough to ensure these authorities are given sufficient management flexibility to fully implement the state wolf management plan. Rather than conditioning adoption of relevant Memorandum of Agreements (“MOAs”) on “acceptable” conservation programs¹ and adequate implementation of

¹ At a minimum, SCI urges the Service to delete the word “acceptable” from the proposed rule, as it is ambiguous and subjective. 50 C.F.R. § 17.84(a)(10)(i)(B) (proposed).

provisions of the 10(j) rule, the Service should instead explicitly and unconditionally defer management to the State and Tribal authorities.

The Service recognizes that the State requested a 10(j) rule to ensure its own flexibility in “reintroducing” and managing wolves in Colorado. This effort was not initiated by the Service, and neither the proposed rule nor the DEIS suggest that a reintroduction of wolves is needed for wolf conservation in the United States. For those reasons, in the 10(j) rule, the Service should ensure state management flexibility by simply turning over management of the wolves to the State and Tribal authorities with minimal oversight within Colorado beyond what may be legally required under the ESA. Nothing in the ESA and its implementing regulations prohibits the Service from doing so.

b. The 10(j) rule should allow intentional take to prevent significant impacts to prey populations.

As the DEIS repeatedly suggests, the Service should include in the 10(j) rule provisions that allow the State to effectively manage the impact of wolves on ungulate populations. *E.g.*, DEIS at 4-9. Allowing intentional take to prevent significant or “unacceptable” impacts to ungulate populations should not be an “optional element”; it should be required by the 10(j) rule.² It is unreasonable for the Service to exclude this authorization from the proposed rule, as it would give the State and Tribal authorities more flexibility to manage the reintroduced wolves, even if the option for intentional take to alleviate impacts to other wildlife is never used.³

When the experimental wolf population establishes itself, it will undoubtedly impact—and most likely reduce—Colorado’s elk, deer, and other wildlife populations. Some of these populations, particularly mule deer on the Western Slope, are already declining. DEIS at 3-17. CPW must have the ability to address further declines or negative pressures caused by the wolves through lethal control.

Further, reduced ungulate populations as a result of wolf predation will have significant economic impacts for Coloradans and CPW. The DEIS recognizes that hunting and wildlife viewing are important economic drivers in Colorado, with hunting being particularly important in the northwest region of the state—an area with some local poverty and environmental justice concerns. DEIS at 3-26, 3-29. Reduced ungulate populations mean fewer tags, fewer hunters, and less income for individuals who make their living from guiding hunts. A reduction in hunting tags and hunting licenses, which are required to purchase hunting tags, would result in a loss of revenue for CPW, used for management of wildlife and habitat. Thus, the 10(j) rule

² The Service should also consider allowing intentional take to prevent unacceptable impacts to other species, not just ungulates.

³ SCI requests that the Service clarify what is meant by “regulatory standards” in the provision stating that “States or Tribes must submit a science-based report showing the action meets regulatory standards” or “meets the regulatory standards.” DEIS at ix, 2-13, 2-19, 2-25. SCI reads this provision to mean State or Tribal regulatory standards, i.e., the provisions in Colorado’s wolf management plan. The DEIS should use that language to be clear.

should ensure that the State has flexibility to protect ungulate populations from excessive impacts caused by the wolves.

For these reasons, SCI supports inclusion of the “optional element” that would allow the Service, or its designee, to take wolves if wild ungulate populations decline below established State or Tribal management objectives due to wolf predation. Moreover, SCI encourages the Service to revise the proposed rule to delegate the Service’s authority to determine when impacts to ungulate populations are “unacceptable” to the State. The Service does not need to second-guess the State’s enforcement of its management objectives; if ungulate populations fall below those objectives, the State should be able to act swiftly to correct the situation without the need for confirmation from the Service.

SCI also requests that the Service include an element that gives the State authority to manage wolves, including through lethal or nonlethal take, before impacts on wild ungulate populations become “unacceptable.” As explained above and in the DEIS, hunting and wildlife viewing are important to Colorado’s economy, particularly the economy of the focal counties. And hunting is part of the character of many of those counties. Based on the experience of wolf reintroduction in other locations, it is expected that wildlife populations will decline in some measure. But the decline should not have to be “unacceptable” before action is taken to stabilize the ungulate populations.

c. Delisting under state law should trigger delisting under the ESA.

Once adopted, Colorado’s wolf management plan will include different management phases, which are triggered based on population counts over time. For example, after achieving a minimum count of 150 wolves for two successive years, wolves will be delisted from Colorado’s list of threatened and endangered species. At that point, the Service should remove the NEP from the ESA list.

The 10(j) rule should explicitly state that the Service will propose to delist the NEP from the ESA as soon as possible after Colorado removes the wolves from the state list, following the specific and measurable delisting criteria set forth in Colorado’s wolf management plan.

d. The 10(j) rule should allow wolf hunting when authorized by State or Tribal authorities.

Finally, to provide full management flexibility for State and Tribal authorities, the 10(j) rule should authorize wolf hunting when those authorities implement a wolf hunting season. If Colorado’s wolves are still listed under the ESA when the State or Tribal authorities establish a hunting season, the wolves’ federally listed status should not preclude a hunt. Indeed, allowing wolf hunting in such a situation is consistent with the ESA’s definition of “conservation,” which recognizes that regulated hunting may be used to manage abundant populations of a species. *See* 16 U.S.C. § 1532(3) (defining “conservation” to include “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary,” which, “in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may

include regulated taking”). The Service should ensure that the State has sufficient flexibility to properly manage an overly abundant wolf population, especially if the gray wolf is delisted under State law before it is—again—delisted under federal law.

The NEP area should include neighboring and nearby states where wolves remain listed under the ESA.

Wolves released in Colorado will undoubtedly disperse from reintroduction sites to other areas, including nearby states. The Service considered this issue in the DEIS, at 2-5, but failed to include these states in the proposed NEP area. The Service should include such states, and treat wolves found there as part of the NEP. Specifically, any nearby state or area in which gray wolves remain listed under the ESA should be included in the NEP—Utah, Arizona, New Mexico, Nebraska, Kansas, Oklahoma, and Texas.⁴ Undoubtedly, the reintroduced wolves will disperse outside Colorado. Other states and their citizens should not be forced to bear the burden of having endangered-listed wolves on their landscapes simply because the citizens of Colorado voted to reintroduce them into Colorado. Accordingly, the Service should significantly enlarge the designated NEP area to include areas where the reintroduced wolves might disperse.

Alternatively, the Service should explicitly commit to return wolves that leave Colorado back to the NEP area. The proposed rule states that wolves “may be returned” to Colorado, but it does not indicate which agency would conduct the translocations or provide any assurance that the Service would even assist if requested. 50 C.F.R. § 17.84(a)(3) (proposed). At minimum, the 10(j) rule should more clearly explain which agency (or agencies) will have what roles in the event that reintroduced wolves leave the State.

Accidental harvest of wolves due to mistaken identification while hunting should not be referred for prosecution, per the “McKittrick Policy.”

The proposed rule states that “shooting a wolf as a result of mistaking it for another species is not considered accidental and may be referred to the appropriate authorities for prosecution.” 50 C.F.R. § 17.84(a)(5)(viii) (proposed). The Service’s conclusion contradicts the Department of Justice’s “McKittrick Policy” and should be removed from the 10(j) rule. The McKittrick Policy provides that incidental shooting of a listed species due to mistaken identity does not violate the ESA’s take prohibition because the shooter does not knowingly violate the law. Thus, criminal prosecution in such instances is not appropriate.

The McKittrick Policy was previously challenged in a suit involving incidental take by hunters who mistake Mexican wolves for coyotes while lawfully coyote hunting. The Ninth Circuit Court of Appeals rejected this challenge to the Policy; thus, it should apply to incidental take of Colorado’s wolves. *WildEarth Guardians v. U.S. Dep’t of Justice*, No. 17-16677, 752 Fed. Appx. 421 (9th Cir. 2018).

⁴ Wolves in Wyoming are not listed under the ESA, and the Service has no authority to designate any portion of Wyoming as part of the NEP area.

To be clear, SCI does not condone intentional illegal harvest of wolves or any other species, and the Service should refer for prosecution any such take that is not truly accidental and illegal. But as the Service has recognized, it is possible to mistakenly identify wolves as coyotes—even trained Service personnel have done so. And coyote hunters provide a valuable service to the State by helping maintain the ever-increasing coyote population. The reintroduction of wolves into Colorado, and the Service’s 10(j) rule, should not deter hunters from hunting coyotes.

The 10(j) rule should include an “escape clause.”

The Service should include an “escape clause” that authorizes the State to lethally remove all members of the experimental population if its “nonessential” status is at risk. The Service has included such escape clauses in numerous other experimental population rules.⁵ This provision is very appropriate here, given that Colorado’s wolf population is not being established to further any necessary conservation objectives, and removal of the population would not impact the status of wolves throughout the lower 48 states, which have long met recovery objectives and no longer meet the standards for endangered or threatened status under the ESA. *See* 85 Fed. Reg. 69778 (Nov. 3, 2020) (final rule delisting wolves throughout lower 48 states).

Colorado’s wolves must not impact the status of the 44-state listed entity.

Even though wolves in the lower 48 states have met recovery objectives for decades, the Service’s efforts to delist wolves and recognize their recovery have been routinely thwarted by litigious animal rights organizations and rejected by federal courts. Most recently, the Service’s delisting of the 44-state listed entity, which does not meet the definition of a “species” under the ESA, was overturned by a U.S. district court in California. Appeal of that decision is currently stayed in the Ninth Circuit pending the Service’s species status assessment for wolves throughout the lower 48 states. Inexplicably, neither the proposed rule nor the DEIS contemplate the impact of Colorado’s wolf reintroduction on the Service’s ongoing status assessment or potential future attempts to delist the 44-state listed entity.

The 10(j) rule should explicitly state that the new population of wolves will not impact the Service’s ongoing species status assessment for wolves throughout the lower 48 states. In other

⁵ The Service routinely includes such clauses in experimental population rules. *E.g.*, 50 C.F.R. § 17.84(j) (including “escape clause” in rule establishing nonessential experimental populations of California condors); *id.* § 17.84(x) (including “escape clause” in rule establishing nonessential experimental population of wood bison in Alaska); 59 Fed. Reg. 60266 (Nov. 22, 1994) (rule establishing nonessential experimental population of the Rocky Mountain gray wolf). For this reason, the DEIS statement that including such a clause “would not be consistent with the ESA...” is unsupported. The Service has also recently attempted to remove gray wolves from the ESA lists, further undercutting the DEIS’ reasoning. Last, the Service’s statement that there is no “regulatory mechanism” to change the nonessential status of an experimental population, DEIS at 2-5, is also unsupported. The Service recently was required to reconsider the status of the Mexican wolf nonessential experimental population in a revised rule published following a court-ordered remand.

words, if the Service determines that the currently listed entity no longer meets the standards for an ESA listing, it must delist the species (including any wolves in Colorado), regardless of the status of Colorado's wolf reintroduction.

The Service has twisted itself into legal knots because of lack of foresight with previous wolf listing determinations and recovery efforts (i.e., listing wolves throughout the lower 48 states despite never intending to recover wolves in all possible areas). It should learn from those past failures and consider all legal avenues that will allow it to address the listing status of wolves outside Colorado without the need to "recover" wolves in Colorado first.

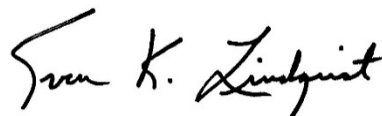
The Service should commit to seeking Congressional intervention if a delisting is overturned.

Finally, as a matter of policy, the Service should commit to seek assistance from Congress in the form of a law directing the delisting of Colorado's wolves, if any future attempt to delist them by regulation is challenged in court. As explained above, other populations of gray wolves have long met recovery objectives and ESA standards for delisting, but they remain on the ESA lists due to repeated litigation challenges to the Service's compliance with the ESA. SCI encourages the Service to consider how it can avoid this scenario for Colorado's wolves, including by asking Congress to step in as necessary. With this assurance that the Service will not let Colorado's wolves follow the pattern of other gray wolf populations in the lower 48 states, the Service can alleviate, rather than exacerbate, the burden placed on the State by this forced reintroduction.

Conclusion

Thank you again for the opportunity to comment on the proposed rule and DEIS. If you have any questions or need anything further, please contact Jeremy Clare at jclare@safariclub.org or Regina Lennox at rlelnox@safariclub.org.

Sincerely,



Sven Lindquist
President, Safari Club International