

Talasi B. Brooks (ISB # 9712)
Lauren M. Rule (ISB # 6863)
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, Idaho 83701
(208) 342-7024
(208) 342-8286 (fax)
tbrooks@advocateswest.org
lrule@advocateswest.org

Kristin F. Ruether (ISB # 7914)
WESTERN WATERSHEDS PROJECT
P.O. Box 2863
Boise, ID 83701
(208) 440-1930 (phone)
(208) 475-4702 (fax)
kruether@westernwatersheds.org

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

WESTERN WATERSHEDS PROJECT,
CENTER FOR BIOLOGICAL DIVERSITY,
FRIENDS OF THE CLEARWATER,
WILDEARTH GUARDIANS, and
PREDATOR DEFENSE,

Plaintiffs,

v.

TODD GRIMM, Idaho Director,
Wildlife Services, and USDA WILDLIFE
SERVICES,

Defendants.

No. 1:16-cv-218-EJL-CWD

**PLAINTIFFS' COMBINED RESPONSE/
REPLY BRIEF ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT
(ECF Nos. 16 & 18)**

INTRODUCTION

Defendants' summary judgment brief confirms what Plaintiffs showed in their opening brief—Wildlife Services arbitrarily refused to prepare a full Environmental Impact Statement (EIS) even though its wolf control actions have highly controversial and uncertain impacts, affect unique areas like wildernesses and high-quality wolf habitat, and may cause significant cumulative impacts. Moreover, the 2011 Idaho EA solely relied on IDFG's statewide wolf plans and population objectives to assess impacts to the wolf population in Idaho and failed to take the required "hard look" at the direct, indirect, and cumulative effects of Wildlife Services' activities. The agency's wolf killing is concentrated in areas like the Lolo/Selway Zone, causing greater effects to those particular ecosystems and wolf populations, but the 2011 EA ignored these site-specific impacts.

At a minimum, new information and circumstances that emerged after the 2011 EA, including new plans to reduce the wolf population in Idaho, required Wildlife Services to conduct supplemental NEPA analysis. The annual monitoring reports upon which Defendants have relied to conclude that no supplementation was necessary were unreasonable. Finally, Defendants' jurisdictional argument that Plaintiffs lack standing fails under recent controlling Ninth Circuit precedent, *WildEarth Guardians v. USDA*, 795 F.3d 1148, 1156-59 (9th Cir. 2015). Accordingly, the Court should grant summary judgment for Plaintiffs.

ARGUMENT

I. PLAINTIFFS HAVE ARTICLE III STANDING.

Defendants first argue that the Court should dismiss this case for lack of standing, because Plaintiffs "cannot show that the relief they request will redress their alleged injuries." Defs. Summ. J. Br. 5, ECF No. 17. Defendants do not contest that Plaintiffs' standing declarants

articulated several types of injuries from Wildlife Service’s NEPA violations, including harms to their interests in observing wolves in the wild, and procedural and informational injuries. *See* ECF Nos. 16-3 – 16-10. Instead, Defendants rely on the Declaration of Brad Compton, ECF No. 18-3, to argue that Idaho would supposedly carry out the same wolf control actions even if Wildlife Services could not, and hence Plaintiffs’ injuries are not redressable by this Court. Defs. Summ. J. Br. 5-6.¹

This contention fails under the Ninth Circuit’s recent decision rejecting an identical standing argument in *WildEarth Guardians v. USDA*, a similar case against Wildlife Services filed in the District of Nevada. 795 F.3d at 1156-59 (reversing district court dismissal of NEPA challenges for lack of standing). In *WildEarth Guardians*, the plaintiff raised several claims, including that Wildlife Services wrongly relied on an EA rather than an EIS for its activities in Nevada. *See id.* at 1152-54. The district court dismissed the Nevada-specific claims for lack of redressability based on Wildlife Services’ assertion – relying on a single cursory letter from a Nevada wildlife official (the “Mayer letter”)– that the State of Nevada would continue predator control actions even if Wildlife Services could not do so pending its NEPA compliance. *Id.* at 1156.

The Ninth Circuit reversed this ruling. It first explained that, for procedural claims such NEPA violations, plaintiffs can show injury in fact by alleging that they use the affected area, and their aesthetic and recreational enjoyment of the area will be lessened by the challenged activity. *Id.* at 1154. “Once plaintiffs seeking to enforce a procedural requirement establish a concrete injury, the causation and redressability requirements are relaxed. Plaintiffs alleging

¹ The Compton Declaration does not actually establish that Idaho would carry out all the wolf control actions that Wildlife Services conducts in Idaho – it just vaguely asserts that Idaho has some funding and equipment available to conduct some wolf control actions, without providing any meaningful details. Compton Decl., ECF No. 18-3.

procedural injury must show only that they have a procedural right that, if exercised, *could* protect their concrete interests.” *Id.* (quoting *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011), *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008)) (internal quotations and citations omitted).²

Turning to redressability, the Ninth Circuit held that the possibility Nevada might undertake its own predator control actions did not demonstrate a lack of redressability for Wildlife Services’ NEPA violations:

[T]he mere existence of multiple causes of an injury does not defeat redressability, particularly for a procedural injury. So long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of the plaintiff’s injury.

Id. at 1157. The court observed that the Mayer Letter did not establish what Nevada would do to carry out the predator killing; to the contrary, Nevada had no existing program to replace Wildlife Services’ activities, and the extent of any potential program was “a matter of speculation.” *Id.* at 1158. As the Ninth Circuit stated:

Nevada does not already have an independent predator damage management program that is entirely redundant with APHIS’s in terms of its effect on WildEarth. . . . What, if any, the extent of a Nevada predator damage management

² As Defendants concede, Plaintiffs do not need to show that the requested relief “would *certainly* result in alleviating the alleged concrete injury,” only that it *could* redress their injuries. Defs. Summ. J. Br. 6 (citing *WildEarth Guardians*, 795 F.3d at 1154). The rationale from *Levine v. Vilsack*, 587 F.3d 986, 993 (9th Cir. 2009) does not apply because Plaintiffs’ injuries stem directly from Wildlife Services’ current disputed conduct and inadequate 2011 EA, and their ability to obtain redress does not depend upon the behavior of third parties not before the Court. Vacating the 2011 EA and DN/FONSI and requiring Wildlife Services to fully comply with NEPA could redress Plaintiffs’ injuries by forcing Wildlife Services to re-evaluate the methods or extent of its engagement with wolf control in Idaho, taking into account new facts and circumstances to possibly arrive at a different balance. *See Cascadia Wildlands v. Woodruff*, 151 F.Supp.3d 1153, 1162 (W.D. Wash. 2015) (“To the extent that, if Plaintiffs prevail, Wildlife Services could either narrow the contractual scope of its involvement with wolf management or prepare an EIS that sufficiently accounts for this discretion, rather than ignoring it, Plaintiffs’ injury can be redressed.”).

program would be if APHIS stopped its activity in Nevada is entirely a matter of speculation because Nevada currently has no such independent program. Nevada has stated, through the Mayer Letter, that it would implement some form of predator damage management if APHIS withdrew from Nevada. But the Mayer Letter states only that the Nevada Department of Wildlife would retain statutory responsibility for predator management if APHIS ceased its involvement. It does not describe what the Department of Wildlife would do to carry out that responsibility on its own. Nevada might adopt practices that would be less harmful to WildEarth's interests, or it might devote less funding to predator damage management than APHIS currently provides. . . . The notion that Nevada would replace everything APHIS currently does is therefore speculative at best. Such speculation does not defeat standing.

Id. at 1158-59.

The same is true here. The administrative record shows that most lethal wolf control in Idaho has been, and currently is, carried out by Wildlife Services. While wolves were listed under the ESA, Wildlife Services admits it was responsible for “the majority” of human-caused wolf mortality in Idaho. Ans. ¶ 46, ECF No. 9. Since de-listing, Wildlife Services killed 69 of 73 wolves killed by livestock producers/private citizens/authorized outfitters in 2012 (AR-DNS #275, 4390), 75 of 94 in 2013 (AR-DNS #165, 2777), and 56 of 67 in 2014 (*id.*). Wildlife Services has also carried out all of the lethal wolf control to benefit wild ungulates in Idaho. AR-DNS #107, #112, #113, #295-97. In contrast, the record contains no evidence about how many wolves IDFG or other IDFG contractors may have killed or by what means.

Wildlife Services' argument relies on IDFG's predation management plans, funding from the Wolf Depredation Control Board, and vague assertions in the Compton Declaration that IDFG “has independent abilities to perform wildlife control activities,” has conducted “some” such activities since 2010, and has “price agreements in place for aerial support services,” which “include services that IDFG has used and may use to perform lethal wolf control.” Compton Decl. ¶ 5, ECF No. 18-3. Just as in *WildEarth Guardians*, these general facts and aspirational statements provide no details about a state-run wolf control program that could totally supplant

Wildlife Services' wolf control actions in Idaho, leaving the extent and nature of a potential IDFG program to take over Wildlife Services' activities "a matter of speculation" that is insufficient to defeat standing. 795 F.3d at 1158.³

Plaintiffs have satisfied the relaxed redressability requirements that apply in procedural cases such as this, by demonstrating that the requested relief, if granted, could protect their concrete interests in seeing and hearing wolves in Idaho, and in ensuring Wildlife Services adequately informs the public about its activities and their environmental consequences.

II. THE DN/FONSI WAS ARBITRARY AND CAPRICIOUS.

Defendants' conclusory assertions that none of the NEPA significance factors apply here fail to refute the evidence in the record showing that Wildlife Services' wolf killing activities affect unique geographic areas, are highly uncertain and controversial, and have cumulatively significant effects when added to the effects of other activities.

A. Wildlife Services Wrongly Concluded That Impacts to Unique Geographic Areas Did Not Warrant An EIS.

Wildlife Services' "ungulate protection" actions discussed in the 2011 EA were intended to reduce the Lolo/Selway Zone wolf population, which inhabits the Selway-Bitterroot Wilderness, part of the central Idaho core area deemed essential to wolf recovery. In light of potential impacts to the wilderness, as well as important wolf habitat, Wildlife Services should have found that impacts to unique geographic areas warranted preparation of an EIS.

While the presence of wilderness areas in Idaho alone implicates impacts to unique geographic areas, the 2011 EA specifically acknowledged that Wildlife Services would be

³ Any attempt by Defendant to submit additional evidentiary information with its reply brief would be improper, and Plaintiffs will seek to strike it, file a sur-reply and/or request discovery in response. *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1273 n.3 (9th Cir. 1993); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996); *Stickle v. SCI Western Mkt. Support Ctr., L.P.*, 2009 WL 3241790, at *4 (D. Ariz. Sept. 30, 2009).

heavily targeting wolves in the Lolo/Selway Zone, with the intended effect of significantly reducing the wolf population there. This is not like *Woodruff*, 151 F.Supp.3d at 1165-66, where plaintiffs could point to no specifics about the projected activities and how they might affect wilderness. Fourteen percent of the Lolo Zone and 79 percent of the Selway Zone lie within the Selway-Bitterroot Wilderness. Pls. SOF ¶ 22, ECF No. 16-2. Science suggests that targeting wolves outside the wilderness affects their presence and behavior within its boundaries. Rutledge *et al.* (2010) (AR-EA #616). Keeping the Lolo/Selway Zone wolf population at a depressed level is intended to reduce that population, and will affect wolf presence and abundance in the wilderness, as well as the wilderness ecological environment. AR-DNS #106, 1556 (intention to reduce wolf population); Rutledge *et al.* (2010) (AR-EA #616) (effects to wilderness); AR-EA #606-10 (Ripple *et al.* trophic cascades studies); AR-EA #407-09 (Creel *et al.* elk response to wolf predation risk studies); Beyer *et al.* (2007)(trophic cascades); SOF ¶¶ 9, 22.

The Lolo/Selway Zone is not the only unique geographic area where Wildlife Services has targeted wolves for removal: Wildlife Services has also repeatedly removed wolves that inhabit the Frank Church-River of no Return Wilderness and Stanley Basin/Sawtooth National Recreation Area (SNRA), due to depredation of livestock, and will likely do so in the future. *See* Marvel Decl. ¶¶ 21-24, Cole Decl. ¶¶ 27, 33-35, 27, 43, 46 (ECF Nos 16-7, 16-10).⁴ *See also* AR-EA #084 (Boulder White-Clouds Council comments); AR-EA#678, 15286-87, AR-EA #674, 15262-63, AR-EA #662, 15185 (packs or individuals killed in FY 2007-2009). Wildlife Services often returns to the same areas to remove members of the same packs year after year,

⁴ The Court can consider extra-record evidence, such as these declarations, to determine whether the agency considered all relevant factors. *Lands Council v. Powell*, 395 F.3d 1019, 1029-30 (9th Cir. 2005); *Asarco, Inc. v. U.S. Env'tl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980). These declarations show that Wildlife Services has often killed wolves in the SNRA and its environs, but the 2011 EA never considered the extent of future killing in these areas and the effects it would have on SNRA, wilderness values, or central Idaho's core wolf habitat.

reducing their numbers or eradicating them. *Id.* Defendants ignored the impacts of this repeated removal of wolves and wolf packs from these unique areas, which also are part of central Idaho’s core wolf habitat.

The District of Idaho has repeatedly recognized that the presence of important wildlife habitat—not just habitat for threatened and endangered species—may also implicate the unique geographic characteristics significance factor, 40 C.F.R. § 1508.27(b)(3). In *Wilderness Soc. v. U.S. Forest Serv.*, 850 F.Supp.2d 1144, 1160-61 (D. Idaho 2012), this Court suggested that impacts to Yellowstone cutthroat trout habitat affected unique characteristics of the geographic area, even though the species is not listed under the ESA. In *Native Ecosystems Council & All. For the Wild Rockies ex rel. Davey*, 866 F.Supp.2d 1209, 1228 (D. Idaho 2012), the Court likewise held that the presence of important habitat (although not designated critical habitat) for the Canada lynx was a “unique characteristic” showing significance under section 1508.27(b)(3). Here, the projected activities in the Lolo Zone, as well as those that have occurred in the SNRA and Frank Church-River of no Return Wilderness, would affect, or have affected, wolf habitat in central Idaho that is particularly important to wolf conservation and recovery. Pls. SOF ¶¶ 7, 17; AR-EA #058, 533. Impacts that reduce the value and security of this habitat for the wolf population affect uniquely important wolf habitat, within 40 C.F.R. § 1508.27(b)(3).

In light of potential impacts to wilderness, as well as important wolf habitat, Wildlife Services’ control actions impact unique geographic areas, warranting an EIS.

B. Effects of Wildlife Services’ Wolf Killing Are Highly Controversial and/or Highly Uncertain.

Second, the record establishes the highly controversial and highly uncertain effects of Wildlife Services’ wolf-killing activities. The comments Wildlife Services received on its draft

Wolf EAs raised significant questions about the size, nature, and effect of Wildlife Services' actions, requiring an EIS. *E.g.*, AR-EA #087, #058, #060, #063, #053, #418.

As commenters pointed out, published scientific studies and other facts at the time of the 2011 EA established scientific controversy about whether the wolf population was really “recovered,” and whether it could withstand the high levels of mortality the EA assumed it could. Bergstrom *et al.* (2009) (AR-DNS #183) (cited in AR-EA #058); Creel & Rotella (2010) (AR-EA #067) (sustainable harvest levels lower than state plans assume); *contrast* Von Holdt *et al.* (2008) (AR-EA #723) (wolf population not functioning as a metapopulation) *with* Von Holdt *et al.* (2010) (AR-EA #724) (some genetic exchange in wolf population); Carroll *et al.* (2006) (AR-EA #390, 7078) (“In the 2003 proposed rule, the USFWS conflated the concepts of population viability and recovery.”); *see also* *Defenders of Wildlife v. Hall*, 565 F.Supp.2d 1160, 1171-72 (D. Mont. 2008) (questioning whether wolf population would function as a metapopulation when greatly reduced). Both public comments and peer reviewers notified Wildlife Services of controversy as to whether wolves were to blame for elk declines in the Lolo Zone and whether killing wolves as proposed in the EA would actually increase elk populations. AR-EA #503, 9443-47; AR-EA #418; AR-EA #058, 531-32; AR-EA #057, 525-26; *see also* Pls. SOF ¶¶ 9, 12. Commenters pointed out the EA did not discuss scientific evidence that killing wolves can disrupt wolf pack social structure, AR-EA #101, 878-80, and notified Wildlife Services about science suggesting that effects to meso-predator populations could occur, AR-EA #063, 581-82, as well as scientific controversy surrounding the agency's assumption that killing wolves would increase social tolerance for wolves, AR-EA #060, 546.

Defendants seek to controvert the scientific controversy and uncertainty about the effects of Wildlife Services' wolf killing by drawing a curious distinction between “efficacy” and

“effects.”⁵ If there is dispute about the efficacy of the wolf killing—*i.e.*, whether killing wolves produces the desired result, that is a dispute about the effect of killing wolves.

The effects of expanding Wildlife Services’ activities to encompass killing wolves for ungulate protection, particularly in the new context of private hunting and trapping, were especially uncertain because the activities and outcomes were untested. *See* Pls. SOF ¶ 12. This case is not like *In Defense of Animals v. U.S. Dep’t of Interior*, 751 F.3d 1054, 1070 (9th Cir. 2014), where BLM intended to control wild horse populations using a method it had been using for 20 years. Finally, there is also uncertainty about the size and nature of Wildlife Services’ activities because the scope of the activities is ill-defined and generally does not crystallize until application of Wildlife Services’ “Decision Model” or Annual Work Planning process at the site-specific level, but no further NEPA is completed at that time. Pls. SOF ¶ 21. Wildlife Services’ reliance on *Marsh v. Or. Natural Resources Council*, 490 U.S. 360, 378 (1989), to reject scientific uncertainty as a basis for needing an EIS is a misinterpretation of that case and deserves no deference. Pls. Summ. J. Br. 22-23, ECF No.16-1 (citing AR #005, 99); *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 342 (D.C. Cir. 2002).

The record and case law establish the 2011 EA’s proposed actions were scientifically controversial and had uncertain effects, and Wildlife Services should have found this factor required an EIS.

⁵ “Efficacy” is “capacity for producing a desired result or effect; effectiveness: *a remedy of great efficacy.*” <http://www.dictionary.com/browse/efficacy?s=t> (accessed Apr. 11, 2017). Definitions of “effect” include “power to produce results; **efficacy**; force; validity; influence: *His protest had no effect.*” <http://www.dictionary.com/browse/effect?s=t> (accessed Apr. 11, 2017) (emphasis added).

C. Significant Cumulative Impacts Require An EIS.

Finally, Wildlife Services failed to take a hard look at the cumulative effects of its proposed wolf-killing activities, because it failed to discuss relevant actions in adequate detail. Therefore, its determination in the DN/FONSI that cumulative impacts did not reach the significance threshold was also flawed.

Rather than analyze the cumulative effects of Wildlife Services' actions added to other past, present, and reasonably foreseeable future actions, such as recreational wolf hunting and trapping, Defendants relied upon monitoring the wolf population *after* issuance of the 2011 EA to make sure it did not drop below 500 to avoid cumulative impacts. Relying solely on a conclusion that "sustainable" IDFG management would prevent any potentially significant impacts, Defendants failed to provide the necessary "observations and analysis" in the 2011 EA, as required. *W. Watersheds Project v. Rosenkrance*, No. 4:09-CV-298-EJL, 2011 WL 39651, at *6 (D. Idaho Jan. 5, 2011) (agency "may not rely on the conclusions of [monitoring assessments] without including actual observations and analysis in the EA"). Instead, the 2011 EA offered merely a "perfunctory" discussion that did not satisfy NEPA. *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994-96 (9th Cir. 2004) (discussing similar cumulative impacts analysis); *see* Pls. SOF ¶ 18; AR-EA #005, 96, 128, 132. A proper cumulative effects analysis for each alternative is required to weigh the cumulative impacts of relevant private, state, and federal activities on local and regional wolf populations, *see* AR-EA #063, 581, #060, 567, as well as impacts to wilderness, Rutledge *et al.* (2010) (AR-EA #616), wolf pack social structure, Brainerd *et al.* (2008) (AR-EA #381), mesopredator populations, AR-EA #063, 581-82 (citing scientific articles), and trophic cascades, AR-EA#057, 525-26 (citing scientific articles).

For all of these reasons, the DN/FONSI was arbitrary and capricious and Wildlife Services should have found its actions could have significant environmental impacts, requiring preparation of an EIS.

III. WILDLIFE SERVICES MAY NOT RELY ON IDFG MANAGEMENT PLANS' WOLF POPULATION OBJECTIVES WITHOUT INDEPENDENTLY ANALYZING LIKELY EFFECTS.

Wildlife Services violated its obligation under NEPA to independently analyze and disclose the direct, indirect, and cumulative effects of its activities by failing to analyze site-specific effects of its projected activities on areas like the Lolo/Selway Zone, where they are concentrated; relying on wolf population objectives in IDFG's ever-shifting wolf management plans; and assuming that the effects of its activities would be the same under any alternative.

A. Wildlife Services Failed To Analyze And Disclose The Site-Specific Impacts Of Its Activities.

One of the most critical flaws of the 2011 EA is the generalized broad-brush analysis of impacts that fails to consider the effects to any particular areas where Wildlife Services focuses its wolf killing. Defendants do not, and cannot, point to any site-specific analysis detailing the effects of Wildlife Services' activities on the Lolo/Selway Zone, SNRA, or any other area where Wildlife Services should have anticipated they would be concentrated. Instead they claim Wildlife Services reasonably exercised its discretion to determine the geographic scope of the analysis, a *non sequitur*. *Id.* at 14. Although Wildlife Services may select the geographic scope of its analysis, it cannot evade analyzing its actions' site-specific impacts. *State of Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (“The critical inquiry... is not whether the project's site-specific impact should be evaluated in detail, but when such detailed evaluation should occur”); *Klamath Siskiyou Wildlands Ctr.*, 387 F.3d at 993 (9th Cir. 2004) (proper cumulative impacts analysis requires “some quantified or detailed information”). Without such site-specific

information, “neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide.” *Rosenkrance*, 2011 WL 39651, at *11-12.

Defendants claim that Wildlife Services could not undertake NEPA analysis for wolf damage management activities that are concentrated in regions like the Lolo Zone because “the specific locations of those activities is not yet known,” Defs. Summ. J. Br., n.8, but this argument is belied by the facts in the 2011 EA itself. The 2011 EA disclosed a plan to target wolves in the Lolo/Selway Zone for removal at IDFG’s request, while failing to discuss the impacts of that wolf killing on the environment or wolf population in the Zone. *See* AR-EA #005, 72-73, 131, 172. These impacts are especially important because the Lolo Zone both encompasses federally-designated wilderness and comprises part of the central Idaho area deemed vital for wolf recovery. Pls. SOF ¶¶ 22, 30. An agency must analyze impacts once affected areas and site-specific effects are identifiable. *N. Alaska Env’tl. Ctr. v. Kempthorne*, 457 F.3d 969, 977 (9th Cir. 2006). Because impacts were identifiable at the site-specific level of the Lolo/Selway Zone, Wildlife Services should have disclosed and analyzed those impacts, at that site-specific level.

Other evidence also establishes that Wildlife Services’ activities are not uniformly distributed across the state, and may have site-specific impacts that should have been discussed and weighed in the 2011 EA. The Declaration of Kenneth Cole discusses numerous instances in which Wildlife Services removed wolves or wolf packs in the SNRA area. Cole Decl. ¶¶ 26-27, 33, 35-37.⁶ Wolf management progress reports from 2008-2010 show that by far most of the wolf control actions those years occurred in just three of the twelve wolf management zones—the McCall-Weiser, Sawtooth, and Southern Mountains Zones, which are located adjacent to

⁶ The Court can consider this information for the same reason discussed in note 4.

each other in central Idaho.⁷ *See also* AR-EA #498, 9382; AR-EA #678, 15292 (showing 2010 control actions concentrated in the McCall-Weiser, Dworshak-Elk City, Southern Mountains, and Sawtooth Zones). But the 2011 EA does not consider this information, nor does Wildlife Services conduct further NEPA analysis at the site-specific level for its annual work plans. AR-EA #005, 81, 83. It is unreasonable for the 2011 EA and DN/FONSI to purport to authorize Wildlife Services' activities throughout the State of Idaho without any public disclosure or analysis of identifiable site-specific impacts.

Defendants attempt to distinguish cases upon which Plaintiffs rely because they involved programmatic analyses that were being used to justify later, site-specific activities, arguing that the "site" here is the entire State of Idaho. But Defendants' argument presumes that the statewide EA provides sufficient detail about site-specific activities and their impacts to satisfy NEPA. To be adequate, such a broad, statewide NEPA review must "provide sufficiently detailed environmental analyses for specific decisions, such as determining the locations and designs of one or more proposals to implement the broad Federal action." Council on Environmental Quality, Effective Use of Programmatic NEPA Reviews, 15 (Dec. 18, 2014). As discussed above, there are certain areas in Idaho that are likely to have more removal of wolves than other areas, requiring a closer look at the impacts in those identifiable areas. *E.g.*, AR-EA #084 (Boulder White-Clouds Council comments), AR-EA#678, 15286-87, AR-EA #674, 15262-63, AR-EA #662, 15185 (packs targeted in FY 2009, FY 2008, FY 2007); Appendix A (2008-2010 Wolf Management Progress Reports).

⁷ These reports are available to the public on IDFG's website. They have been attached as Appendix A to this brief for the court's convenience. *See* pages 4, 9 of 2008 report; pages 4, 9 of 2009 report; pages 3, 10 of 2010 report. Later, similar reports are in the record at AR-DNS #295-297. The Court can consider this information for the same reason discussed in note 4.

The 2011 EA does not provide adequate site-specific detail to encompass these impacts. Indeed, it provides barely any detail about site-specific activities while simultaneously acknowledging that further site-specific analysis is necessary, disclosing that Wildlife Services actually conducts such analysis, through its “wildlife decision model,” and agreements or work plans that specify “the details of the damage management action to be conducted.” AR-EA #005, 81, 83; *see* Pls. SOF ¶ 21. These site-specific analyses are done without any further NEPA analysis, and thus the public is given no opportunity to review or comment on Wildlife Services’ site-specific actions and decisions. Pls. SOF ¶ 21. This approach violates NEPA. *See Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1194 (9th Cir. 2008) (EA must foster both informed decision-making and informed public participation).

B. The 2011 EA Failed To Take An Independent “Hard Look” At The Effects Of Wildlife Services’ Activities.

Wildlife Services should have analyzed how the effects of its wolf-killing activities might differ under the five alternatives, rather than relying on IDFG’s shifting wolf population objectives and management plans to assume the effects would remain “similar” once wolves were delisted.⁸ This Court should follow the holding in *Woodruff*, 151 F.Supp.3d at 1163-64, which rejected almost identical reasoning.

In *Woodruff*, Wildlife Services disclaimed responsibility for examining the effects of its wolf removals, because “WDFW, USFWS, [and] tribes are responsible for determining the number of wolves to remove and would respond if [Wildlife Services] could not.” 151 F.Supp.3d at 1163 (quoting administrative record). The court rejected that reasoning, stating “[t]his logic fails [because]... it ignores Wildlife Services’ shared responsibility and discretion, assumes a

⁸ Comments on the draft Wolf EAs notified Wildlife Services that with the 2008-12 management plan suspended, many of its assumptions were unfounded. *E.g.*, AR-EA #060, 544-45; AR-EA #063, 580.

specific, but uncertain outcome if Wildlife Services did not provide assistance, and presumes that the [state] Wolf Conservation and Management Plan is static and mandatory.” *Id.* at 1163-64.

The 2011 EA here makes the same assumptions. Rather than independently analyzing how Wildlife Services’ level of engagement might change impacts to wolf populations, it simply claims that “[w]olf management goals are established by the responsible agency to ensure population healthy [*sic*] and viability,” and disclaims responsibility for considering an appropriate population level for wolves in Idaho. AR-EA #005, 80, 101-02. The 2011 EA lists past effects of its actions, *see* Defs. Summ. J. Br. 8 (citing AR-EA #005, 122), but largely fails to anticipate how these might change in the new context of public hunting and trapping and “ungulate protection.” Instead, it relies upon the assumption that IDFG will manage wolves under the suspended 2008-12 plan’s 500-700 wolf objective.⁹ AR-EA #005, 125. It also assumes that the central Idaho core area “will be a dependable source of dispersing wolves to help maintain a viable wolf population in the NRM (USFWS 1994),” without discussing how plans to remove wolves from the Lolo/Selway Zone, or and other central Idaho Zones, could affect that assumption. *Id.* at 123. This ignores Wildlife Services’ “shared responsibility and discretion,” and erroneously assumes the state wolf plan is static and mandatory, like the EA in *Woodruff*.

Also like the EA in *Woodruff*, the 2011 EA presumes that approximately the same amount of wolf killing would occur under each alternative, post-delisting, explaining: “[T]he Idaho Fish and Game Commission has directed IDFG to manage wolves (when they are delisted) at the 2005 population level (of about 500 wolves), and this would be the case regardless of WS activities analyzed under this EA.” *Id.* at 128; *see also id.* at 130 (Idaho wolf population to be

⁹ Comments on the draft Wolf EAs notified Wildlife Services that with the 2008-12 management plan suspended, many of its assumptions were unfounded. *E.g.*, AR-EA #060, 544-45; AR-EA #063, 579-80.

maintained at around 500 wolves under Alternative 1), 138 (effects on wolf population expected to be about the same under Alternative 2), 140 (same under Alternative 3), 143 (same under Alternative 4, post-delisting), 144 (same under Alternative 5). This analysis suffers from the same defect the *Woodruff* court identified, assuming a specific but uncertain outcome.

Defendants claim that this case is different from *Woodruff* due to the 2011 EA's "detailed discussion" of the ecological effects of wolf removal, quoting from a subsection of the EA that appears under the heading "ISSUES NOT CONSIDERED IN DETAIL AND RATIONALE." *Id.* at 91, 93-97 (emphasis added). While the EA mentioned *potential* ecological effects of wolf removal, such as disrupting packs' social structures; disrupting "trophic cascades" (vegetation changes caused by wolves' effects on herbivore density and behavior); increases in abundance of mesopredators like coyotes and mountain lions, which are normally controlled by wolf presence; and reduced availability of carrion from wolf kills, which feeds raptors, bears, and beetles; it quickly discarded them, asserting that none of these effects would occur "*because USFWS intends to ensure that Idaho's wolf population is managed in a sustainable manner.*" *Id.* at 92-96 (emphasis added) (citing 2008-12 wolf plan). It also noted:

[I]t is reasonably foreseeable that, in the absence of any assistance by WS in wolf damage management in Idaho, IDFG and/or USFWS could conduct or authorize other entities to perform similar levels of wolf removals. Therefore, the environmental status quo with regard to this issue in the absence of any federal involvement by WS is expected to be similar.

Id. at 97. By relying on these assumptions, the EA avoided the actual effects analysis required for a "hard look."

Even if Wildlife Services had adequately considered and disclosed the effects of maintaining a population of approximately 500 individuals, as Defendants contend, the 2011 EA ignored that IDFG was free to manage for as few as 15 breeding pairs and 150 wolves under the

2002 plan. The 2011 EA did not discuss the environmental effects of reducing the wolf population to such a depressed number, beyond stating that U.S. Fish & Wildlife Service had approved it. This shortcoming highlights the problems the *Woodruff* court recognized with incorrectly assuming a state management plan is static and mandatory.

This Court should find the 2011 EA's conclusory analysis inadequate just as the *Woodruff* Court did. *Woodruff*, 151 F.Supp.3d at 1163-64. It seems intuitive that effects like the ones discussed above would change depending on whether the statewide wolf population was maintained at 500 or more wolves, or could be reduced to as few as 150. Likewise, targeting wolves to boost ungulate populations in Zones that encompass wilderness, as the EA disclosed was likely under the preferred alternative would impact local population dynamics of wolves and elk, as well as the public's ability to see and hear wolves in the wilderness—but the EA did not even consider these effects. Rutledge *et al.* (2010) (AR-EA #616); *see also* Haverstick Decl. ¶ 21, ECF No. 16-5, Freistadt Decl. ¶ 17-18, 20, ECF No. 16-3. At the very least, these potential effects merit detailed consideration to provide the necessary “hard look.”

C. The 2011 EA Tiered To The State Wolf Plans.

Despite Defendants' contention that Wildlife Services only “considered” the state wolf plans and did not unlawfully “tier” to them, Defs. Summ. J. Br. 13, ECF No. 17, “consideration” that consists of summarizing the management plans' content “amounts to exactly the same thing as tiering.” *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, No. 2:05-CV-0299-MCE-PAN, 2006 WL 1991414, at *9 (E.D. Cal. July 14, 2006); *see also Rosenkrance*, 2011 WL 39651, at *5 (“This process of incorporation by reference is called ‘tiering’”). The 2011 EA relied upon USFWS (or IDFG) “sustainable” management as a substitute for a thorough hard look at how different levels of wolf removal could affect ecological processes. AR-EA #005, 96

(citing 2008 wolf plan). Wildlife Services specifically disclaimed any responsibility for independently considering wolf population health and viability, *see e.g., id.* at 80, 101-02, 128, and repeatedly cited the 500-wolf minimum as evidence of its activities' benign effects, *see e.g.,* Pls. SOF ¶ 18; *see also* AR-EA #005, 87, 125, 128, 130, 132, 156, 167. By relying on IDFG (or USFWS) management objectives, Wildlife Services evaded conducting an independent effects analysis. For these reasons, the 2011 EA improperly tiered to IDFG's wolf plans, which Defendants concede is unlawful. Defs. Summ. J. Br. 13.

IV. WILDLIFE SERVICES FAILED TO TAKE A HARD LOOK AT NEW INFORMATION REQUIRING NEPA SUPPLEMENATION.

Regardless of the sufficiency of the 2011 EA, Wildlife Services has a duty to supplement its analysis due to new information and changed circumstances. Supplementing the 2011 EA is action unlawfully withheld or unreasonably delayed under 5 U.S.C. § 706(1), and Wildlife Services' decisions via the 2011, 2012, and 2013-14 Monitoring Reports not to supplement the EA were arbitrary and capricious under 5 U.S.C. § 706(2).

Despite Defendants' contrary statement, Wildlife Services' 2013-14 Monitoring Report did not consider "all of the 'new' information identified by Plaintiffs." Defs. Summ. J. Br. 22. The 2013-14 Monitoring Report did not consider IDFG's new 2014 statewide elk plan, or the new predation management plans that call for reducing wolf populations in the Middle Fork and Sawtooth Elk Zones.¹⁰ Pls. Summ. J. Br. 29. Nor did it consider how Wildlife Services' activities in the Lolo Zone could combine with potential activities in the Middle Fork and Sawtooth Elk Zones under these plans to exacerbate the effects of Wildlife Services' activities on central Idaho's core wolf habitat/population and the wilderness it encompasses. Even though the

¹⁰ These plans did not exist when the 2011 EA issued, and Wildlife Services cannot rely on the 2011 EA's analysis of elk management plans to supplant the need to consider them. *See* Defs. Summ. J. Br. 24.

Monitoring Report contemplated maintaining the minimum Lolo Zone wolf population discussed in the 2011 EA, it did not discuss the effects of extending the duration over which that population remained at depressed levels—as is permitted and has occurred under the Lolo/Selway Elk Management Zone Plan. Pls. Summ. J. Br. 28-29; *contrast* SOF ¶ 9 *with* SOF ¶ 37. And, like the EA, the report substituted reliance upon IDFG’s management objectives for a thorough analysis of how Wildlife Services’ activities, along with a swift reduction of the wolf population, could affect the environment.

There also is no evidence that Wildlife Services actually took a “hard look” at all of the studies containing new and important information about the effects of Wildlife Services’ activities that Plaintiffs presented, because the Wagner letter to which Defendants direct the Court’s attention only addresses four of the studies. AR-DNS #339. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 72-73 (2004) (agency must take a “hard look” at new information to assess whether supplementation might be necessary). Although Defendants complain that Plaintiffs did not explain why the new studies were significant, the Ninth Circuit has held that “[i]t is the agency, not an environmental plaintiff, that has a ‘continuing duty to gather and evaluate new information relevant to the environmental impact of its actions.’” *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000) (quoting *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023 (9th Cir. 1980)). Defendants should already have been aware of most of the studies,¹¹ and in fact, were acutely aware of the Treves study. *E.g.*, AR-DNS #348, #339, 8159-62 (letters rebutting Treves’ conclusions). In any case, Plaintiffs’ letter of

¹¹ Unlike participation in an administrative proceeding, at issue in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553 (1978), the “vital responsibility” for NEPA compliance falls upon federal agencies and “should not depend on the vigilance and limited resources of environmental plaintiffs.” *Friends of the Clearwater*, 222 F.3d at 559 (quotation omitted).

April 1, 2016, explained in detail why the appended materials were vital to an adequate analysis, and Wildlife Services could easily have initiated supplementation in response. AR-DNS #094.

Reliance on the 2011 and 2012 monitoring reports does not help Defendants' argument because those reports failed to even identify the correct IDFG wolf management plan governing IDFG's wolf population objectives. AR-DNS # 276, #275 (incorrectly citing 2008-12 plan 500-wolf objective). And, although the new Lolo/Selway Zone Predation management plan had already issued when the 2011 and 2012 monitoring reports were produced—and did not limit potential Wildlife Services wolf control activities in the Zone to those the EA had considered¹²—the 2011 and 2012 Monitoring Reports did not even discuss that new plan.

Accordingly, none of Wildlife Services' "monitoring reports" took the required hard look at re-evaluation of the agency's activities, *see Idaho Wool Growers' Ass'n v. Vilsack*, 816 F.3d 1095, 1107 (9th Cir. 2016) (supplementation not required where agency finds unchanged impacts after "hard look"), and its decision through the monitoring reports not to supplement the 2011 EA was arbitrary and capricious in light of changed circumstances and new information. *See Portland Audubon Soc. v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 2003).

CONCLUSION

For these reasons, Plaintiffs request that this Court grant their motion for summary judgment, and deny Defendants' cross-motion for summary judgment.

Dated: April 21, 2017

Respectfully submitted,

/s/ Talasi B. Brooks
Talasi B. Brooks (ISB # 9712)
Attorney for Plaintiffs

¹² Whereas the 2011 EA discussed a 5-year plan to maintain a population of 20-30 wolves in the Lolo/Selway Zone, AR-EA #005, 73, 131, the Lolo/Selway Zone Predation Management Plan did not identify a minimum wolf population for the two Zones, and did not limit its wolf reduction plan to a 5 years, AR-DNS #106. *See* Pls. SOF ¶ 37 (extent of activities).

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2017, I filed the foregoing PLAINTIFFS' COMBINED RESPONSE AND REPLY BRIEF ON CROSS-MOTIONS FOR SUMMARY JUDGEMENT electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Christine G. England
Christine.England@usdoj.gov

John P. Tustin
John.Tustin@usdoj.gov

Shaun M. Pettigrew
Shaun.Pettigrew@usdoj.gov

Attorneys for Defendants

/s/ Talasi B. Brooks
Talasi B. Brooks (ISB # 9712)
Attorney for Plaintiffs