

**Center for Biological Diversity
Cascadia Wildlands
Western Environmental Law Center
Gifford Pinchot Task Force
Kettle Range Conservation Group
The Lands Council
Washington State Chapter of Sierra Club
Wildlands Network**

Sent via electronic mail and by U.S. mail

August 28, 2014

Governor Jay Inslee
Office of the Governor
416 Sid Snyder Avenue SW, Suite 200
P.O. Box 40002
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Re: Appeal of the Washington Fish and Wildlife Commission's Denial of Rulemaking to Amend Washington Administrative Code Concerning Wolves

Dear Governor Inslee:

Pursuant to RCW 34.05.330(3), the Center for Biological Diversity, Cascadia Wildlands, Western Environmental Law Center, Gifford Pinchot Task Force, Kettle Range Conservation Group, The Lands Council, Washington State Chapter of Sierra Club, and Wildlands Network ("Petitioners") hereby appeal Washington Fish and Wildlife Commission's ("Commission's") August 1, 2014 denial of a petition to promulgate rules that would codify key provisions of the Washington Wolf Conservation and Management Plan concerning the lethal removal of wolves in response to chronic depredation in the Washington Administrative Code ("WAC"). Exhibit ("Ex.") A (GARY J. WILES ET AL., WASH. DEP'T OF FISH AND WILDLIFE, WOLF CONSERVATION AND MANAGEMENT PLAN (2011)) ("Plan"). The Commission has refused to codify the Plan while the Washington Department of Fish and Wildlife ("Department") has insisted that no rules be enacted to make its provisions binding on the agency. Petitioners respectfully request that you reverse the Commission's denial of their Petition for Rulemaking and direct the Commission to initiate a process immediately to amend the WAC to codify clear and consistent rules to govern lethal wolf control and minimize conflict that are enforceable and based on scientific and social factors. Ex. B (Petition from Nick Cady, Legal Dir., to Joanna Eide, Legal Services, Wash. Dep't of Fish and Wildlife (June 6, 2014)) ("2014 Petition"); Ex. C (Letter from Miranda

Wecker, Chair, Wash. Fish and Wildlife Comm'n, to Nick Cady, Cascadia Wildlands (Aug. 6, 2014)) (“Commission’s Denial”).

As made clear by the Department’s destruction of the Wedge Pack in 2012, and more recently, by its authorization of killing up to four members of the Huckleberry Pack – and successfully killing one so far -- in August of 2014, a rulemaking is critically necessary to ensure that the Department’s actions to address conflicts adhere to the Plan. In connection with its treatment of both packs, the Department failed to use or require the livestock producers to apply sufficient nonlethal conflict prevention measures before secretly resorting to killing wolves, and in the process, it undermined the public’s and conservation community’s trust in the Department. Had the Commission and Department stayed true to the original Plan and the stakeholder process that it has facilitated, the gunning down of members of the Wedge Pack and the Huckleberry Pack would not have occurred.

A rulemaking to codify key provisions of the Plan—*e.g.*, requiring documented use of nonlethal measures before lethal measures may be considered—is necessary to return the Department’s management of wolf recovery in Washington State to sane, rational approaches that adhere to the Plan. The Plan is the result of a monumental effort and stakeholder process and represents the most promising, consensus-based approach to wolf recovery in the state. Yet rather than adhere to the Plan, the Commission and the Department are bowing to political pressure and taking steps to unravel it, including through legislative efforts and amendments and proposed changes that vastly expand the Department’s discretion to determine when wolves may be killed and who may be compensated for livestock losses. The Department has also attempted to side-step the consensus-based Plan by developing a draft “guidance” document that departs from the Plan dramatically, and would allow wolves to be killed after just one depredation, and for wolf pups to be killed for no depredations at all.

Consequently, on behalf of our many thousands of members, we call on you to correct these actions, to reverse the Commission’s denial of our Petition for Rulemaking, and to direct the Commission and Department to codify the Plan’s common-sense provisions expeditiously. Rules to make the Plan legally enforceable are desperately needed.

I. Background

On December 3, 2011, the Commission approved the state’s wolf Plan. The Plan represents the culmination of the efforts of tens of thousands of Washingtonians over five years, beginning with the development of a draft Environmental Impact Statement and creation of the Wolf Working Group (“Group”) in 2007. The Group began as a diverse, 18-member stakeholder group to advise the Department in developing the Plan. The Group met regularly over 15 months to negotiate and draft components of the Plan. The state held 23 public scoping meetings plus official comment periods on the Plan that generated more than 65,000 written comments submitted by members of the public. Drafts of the Plan were also peer-reviewed by 43 reviewers. The Plan is central to the state’s effort to recover wolves in Washington in a manner that minimizes conflicts, especially with commercial livestock operators who often are opposed to wolf recovery.

The Plan establishes benchmarks for wolf recovery and delisting from the state's endangered species list, and specifies how conflicts will be avoided and addressed, including through the use of nonlethal and lethal control and compensation for livestock losses. For example, the Plan makes clear that lethal control may only be used to stop "repeated depredation" if livestock have been documented to "have clearly been killed by wolves, if non-lethal methods have been tried but failed to resolve the conflict," and if "depredations are likely to continue and there is no evidence of intentional feeding or unnatural attraction of wolves by the livestock owner." Ex. A (Plan) at 88. Situations must be evaluated on a case-by-case basis, with management decisions based on pack history and size, pattern of depredations, number of livestock killed, legal status of wolves, extent of proactive management measures being used, and other considerations. If it is determined that lethal removal is necessary, it must be used incrementally, with one or two offending animals removed initially. If depredations continue, additional animals may be removed. Lethal removal methods include trapping and euthanasia, or shooting. *Id.* (Plan) at 88.

Additional controls apply even when such criteria have been met. For example, lethal control is limited to solitary individuals or territorial pairs whenever possible, and removals of wolves from reproductive packs should only occur when pups are more than six months old, the packs contain six or more members (including three or more adults or yearlings), neighboring packs exist nearby, and the population totals 75 or more wolves. Consideration must also be given to minimizing lethal control around or between any core recovery areas, especially during denning and pup rearing periods (April to September). Additionally, managers should assess the potential negative impacts of wolf removal on pack structure and persistence and the potential for creating unstable pack dynamics if sink habitats are created by depredation control, especially in recovering populations. *Id.* (Plan) at 81.

But despite the Plan's critical importance to guiding wolf management issues in Washington, the Plan is considered by the Commission and Department to be a "guidance document," and its provisions are unenforceable upon the Department.

In 2013, without the Group's consensus, the Commission unilaterally amended the Plan by adopting a rule that dramatically expanded the circumstances in which wolves can be killed and by whom. Under chapter four of the Plan, lethal take of wolves by people other than Department staff is allowed only by livestock owners and producers (including family members and authorized employees) and only if wolves are caught "in the act" of attacking livestock (which the Plan defines as biting, wounding, or killing, not just chasing or pursuing), on private or public grazing allotments they own or lease, acting in accordance with a permit after documented depredations (including injury or mortality) have occurred. *Id.* (Plan) at 88. These requirements necessarily entail documentation of conflict before lethal measures may be taken. However, under an "emergency" rule the Commission adopted last year, anyone who owns any domestic animal (including family members and authorized employees) may kill a wolf that attacks a domestic animal, not just livestock, without first obtaining a permit. (Adopted April 26, 2013 as WAC 232-36-05100B, and made permanent as WAC 232-36-052 at the Commission's October 4, 2013 meeting.)

Additionally, at its October 4, 2013 meeting, the Commission adopted rule amendments the Department proposed last summer, which, among other things, expanded who may qualify for

compensation for wolf-caused losses. Under WAC's previously-enacted rules, which mirrored the Plan, only commercial livestock operators qualified for compensation. However, under the expanded, amended WACs, any owner of any domestic animal can now qualify for compensation. WAC 232-36-30, 232-36-051, 232-35-200, 232-36-210.

Now with its filing of a Form CRC 101 on May 7, 2014, the Department is proposing to enact a rule for lethal control in instances of repeated depredations that is so broad and vague that it would allow the Department to utterly ignore the Plan's provisions entirely. Ex. D (Preproposal Statement of Inquiry, Joanna Eide, Rules Coordinator, Wash. Dep't of Fish and Wildlife (May 7, 2014)) ; Ex. E (WASH. DEP'T OF FISH AND WILDLIFE, PROPOSED RULES, WAC 232-36-041 AND WAC 232-36-053 (undated)). This rule language would set the barest of sidebars on the Department's ability to lethally-control wolves and pays no heed whatsoever to the science cited in the Plan, which cautions against the use of lethal control of small, recovering wolf populations and prescribes the individuals, age class, pack size, age structure of the pack, neighboring packs, and overall wolf population that are necessary before resorting to lethal control. Ex. A (Plan) at 81.

In addition, the Department has prepared a new lethal control protocol ("Protocol") to guide its lethal control decisions that is not binding and may be changed at the Department's whim. Ex. F (WASH. DEP'T OF FISH AND WILDLIFE, PROTOCOL FOR LETHAL REMOVAL OF GRAY WOLVES IN WASH. DURING RECOVERY (2014)). ("Department's Lethal Control Protocol") Like previous, unilateral actions by the Department, this new Protocol: (1) is also contrary to the scientific prescriptions that are set forth in the Plan, (2) is internally inconsistent, (3) would allow a wolf to be killed after one depredation, (4) sets no time limits within which repeated depredations may count towards lethal control while at the same time ruminating that one to two depredations within a one-year period may be enough, and (5) even allows for killing pups less than six months old that never have depredated but have been fed by adults who depredated. In April 2013 the Department submitted the Protocol for discussion by the Wolf Advisory Group ("WAG"), which is an advisory group of stakeholders that assists the Department in implementing the Plan. Yet the Department has refused to make any substantial changes in spite of many concerns the conservation community has pointed out during the ensuing months.¹

Petitioners maintain that the process that culminated in the Plan must be honored by the State of Washington, and its provisions must be followed by the Department. Therefore, after the many departures from the Plan by the Commission and the Department – particularly in light of the Department's lack of engagement with the Group – on July 19, 2013, Petitioners filed an initial petition for rulemaking, seeking codification of key provisions of the original Plan to which stakeholders agreed. Ex. G (Petition from Amaroq Weiss, West Coast Wolf Organizer, Ctr. for Biological Diversity, to Loreva Preuss, Rules Coordinator, Wash. Dep't of Fish and Wildlife (July 19, 2013)). Petitioners submitted their initial petition in accordance with WAC 34.05.330.

Petitioners agreed to withdraw their initial petition in exchange for the Department's express commitment to facilitate a discussion within the WAG of the Petitioners' proposed rules. In

¹ The protocol has undergone some revisions by the Department; the most recent iteration is dated April 28, 2014. Ex. F (Department's Lethal Control Protocol).

doing so, Petitioners reserved their ability to refile their petition in the event that the facilitated WAG process did not result in proposed rule language. Petitioners memorialized this agreement with the Department in a letter dated August 15, 2013. Ex. H (Letter from Amaroq Weiss, West Coast Wolf Organizer, Ctr. for Biological Diversity, to Lori Preuss, Rules Coordinator, Wash. Dep't of Fish and Wildlife (Aug. 15, 2013)).

At the September 18, 2013, WAG meeting, Petitioners presented their proposal for codifying key provisions of the Plan. At the December 19, 2013, WAG meeting, Petitioners introduced specific proposed rule language. However, the Department completely ignored Petitioners' proposal, choosing instead to facilitate a discussion about vague rule language for lethal control that the Department was proposing. The Department's actions also caused confusion, with many members of the WAG leaving the December 19, 2013, meeting with unresolved questions and concerns. The Department assured WAG members that discussion of its proposed rule, WAC 232-36-053, would occur at the March 20, 2014 meeting, the first meeting of the year. But despite these assurances, the Department issued an updated version of the lethal control Protocol on January 23, 2014, granting the Department the unfettered ability to kill a wolf following one depredation, kill a wolf if there are one or more depredations in an entire year, kill pups that have never depredated, and change the document at will since it is not legally enforceable. The Department announced that the Protocol was effective immediately. In addition to violating express promises made for Petitioners to withdraw their initial Petition for Rule-Making, the Department's actions led the conservation community, including Petitioners, to protest its proposed rules or lethal control and to denounce the Protocol, which remains in effect today. Ex. I (Letter from Nick Cady, Legal Dir., Cascadia Wildlands, to Phil Anderson, Dir., Wash. Dep't of Fish and Wildlife (Feb. 6, 2014)).

Petitioners repeatedly expressed concerns with the Department's disregard of Petitioners' proposed rule language, its reliance upon an unenforceable lethal control guidance document, and the Department's proposed rule language. Petitioners were concerned that the lethal control guidance document would permit the killing of wolves after a single depredation, in express violation of the Plan. Additionally, there were concerns about the vagueness and lack of concrete standards in the proposed rule, which Petitioners believed would not address the problems concerning a lack of procedure and guidance for the Department and a lack of accountability, transparency, and predictability for the public. *See* Ex. J (WASH. FISH AND WILDLIFE COMM'N, SUMMARY REPORT FOR AGENDA ITEM: PETITION FOR RULE CHANGE TO WAC 232-36 (2014)(recognizing concerns expressed about the Department's proposed rule and lethal guidance document). Numerous state legislators also expressed concerns with the direction the Department was taking, and commented in support of a mediated rule-making process to develop a consensus rule with buy in from all stakeholders. Ex. K (Letter from Hans Dunshee, Representative, Wash. House of Representatives, to Phil Anderson, Dir., Wash. Dep't of Fish and Wildlife (July 1, 2014)). In response, the Department postponed its rule-making process. Ex. L (Letter from Dave Ware, Game Division Manager, Wash. Dep't of Fish and Wildlife, to Wolf Advisory Group Members (July 8, 2014)).

Petitioners refiled their Petition for Rulemaking on June 6, 2014, in light of the Department's broken promises and failure to adhere to the contents of the original, consensus-based Plan, which is the product of a comprehensive public process involving multiple stakeholders and is

designed to take into account both the scientific and social considerations when making any decision to use lethal control of wolves. In their refiled Petition, Petitioners focused on the Plan's provisions regarding lethal control of wolves and the use of nonlethal methods to prevent depredations. The Plan sets forth solid scientific sideboards to be applied whenever killing of wolves is considered – related to pack biology and history and related to the use of nonlethal methods to prevent and resolve conflict, such as removing attractants that might bait wolves in, maintaining human presence with shepherders and range riders, the use of fencing and night-penning and other strategies and tools. The Department's and Commission's dramatic departure from the provisions of the consensus-based Plan makes a rulemaking and codification of the Plan imperative, to ensure it is not undermined further – now or in the future. The lack of rules has led to poor decision-making – as demonstrated by the Department's mishandling of the Huckleberry Pack – and has undermined trust in the Department's ability to manage wolf recovery in Washington.

Hence, set forth below are the reasons why the Commission's denial of the Petition must be reversed and why it must be directed to commence a rulemaking process to codify key provisions of the consensus-based Plan right away.

II. A Rulemaking Is Necessary To Ensure Wolf Recovery in Washington, To Set Clear, Binding Standards for the Use of Lethal Wolf Control by the Department, and To Avoid Tragic Situations Such as Occurred with the Wedge and Huckleberry Packs.

Washingtonians greatly value endangered species. According to surveys professionals and the Department conducted, more than 74 percent of Washingtonians support the return of wolves to the state, view wolves as an important part of Washington's natural and cultural heritage, and wish to see wolves conserved and managed in ways that reflect those values. Ex. A (Plan) at 41-43.

Wolves are protected under state law, WAC 232-12-014, which prohibits the killing of species listed as endangered or threatened except under rare circumstances that are defined by the Department. *See* RCW 77.15.120. However, this statute was much more restrictive when the Plan was developed in 2007 and adopted by the Commission in 2011. Until this spring, lethal take of an endangered species was only allowed when “authorized by rule of the Commission.” RCW 77.15.120 (2013).² But during the 2014 legislative session, RCW 77.15.120 (2014) was amended to allow lethal take by issuance of a permit from the Department, and the emergency rule the Commission enacted last year eliminated even the requirement to first obtain a permit to

² RCW 77.15.120 as amended in 2014 reads as follows:

- (1) A person is guilty of unlawful taking of endangered fish or wildlife in the second degree if: (a) The person hunts for, fishes for, maliciously harasses, or kills fish or wildlife ... (b) The fish or wildlife is designated by the commission as endangered; and (c) The taking of the fish or wildlife ... has not been authorized by rule of the commission, a permit issued by the department, or a permit issued pursuant to the federal endangered species act.

kill a wolf attacking any domestic animal. But as made evident by the Department's mishandling of the Wedge and Huckleberry packs, as described later on in Petitioner's Appeal, this approach of enacting lessened restrictions on when wolves can be killed has failed. Thus, a rulemaking to codify standards for lethal take—complete with a formal process that will take public comment and account for the broad interests of all stakeholders—is essential for the interests of the people of Washington to be represented and for wolves to fully recover in the state.³

The Plan is consistent with Washingtonians' desire for wolf recovery in the state. The purpose of the Plan is “to ensure the reestablishment of a self-sustaining population of gray wolves in Washington and to encourage social tolerance for the species by addressing and reducing conflicts.” Ex. A (Plan) at 9. The Plan's goals include to “[r]estore the wolf population in Washington to a self-sustaining size and geographic distribution that will result in wolves having a high probability of persisting in the state through the foreseeable future (>50-100 years) and to “[m]anage wolf-livestock conflicts in a way that minimizes livestock losses, while at the same time not negatively impacting the recovery or long-term perpetuation of a sustainable wolf population.” *Id.* At the same time, the Plan acknowledges that “excessive levels of lethal removal can preclude the recovery of wolf populations.” *Id.* at 81. The Plan makes clear, therefore, that wolf managers must “monitor and, if necessary, adjust the extent of lethal removals to meet both conservation and management objectives.” *Id.* The Plan sets forth target population objectives and criteria for reclassification, as well as an implementation plan for reaching population objectives. *Id.* at 46. Petitioners seek a rulemaking that leads to clear, consistent, and binding standards for when the Department may exercise lethal control and when it must adjust its use to avoid precluding wolf recovery in Washington and to meet conservation and management objectives.

Codification of the Plan through a rulemaking can also define key terms that are inherently subjective and in need of clarification. For example, the Plan states that lethal control of wolves to address wolf-livestock conflicts will be limited to situations where there are “repeated wolf-livestock conflicts.” *Id.* at 80. The term “repeated” should be defined—*e.g.*, to make clear that after a certain number of depredations within a certain time period, the public can anticipate a lethal response by the Department. Based on the Plan, Petitioners proposed a definition of “repeated” in WAC 232-36-053, meaning four mutually-exclusive incidents of depredation occurring on at least four separate days in a four-month period, with each incident resulting in at least one livestock death. Ex. B (2014 Petition) at 12. This proposal is based on the best available scientific information and, particularly when combined with a requirement that nonlethal measures be exhausted first, will minimize conflicts.

As another example of the need to define key terms, the Plan only allows the killing of wolves in response to livestock depredations where the livestock were “clearly killed by wolves.” Ex. A

³ There is clear precedent for codifying strict rules to protect endangered species in Washington. An example is the bald eagle, which is specifically protected by rules in WAC 232-12-292 if it becomes re-listed under state law as an endangered or threatened species. That regulation includes definitions, authority, applicability and operation, habitat protection, and penalties. Such rulemaking is needed to address the specific recovery needs of a state listed species.

(Plan) at 88. The term “clearly killed” is not defined in the Plan. Petitioners have therefore petitioned for a definition of this key phrase—specifically, to mean a “confirmed” depredation, as determined and documented by Department staff, that has resulted in actual livestock death and not mere injury or attack. Ex. B (2014 Petition) at 12. The Plan also provides that before lethal control is exercised by the Department, “non-lethal measures have been tried but failed to resolve the conflict.” Plan at 88. Appropriate “measures” and “tried but failed” are not defined, however. Petitioners therefore seek rules to clearly specify what measures qualify as “non-lethal” and what actions are necessary before one can deem that such measures failed. *Id.* at 11, 12. Leaving these terms undefined has and will continue to lead to controversy and public outcry every time the Department moves to lethally control wolves, as recent events in connection with the Huckleberry Pack have illustrated.

Rulemaking is also necessary to codify standards for when lethal control may be used by the Department. The Plan contemplates that lethal control, even while wolves are listed under the state’s Endangered Species Act (“ESA”), is a necessary tool. Yet, many scientific studies have suggested that killing wolves does not reduce the rates of depredation. *See, e.g.*, Ex. A (Plan) at 81 (citing Harper, et al. (2008); Muhly, et al. (2010)). A 2010 paper that evaluated mortality of wolves in the Northern Rocky Mountains from 1982-2004 revealed that even though agencies and private citizens had the ability to lawfully kill wolves for repeated livestock depredations or if caught in the act of attacking livestock, 24 percent of all wolf mortalities were due to illegal poaching. *See, e.g.*, Appendix G of Ex. A (Plan) at 269-270 (citing Smith, et al. (2010)). A 2013 paper reported that tolerance for wolves by members of the public decreased directly after a state-sanctioned wolf hunt. Ex. M (J. HOGBERG ET AL., UNIV. OF WISCONSIN, PUBLIC ATTITUDES TOWARDS WOLVES IN WISCONSIN: 2013 SURVEY REPORT (2013)).⁴

The 2012 aerial gunning and on-the-ground killing of the Wedge Pack cost \$76,500 and reportedly destroyed seven of the eight known members of the pack. Ex. N (Letter from Philip Anderson, Dir., Wash. Dep’t of Fish and Wildlife, to Kevin Ranker, Wash. State Senator (Oct. 4, 2012)) (“Letter to Senator Ranker”) at 3-4. Yet depredations in the area formerly inhabited by the Wedge Pack continued through 2013, and the Department nearly moved to implement lethal control in the area again, showing that the Wedge Pack’s destruction was not effective in eliminating conflicts.⁵ While the Department has repeatedly claimed it must kill wolves to build

⁴ In Hogberg, et al. (2013), authors analyzed the survey results of attitudes towards wolves in Wisconsin following that state’s first wolf hunt since federal delisting. Comparing results from attitude surveys taken in years prior to the wolf hunt to survey results following the wolf hunt, the authors found that attitudes generally did not change, but that for people living within wolf-occupied range, tolerance for wolves significantly *decreased* following the state’s wolf hunt. In 2009, before wolf hunting was allowed, 51 percent of wolf range residents said that their tolerance for wolves would increase if wolves could be hunted. The same residents were surveyed the year following the first wolf hunt, and contrary to what they said in 2009, wolf tolerance for all residents in the wolf range decreased 18 percent, with hunter tolerance decreasing 21 percent. The study further found that 81 percent of all individuals surveyed, whether they lived inside or outside the wolf range, said their tolerance did not change.

⁵ In Oregon, chronic depredations by the Imnaha Pack initially prompted repeated killing of pack members by the Oregon Department of Fish and Wildlife. However, following a court

social tolerance for the species in Washington, we are aware of no peer-reviewed studies that would support this rationale.

Meanwhile, lethal control has serious consequences. To maintain consistency with the state ESA and the recovery goals in the Plan, lethal control must be tightly regulated and rarely utilized to ensure that its use is minimal and conflicts are avoided wherever possible, and so that the Department's decisions on lethal control are consistent and transparent. Ex. A (Plan) at 81 (noting that the benefit of agency use of lethal control is that it can be "tightly regulated"). Legally-binding protocols can also serve to shield the Department from political and industry pressures, and they help restore agency accountability and public trust in the agency. Petitioners' proposed rule would require that lethal control decisions be documented in writing and disclosed to the public. Ex. B (2014 Petition) at 12.⁶

Yet, as explained above, the Commission enacted rules last year that expanded the circumstances under which wolves can be killed from those contained in the Plan, and more changes proposed by the Department would expand such circumstances even more. Accordingly, consistent with the Plan and Petition, a rulemaking is necessary to require a cautious, incremental, analyzed approach to the Department's use of lethal control and to minimize the use of lethal control. Such a precautionary approach is commonly taken regarding listed species and, as wolves are not fully recovered in Washington, is warranted here.

Moreover, rulemaking is necessary to avoid tragic situations, such as the elimination of the Wedge Pack and the Department's recent attempted killing of four members of the Huckleberry Pack. Under RCW 77.12.240, the Department currently has nearly-unrestricted authority to kill any wild animals, endangered or not, that are causing property damage. This includes the authority to kill wolves after any incident of depredation, without regard for the Plan, if the Department so chooses.⁷ The Department exercised this unbridled authority to eliminate the entire Wedge Pack in late 2012 and, just this month, attempting to kill four members of the Huckleberry Pack and successfully killing at least one pack member as of today's date amidst an ongoing lethal control operation. In these situations, the killing of these wolves may not have occurred if the Plan had been codified as Petitioners requested. Codification is necessary to avoid tragic situations like these.

injunction and codification of clear standards to govern the use of non-lethal measures and lethal control, Oregon has not killed any members of the Imnaha Pack—or members of any other pack—in the past three years, and depredations have become rare.

⁶ In deciding to eliminate four members of the Huckleberry Pack, it is clear to Petitioners that the Department and its staff were influenced by pressures from livestock producers and possibly from elected officials in the area of depredations, and as a result made poor decisions that were contrary to the Plan. While pressures from the conservation community can work in the same fashion, a clear rule identifying lethal control circumstances would level the playing field, creating a predictable response that is established through an open and public process.

⁷ Every time the Department moves to kill wolves without any guiding rules or accountability, there will be a public uproar and controversy. This is acknowledged in the Plan. Ex. A (Plan) at 81.

Indeed, the Department's elimination of the Wedge Pack was in complete contrast to the Plan, which considers lethal control as a last resort. In 2012, following reports of possible wolf depredations on livestock in Stevens County, the Department killed all but one of the eight-member Wedge Pack, first using ground efforts then switching to an aerial gunning operation, an action that drew explosive criticism from the public, conservation groups and state representatives. Ex. O (*Senator calls killing of Colville wolf pack 'serious failure,'* NWCN, Sept. 29, 2012) ("Sept. 2012 News Article"). The incident even prompted a state senate committee chair to call for an investigation. Ex. P (*Senator wants answers on decision to kill Washington wolf,* K5 NEWS, Nov. 1, 2012). At the time the Department began shooting the wolves, there were conflicting conclusions made by depredation consultants who examined evidence of the initial alleged wolf-caused losses. Livestock had not "clearly been killed by wolves" as required by the Plan. Ex. A (Plan) at 88.

The eradication of the Wedge Pack also disregarded constraints on lethal control contained in the Plan, *i.e.*, to minimize negative impacts on re-colonizing wolf populations. Such constraints, which are based on scientific principles, limit lethal control to wolves older than six months old from reproductive packs of at least six wolves (including three or more adults or yearlings) to maintain pack integrity, and they require the nearby presence of neighboring packs with population totals of 75 or more wolves. *Id.* at 81. Further, months earlier, the livestock operator had boycotted participation in a conflict-avoidance program that would have provided him free assistance to prevent these very types of depredation incidents. Despite the incredible blowback from the Department's rush to start killing wolves, the Department still incorrectly maintains that it "followed those prescriptions [in the Plan], ..." and without codified rules, the Department will never be held accountable for such incidents. Ex. C (Commission's Denial) at 2. If the Department had followed the Plan, the elimination of the entire Wedge Pack simply could not have occurred.⁸

⁸ It is doubtful that the Department even acted within its then-existing legal authority when it destroyed the Wedge Pack in 2012, when state law prohibited intentional take of an endangered species by the Department or anyone else unless such authority had been granted by the Commission through an express rulemaking, which had not occurred. State Senator Kevin Ranker expressed his doubts that the Department put as much effort into non-lethal methods as it did in killing the entire Wedge Pack. Ex. O (Sept. 2012 News Article). The affected livestock producer did not exhaust common sense, low-cost non-lethal measures—including the use of range riders offered by the Department, which other Washington ranchers have used with a high degree of success. In spite of the lack of such measures in accordance with the Plan, the Department simply eliminated the entire pack. And rather than using lethal control "incrementally," after initially killing one wolf the Department simply used aerial gunners to kill six wolves in four days, costing the state \$22,000 over that time period alone, and spending another \$54,500 to kill wolves on the ground beforehand, for a total of \$76,500 of taxpayer dollars on the operation. Ex. N (Letter to Senator Ranker) at 3-4. Adding even more insult to injury, the funds used to eradicate the Wedge Pack came in part from funds generated by personalized license plates, a use of public funds that wolf-supporting citizens would most likely find highly objectionable.

The Department's recent mishandling of the Huckleberry Pack is yet another example of why Departmental use of lethal control must be tightly regulated. Just last week the Department moved to kill four wolves from the Huckleberry Pack, yet failed to notify the public, conservation groups, or even members of the WAG that a kill order was being executed, and also failed to document the implementation of non-lethal measures first. Again, the operator at issue boycotted participation in a conflict avoidance program. When losses were discovered, his 1800 sheep had been left to fend for themselves in rugged terrain with only four guard dogs as oversight and sheep carcasses were not removed, serving as attractants that likely continued to draw in wolves. At an August 15, 2014 Commission meeting, the Department assured the Commission it was implementing many conflict deterrence measures that a week later were still not fully in place and as conflicts continued the Department had ignored offers of assistance from a conservation group and from a Washington State University wolf-livestock conflict researcher. Ex. Q (E-mail from Robert Wielgus, Wash. State Univ., to Carter Niemeyer (Aug. 25, 2014)). The Department suddenly authorized agency staff and the sheep operator to kill any wolves in the vicinity and three days later launched a covert operation over the weekend to gun wolves down from a helicopter. Ex. R (Press Release, Craig Bartlett, Wash. Dep't of Fish and Wildlife (Aug. 20, 2014)); Ex. S (Press Release, Public Affairs, Wash. Dep't of Fish and Wildlife (Aug. 25, 2014)). When Petitioners contacted the Department, we were initially told that the Department could not tell us what was going on. Eventually this was followed by conflicting statements from Department officials and representatives as to what was being done to prevent further depredations.⁹ Petitioners' proposed rule would require the Department to document the implementation of nonlethal measures and the purported need for lethal control, according to clear standards. Ex. B (2014 Petition) at 12. Had this occurred in connection with the Huckleberry Pack, the ensuing alarm and panic would have been avoided.

III. The Department's Denial of the Rulemaking Petition is Not Based on Rational Factors.

The Commission denied the petition for rulemaking on August 1, 2014, and provided Petitioners with a written explanation of their decision in a letter dated August 6, 2014. The August 6 letter provided three reasons for the denial: (1) "determining the need to use lethal control to stop repeated depredations is a complicated issue;" (2) "limiting the flexibility articulated in the Wolf Conservation and Management Plan reduces the ability to address each case-specific wolf-livestock conflict"; (3) "establishing a new advisory group undermines the existing advisory body composed of diverse groups to provide technical advice and policy counsel to implement the Wolf Conservation and Management Plan." Ex. C (Commission's Denial).

Even if the policy rationales discussed above did not justify the initiation of rulemaking proceedings consistent with the Washington Administrative Procedures Act ("APA"), the Commission's decision is still arbitrary and capricious, as it fails to articulate a reasonable and justified rationale for denial. The reasons the Commission put forth do not lead to the conclusion

⁹ Petitioners received conflicting accounts of whether there was human presence with the sheep at night, whether the sheep were grouped together, whether the sheep had been moved from the conflict area and whether there was a range rider present with the sheep.

that the petition should be denied, as these reasons either support the Petition or are based on aspects of the Petition that simply do not exist.

First, we entirely agree with the Commission's assertion that the determination of whether to use lethal control against a state endangered species such as the gray wolf is indeed a complicated issue. This is one of the precise reasons why rulemaking is necessary. Although some aspects of the Plan are necessarily vague, others leave the Department with too much discretion and allow it to alter the rules by which it plays as specific circumstances related to wolf management arise. The rule language proposed by Petitioners seeks to codify crucial language that would clarify the Plan's ambiguity and establish clear and consistent criteria for when the Department can legally and justifiably move to lethally control depredating wolves. Such clarity and consistency would add predictability and stability to the implementation of Washington's Plan, and foster an environment within the state that is conducive to the recovery of the gray wolf across its range in Washington.

Second, the Commission's reasoning that the rulemaking requested by Petitioners would unduly limit the Department's flexibility in managing wolf-livestock conflicts entirely misses the point of the Petition. Constraining the scenarios under which the Department can opt to use lethal control against depredating wolves—while still allowing it the ability to do so in limited circumstances—is exactly why rulemaking is needed. The Department has too much flexibility as it now stands, and it is vulnerable to pressures and incendiary opinions from a broad array of interested parties every time a wolf-livestock conflict arises. This situation played out when the Wedge Pack was killed by the Department in 2012, and a similar situation is unfolding currently with the Huckleberry Pack. Unpredictable and inconsistent responses from the Department, made under incredible stress and without time to thoroughly contemplate responses, are why the codification of certain provisions of the Plan is necessary. Neither the environmental community nor the livestock operator community deserves to rely on a Department that succumbs to crisis and responds by shooting from the hip in an attempt to pacify the vocal members of those same communities. A rule that explicitly describes the criteria that must be met before lethal control becomes an option would add consistency to Department determinations, and members of all interested communities would know with certainty what type of response to expect from the Department depending on what type of depredation incidents may occur.

Additionally, the rules proposed by Petitioners would not eliminate the flexibility needed to address situations on-the-ground. For example, a determination of what type of non-lethal measures would be effective in any particular location largely depends on the nature of the livestock operation, the landscape surrounding that operation, and the location of nearby wolves. Further, the rule proposed by Petitioners allows the Department to employ lethal control, but on-the-ground circumstances necessarily will influence whether or not the Department ultimately decides to use lethal methods. Further, the decision of when to move to lethal control is not a scientific or ecological decision. It is a policy decision. Such a decision, which includes a determination of how many depredations must occur in a given time period, needs to be agreed upon by all interested communities ahead of time, otherwise controversy will persist, and the Department will be faced with intense pressure from all sides of the debate every single time wolf-livestock conflict arises. This was the approach taken in Oregon and it has quelled outrage

in both the conservation community and the agricultural community. Indeed, Oregon has been without wolf controversies (legislative, legal, or otherwise) for three years.

Third, the Commission denied the Petition on the mistaken grounds that Petitioners asked that a new advisory body be created. However, review of the Petition makes clear that no such request was made, and Petitioners do not seek the creation of a new advisory group. While Petitioners do seek to participate in a rulemaking process to codify specific Plan provisions, such a process, and the negotiations that such a process may entail, is best conducted outside of the confines of an advisory group. Indeed, the Commission has pointedly stated at many hearings, including the August 1, 2014, hearing at which it denied the Petition, that it views the WAG to be advisory only. Members of the WAG agree that their role is to be advisory in nature and that they are not in a position to negotiate rule language with the Department or other interested parties. Recognizing this, Petitioners have petitioned for a rulemaking process and provided the Department with proposed rule language that could serve as a starting point for negotiations with the Department and other interested parties as final rule language is developed. It is important to remember that granting the Petition does not also require that the Commission adopt Petitioners' proposed rule language verbatim. Instead, the rulemaking process would enable the Department and the Commission to develop rule language with the input of any interested member of the public, including members of the livestock industry.

None of the three reasons put forth by the Commission for denying the Petition are justified. In fact, the Commission completely ignored the reasons and concerns Petitioners raised and refused to address the very real and pressing issues facing both the Commission and the Department. As such, the Commission violated RCW 34.05.330(1)(a)(i) by failing to "specifically address[] the concerns raised by the [P]etitioners." This renders the decision by the Commission to be arbitrary and capricious. To allow the Commission's denial to stand would allow the Commission to violate its obligations under Washington's APA and further frustrate citizen participation in the government.

IV. Conclusion

Petitioners respectfully request that you direct the Commission to initiate rulemaking proceedings pursuant to RCW 34.05.330(3) and thereby instruct the Commission to demonstrate its commitment to the efforts of the incredibly diverse collective of stakeholders that made the Plan possible.

The gray wolf is one of the most iconic, imperiled, and contentious species in Washington and the United States. Wolf recovery in Washington is still in its infancy, and Washington's wolf population is still a long way from being recovered, even under the terms of the Plan. In fact, Washington's first wolf pack since the early 1900s was only confirmed six years ago. Because wolves, unlike other species, are threatened primarily by lethal take at the hands of humans, management of wolves requires a very different framework. Also, because wolves inflame passions on all sides of the wolf management debate, it is vitally important that there be consistent and legally enforceable rules that the Department must follow before resorting to lethal control of wolves. It is for this reason that we respectfully request that you grant our

appeal and direct the Commission and Department to initiate rulemaking proceedings as requested by Petitioners.

A rulemaking process benefits all factions in the wolf management debate, including livestock operators, the conservation community, and the Department. A rulemaking as requested by Petitioners would allow livestock operators to know what they can expect from the Department when faced with depredation incidents, and it would give assurances to the environmental community that the Department will act in a disciplined and responsible manner in its responses to depredation incidents. Importantly, it would also allow the Department to expend its valuable resources on other matters, instead of constantly responding to criticisms and demands from all sides of the wolf management debate.

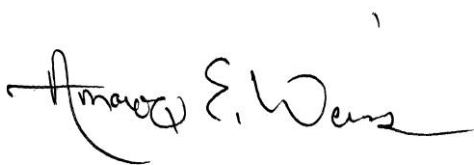
The Department should be looking for ways to reach consensus amongst the interested parties in an effort to avoid long-term conflict. As the current situation involving the Huckleberry Pack demonstrates, the Department will only be able to avoid long-term conflict by establishing firm, legally enforceable rules for when lethal control can be employed as a wolf management tool. Until that is accomplished, every time a real or perceived crisis arises related to wolves, we will be faced with inflamed passions and reactionary wildlife management policies that only serve to further entrench the parties in their polarized positions.

Our goal is not to further complicate the issue of deciding when to implement lethal control. Rather, our goal is to make the process more comprehensible and transparent, and to create rules that are consistent and congruous with the consensus-based Plan. We seek to head off an ongoing battle over lethal control in Washington that could lead to years of litigation and legislation. The proposed rule language would give the Department the legal authority to resist political pressures and reach predictable conclusions, while still giving it the flexibility necessary to resolve fact-specific, on-the-ground realities.

We respectfully request that you reconsider the Commission's denial of our Petition for rulemaking and instruct the Commission to initiate a rulemaking process to establish clear and consistent rules to govern lethal control and minimize conflict, which are also enforceable and scientifically, socially, and economically sound.

Petitioners would be happy to meet with you and your staff in person to discuss the contents of this appeal as well as other issues surrounding wolf management in Washington. We thank you for your consideration of this appeal and look forward to your response.

Sincerely,



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