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Sent via e-mail to: fgc@fgcc.ca.gov on date shown below

May 22, 2014

Michael Sutton, President
California Fish and Game Commission
P.O. Box 944209
Sacramento, CA 94244-2090

Re: EPIC Supplemental Comments Regarding listing of Gray Wolf (*Canis Lupus*) as an “Endangered” Species under the California Endangered Species Act

Dear President Sutton and Commissioners:

The Environmental Protection Information Center (EPIC) presents the following supplemental comments regarding the listing of the Gray Wolf (*Canis lupus*) as an “endangered” species under the California Endangered Species Act (CESA).

EPIC is a community-based, membership-driven non-profit environmental advocacy organization. EPIC works to protect and restore ancient forests, watersheds, coastal estuaries, and native species in Northern California. EPIC uses an integrated, science-based approach, combining public education, citizen advocacy, and strategic litigation.

Consistent with our mission, EPIC works to give voice to the spectacular biodiversity in our state, and advocates for the protection, enhancement, conservation, and restoration of native species and the habitat necessary for these species survival. Protection and restoration of wolves in California is a matter of concern to EPIC and our membership because the presence of these apex predators in our ecosystems will help restore balance to those systems.

In its Status Report for the Gray Wolf (CDFW 2014), the Department of Fish and Wildlife frequently refers to a lack of certainty in science or other evidence that would demonstrate that the listing of the wolf is warranted under CESA. However nothing is certain in science or in life generally. The standard of review provided under CESA is only that the best available information be considered.

As the Commission is surely aware, CESA is modeled on the federal ESA (FESA), and the two statutes contain very similar substantive and procedural provisions. For instance, both statutes

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provide for the listing and protection of threatened and endangered species in a process initiated by a citizen petition. CFGC § 2071 *et seq.*, 16 U.S.C. § 1533 *et seq.* At the first step in each process, the decision makers decide whether listing “may be warranted,” CFGC § 2074.2, 16 U.S.C. § 1533(b)(3)(A), and at the second step in each process, the decision makers decide whether listing “is warranted.” CFGC § 2075.5, 16 U.S.C. § 1533(b)(3)(B). Under CESA, as under FESA, listing decisions must be based on the best available science. CFGC §§ 2072.3, 2074.6; 16 U.S.C. § 1533(b)(1)(A).

California courts have explained that “it is a basic premise of statutory construction that when a state law is patterned after a federal law, the two are construed together.” *NRDC v. California Fish & Game Comm.*, 28 Cal.App.4th 1102, 1118 (1994), citing *Moreland v. Department of Corporations*, 194 Cal.App.3d 506, 512-13 (1987). Thus, interpretation of the federal ESA guides CESA. This is particularly applicable here, as case law has determined that scientific certainty is not required for a species to qualify for protected status through listing.

The [FESA] contains no requirement that the evidence be conclusive in order for a species to be listed. Application of such a stringent standard violates the plain terms of the statute . . . Congress repeatedly explained that it intended to require the FWS to take preventive measures before a species is ‘conclusively’ headed for extinction. The purpose of creating a separate designation for species which are ‘threatened’, in addition to species which are ‘endangered’, was to try to ‘regulate these animals before the danger becomes imminent while long-range action is begun.’

The FWS itself has taken the position that it need not, and must not wait for conclusive evidence in order to list a species. For example, in its decision to list the northern spotted owl, it explained that because the agency had ‘used the best data available to prepare the proposed rule, it was ‘not obligated to have data on all aspects of a species biology prior to reaching a determination on listing’. Moreover, the agency concluded that ‘to withdraw the proposal and conduct additional research would not improve the status of the [species] and would not be in keeping with the mandates of the Endangered Species Act.’ More recently, the FWS decided to list the California red-legged frog, even though many aspects of the species’ status were ‘not completely understood’, because ‘a significant delay in listing a species due to large, long-term biological or ecological research efforts could compromise the survival of the [species].’

Furthermore, Defendants have gone to great lengths to argue that there is a lack of ‘scientific certainty’ as to various aspects of the [species’] status. The ESA does not, however, require such ‘certainty’ to justify the listing of a species. To the contrary, the clear intent and purpose of Congress in enacting the ESA was to provide preventive protection for species before there is ‘conclusive’ evidence that they have become extinct.

Defenders of Wildlife v. Babbitt, 958 F.Supp. 670, 679-81 (D.D.C. 1997) (internal citations omitted).

The Department has erred in requiring an unattainable standard of scientific certainty. The Commission must not also fall victim to this error. Instead, the Commission must simply consider whether or not listing of the wolf under CESA will serve to further the legislative intent of the Act. If listing of the wolf as an “endangered” species will serve to protect, enhance, conserve, and restore the Gray Wolf in California, then the Commission must list.

Wolves are not coming to California; they are already here. Listing the wolf as a species of special concern, completion of a California Wolf Management Plan, alternative regulatory mechanisms, or deferral of listing to another date is not comparable to the certainty of CESA listing. EPIC therefore urges the Commission to list the Gray wolf as an “endangered” species under CESA without further delay.

Sincerely,

A handwritten signature in black ink, appearing to read "Rob DiPerna", with a long horizontal flourish extending to the right.

Rob DiPerna
California Forest and Wildlife Advocate

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