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September 8, 2011

**Sent Via Certified Mail
Return Receipt Requested**

Tod Stevenson, Director
New Mexico Department of Game and Fish
P.O. Box 25112
Santa Fe, NM 87504

Jim McClintic, Chairman
New Mexico State Game Commission
P.O. Box 21027
Albuquerque, NM 87154

Re: Notice of Violations of the Endangered Species Act Concerning the Mexican Gray Wolf (*Canis lupus baileyi*)

Dear Director and Chairman:

On behalf of WildEarth Guardians and pursuant to the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), I write to provide you with formal 60-day notice of our intention to file suit against you, in your official capacity, for violating ESA § 9, 16 U.S.C. § 1538(a)(1)(B), and the Mexican wolf Section 10(j) Rule, 50 C.F.R. § 17.84(k), by continuing to authorize trapping within occupied wolf range without first exercising due care to avoid wolf take.

As you are well aware, only one wild population of Mexican gray wolves currently exists. That population, which numbers approximately 50 individuals, inhabits the 4.4 million acre Blue Range Wolf Recovery Area (“BRWRA”) of New Mexico and

Arizona. Despite 13 years of active reintroduction efforts to the BRWRA, the Mexican gray wolf is not recovering, but rather continues to totter on the brink of extinction. The U.S. Fish and Wildlife Service, that agency ultimately tasked with conserving the Mexican wolf under the ESA, has conceded that the wild wolf population is now at risk of total failure. Indeed, the Mexican gray wolf reintroduction and recovery project (“the project”) has become stymied, as this subspecies remains one of the most endangered mammals in the United States.

Reasons for poor wolf survival and genetic veracity in the BRWRA are myriad and run the gamut from vehicle collision to illegal shooting. Importantly, non-project related trapping is one of the key drivers continuing to suppress wild Mexican wolf population growth. Wolves have been, and will continue to be, inadvertently caught in traps legally set under New Mexico regulations by non-project personnel for other, target species. As the United States Geological Survey recently published, fourteen individual wolves have been captured in foothold traps set by trappers other than FWS project personnel fifteen times during the course of the reintroduction effort. Thirteen of these incidents occurred within the State of New Mexico.

As an endangered species, the reintroduced population of Mexican gray wolves is protected by the provisions of the ESA as modified by the Mexican wolf Section 10(j) Rule. ESA § 9 prohibits any person, including a governmental entity, from taking an endangered species. See 16 U.S.C. §§ 1532(13) and 1538(a)(1)(B). The ESA take prohibition is capacious and expressly forbids trapping. See id. §1532(19). The Section 10(j) Rule alters the Section 9 take prohibition to provide only narrow exceptions to the take prohibition. As it relates to trapping, the Section 10(j) Rule, which exempts “unavoidable and unintentional” take from the otherwise applicable Section 9 prohibition, expressly states that, “Taking a wolf with a trap, snare, or other type of capture device within occupied wolf range...will not be considered unavoidable, accidental, or unintentional take, unless due care was exercised to avoid taking a wolf.” 50 C.F.R. 17.84(k)(15).

The New Mexico Game Commission (“NMGC”) is authorized by statute to establish rules and regulations governing trapping within the State. See N.M.S. §§ 17-1-26 and 17-5-4. The New Mexico Department of Game and Fish (“NMDGF”) is charged with administering State laws governing trapping, including issuing trapping licenses to the public. See id. § 17-3-22; N.M.A.C. § 19.31.3. The current New Mexico trapping regulations, and therefore the licenses issued pursuant to those regulations, permit members of the public to set *with no regard for the possibility of capturing a Mexican gray wolf* foothold traps and snares that have the capability to capture Mexican gray wolves due to their indiscriminate nature. As such, neither the NMGC nor the NMDGF is exercising “due care...to avoid taking a wolf” as required by the Mexican wolf Section 10(j) Rule. The NMGC and the NMDGF are therefore in violation of ESA § 9.

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It is inconsequential that these agencies are not directly trapping endangered species. Rather, case law is clear that vicarious liability applies to violations of ESA § 9. See, e.g., Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir.1997); Palila v. Hawaii Department of Land and Natural Resources, 639 F.2d 495, 498 (9th Cir.1981). To be sure, a governmental entity's failure to regulate in a way that avoids the take of a listed species constitutes take in violation of the ESA. See, e.g., Loggerhead Turtle v. County Council of Volusia County, Florida, 148 F.3d 1231, 1249 (11th Cir.1998); United States v. Town of Plymouth, Massachusetts, 6 F.Supp.2d. 81, 82 (D. Mass. 1998). Because the NMGC and the NMDGF are currently regulating trapping and issuing licenses for trapping within the State of New Mexico in a way that makes no effort to mitigate or avoid wolf captures, both agencies are in violation of the ESA and its implementing regulations.

If you believe any of the above information is incorrect or you would like to discuss with me a timetable for amending the New Mexico trapping regulations so as to comply with ESA § 9 and 50 C.F.R. § 17.84(k), please contact me at the phone number or e-mail address above. By submitting this notice, we hope to spur you to take swift action for the critically endangered Mexican gray wolf.

Very truly yours,

W. RANDOLPH BARNHART, PC

Melissa A. Hailey

on behalf of

John Horning, Executive Director
WildEarth Guardians
312 Montezuma Avenue
Santa Fe, NM 87501

cc: Tom Arvas, NMGC Commissioner
Scott Bidegain, NMGC Commissioner
Robert V. Hoffman, NMGC Commissioner
Gerald Maracchini, NMGC Commissioner
William Montoya, NMGC Commissioner
Thomas Salopek, NMGC Commissioner