



September 6, 2012

Tom Vilsack
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

William H. Clay, Deputy Administrator
Wildlife Services
1400 Independence Avenue, SW
Room 1624 South Agriculture Building
Washington, DC 20250-3402

Alan May
New Mexico Wildlife Services State Director
8441 Washington NE
Albuquerque, NM 87113

Ken Salazar, Secretary
Department of the Interior
1849 C Street, N.W.
Washington DC 20240

**RE: 60-Day Notice of Intent to Sue in Regards Environmental Assessment (EA),
Finding of No Significant Impact (FONSI) and Decision for Aquatic Rodent Damage
Management in New Mexico**

Dear Secretary Vilsack, Secretary Salazar, Deputy Administrator Clay and State Director May,

WildEarth Guardians is writing to inform you of our intent to file suit against the U.S. Department of Agriculture Animal And Plant Health Inspection Service (APHIS) Wildlife Services (WS) to remedy violations of the Endangered Species Act (ESA). This letter constitutes notice pursuant to 16 U.S.C. Section 1540(g) but does not constitute an admission that our claims require such notice. See *Bennett v. Spear*, 520 U.S. 154 (1997).

First, WildEarth Guardians alleges that APHIS violated Section 7 of the ESA by failing to use the best available scientific data in issuing a Finding of No Significant Impact (FONSI) and Decision for Aquatic Rodent Damage Management in New Mexico. In addition, the APHIS failed in its duty to conserve several listed species under section 7(a)(1) of the ESA by not gathering data that would show whether the proposed action would impact these species.

Second, WildEarth Guardians alleges that APHIS violated Section 7 of the ESA when it failed to initiate and complete formal consultation with the United States Fish and Wildlife Service (FWS) as to the impacts on several listed species in New Mexico, despite the fact that APHIS acknowledges in the EA and FONSI that its proposed actions may adversely affect these species. For example, the proposed actions may adversely affect listed aquatic species – including listed minnows and shiners – by causing the loss of critical and limited

habitats and refugia which are essential during times of low flow and droughts. Additionally, traps and snares may adversely affect federally listed mammalian species such as the Mexican wolf and avian species such as the southwestern willow flycatcher may be adversely affected by removal or flooding of nest trees. Amphibians such as the Chiricahua leopard frog may be adversely affected by the spread of the chytrid fungus.

Furthermore, many listed species in New Mexico may also be adversely affected by the general degradation of wetlands and riparian habitats associated with the proposed actions. Indeed, the Surface Water Quality Bureau of the New Mexico Environment Department (NMED/SWQB) has expressed serious reservations concerning the proposed project. It wrote in a comment letter as follows: "Beavers are a keystone species integral to healthy river ecosystems. There are direct links between beaver and water quality. The presence of beavers and beaver habitat can help improve surface water by reducing impairments for temperature, sediment and nutrients. Beavers help increase the amount and diversity of riparian vegetation which shades and reduces the solar gain in streams. The increased vegetation can utilize nutrients and trap excess sediments that would otherwise remain in the surface water. Additionally, the removal of beavers from areas where beaver dams have been created can result in erosional head cuts as well as excess turbidity and sediment loading in the river when the abandoned dams are suddenly breached during high flows." The NMED/SQWB comment letter goes on to note that "[b]eavers and beaver habitat are crucial to the protection, restoration and increase of New Mexico's wetlands and riparian areas" and that the removal of beavers "is detrimental to the projects and at direct odds with SWQB's project and program goals for wetlands and watershed protection."

WildEarth Guardians' 12,500 members and supporters, many of whom live, conduct business and recreate in New Mexico have grave concerns over the ARDM program in New Mexico and its effects on all the target species considered as well as the non-target species. However, beaver, as ecosystem engineers are absolutely essential to New Mexico for their climate adaptation value as well as other values including aesthetics, wildlife viewing, etc. Numerous species listed as threatened or endangered or as candidates by the U.S. Fish and Wildlife Service (USFWS) rely on the wetlands engineered by beaver including, but not limited to, Chiricahua leopard frog, cutthroat trout, NM meadow jumping mouse and the Southwest willow flycatcher.

Beaver can, directly and indirectly, impact water quality and water quantity. There are economic values for the ecosystem services that can be generated by beavers especially for downstream water users. Beaver dams impede the flow of water and create pools of very slow-moving water directly upstream. In systems with seasonal water shortages such as New Mexico this storage and subsequent slow release can be crucial to maintaining minimum baseflows for downstream habitat, and valuable late season flows for irrigators, municipal water systems and other water consumers.

As a keystone species, beaver can play a significant role in efforts to improve ecological conditions and build resilience and adaptation to climate change in the in the watersheds that provide our water supply. Beaver populations, with their dams and ponds and the wetlands and the aquatic ecosystems associated with each, can increase water storage of streams that are undergoing dramatic changes in runoff patterns.

Section 7 of the Endangered Species Act (ESA) requires the APHIS, in consultation with the U.S. Fish and Wildlife Service (FWS), to insure that any action authorized, funded, or carried out by the agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to include all activities or programs of any kind authorized, funded, or carried out by federal agencies, including actions directly or indirectly causing modifications to the land, water, or air; and actions intended to conserve listed species or their habitat. 50 C.F.R. § 402.02. ARDM is an ongoing agency action pursuant to Section 7 of the ESA.

For each federal action, the APHIS must request from FWS whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the APHIS must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* The biological assessment must generally be completed within 180 days. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i). If the APHIS determines that its proposed action may affect any listed species or critical habitat, the agency must engage in formal consultation with FWS. 50 C.F.R. § 402.14.

To complete formal consultation, FWS must provide the APHIS with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. The biological opinion “is required to address both the ‘no jeopardy’ and ‘no adverse modification’ prongs of Section 7.” *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115, 1127 (N.D. Cal. 2006), citing 50 C.F.R. § 402.14(g)(4). Consultation must generally be completed within 90 days from the date on which consultation is initiated. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).

If FWS concludes that the proposed action “will jeopardize the continued existence” of a listed species, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, FWS must provide an “incidental take statement,” specifying the amount or extent of such incidental taking on the listed species, any “reasonable and prudent measures” that FWS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by the Air Force to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

Moreover, if a formal consultation is triggered with respect to a proposed action – as is true in this case in light of APHIS’s concession that its action may have an adverse effect on several listed species – than the USFWS has an opportunity to review an possible incidental take of species associated with that action and to impose important substantive constraints on the action as conditions to issuance of an incidental take permit pursuant to Section 9 of the ESA. 16 U.S.C. Section 1538. In this case, since no incidental take of any listed species has been authorized in connection with aquatic rodent management actions, then any and all take occurring as a result of this action would constitute a violation of the ESA.

There are numerous species that have been listed as threatened, endangered or candidates (T&E species) or have had critical habitat designated since APHIS obtained a Biological Opinion in 1992 from FWS describing potential effects on T&E species and prescribing reasonable and prudent measures for avoiding jeopardy and since New Mexico APHIS conducted an informal consultation (2003) with FWS for its wildlife damage management program specifically concerning the T&E species in New Mexico.

The species with significant new information since that time include:

- Chiricahua leopard frog (critical habitat designated and recovery plan final);
- Gila chub (listed and critical habitat designated);
- Gila Trout (revised recovery plan);
- Loach minnow (critical habitat designated);
- NM meadow jumping mouse (candidate status, action plan);
- NM spring snail (candidate status);
- Piping plover (revised critical habitat);
- Rio Grande cutthroat trout (status review and conservation plan);
- Rio Grande silvery minnow (revised recovery plan);
- Southwest willow flycatcher (revised critical habitat);
- Spikedace (critical habitat designated);

Therefore, APHIS must withdraw its FONSI and Decision for Aquatic Rodent Damage Management in New Mexico and refrain from any ARDM until the agency has done a scientifically credible analysis of impacts to the species listed above and has initiated and completed a formal consultation with the USFWS as to all of those species which APHIS itself acknowledges may be adversely affected by the proposed action.

APHIS cannot take the position in this case that it has conducted an informal consultation with the USFWS as to those proposed actions that may affect New Mexico listed species.

Pursuant to USFWS regulations implementing the ESA, informal consultation require a written letter of concurrence from the USFWS in response to a "may affect - not likely to adversely affect" determination by an action agency. 50 C.F.R. Section 402.13(a). In this case, APHIS concedes that its action may adversely affect a number of species, and as to these species "informal consultation" is simply not an option. Furthermore, as for those species where APHIS does make a "may affect - not likely to adversely affect" determination in connection with the proposed action, the FWS has not issued a letter concurring in that "not likely to adversely affect" determination. Instead, the USFWS merely wrote in an e-mail of October 4, 2011 that APHIS has "minimized potential impacts to federally listed species through the Standard Operating Procedures." Regardless of whether or not USFWS's statement regarding impacts is based on substantial evidence, as a legal matter USFWS's statement does not constitute the written concurrence required to terminate an informal consultation pursuant to controlling regulations.

If the aforementioned violations of the ESA are not remedied within 60 days of the date of this letter, we intend to file a citizen's suit seeking preliminary and permanent injunctive relief.

Thank you for your attention. Please contact us should you have any questions regarding this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Bryan Bird', with a stylized, overlapping flourish at the end.

Bryan Bird
Wild Places Program Director
bbird@wildearthguardians.org