



Via Email and Certified Mail/Return Receipt Requested

October 13, 2021

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Re: APHIS Wildlife Services' Minnesota Wildlife Damage Management Program: Notice of Intent to Sue for Violations of the Endangered Species Act for Inadequate Consultation on Impacts to Canada Lynx

On behalf of the Center for Biological Diversity (the "Center"), we hereby provide notice, pursuant to Section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), that the U.S. Fish and Wildlife Service ("FWS") and USDA APHIS Wildlife Services ("Wildlife Services") are in violation of Section 7 of the ESA, 16 U.S.C. § 1536, and the ESA's consultation regulations, 50 C.F.R. Part 402, for failing to sufficiently analyze impacts to Canada lynx from Wildlife Services' Wildlife Damage Management Program ("WDM Program"), including its Wolf Depredation Management Program ("Wolf Management Program"). Because of the reasonable certainty that Wildlife Services' trapping of other animals will capture a Canada lynx, Wildlife Service is also in violation of Section 9 of the ESA. 16 U.S.C. §§ 1538(a)(1)(B), 1533(d); 50 C.F.R. § 17.40(k).¹

¹ Wildlife Services is also in violation of the National Environmental Policy Act ("NEPA") and its implementing regulations, 40 C.F.R. §§ 1500-1508, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

The Center is a national, nonprofit conservation organization with over 1.7 million members and online activists dedicated to the protection of vulnerable species and vital natural environments. The Center and its members are concerned with the conservation of imperiled and threatened species, including the gray wolf and Canada lynx in Minnesota, and the effective implementation of the ESA.

STATUTORY BACKGROUND

The ESA was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). When a species has been listed or critical habitat designated under the ESA, all federal agencies – including Wildlife Services – must ensure through consultation with FWS that their programs and activities are compliant with the ESA. 16 U.S.C. § 1536(a)(2).

Through consultation under Section 7 of the ESA, federal agencies work with FWS to determine whether their actions will jeopardize listed species’ survival or adversely modify designated critical habitat and, if so, to identify ways to modify the action to avoid that result. 50 C.F.R. § 402.14. An agency is required to review its actions “at the earliest possible time” to determine whether the action may affect listed species or critical habitat. 50 C.F.R. § 402.14(a).

The scope of agency actions subject to consultation is broadly defined to encompass “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02 (definition of “action”). Wildlife Services’ WDM program is “agency action” subject to consultation.

For each federal action, Wildlife Services must ask FWS whether any listed or proposed species may be present in the action area. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, Wildlife Services must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* The biological assessment must generally be completed within 180 days. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i).

If an agency determines that its action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, the regulations permit “informal consultation,” during which FWS may concur in writing with the agency’s determination. 50 C.F.R. § 402.14(a)-(b). If the agency determines that its action is “likely to adversely affect” a listed species or critical habitat, or if FWS does not concur with the agency’s “not likely to adversely affect” determination, the agency must engage in “formal consultation,” as outlined in 50 C.F.R. § 402.14. 50 C.F.R. §§ 402.02, 402.14(a). An agency is relieved of the obligation to consult on its actions only where the action will have “no effect” on listed species or designated critical habitat. Effects determinations are based on the direct, indirect, and cumulative effects of the action when added to the environmental baseline and other interrelated and interdependent actions. 50 C.F.R. § 402.02 (definition of “effects of the action”).

To complete formal consultation, FWS must provide Wildlife Services with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. Consultation must generally be completed within 90 days from the date on which consultation is initiated. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).

If FWS concludes that the proposed action “will jeopardize the continued existence” of a listed species, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species and will not result in the destruction or adverse modification of critical habitat, FWS must provide an “incidental take statement” specifying the amount or extent of such incidental taking on the listed species, any “reasonable and prudent measures” that FWS considers necessary or appropriate to minimize such impact, and the “terms and conditions” with which Wildlife Services must comply to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). Taking of listed species without the coverage of an incidental take statement is a violation of Section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B).²

Agencies must reinitiate consultation on agency actions over which the federal agency retains, or is authorized to exercise, discretionary involvement or control if:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16.

During the consultation process, Wildlife Services is prohibited from making any irreversible or irretrievable commitment of resources with respect to the WDM program that may foreclose the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d). This means that Wildlife Services may not proceed with its predator control activities in occupied Canada lynx habitat unless it completes reinitiated Section 7 consultation regarding the Canada lynx.

² To “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. 16 U.S.C. § 1532(19). “Take” includes direct as well as indirect harm and need not be purposeful. See 50 C.F.R. § 17.3 (definitions of “harass” and “harm”); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 (1995). “Take is defined in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” *Defenders of Wildlife v. Administrator, EPA*, 882 F.3d 1294, 1300 (8th Cir. 1989).

Compliance with the Section 7 consultation process is integral to compliance with the substantive requirements of the Act and ensures that an agency's action will not jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat.

FACTUAL BACKGROUND

I. Canada Lynx

The Canada lynx (*Lynx canadensis*) is a medium-sized cat with black-tufted ears, immense paws, a black-tipped tail, and silver-gray fur.³ Primarily nocturnal, the Canada lynx resides in boreal spruce-fir forests and relies on birds and small mammals, like the snowshoe hare, for food.⁴

Due to trapping and inadequate regulatory protections that resulted in low populations throughout the United States, FWS listed the Canada lynx as a threatened species under the ESA in 2000. 65 Fed. Reg. 16,052 (Mar. 24, 2000). Critical habitat was designated for the species in 2006, revised in 2009, and revised again in 2014 when critical habitat was designated in northeastern Minnesota. 79 Fed. Reg. 54,781 (Sept. 12, 2014). Today it is estimated that 50 to 200 lynxes inhabit northern Minnesota.⁵ Only 2% of the country's lynx population occurs in the contiguous United States, however, with the remaining 98% in Canada and Alaska.⁶

This small and vulnerable population continuously faces threats to its survival in Minnesota, including being caught, injured, or killed in traps set for other species like wolves and coyotes.⁷ Because Minnesota is one of the few places that contains viable habitat for the species in the lower 48, any federal actions that may affect the Canada lynx must be adequately assessed to ensure that the species is not jeopardized.

II. Wildlife Services' Wildlife Damage Management Programs

Wildlife Services has consistently eradicated valuable wildlife since its inception more than 100 years ago. In fiscal year 2020, Wildlife Services reported that it killed 433,192 native animals nationwide, including, for example, 381 gray wolves, 62,537 adult coyotes, 434 black

³ Lavoie, M, Renard, A., and Lariviere, S. 2019. *Lynx Canadensis*, Journal of Mammalogy 51(985): 136-154, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7149466/pdf/sez019.pdf>; U.S. Fish and Wildlife Service. 2013. Canada Lynx Fact Sheet, available at https://www.fws.gov/mountain-prairie/es/species/mammals/lynx/CandaLynxFactSheet_091613.pdf.

⁴ U.S. Fish and Wildlife Service. 2013. Canada Lynx Fact Sheet, available at https://www.fws.gov/mountain-prairie/es/species/mammals/lynx/CandaLynxFactSheet_091613.pdf.

⁵ U.S. Fish and Wildlife Service. 2017. Species Status Assessment for the Canada Lynx, at 109, available at https://www.fws.gov/mountain-prairie/es/species/mammals/lynx/SSA2018/01112018_SSA_Report_CanadaLynx.pdf.

⁶ U.S. Fish and Wildlife Service. 2013. Canada Lynx (*Lynx Canadensis*), available at <https://www.fws.gov/mountain-prairie/es/canadalynx.php>.

⁷ U.S. Fish and Wildlife Services. 2017. Species Status Assessment for the Canada Lynx, at 110 (discussing that between 2000 and 2017 there were "45 lynx mortalities" reported in Minnesota, 11 due to incidental trapping and seven due to illegal shooting), available at https://www.fws.gov/mountain-prairie/es/species/mammals/lynx/SSA2018/01112018_SSA_Report_CanadaLynx.pdf

bears, 2,523 foxes, and 25,400 beavers.⁸ In Minnesota, Wildlife Services killed more than 5,000 native animals in 2020, including 203 wolves, 167 coyotes, and 30 foxes killed in foothold traps and neck snares, and 1,357 beavers killed in body-gripping traps.⁹

The traps used by Wildlife Services are fundamentally nonselective, environmentally destructive, and inherently cruel. For example, foothold traps are internationally recognized as inhumane and have been banned in many countries.¹⁰ The force of the jaws clamping on the animal's limb and the subsequent struggle can result in severe trauma, including mangling of the limb, fractures, damage to muscles and tendons, lacerations, injury to the face and mouth, broken teeth, loss of circulation, frostbite, and amputation.¹¹ Any of these injuries significantly decreases the ability of any animal, like the Canada lynx, to survive in the wild.¹²

III. Wildlife Services' Wolf Management Program in Minnesota

A part of its WDM Program in Minnesota, Wildlife Services' Wolf Management Program focuses on killing wolves, largely in response to reports of conflicts with livestock or other domestic animals. The Wolf Management Program is guided by an outdated 2001 Minnesota Wolf Plan that largely favors lethal control rather than conflict prevention.¹³

Wildlife Services in Minnesota intentionally killed 204 gray wolves in 2020, 178 wolves in 2019, 175 wolves in 2018, 200 wolves in 2017, 174 wolves in 2016, and 220 wolves in 2015.¹⁴ Nontarget wildlife is also unintentionally killed in traps and snares set for wolves.

The last NEPA analysis specific to this Wolf Management Program was completed in April of 2002, which resulted in a "Finding of No Significant Impact" and a finding that the program was "not likely to adversely affect" federally listed species, such as the Canada lynx, in Minnesota.¹⁵

⁸ USDA, Animal and Plant Health Inspection Service. 2020. Program Data Report G, Animals Dispersed, Killed or Euthanized, Removed or Destroyed, Freed or Relocated, available at https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/pdr/?file=PDR-G_Report&p=2020:INDEX.

⁹ *Id.*

¹⁰ Library of Congress. 2016. Laws on Leg-Hold Animal Traps Around the World, Law Library, available at <https://tile.loc.gov/storage-services/service/l1/lglrd/2016479005/2016479005.pdf>.

¹¹ American Veterinary Medical Ass'n. 2008. Literature Review on the Welfare Implications of Leghold Trap Use on Conservation and Research, available at https://www.avma.org/sites/default/files/resources/leghold_traps_bgnd.pdf.

¹² *Id.*

¹³ Minn. Dept. Nat. Resources. 2001. Minnesota Wolf Management Plan, available at https://files.dnr.state.mn.us/natural_resources/animals/mammals/wolves/wolfplan.pdf.

¹⁴ See USDA, APHIS. 2015-2020. Program Data Reports, available at https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/sa_reports/sa_pdrs/PDR-Home-2020 (filter by Program Data Report G for years 2015-2020 and for Minnesota).

¹⁵ USDA, APHIS. 2002. Final Environmental Assessment, Management of Wolf-Livestock Conflicts and Control of Depredating Wolves in the State of Minnesota at 4-7, available at https://www.aphis.usda.gov/wildlife_damage/nepa/states/MN/mn-2002-wolf-ea.pdf (explaining that the U.S. Fish and Wildlife Service concurred with Wildlife Services' "not likely to adversely affect" determination); see USDA, APHIS. 2002. Finding of No Significant Impact, available at https://www.aphis.usda.gov/wildlife_damage/nepa/states/MN/mn-2002-wolf-fonsi.pdf.

Since 2002, new information has come out on the harms associated with trapping, and the benefits and efficacy of nonlethal preventative methods of dealing with wildlife conflicts.¹⁶ In 2017, Wildlife Services completed a draft EA for the Wolf Management Program, which was never finalized.¹⁷

IV. Wildlife Services' Impacts on Canada Lynx in Minnesota

In 2016, Wildlife Services determined that the lethal methods it employs against wolves, coyotes, and all other species were “not likely to adversely affect” the Canada lynx, despite its contradictory statement that “foot-hold traps may result in the capture and/or injury or death of a lynx.”¹⁸

Indeed, there is ample evidence of Canada lynx being unintentionally caught in traps set for other predators in Minnesota.¹⁹ For example, in the summers of 2015 and 2016, researchers targeting wolves caught lynxes in foothold traps. In November of 2014, a trapper targeting a wolf caught a lynx in a leghold trap, and in November of 2013, a trapper targeting fox caught a lynx in a leghold trap.

Wildlife Services has provided inadequate mitigations to reduce risk to Canada lynx. Wildlife Services explains that it “will not utilize neck snares for the purpose of capturing fox or coyote in St. Louis, Lake, Koochiching or Cook Counties (Counties with lynx critical habitat).”²⁰ But it does not restrict the use of neck snares targeting wolves living in these lynx areas. And Wildlife Services fails to consider that lynx have expanded their range beyond these four counties.²¹ Plus, this mitigation is only for neck snares, even though Wildlife Services acknowledges the risk of capturing lynx in foothold traps set for coyotes, foxes, or wolves.

¹⁶ Stone, A.S. et al. 2017. Adaptive use of nonlethal strategies for minimizing wolf-sheep conflict in Idaho, *Journal of Mammalogy*, 98(1): 33-44, <https://doi.org/10.1093/jmammal/gyw188>; Shivik, J. et al. 2003. Nonlethal Techniques for Managing Predation: Primary and Secondary Repellents. USDA Nat. Wildlife Research. Ctr., available at https://digitalcommons.unl.edu/icwdm_usdanwrc/; Miller, J. et al. 2016. Effectiveness of contemporary techniques for reducing livestock depredations by large carnivores, *Wildlife Society Bulletin*, 40(4): 806, 815, <https://doi.org/10.1002/wsb.720>; Breck, S.W. and T. Meier, T. 2004. Managing wolf depredation in United States: past, present and future, *Sheep, Deer, and Goat Research Journal* 9: 41-46, available at <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article>.

¹⁷ USDA, APHIS, 2017. Draft Environmental Assessment Management of Wolf Conflicts and Depredating Wolves in Minnesota, available at <https://www.regulations.gov/document/APHIS-2017-0023-0002>.

¹⁸ USDA, APHIS. 2016. Consultation at 14, available at <https://diversity.app.box.com/s/xg62rl5uonq0murgflglqarg8zi72tn1/file/827332185135>.

¹⁹ U.S. Fish and Wildlife Services. 2017. Species Status Assessment for the Canada Lynx, at 110 (discussing that between 2000 and 2017 there were “45 lynx mortalities” reported in Minnesota, 11 due to incidental trapping and seven due to illegal shooting), available at https://www.fws.gov/mountain-prairie/es/species/mammals/lynx/SSA2018/01112018_SSA_Report_CanadaLynx.pdf; see also Center for Biological Diversity. 2019. Illegal Incidental Take of Canada Lynx in Minnesota: Notice of Intent to Sue for Violations of the Endangered Species Act, available at https://s3-us-west-2.amazonaws.com/s3-wagtail.biologicaldiversity.org/documents/Lynx_MN_Sec_9_-_NOI_12_3_2019_to_send.pdf.

²⁰ USDA, APHIS. 2016. Consultation at 14, available at <https://diversity.app.box.com/s/xg62rl5uonq0murgflglqarg8zi72tn1/file/827332185135>.

²¹ Minnesota Dept. of Nat. Resources. Undated. Lynx sightings, available at https://www.dnr.state.mn.us/nhnrp/lynx_sightings.html (map of lynx sightings from 2000 to 2006); Catton, T. et al. 2017. Summary of the Superior National Forest’s 2017 Canada lynx (*Lynx canadensis*) DNA database, available at <https://files.dnr.state.mn.us/eco/nhnrp/Summary%20results%20of%202017%20Canada%20lynx%20DNA-Final.pdf>

In 2017, Wildlife Services FWS concurred with the “not likely to adversely affect” determination.²² FWS’ concurrence was based on Wildlife Services’ commitment to placing traps for beavers underwater to reduce risk to lynx. FWS required no measures to reduce the risk to lynx from traps set for wolves, coyotes, or foxes.

LEGAL VIOLATIONS

FWS unreasonably concurred with Wildlife Services’ finding that the WDM program was “not likely to adversely affect” Canada lynx. It failed to rationally consider and explain several relevant factors, including the evidence of incidental capture of lynx in foothold traps and snares in Minnesota, and the lack of adequate mitigation measures to prevent such captures. These failures are especially concerning given Wildlife Services’ own statement that “[u]se of foot-hold traps may result in the capture and/or injury or death of a lynx.” And the fact that Wildlife Services sets hundreds of foothold traps and snares as part of its WDM program.

Because Wildlife Services’ continued use of foothold traps and snares is likely to adversely affect the threatened Canada lynx, Wildlife Services unreasonably relied upon FWS’ concurrence. Wildlife Services is violating and will continue to violate the consultation provisions of Section 7(a)(2) by failing to ensure that the WDM program will not jeopardize the continued existence of the Canada lynx. 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 402.

Moreover, multiple events triggering the need to reinitiate consultation have occurred since FWS issued its November 9, 2017 letter of concurrence. These include new information on additional non-target Canada lynx trappings, new science on the status of and threats to Canada lynx, and evidence of Canada lynx populations expanding throughout Minnesota where WDM activities occur. 50 C.F.R. § 402.16(b). Yet, Wildlife Services and FWS have failed to timely reinitiate and complete reinitiated consultation regarding the continued implementation and impacts of its WDM program on the Canada lynx in violation of the ESA. 16 U.S.C. §§ 1536(a)(2), 1536(b)(1)(A); 50 C.F.R. §§ 402.14, 402.16.

By allowing, authorizing, and approving projects and activities to proceed that may affect the Canada lynx, prior to the reinitiation and completion of consultation with FWS, Wildlife Services and FWS are failing to protect the species from jeopardy, in violation of Section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2). For this same reason, Wildlife Services is also violating Section 7(d) of the ESA. 16 U.S.C. § 1536(d).

Moreover, until Wildlife Services either stops trapping that results in a reasonable certainty of incidental take of Canada lynx or completes formal consultation and receives an incidental take statement that covers any such taking, Wildlife Services is in violation of Section 9 of the ESA. 16 U.S.C. §§ 1538(a)(1)(B), 1533(d); 50 C.F.R. § 17.40(k).

(“Lynx detections are distributed over 12 counties in Minnesota.”); Catton, T.J., et al., 2021. Summary of the Superior National Forest’s Canada lynx DNA database & population monitoring 2020.

²² U.S. Fish and Wildlife Service. 2017. Letter of Concurrence, available at <https://diversity.app.box.com/s/xg62rl5uonq0murgflglqarg8zi72tn1/file/827326963732>

CONCLUSION

For the reasons stated above, Wildlife Services and FWS have violated and remain in ongoing violations of Section 7 and Section 9 of the ESA. If these violations of law are not cured within sixty days, the Center for Biological Diversity may file suit for declaratory and injunctive relief, as well as attorney fees and costs. 16 U.S.C. § 1540(g). If you believe that any of the above information is inaccurate or otherwise would like to discuss this notice letter, please contact me at 651-955-3821.

Sincerely,



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