



Tracking Number: (Click here to enter text.)

To request a change to regulations under the authority of the California Fish and Game Commission (Commission), you are required to submit this completed form to: California Fish and Game Commission, 1416 Ninth Street, Suite 1320, Sacramento, CA 95814 or via email to FGC@fgc.ca.gov. Note: This form is not intended for listing petitions for threatened or endangered species (see Section 670.1 of Title 14).

Incomplete forms will not be accepted. A petition is incomplete if it is not submitted on this form or fails to contain necessary information in each of the required categories listed on this form (Section I). A petition will be rejected if it does not pertain to issues under the Commission's authority. A petition may be denied if any petition requesting a functionally equivalent regulation change was considered within the previous 12 months and no information or data is being submitted beyond what was previously submitted. If you need help with this form, please contact Commission staff at (916) 653-4899 or FGC@fgc.ca.gov.

SECTION I: Required Information.

Please be succinct. Responses for Section I should not exceed five pages

1. Person or organization requesting the change (Required)

Name of primary contact person: Jean Su on behalf of Petitioners Center for Biological Diversity and Project Coyote,
Address: 1212 Broadway St, Suite 800, Oakland, CA 94612
Telephone number: (510) 844-7139
Email address: jsu@biologicaldiversity.org

2. Rulemaking Authority (Required) - Reference to the statutory or constitutional authority of the Commission to take the action requested: Sections 200, 202, 203, 3000, 3003.1, 4009.5, and 4150 of the California Fish and Game Code, and to implement, interpret or make specific sections 1755, 2055, 2062, 2067, 2070, 2072.7, 2074.6, 2075.5, 2077, 2080, 2081 and 2835, of said Code.

3. Overview (Required) - Summarize the proposed changes to regulations: Petitioners propose to amend Sections 465.5(g)(5)(c) and 474(a) of Title 14 of the CCR so to ban night-time hunting and lethal trapping within the range of the gray wolf (*Canis lupus*), a species protected by both the federal Endangered Species Act ("ESA") and the California Endangered Species Act ("CESA"). Such regulatory amendments would afford comparable protections to the wolf as is currently provided to the State's other CESA-listed canids, the San Joaquin kit fox and the Sierra Nevada red fox, and minimize the likelihood of violations of CESA and the ESA. See attached for more detail.

4. Rationale (Required) - Describe the problem and the reason for the proposed change: The gray wolf is currently listed as endangered under the federal ESA. In June 2014, the Commission found that the gray wolf also warranted listing under CESA, with final regulations to be adopted at its December 2015 meeting. Further, the Department is currently developing the California Wolf Plan, a state-wide wolf management plan, aiming to regulate human interaction with wolves so as to ensure gray wolf recovery. Petitioners' proposed regulatory amendments would afford comparable protections as that afforded to California's two other CESA-listed canids, the San Joaquin kit fox (*Vulpes macrotis mutica*) and the Sierra Nevada red fox (*Vulpes vulpes nescator*), to the gray wolf as is currently provided to these two species, minimize the likelihood of inadvertent take in violation of CESA and the ESA, and



consequently reduce the potential legal liability of both the Commission and the California Department of Fish and Wildlife under these statutes. See attached for more details.

SECTION II: Optional Information

5. **Date of Petition: Dec 4, 2015**
6. **Category of Proposed Change**
 Sport Fishing
 Commercial Fishing
 Hunting
 Other, please specify: Trapping and Night Hunting
7. **The proposal is to:** *(To determine section number(s), see current year regulation booklet or <https://govt.westlaw.com/calregs>)*
 Amend Title 14 Section(s):465.5(c) and 474
 Add New Title 14 Section(s): *Click here to enter text.*
 Repeal Title 14 Section(s): *Click here to enter text.*
8. **If the proposal is related to a previously submitted petition that was rejected, specify the tracking number of the previously submitted petition** NA
Or Not applicable.
9. **Effective date:** If applicable, identify the desired effective date of the regulation.
If the proposed change requires immediate implementation, explain the nature of the emergency: Immediate.
10. **Supporting documentation:** Identify and attach to the petition any information supporting the proposal including data, reports and other documents: See attached..
11. **Economic or Fiscal Impacts:** Identify any known impacts of the proposed regulation change on revenues to the California Department of Fish and Wildlife, individuals, businesses, jobs, other state agencies, local agencies, schools, or housing: None.
12. **Forms:** If applicable, list any forms to be created, amended or repealed:
NA.

SECTION 3: FGC Staff Only

Date received: *Click here to enter text.*

FGC staff action:

- Accept - complete
 Reject - incomplete
 Reject - outside scope of FGC authority
Tracking Number



Date petitioner was notified of receipt of petition and pending action: _____

Meeting date for FGC consideration: _____

FGC action:

- Denied by FGC
- Denied - same as petition _____
Tracking Number
- Granted for consideration of regulation change

BEFORE THE CALIFORNIA FISH AND GAME COMMISSION

**PETITION TO INSTITUTE A BAN ON
NIGHT-TIME HUNTING AND LETHAL TRAPPING
IN THE RANGE OF THE GRAY WOLF;
PROPOSED AMENDMENTS TO 14 CCR §§ 465.5(g)(5)(c) and 474(a)**



CENTER FOR BIOLOGICAL DIVERSITY and PROJECT COYOTE

December 4, 2015

I. NOTICE OF PETITION

Pursuant to Title 14, Section 662 of the California Code of Regulations (“CCR”) (*Petitions for Regulation Change*), the Center for Biological Diversity (“the Center”) and Project Coyote (collectively, “Petitioners”) submit this petition to the California Fish and Game Commission (“the Commission”) to amend Sections 465.5(g)(5)(c) and 474(a) of Title 14 of the CCR so to ban night-time hunting and lethal trapping within the range of the gray wolf (*Canis lupus*), a species protected by both the federal Endangered Species Act (“ESA”) and the California Endangered Species Act (“CESA”). Such regulatory amendments would afford comparable protections to the wolf as is currently provided to the State’s other CESA-listed canids, the San Joaquin kit fox and the Sierra Nevada red fox, and minimize the likelihood of violations of CESA and the ESA.

A. LEGAL AUTHORITY

The Commission possesses the authority to make such amendments pursuant to Sections 200, 202, 203, 3000, 3003.1, 4009.5, and 4150 of the California Fish and Game Code (“FGC”).

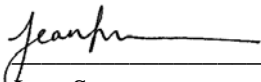
B. PETITIONERS

The Center for Biological Diversity is a non-profit, public interest environmental organization dedicated to the protection of species and their habitats through science, policy and environmental law. The Center has over 900,000 members and online activists worldwide, including over 100,000 members and supporters in California.

Project Coyote is a national nonprofit wildlife conservation organization with more than 25,000 advocates dedicated to promoting coexistence between people and wildlife through education, science and advocacy.

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Phone: (510) 844-7139
Email: jsu@biologicaldiversity.org

I hereby certify that, to the best of my knowledge, all statements made in this petition are true and complete.



Jean Su
Staff Attorney
Center for Biological Diversity

Submitted on behalf of Petitioners
Date submitted: December 4, 2015

II. EXECUTIVE SUMMARY

Pursuant to Title 14, Section 662 of the California Code of Regulations (“CCR”) (*Petitions for Regulation Change*), the Center for Biological Diversity and Project Coyote (collectively, “Petitioners”) submit this petition to the California Fish and Game Commission (“the Commission”) to ban all night-time hunting and lethal trapping within the range of the gray wolf (*Canis lupus*) by amending Sections 465.5(g)(5)(c) and 474(a) of Title 14 of the CCR. The Commission possesses the authority to make such amendments pursuant to Sections 200, 202, 203, 3003.1, 4009.5, and 4150 of the California Fish and Game Code (“FGC”).

The gray wolf (*Canis lupus*) is protected by both the federal Endangered Species Act (“ESA”) and the California Endangered Species Act (“CESA”), yet few on-the-ground protections to the species have been provided since its return to California. In contrast, California's two other CESA-listed canids, the San Joaquin kit fox (*Vulpes macrotis mutica*) and the Sierra Nevada red fox (*Vulpes vulpes nescator*), are currently protected from inadvertent take by prohibitions on night-time hunting and the use of lethal traps within their range. See 14 CCR § 465.5(g)(5)(c), 466 and 474(a). Petitioners’ proposed regulatory amendments would afford comparable protections to the gray wolf as is currently provided to these two species, minimize the likelihood of inadvertent take in violation of CESA and the ESA, and consequently reduce the potential legal liability of both the Commission and the California Department of Fish and Wildlife (“the Department”) under these statutes.

Though native to California, the gray wolf was extirpated from the state in the 1920s. Nearly a century later, the first known wolf to enter California—the now famous OR7—crossed into the state in December 2011 and returned to Oregon in March 2013, with subsequent visits across the border since. In August 2015, the Department confirmed the discovery of a family of seven resident wolves—the aptly named Shasta Pack—living in southeastern Siskiyou County in northern California. With a source population in Idaho and growing source populations in eastern Oregon and the Washington Cascade Range, gray wolves are likely to continue naturally dispersing to and throughout California.

The homecoming of the Shasta Pack has sparked both renewed hope and debate about wolf management in California. Notwithstanding the polarizing discussions about wolves, it is indisputable that the species’ survival and recovery in California are precarious in the wake of the single pack now residing here. The Commission and Department both recognize this fact. The gray wolf is currently listed as endangered under the federal ESA. In June 2014, the Commission found that the gray wolf also warranted listing under CESA, with final regulations to be adopted at its December 2015 meeting. Further, the Department is currently developing the California Wolf Plan, a state-wide wolf management plan, aiming to regulate human interaction with wolves so as to ensure gray wolf conservation.

While these regulatory mechanisms prohibit the taking of gray wolves in California, they do not adequately protect the species against another potent threat: the accidental killing of wolves mistaken as other species, particularly coyotes, in night-time hunting and lethal trapping currently permitted in occupied and potential wolf territory. Mistaken killings of non-target species pose an immediate risk to the Shasta Pack specifically and gray wolf recovery more generally, while California’s current regulations which permit night-time hunting and lethal trapping of coyotes and other nongame and furbearer species

within the range of the wolf will, absent amendment, result in the illegal take of endangered gray wolves in violation of the ESA and CESA. In order to minimize this risk and avoid violations of law, Petitioners respectfully request that the Commission ban all night-time hunting and lethal trapping within the range of the wolf by amending Sections 465.5(g)(5)(c) and 474(a) of Title 14 of the CCR.

III. FACTUAL AND LEGAL BACKGROUND

A. Species Description and Ecological Importance of the Gray Wolf

Gray wolves (*Canis lupus*) are the largest member of the family *Canidae*¹ and resemble some large breeds of domestic dogs, such as Alaskan malamutes and German shepherds. Females on average weigh from 80–85 pounds and males from 95–100 pounds², though considerable clinal variation in size exists from the Arctic to central Mexico.³ The heaviest recorded wolf was a 175-pound male from east central Alaska, though males seldom exceed 120 pounds and females are seldom over 100 pounds.⁴

Ecologically, gray wolves play a critical role in ecosystems because they are a top predator and keystone species. Wolves limit ungulate herbivory of saplings in sensitive riparian areas and thereby aid beavers, songbirds and fish whose habitat is enhanced through growth of riparian trees.⁵ Wolves have also been found to aid fox (*Vulpes spp.*) and pronghorn (*Antilocapra americana*) populations by controlling coyotes (*Canis latrans*), which are intolerant of foxes and disproportionately prey on pronghorn fawns.⁶ These results indicate that broader recovery of wolves would benefit many species and overall ecosystem integrity.

The extirpation of gray wolves has likely impacted biological communities throughout California. It is reasonable to assume that the removal of wolves allowed coyotes to move into new areas and to reach higher population densities. This may also explain the high mortality rate of the San Joaquin kit fox (*Vulpes macrotis mutica*), caused by predators, chiefly coyotes.⁷ Recovering the gray wolf to its former range in California would likely bring similar benefits to ecological communities within the state and would restore a lost part of California's natural heritage.

¹ Mech, L.D. 1970. *The wolf: the ecology and behavior of an endangered species*. Natural History Press. Stillwater, MN.

² Mech 1970.

³ Young, S.P. and E.A. Goldman. 1944. *The Wolves of North America*. American Wildlife Institute. Washington, D.C.

⁴ Mech 1970.

⁵ Ripple, W. J. and R. L. Beschta. 2003. Wolf reintroduction, predation risk and cottonwood recovery in Yellowstone National Park. *Forest Ecology and Management* 184: 299-313.

⁶ Berger, K.M. and E.M. Gese. 2007. Does interference competition with wolves limit the distribution and abundance of coyotes? *Journal of Animal Ecology* 76(6):1075-1085; Berger, K. M., Gese, E. M. and Berger, J. 2008. Indirect effects and traditional trophic cascades: a test involving wolves, coyotes and pronghorn. *Ecology* 89(3) 818-828; Smith, D.W., R.O. Peterson, and D.B. Houston. 2003. Yellowstone after wolves. *BioScience* 53(4):330-340.

⁷ O'Farrell, T.P. 1984. Conservation of the San Joaquin Kit Fox *Vulpes macrotis mutica* on the Naval Petroleum Reserves, California. *Acta Zoologica Fennica* 172:207-208. Oregon Department of Fish and Wildlife. 2011. Oregon Wolf Program, July Update. Available online: http://www.dfw.state.or.us/Wolves/docs/oregon_wolf_program/July_2011_Wolf_Report.pdf.

B. Distribution and Range of Gray Wolf in California

As of the filing of this petition, the current number of documented gray wolves in California is seven. A Department trail camera in Siskiyou County recorded a lone canid in May and July 2015. Additional cameras deployed in the vicinity took multiple photos showing two adults, and five pups which appeared to be a few months old in August 2015. Recent lab results released by the Department also indicate that at least the breeding female of the Shasta Pack was born into the Imnaha Pack of northeastern Oregon.⁸

In addition to the Shasta Pack, the Department has stated that the natural dispersal of wolves into California is reasonably foreseeable given the expanding populations in the Pacific Northwest.⁹ The wolf designated OR7 crossed into California in 2011 and has since returned to Oregon and established a pack there, named the Rogue Pack. In addition to OR7's pack, nine other wolf packs have been documented in Oregon, with the overall population currently at 82 confirmed individuals. In Washington, there are at least 68 confirmed wolves. Wolf populations in Oregon and Washington will likely continue to grow in the coming years and generate individual dispersing wolves, some of which are predicted to cross into California.

C. Current Legal Status and Regulatory Mechanisms Protecting Gray Wolves in California

In California, the gray wolf is currently pending listing as an endangered species pursuant to CESA. In February 2012, prompted by the presence of OR7 in California, the Center and allies submitted a petition to list the gray wolf as endangered throughout its range in California pursuant to CESA. In June 2014, the Commission made the finding that such listing was warranted and voted to list gray wolves under CESA. The Commission is scheduled to make a final vote adopting final regulations for the listing, including the completion of all official filings with respect to the listing, at the December 2015 Commission meeting in San Diego.

Federally, the gray wolf is listed as endangered in portions of its range, including California, under the ESA. Currently, gray wolves that enter California are protected by the ESA, making it illegal to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect wolves, or to attempt to engage in any such conduct in California.

Separately, the Department is developing a California Wolf Conservation Plan, with a draft version for public comment just released in December 2015. The Department has engaged a wide stakeholder group, including Petitioner, to develop the plan.

⁸*Wolf News: Results of lab analysis of scat collected from the Shasta Pack* (Oct. 5, 2015), <https://www.wildlife.ca.gov/Conservation/Mammals/Gray-Wolf/20151005>.

⁹*See, e.g.*, California Department and Game et al., "Federal/State Coordination Plan for Gray Wolf Activity in California" (May 2012), <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=76635&inline=1>.

D. Threats to Gray Wolves in California

Human-caused killing of wolves continues to be a primary obstacle to wolf recovery in this country.¹⁰ Indeed, in the Commission’s own words from its findings for the gray wolf listing “[h]umans are the primary factor in the past decline of wolves in the conterminous United States, including California, and humans remain the largest cause of wolf mortality as a whole in the western United States.”¹¹

Critically, the primary determinant of the long-term viability of gray wolf populations in California is human attitudes toward this species. Any successful recovery effort in California will require the establishment of policy mechanisms that address direct human-caused mortality of gray wolves, which remains a primary threat to the species. At the time of the gray wolf’s federal 1978 listing, FWS recognized that “[d]irect killing by man . . . has been the major direct factor in the decline of wolves in the conterminous United States.” 43 Fed. Reg. at 9611. Through the enforcement of take prohibitions for gray wolves, the federal ESA has been crucial to allowing progress towards wolf recovery for gray wolves. Yet even with the ESA’s protections, human-caused mortality—including illegal shooting and trapping, whether intentional or inadvertent—has accounted for a significant number of wolf deaths. As the Commission found, “humans impact wolf populations through intentional predation (shooting or trapping) for sport or for protection; through unintentional killing, as gray wolves are often confused with coyotes (*Canis latrans*), domestic dogs (*C. lupus familiaris*), and wolf hybrids; through vehicle collisions; and through exposures to diseases from domestic animals.”¹²

Illegal killing of wolves occurs for a number of reasons. One of the chief reasons is accidental killings, either through mistaken identity or when caught in traps set for other species. 76 Fed. Reg. at 26117. It is likely that most illegal killings intentional or not, are never reported to government authorities. *Id.* Because the killings generally occur in remote locations and the evidence is easily concealed, there are no reliable estimates of illegal killings of gray wolves. *Id.*

E. Threat of Mistaken Night-Time Hunting and Lethal Trapping to Gray Wolves

Both the endangered listing under CESA and ESA as well as the California Wolf Conservation Plan are important regulatory mechanisms to protecting the gray wolf in California, reflective of the legal and public mandate to preserve and recover gray wolves in the state. However, these regulatory instruments are limited because, while they prohibit the taking of wolves, they fail to protect the species from accidental killing and trapping intended for other target animals, thereby posing a critical gap in wolf recovery efforts. The proposed amendments seek to mitigate these risks to gray wolf recovery.

Overall, both daytime and night-time hunting of species, particularly in wolf territory, has resulted in innumerable cases of wolf deaths and other non-target species. Hunting, particularly recreational coyote

¹⁰ Hinton, Joseph et al. 2014. Strategies for red wolf recovery and management: a response to Way (2014). *Canid Biology and Conservation*. Available online: http://www.canids.org/CBC/18/Red_wolf_recovery_response_to_Way.pdf.

¹¹ California Fish and Game Commission, Notice of Finding and Notice of Proposed Rulemaking Gray Wolf (2014), 9, <http://www.fgc.ca.gov/CESA/gwfindingslistingwarranted.pdf>.

¹² *Id.*

hunting, has led to several deaths of endangered wolves mistaken as coyotes. In its notice of findings for the gray wolf CESA listing, the Commission confirmed that “dispersing wolves and small wolf populations are inherently at risk due to . . . bring killed by hunters that mistake them for coyotes” and “[Department staff] have been fearful that . . . unknown wolves that could be in California would be mistaken for a coyote and shot or harmed.”¹³ Such risks have been substantiated in other states. In October 2015, an Oregonian coyote hunter shot a radio-collared wolf which he claimed to have mistaken for a coyote; though he has been charged with killing a state-listed endangered species, this prosecution will not restore the wolf to life.¹⁴ In December 2014, the first gray wolf spotted in the Grand Canyon in over 70 years, affectionately named Echo by schoolchildren three months prior to her death, was shot dead by a hunter in southern Utah who mistook Echo for a coyote.¹⁵ Similarly, in January 2013, a highly endangered Mexican wolf, one of fewer than 100 roaming the southwest after an expensive reintroduction program, was killed in southwestern New Mexico by a U.S. Wildlife Services officer who again mistook the animal for a coyote.¹⁶ These deaths follow a string of accidental wolf killings in recent years: gray wolves have been shot mistakenly as coyotes in Iowa in 2014, in Missouri in 2012, and in Illinois in at least two separate incidents in 2011.¹⁷

In addition to these breaking headlines, state and federal officials have reported wolves being shot mistakenly as coyotes in all parts of the country where wolves are returning. A 2014 report, prepared by the Center, tabulated known dispersals of wolves from gray wolf federal recovery areas in the Western Great Lakes states and northern Rockies to adjacent states over a 33-year period from 1981-2014, and the outcome of those dispersal events.¹⁸ Of 56 known dispersals, in 48 instances the wolves were later found killed or dead of unknown causes. Of those 48 instances, in 36 cases the wolves were found shot and killed, and in 11 of those cases, agency reports noted that the shooter mistook the animal for a coyote.¹⁹

As the accidental killings of wolves mistaken for coyotes in daytime are well-documented, night-time conditions only serve to exacerbate the risk of mistaken wolf taking in potential wolf territory where night-time hunting is permitted. Exemplifying such risk, North Carolina’s red wolf population suffered the loss of five wolves in 2012; they were shot by coyote hunters engaging in spotlighting, which compelled a state court to ban night-time spotlight hunting of coyotes entirely in order to protect the imperiled 100 red wolves there.²⁰

¹³ *Id.* at 7. 9.

¹⁴ Stuart Tomlinson, *Baker City man charged with misdemeanors for shooting wolf* (Nov. 16, 2015, 2:36 pm), http://www.oregonlive.com/pacific-northwestnews/index.ssf/2015/11/baker_city_man_charged_with_mi.html#incart_river_home.

¹⁵ Ari Philips, *First Gray Wolf Spotted at Grand Canyon In 70 Years Shot Dead by Hunter* (Feb. 12, 2015, 2:59 pm), <http://thinkprogress.org/climate/2015/02/12/3622423/famous-grand-canyon-gray-wolf-shot-by-hunter/>. See also Brett Prettyman, *Coyote hunter kills a wolf by mistake near Beaver* (Dec. 29, 2014, 1:00 pm), <http://www.sltrib.com/news/1999741-155/utah-hunter-kills-wolf-near-beaver>.

¹⁶ Chris Clarke, *Is it time to end coyote hunting in California?* (Jan. 5, 2015, 2:14 pm), <http://www.kcet.org/news/redefine/rewild/commentary/is-it-time-to-end-coyote-hunting-in-california.html>.

¹⁷ *Id.*

¹⁸ Weiss et al., Center for Biological Diversity, *Making Room for Wolf Recovery: The Case for Maintaining Endangered Species Act Protections for America’s Wolves* (2014), available at http://www.biologicaldiversity.org/campaigns/gray_wolves/pdfs/Making_Room_for_Recovery_print.pdf.

¹⁹ *Id.* at 5-6; Appendix D at 19-25.

²⁰ Brian North, *Fourth red wolf killing prompts hunting change* (Nov. 21, 2012, 8:25 pm), <http://www.wcti12.com/news/Fourth-red-wolf-killing-prompts-hunting-change/17518384>.

Further, numerous examples abound of other non-target victims of night-time coyote hunting, demonstrating the significant risk such activity poses to wolf recovery. Such mistaken-identity night-time killings include species that look nothing like the target species, including humans. Exemplifying this in California in 2014, Department Warden Bob Perra suffered near-fatal neck injuries from night-time shots taken by a contestant of a coyote-killing contest in El Dorado County.²¹ Other human victims of night-time coyote hunting include seventeen year-old Devin Dourin of Michigan, who was killed by a hunter firing immediately at Dourin when observing movement in the brush at the base of a tree.²² Twenty-eight year old Trenton Sutherland of Colorado, a coyote hunter himself, was shot dead by his two hunting companions, who mistook his eyes for those of a coyote when engaging in coyote night-hunting.²³ U.S. Forest Service ranger Christopher Upton of Georgia was brutally killed with eleven shots by a coyote hunter wielding a high-powered rifle with night-vision equipment; the killer said that he mistook Upton's eyes, looking out from binoculars, as those of a coyote.²⁴ Such tragedies highlight that even hunters equipped with high-tech equipment fail to differentiate a human from a coyote. It is clear that if coyote hunters cannot adequately differentiate humans from target species at night, wolves face a great risk of accidental targeting.

In addition to mistaken human killings during night-time hunting, there is strong anecdotal evidence about mistaken nocturnal shootings of other non-target species, further heightening the case for protections in wolf territory. A recent example includes a Nevada deaf dog who was run over numerous times by a police officer who believed it was a coyote in the evening time.²⁵ Similar incidents have been reported around the country, such as local newspaper accounts from Maine, Michigan, and Pennsylvania.²⁶

In sum, accidental shootings of wolves and other wildlife is a relatively common occurrence by coyote hunters, with the risks greatly exacerbated at night. Additionally, the use of lethal traps in areas of potential wolf territory also poses the risk of non-target trapping of wolves. While the likelihood of hunting accidents can theoretically be reduced by responsible hunters exercising good judgment, traps

²¹ Locke, Cathy, El Dorado County man charged in 2014 wounding of game warden (Feb. 25, 2015), <http://www.sacbee.com/news/local/crime/article11171996.html>.

²² Roger Weber, *Michigan teen dies in apparent hunting accident in Brockway Township* (Sep. 21, 2012, 10:08 am), <http://www.clickondetroit.com/news/Michigan-teen-dies-in-apparent-hunting-accident-in-Brockway-Township/16688822>.

²³ *Man shot and killed after being mistaken for coyote* (Jan. 5, 2014, 7:24 pm), <http://kdvr.com/2014/01/05/man-shot-and-killed-after-being-mistaken-for-coyote/#comment-48689>. See also *Man killed in hunting accident* (Jan. 5, 2014, 10:15 am), <http://www.kktv.com/news/headlines/Man-Killed-In-Hunting-Accident-238774501.html>; Associated Press, *Man killed in hunting accident in SW Colorado* (Jan. 4, 2014, 2:49 pm), http://www.denverpost.com/news/ci_24846304/man-killed-hunting-accident-sw-colorado.

²⁴ Rob Pavey, *Forest officer's death investigated after shooter says he mistook man for coyote* (Mar. 8, 2010), <http://chronicle.augusta.com/news/metro/2010-03-08/forest-officers-death-investigated-after-shooter-says-he-mistook-man-coyote>.

²⁵ John Edwards, *Collingwood police confirm it was dog, not coyote run over by OPP cruiser three times* (Oct. 21, 2015), <http://www.simcoe.com/news-story/5970394-collingwood-police-confirm-it-was-dog-not-coyote-run-over-by-opp-cruiser-three-times/>.

²⁶ See, e.g. <http://bangordailynews.com/2011/12/30/news/portland/family-dog-mistaken-for-coyote-shot-and-killed-by-hunter/>; <http://uppermichiganssource.com/news/local/purebred-dog-shot-and-killed-mistaken-for-coyote/>; <http://wnep.com/2015/01/12/looking-for-answers-after-family-dog-shot-dead/>.

catch, kill and maim non-target animals without the opportunity for human judgment. Where there is overlap of wolves and traps, wolves will almost inevitably be trapped. For example, very recently in Utah, a gray wolf perished in a trap laid out for coyotes.²⁷ For example, a study by the U.S. Geological Survey found that thirteen highly endangered Mexican wolves were accidentally trapped by trappers targeting other species, with seven of those animals (equal to California's entire current wolf population) suffering injuries.²⁸ The Oregon Department of Fish and Wildlife similarly reports that, in Oregon, four wolves have been incidentally captured in traps set by recreational trappers seeking species other than wolves²⁹. Clearly, restricting the use of lethal traps in the range of the wolf in California is essential to prevent such from occurring here.

F. Current Regulation of Night-Time Hunting and Lethal Trapping in California

The California Fish and Game Code generally prohibits the take of birds and mammals at night (defined as from one half-hour after sunset to one half-hour before sunrise) with the exception of nongame mammals, for which such take can be authorized. *See* FGC § 3000. Notably, this section explicitly authorizes the Commission to prohibit night-time take of nongame mammals. *Id.* Notwithstanding the statutory prohibition on night-time take of furbearers, through regulation, the Commission has authorized night-time take of those furbearers for which take is otherwise authorized. *See* 14 CCR § 466. Similar regulations authorize night-time take for nongame mammals for which take is otherwise authorized. *See* 14 CCR § 474.

Importantly, the current regulations that allow night-time take of furbearers and nongame mammals include important restrictions designed to protect sensitive species from accidental take by hunting and trapping. Specifically, section 465.5(g)(5) precludes use of Conibear-type traps and snares in two zones, which correspond to the ranges of the CESA-listed San Joaquin kit fox and the Sierra Nevada red fox. Similarly, section 474(a) prohibits night-time hunting of nongame mammals within a zone that corresponds to the range of the San Joaquin kit fox. Section 466, cross-references section 474(a) and precludes all night-time take of furbearers within that same zone. Read together with the statutory prohibitions on taking game mammals at night, these regulations collectively result in a complete ban on the use of lethal traps in the range of both the kit fox and red fox and a ban on the night-time hunting of any mammal in the range of the kit fox.

Currently, there are no limits to night-time hunting of furbearers or nongame mammals, including coyotes, within much of the range of the gray wolf in California. California classifies coyotes as nongame mammals. FGC § 4150. Coyotes may be taken at any time of the year with no bag limits. 14 CCR § 472(a). Consequently, night-time hunting of coyotes is legal except in the area designated for the

²⁷ Maffly, Brian, *Utah's war on coyotes claims another wolf I* (Nov. 30, 2015, 2:40 pm), <http://www.sltrib.com/home/3223668-155/utahs-war-on-coyotes-claims-another>.

²⁸ Turnbull, T.T., Cain, J.W., III, and Roemer, G.W., 2011, Evaluating trapping techniques to reduce potential for injury to Mexican wolves: U.S. Geological Survey Open-File Report 2011–1190, 11, *available at*: <http://pubs.usgs.gov/of/2011/1190/>.

²⁹ Oregon Department of Fish and Wildlife, Updated biological status review for the Gray Wolf (*Canis lupus*) in Oregon and evaluation of criteria to remove the Gray Wolf from the list of Endangered Species under the Oregon Endangered Species Act (Oct 9, 2015), 19, *available at*: http://www.biologicaldiversity.org/campaigns/gray_wolves/pdfs/ODFWStatusReviewForGrayWolf.pdf.

protection of the endangered San Joaquin kit fox. 14 CCR § 474(a). Coyote hunting, including night-time hunting, is common and widespread within the range of the gray wolf in California and therefore presents a significant threat to both individual wolves as well as to the establishment and recovery of the species.

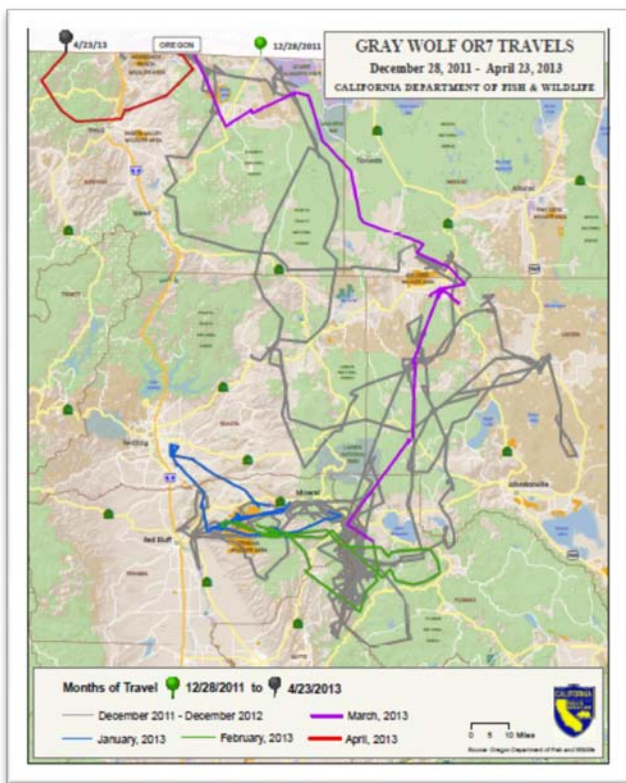
Similarly, geographic restrictions on the use of lethal traps that were imposed to protect California's two other endangered canids are not applicable within much of the current known and probable range of wolves in the state. Gray wolves need, are legally-entitled to, and consequently must be afforded the same protections the San Joaquin kit fox and Sierra Nevada red fox currently receive. Night-time hunting and the use of lethal traps should be prohibited within the gray wolf's known and projected range.

IV. PROPOSED REGULATION AMENDMENTS

A. Description of Proposed Amendments

The proposed amendments below prohibit night-time hunting and the use of lethal traps in known and potential wolf territory. The proposed restricted zones are intended to encompass the areas in which the Shasta Pack is currently understood to reside and expand to, based on areas geographically covered by OR7 (*see* Map 1 below) and some of the territories that the Department has identified as wolf recovery territory in the draft wolf management plan (*see* Map 2 below).

Map 1. OR7 Traveled Territory in California



Map 2. CDFW Map of Wolf Recovery Areas



As a result, the proposed restricted area is described in the recommended amendments as:

Beginning at the intersection of the Oregon border and the Pacific coast line; south along the Pacific coast line to the mouth of the Eel River; east along the Eel River to the intersection with State Route 211; north on State Route 211 to Fernbridge Drive; south on Fernbridge Drive to U.S. Highway 101; south on Highway 101 to State Route 36; east on State Route 36 to Highway 99; south on Highway 99 to State Route 149; south on State Route 149 to State Route 70; east on State Route 70 to U.S. Highway 395; south on U.S. Highway 395 to the border of Nevada; north along the Nevada border to the Oregon border; west along the Oregon border to the Pacific coast line.

This zone is outlined in Map 3 below. Petitioners welcome further consultation with the Department’s scientists and other science-based stakeholders to determine modifications of this zone as the wolf population in California expands and disperses.

Map 3. Proposed Zones Banning Night-Time Hunting and Lethal Trapping



Further, under the current text of 14 CCR §465.5(g)(5)(c), lethal trapping, including conibear traps and snares, is prohibited in two zones designed to protect the San Joaquin kit fox and Sierra Nevada red fox (*see map below*), which are listed as endangered species pursuant to CESA. This Petition seeks to expand such zones to protect the predicted territory of gray wolves in California, who deserve the same amount of protections as other endangered species.

With respect to night-time hunting, all night-time hunting of any species in California poses threats to wolves if such hunting is permitted in potential wolf territory. To avoid mistaken night-time killings via hunting, the current text of 14 CCR § 474, which governs hours for taking of nongame mammals including the coyote, generally allows for night-time hunting at all hours except for certain areas enumerated in 14 CCR § 474(a). The proposed amended language includes the wolf zone described above within this provision applicable to nongame mammals. In addition, this amendment would result in the prohibition of night-time hunting of furbearers as well. 14 CCR § 466 (Hours for Taking Furbearers) requires that furbearers may only be hunted “at any hour of the day or night except that they may not be taken between one-half hour after sunset and one-half hour before sunrise in the area described in Section 474(a) of these regulations”—which will exclude the wolf zone under the proposed amendments.

With regard to trapping, 14 CCR § 465.5(g)(5) currently contains two zones, described in subsections (a) and (b), which correspond to the ranges of the San Joaquin kit fox and Sierra Nevada red fox. The proposed amendment would add a subsection (c) to delineate a wolf zone where such practices would also be prohibited.

B. Text of Proposed Amendments

Petitioners request the Commission to adopt the following amendments with respect to night-time hunting and lethal trapping in the known and likely range of the gray wolf in California (additions shown in *redline italics*):

Title 14 §465.5(g)(5)(c)

(g) Use of Conibear Traps, Snares, Cage and Box Traps, Nets, Suitcase-type Live Beaver Traps and Common Rat and Mouse Traps for Purposes Unrelated to Recreation or Commerce in Fur. Conibear traps, snares, cage and box traps, nets, suitcase-type live beaver traps and common rat and mouse traps may be used by individuals to take authorized mammals for purposes unrelated to recreation or commerce in fur, including, but not limited to, the protection of property, in accordance with subsections (1) through (5) below. Except for common rat and mouse traps, all traps used pursuant to this subsection must be numbered as required by subsection (f)(1) above. The prohibitions of subsections (c) and (d) above shall apply to any furbearing or nongame mammal taken by a conibear trap or snare pursuant to this subsection (g).

(5) Zones Prohibited to the Use of Conibear-type Traps and Snares. Conibear-type traps and snares, except those totally submerged, and deadfall traps are prohibited in the following zones.

(A) Zone 1: Beginning at Interstate 5 and Highway 89 . . .

(B) Zone 2: Beginning in Tehama County . . .

(C) Zone 3: Beginning at the intersection of the Oregon border and the Pacific coast line; south along the Pacific coast line to the mouth of the Eel River; east along the Eel River to the intersection with State Route 211; north on State Route 211 to Fernbridge Drive; south on Fernbridge Drive to U.S. Highway 101; south on Highway 101 to State Route 36; east on State Route 36 to Highway 99; south on Highway 99 to State Route 149; south on State Route 149 to State Route 70; east on State Route 70 to U.S. Highway 395; south on U.S. Highway 395 to the border of Nevada; north along the Nevada border to the Oregon border; west along the Oregon border to the Pacific coast line.

Title 14 § 474(a)

Nongame mammals may be taken at any time except as provided in this section.

(a) Area Closed to Night Hunting. Nongame mammals may be taken only between one-half hour before sunrise and one-half hour after sunset in the following described area:

(1) Beginning at a point where Little Panoche Road crosses Interstate 5 near Mendota . . .

(2) Beginning at the intersection of the Oregon border and the Pacific coast line; south along the Pacific coast line to the mouth of the Eel River; east along the Eel River to the intersection with State Route 211; north on State Route 211 to Fernbridge Drive; south on Fernbridge Drive to U.S. Highway 101; south on Highway 101 to State Route 36; east on State Route 36 to Highway 99; south on Highway 99 to State Route 149; south on State Route 149 to State Route 70; east on State Route 70 to U.S. Highway 395; south on U.S. Highway 395 to the border of Nevada; north along the Nevada border to the Oregon border; west along the Oregon border to the Pacific coast line.

This section does not pertain to the legal take of nongame mammals with traps as provided for by Sections 461-480 of these regulations, and by Sections 4000-4012, 4152 and 4180 of the Fish and Game Code. (This regulation supersedes Section 3000 of the Fish and Game Code.)

(b) On privately-owned property. . .

(c) Fallow deer. . .

V. POLICY AND LEGAL JUSTIFICATION FOR PROPOSED REGULATION AMENDMENTS

While take of wolves is prohibited under both federal and state law, and the California Wolf Plan holds potential to address numerous threats to the species, absent action by the Commission these mechanisms are unlikely to prevent one of the greatest threats to California small and vulnerable wolf population—death and injury as a result of inadvertent killing via night-time hunting and lethal trapping intended for other target animals in wolf territory. As discussed above, night-time hunting and lethal trapping of animals, particularly the coyote, pose a serious threat to gray wolves because these activities have repeatedly resulted in deaths and injuries to wolves and other non-target species across the country. Therefore, the proposed regulatory amendments would tackle this gap in protection by banning the practices of night-time hunting and lethal trapping within the known and likely range of the wolf in California.

A. Protections Against Accidental Killings are Necessary to Avoid Violations of the ESA and CESA

The Commission risks legal liability under the ESA and CESA if it fails to ban night-time coyote hunting and lethal trapping within the range of the wolf in California. Permitting these activities will likely result in the illegal take of gray wolves in violation of the ESA, CESA, and their implementing regulations. The Commission may face litigation under these statutes should it fail to implement the proposed regulatory amendments set forth in this petition.

Federal courts have firmly held that third party liability is appropriate under the ESA. Section 9 of the ESA prohibits the “take” of an endangered species without authorization; “take” is defined by the ESA “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19). The ESA expressly applies to any person, which is defined to include “any . . . agent, department, or instrumentality” of any state (16 U.S.C. § 1532(13)), who “causes to be committed” an unlawful take. 16 U.S.C. § 1538(g); 50 C.F.R. 1784(c)(8). Applying these provisions, a federal circuit court ruled that the ESA “not only prohibits the acts of those parties that directly exact the taking, but also *bans those acts of a third party that bring about the acts exacting a taking*. We believe that a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.” *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) (emphasis added). Other courts have followed the First Circuit. *See, e.g., Seattle Audobon Soc’y v. Sutherland*, 2008 U.S. Dist. LEXIS 31880, 23 (“The plain language of the ESA supports the proposition that a government official violates the ESA take prohibition when that official authorizes someone to exact a taking of an endangered species. . .”).

Moreover, in remarkably similar facts as to the situation facing gray wolves in California, two federal courts have stated that state wildlife agencies are liable under the ESA for authorizing actions leading to mistaken hunting and trapping of endangered species because such regulations directly led to the increased likelihood of take. Specifically, with respect to mistaken killings during coyote hunting, a federal court stated that North Carolina’s wildlife commission would be liable under the ESA for unauthorized take of federally endangered red wolves “where [the commission’s] actions have greatly increased the likelihood of the take” through authorizing coyote hunting in red wolf recovery territory. *Red Wolf Coalition v. North Carolina Wildlife Resources Commission*, 2014 U.S. Dist. LEXIS 65601, 20 (E.D.N.C. 2014). With respect to trapping, a federal court in Maine held that the state’s wildlife

department, in permitting of the use of a lethal trap intended for other animals but which could also trap Canada lynx, a threatened species under the ESA, caused incidental takes in violation of the ESA. *Animal Welfare Institute v. Martin*, 588 F. Supp.2d 70 (D. Me. 2008). Critically, the district court held that the state’s actions in regulating trapping were sufficiently proximate to subject it to liability for incidental takes actually perpetrated by citizen trappers. *Id.* at 98-99 (“[B]y authorizing trapping, Maine creates the likelihood that lynx—along with the preferred animal—will find its way into a trap.”).

In California, the Commission, by permitting coyotes to be hunted and conibear traps and snares to be laid in wolf habitat would be the “cause” of any illegal take of gray wolves that occurs via hunters or trappers. By prohibiting night-time hunting and the use of lethal traps in wolf habitat, the Commission would significantly reduce the likelihood of wolves being accidentally taken, thereby both reducing the Commission’s legal exposure while simultaneously advancing wolf conservation.³⁰

B. The Commission is Legally Required to Advance Wolf Recovery under California Law

While avoiding liability under the ESA and CESA for unauthorized takes is reason enough for the Commission to act in accordance with this petition, CESA additionally requires the Commission to utilize its authority to carry out the purposes of the Act. The rulemakings requested under this petition are within the Commission’s authority to implement and serve the purpose of CESA in reducing the likelihood of illegal take of the gray wolf.

Specifically, when a species is listed as endangered pursuant to CESA, both prohibitory and affirmative mandates come into force. As noted above, all “take”—which includes, according to FGC § 86, hunting, catching, capturing, killing and any attempts to do so—is legally prohibited. Additionally, CESA § 2055 requires that all state commissions and agencies “conserve endangered and threatened species” and “utilize their authority in furtherance of the purposes” of CESA. Further, CESA § 2052 declares that “it is the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat”.

Under FGC § 2061, the definition of “conservation” of a CESA-listed species requires that the state and its agencies:

“use . . . *all methods and procedures which are necessary* to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. These methods and procedures include, but are not limited to, all activities associated with . . . *law enforcement*, habitat acquisition, restoration and maintenance . . .” (emphasis added).

³⁰ Banning night-time hunting of coyotes or other species within the range of the wolf is also consistent with the conservation principles of the ESA and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”). The ESA provides protection for species which, though they may not be endangered themselves, *resemble* endangered species closely enough that it would be difficult for either law enforcement or the public at large to distinguish between them. Similarly, CITES, to which the U.S. is a signatory, contains mirror provisions to the ESA, affording protection to species which resemble the most imperiled species in the world. Here, coyotes are far from threatened in population size, but it is clear that coyote hunters pose a critical threat to California’s wolves who are struggling to survive.

Furthermore, FGC § 1801 reinforces the Commission’s responsibility to recover gray wolves by mandating that the Commission “encourage the preservation, conservation, and maintenance of wildlife resources under the jurisdiction and influence of the state” and to “maintain sufficient populations of all species of wildlife and the habitat necessary”.

Consistent with these conservation mandates, the Commission has previously promulgated regulations protecting California's two other CESA-listed canids, the San Joaquin kit fox and the Sierra Nevada red fox, from inadvertent take by prohibitions on night-time hunting and the use of lethal traps within their range. *See* 14 CCR § 465.5(g)(5)(c), 466 and 474(a) Petitioners’ proposed regulatory amendments would afford comparable protections to the wolf as is currently provided to these two species.

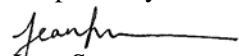
In addition to its past actions protecting the kit and red foxes, the Commission has recently taken steps to reduce the risk of wolves being killed as a result of coyote killing contests. Concern over coyote-killing contests was driven in significant part by the threat the contests posed to the wolf OR7, whose territory in California overlapped with the site of the state’s best-known coyote-killing contest held in Modoc County each year. The Commission’s 2014 decision to interpret existing law as prohibiting inducements for coyote killing contests occurred in this context and serves as precedent demonstrating that the Commission has already recognized the real threat to wolf recovery from coyote hunting. This policy reasoning applies equally here.

Given its affirmative legal mandate to use all methods and procedures to recover and protect gray wolves, the Commission must take action such as requested in this petition to protect and recover the gray wolf.

VI. CONCLUSION

The first family of wolves has returned to California after nearly a century of absence from its native lands. In recognition of the imperiled status of the handful of gray wolves in California, both the Commission and Department are finalizing the listing of gray wolves under CESA and developing a management plan of the species with the ultimate goal of population recovery. Key to these efforts is addressing the very real danger of mistaken night-time shooting and lethal trapping of wolves in their territory, which existing regulations fail to cover. The Commission is obligated under California and federal law to implement the proposed regulatory amendments here in order to help actualize the recovery of gray wolves in California.

Respectfully submitted on behalf of Petitioners,



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