



Public Employees for Environmental Responsibility

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November 2, 2017

Secretary Ryan Zinke
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

cc:

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By Certified Mail

RE: Notice of Endangered Species Act Violation and 60-day Notice of Intent to File a Citizen Suit Pursuant to 16 U.S.C. § 1540(g).

Dear Secretary Zinke:

Public Employees for Environmental Responsibility (“PEER”), Atchafalaya Basinkeeper (“ABK”), the Sierra Club and its Delta Chapter, the Louisiana Crawfish Producers Association-West, Ronald M. Nowak, Michael J. Caire, and Harold Schoeffler write to inform you that the United States Fish and Wildlife Service (“FWS”) is in violation of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA” or “Act”) at § 1533, for

removing the Louisiana black bear (*Ursus americanus luteolus*) from the U.S. List of Endangered and Threatened Wildlife, removing its legally designated critical habitat, and ignoring the “best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).

The organizations and individuals who are signatories to this Notice of Intent to Sue (collectively “NOI signatories”) intend to initiate legal action under the ESA citizen suit provision against FWS unless it promptly addresses the inadequacies of delisting the Louisiana black bear.

As detailed below, the NOI signatories have reason to believe that FWS has neglected scientific data concerning the Louisiana black bear and has erroneously removed this species from coverage by the Endangered Species Act. Available data show that the recovery plan, which itself was greatly insufficient to assure anything approaching true recovery, was not effectively implemented, because one of the populations (FWS used the term “subpopulations”) relied upon for delisting does not consist of true Louisiana black bears as alleged, and because the other population so relied upon is at risk of hybridization. Additionally, the removal of the critical habitat designation was premature, as it serves to remove the reasonable assurance that there will never again be actions authorized, funded, or carried out by federal agencies that might be detrimental to such habitat, without any explanation of why such restrictions are no longer needed. Finally, even if the population levels relied upon in the delisting are taken at face value, the population densities are well below normal for well-managed black bear populations.

We hope that the Agency will promptly remedy these problems by relisting the Louisiana black bear and redesignating its critical habitat, either by rescinding the rule that removed the bear or by issuing a new rule listing the bear. However, if FWS fails to promptly remedy the violations of the ESA, we intend to file a citizen suit against FWS pursuant to 16 U.S.C. § 1540(g), seeking preliminary and permanent injunctive relief, as well as attorneys’ fees and costs. The citizen suit provision of the ESA, 16 U.S.C § 1540(g), allows private citizens to commence a civil suit “against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of [the Act] which is not discretionary with the Secretary.” 16 U.S.C. § 1540(g)(1)(C). The ESA requires that suit may not be filed prior to sixty days after written notice to the Secretary of Interior. *Id.* § 1540(g)(2)(c). Through this letter, the NOI signatories fulfill that requirement.

Legal Background: ESA

The purposes of the ESA include “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). The ESA achieves this goal by authorizing the Secretary of the Interior to determine “whether any species is an endangered species or a threatened species” as a result of habitat destruction, overutilization of the species, predation or disease, inadequate regulatory structures, or any other natural or manmade factors affecting the species’ continued existence. § 1533(a)(1). FWS is also required to reconsider the classifications of species and change them if warranted based on new information. *See* § 1533(c)(1) (requiring FWS to revise the endangered species list “from time to time.”). The status of each listed species must be reviewed every five years. § 1533(c)(2)(A), (B). Concurrent with making a determination that a species should be listed as endangered or threatened, the Secretary should also “designate any habitat of such species which is then considered to be critical habitat.” § 1533(a)(3)(A).

While these directives are generally broad, the ESA also establishes standards by which the Secretary is directed to categorize a species. In making determinations as to whether a species should be listed as endangered or threatened, the action should be taken “solely on the basis of the best scientific and commercial data available.” § 1533(b)(1)(A); *see* 50 C.F.R. § 424.11(b) (requiring determinations for listing and delisting to be made “solely on the basis of the best available scientific and commercial information”). *See also N.M. Cattle Growers v. U.S. Fish and Wildlife Service*, 248 F.3d 1277, 1284-85 (10th Cir. 2001) (quoting H.R. Rep. No. 97-567, pt. 1 at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807) (“The addition of the word ‘solely’ is intended to remove from the process of the listing or delisting of species any factor not related to the biological status of the species.”). Designations of critical habitat must also be based on the “best scientific data available.” *See* 16 U.S.C. § 1533(b)(2). Failure to adequately adhere to the standards set out above will result in violations of the statute.

When the Agency removes a species from the Federal Lists of Endangered and Threatened Wildlife and Plants, or “delists” a species, it is required to make a determination that the threats that merited listing in the first place have been eliminated or controlled.

Specifically, the factors to be considered for delisting are the same as those for listing: 1) the present or threatened destruction, modification, or curtailment of the species' range or habitat; 2) over-utilization for commercial, recreational, scientific, or educational purposes; 3) disease and predation; 4) the inadequacy of existing regulatory mechanisms protecting the species or habitat; and 5) other natural or manmade factors affecting its continued existence. 16 U.S.C. §1533(a)(1),(c); 50 C.F.R. § 424.11(c) and (d); *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432 (D.C. Cir. 2012). A species may be delisted based upon consideration of these five factors and only if “the best scientific and commercial data” substantiate that it is no longer endangered or threatened for one of the following reasons: extinction, recovery, or if the original data underlying the listing is found to be in error. 50 C.F.R. § 424.11(d).

The guidelines for penalties and enforcement under the ESA are established in 16 U.S.C. § 1540. This section lays out penalties the FWS may assess against individuals who violate the ESA by taking or harming listed animals or degrading their habitat. § 1540(a)–(b). This section also provides a private right of action in the form of citizen suits whereby individual citizens may bring suit against violators of the ESA or against the Secretary for failing to perform non-discretionary duties required by the ESA. *See* § 1540(g). Specifically relevant to this letter, § 1540(g)(1)(C) allows for citizen suits when the Secretary fails to comply with the requirements of § 1533. The citizen suit provision provides that suit cannot be filed prior to 60 days after written notice has been to the Secretary. § 1540(g)(2)(C). This letter serves to meet the requirement under § 1540(g)(2)(C).

Standing

PEER is a 501(c)(3) nonprofit organization incorporated in Washington, D.C. PEER's organizational purposes include assuring the enforcement of federal and state laws aimed at protecting endangered species and ensuring the use of adequate scientific research in agency decision-making. PEER has members who engage in scientific study of the Louisiana black bear and who enjoy observing the Louisiana black bear in its natural habitat.

The Sierra Club, and its Delta Chapter, have members in Louisiana whose recreational, aesthetic, business and/or environmental interests have been, are being and will be adversely affected by the delisting of the *luteolus*. Members of the Sierra Club live,

work and play in the area around Atchafalaya Basin, and use these waterways and the surrounding areas for recreation, scientific study, fishing, and a variety of other activities.

Atchafalaya Basinkeeper (ABK), founded in 2004, works to preserve and restore the ecosystems of the Atchafalaya Basin for future generations. ABK is a proud member of the Waterkeeper Alliance, an international grassroots advocacy organization of over 200 programs working to protect watersheds across the globe. Locally, ABK works diligently to protect the long-term health and sustainability of the Atchafalaya Basin. ABK has over 1,100 members, including members who live in the Atchafalaya Basin, who work in the Basin and who recreate and enjoy the diverse ecosystems represented in the Basin.

Dean Wilson has served as the Executive Director and appointed Basinkeeper of ABK since its inception in 2004. Dean is a 30-year resident of Plaquemine, Louisiana in Iberville Parish and within the Atchafalaya Basin. Mr. Wilson is also the owner of Last Wilderness Swamp Tours. The bear's presence and habitat in the swamps creates a major draw for ecotourism in the Basin.

The March 2016 delisting of the Louisiana black bear has harmed the interests of the Sierra Club, and its Delta Chapter, and the ABK, and their members in protecting the Basin. The delisting has had a direct negative impact on ABK, its membership, and its Executive Director's interest in the Atchafalaya Basin. The delisting impacts the protections for Louisiana black bears in the Lower Atchafalaya River Basin subpopulation and the ecosystems they depend on, which has repercussions on ecotourism as well as protectionist measures employed in the Basin to ensure the longevity of the species. For example, the delisting resulted in the removal of critical habitat designations in the Atchafalaya Basin. These areas were protected from development projects that not only impair bear habitat but also surrounding waters and ecosystems. As a result, ABK is concerned about the Basin's ability to serve as viable habitat for the Lower Atchafalaya River Basin population of *luteolus*, as well as the decline in overall productivity of the wetlands and ecosystems in the Atchafalaya Basin.

The Louisiana Crawfish Producers Association-West ("LCPA") is a nonprofit corporation organized under the laws of Louisiana. LCPA's mission is to protect the economic, environmental and cultural interests of the Atchafalaya Basin and its residents and to promote a healthy habitat for the crawfish, fish and other wildlife that the Basin

supports. Additionally, LCPA works to protect and insure public access to the waters of the United States within the Basin. LCPA works to ensure that the state and federal laws and regulations intended to preserve and enhance the Basin's natural resources and wildlife are followed. LCPA has approximately 500 members, including recreational and commercial fishermen, hunters and recreationists who live, work and recreate in and around the Basin. These members' regularly use the Basin in pursuit of these interests, including the areas impacted by the 2016 delisting of the Louisiana black bear, mainly from the loss of critical habitat designation.

LCPA President Jody Meche is a third-generation Cajun crawfisherman who has been making a living in the Basin his entire life. Meche, like many members of LCPA who were born and raised in the Basin, work and live in the geographic area of the Lower Atchafalaya River Basin Louisiana black bear subpopulation's habitat. Moreover, the organization's members have long observed and captured on game cameras the presence of the black bear in the Basin. LCPA's interests in ecotourism and wetlands protection are impacted by the delisting of the Louisiana black bear. As more development is authorized in areas previously designated as critical habitat, the ability of crawfishermen to make a living in areas with exacerbated sedimentation, impaired water quality and disruption of crawfish and other wildlife habitat is severely diminished. LCPA's members intend to continue using the Basin to advance their economic, recreational, cultural and aesthetic interests, including bear sightings in the Basin and protection of areas formerly designated as critical habitat for the Louisiana black bear.

Ronald M. Nowak is a native of Louisiana, who has spent much time there and elsewhere gathering information on the Louisiana black bear. He is a PhD. biologist and has authored 11 books on mammals, mostly with Johns Hopkins University Press, several of which discuss the Louisiana black bear. He was staff mammologist, Office of Endangered Species, U.S. Fish and Wildlife Service, from 1974 to 1987, during which time he did several surveys and reports on the Louisiana black bear and other kinds of bears as part of his duties. Prior and subsequent to that time, he also was contracted by the Service to do studies of wolves and cougars. He makes periodic visits to Louisiana, where he attempts to observe and study the Louisiana black bear and its habitat, and his further plans in that regard would be damaged if the subspecies were to be reduced in numbers or distribution or

if it were to undergo hybridization with an alien subspecies as a result of the delisting. Potential conservation measures that would result from returning the Louisiana black bear to the U.S. List of Endangered and Threatened Wildlife, redesignating its critical habitat, and protecting its genome from further hybridization would greatly enhance his plans for additional study and observation.

Michael Jordan Caire, MD, is a Louisiana resident who has been actively involved with the Louisiana black bear. He received a degree in Zoology from the University of North Carolina Chapel Hill and his MD from Louisiana State University Medical School in New Orleans. He has expertise and experience in evaluating the best available science. Dr. Caire is a life member of the Black Bear Conservation Coalition, and has received several awards for his work on the Louisiana black bear, including the Louisiana Wildlife Federation Volunteer Conservation Award and the Chevron Conservation Award. Dr. Caire was active with the Tensas Conservancy Coalition, where his work led to the purchase of the land for the Tensas National Wildlife Refuge (NWR) and the adjacent Big Lake Wildlife Management Area, which are the core habitat of the present Louisiana black bear population. Dr. Caire has been mentioned in the Congressional Record citing his work in the establishment of the Tensas NWR and in the protection of the Louisiana black bear. Dr. Caire has a demonstrated long history of undertaking efforts to restore the Louisiana black bear. Caire's involvement with the Louisiana black bear will continue into the future, as he intends to continue studying bear issues, including conservation, and visiting and observing the bear habitat. Reversing the delisting would greatly enhance his plans for additional study and observation.

Harold Schoeffler is a longtime resident of Lafayette, Louisiana with many interests in the survival of the Louisiana Black Bear and the protection of its habitat. Schoeffler has a long history of involvement in efforts to conserve the bear and protect its habitat, including spending decades of time and effort seeking to have the Secretary of the Interior protect the bear under the ESA. In 1987, Schoeffler personally drafted a citizens petition to have the bear listed as a threatened species under the ESA. Schoeffler believes preserving the Atchafalaya Basin is vital to saving the bear because the region is some of the bear's best remaining habitat. Schoeffler uses the Atchafalaya Basin on a regular basis, four or five days a week, for fishing, crabbing, canoeing, and hunting; and he will continue to do so.

PEER, the Sierra Club and its Delta Chapter, Atchafalaya Basinkeeper, and the Louisiana Crawfish Producers Association-West have standing to bring the lawsuit that is the subject of this letter because they are organizations whose members would have standing to sue on their own and because the interests at stake are germane to the organizations' purposes, as set out above. *See Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) ("An association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit.").

Specifically, the delisting of the Louisiana black bear causes damage to these organizations' members' aesthetic and recreational interests. The Supreme Court has ruled that damage to aesthetic or recreational interests may qualify as an injury in fact. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 145 (2000) (effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . deserving of legal protection through the judicial process."); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (interest supporting standing may reflect aesthetic, conservational, and recreational values). The desire to observe a species is recognized as a cognizable interest supporting standing under the ESA. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992); *Fox v. Palmas Del Mar Properties, Inc.*, 620 F. Supp. 2d 250, 261 (D.P.R. 2009). By delisting the Louisiana black bear, the FWS is harming the organizational signatories' and their members' interests by subjecting the bear and its habitat to potential threats caused by the erroneous delisting of the bear. Thus, the organizational signatories have standing to sue under the ESA on behalf of their members.

In addition, the individual signatories would have standing to sue based on their scientific, aesthetic and recreational interests described above.

Factual Background on the Delisting of *Ursus americanus luteolus*

The Louisiana black bear (*Ursus americanus luteolus*) is one of 16 subspecies of the American black bear, which is the official state mammal of Louisiana. While the black bear historically was found across North America, the Louisiana black bear subspecies is only

known to have occurred in Louisiana, eastern Texas, southern Arkansas, and most of Mississippi. Compared to other black bears, the Louisiana black bear's skull is longer, narrower and flatter, with larger molar teeth, and adult males can weigh more than 600 pounds.

Before large-scale human development, the Louisiana black bear had an overall range of over 120,000 square miles, including at least 80,000 individuals.¹ However, by the late 20th century, range and numbers had declined by over 99 percent. See 80 Fed. Reg. 29399-C, 29400-C (May 21, 2015). On January 7, 1992, the bear was listed as threatened pursuant to the Endangered Species Act of 1973. 57 Fed. Reg. 588.

As recently as February 18, 2014, FWS completed an extensive 5-year review of the status of the Louisiana black bear that concluded that the subspecies should remain listed as threatened.² Yet, just over a year later, FWS proposed delisting the Louisiana black bear. 80 Fed. Reg. 29394 (May 21, 2015). FWS issued the final delisting rule on March 10, 2016, three years before the next 5-year review was due, based on a finding that the species had recovered. 81 Fed. Reg. 13125 (March 11, 2016). This decision relied on a number of factors, including claims that over 312 square miles of bear habitat had been restored or permanently protected and that the recovery goal of two viable populations connected by a secure corridor had purportedly been met.

While habitat loss from development has been relatively stabilized, habitat loss from climate change is increasing. Specifically, habitat in the Lower Atchafalaya River Basin (LARB) is eroding into the Gulf.³ In Louisiana and Mississippi, the most significant causes

¹ The estimate of 80,000 bears was calculated in Ronald M. Nowak's comment on the delisting proposal (<https://www.regulations.gov/document?D=FWS-R4-ES-2015-0014-0055>). It was based in part on the proposal's citation (80 Fed. Reg. 29402-A (May 21, 2015) of a density of 1.71 bears per square mile for an area of prime habitat occupied by an unexploited, native population of *U. a. luteolus*, and applying that figure to the estimated extent of such habitat within the original range of the subspecies. The final rule questioned that figure. See 81 Fed. Reg. 13,145 (March 11, 2016). However, current numerical estimates for several states (such as Washington, Wisconsin, and Maine) where black bears are still widespread and reasonably well-protected, indicate the original overall range of *luteolus* would once have contained well over 80,000 animals.

² Deborah Fuller, Louisiana black bear (*Ursus americanus luteolus*) 5-Year Review: summary and evaluation, Louisiana Ecological Services Field Office, U.S. Fish and Wildlife Service, Lafayette, Louisiana (2014).

³ In the final delisting decision, the Service acknowledges the threat of sea level rise (81 Fed. Reg. at 13,169) (stating that "we identified the LARB subpopulation as one that may be at greater risk of extinction due to its additional potential threats from future anticipated development and sea level rise.") Furthermore, "Habitat supporting the LARB subpopulation . . . is more vulnerable to one of the particular effects of global climate

of death are poaching and road kills. Roads fragment bear habitat and increase the chances of vehicle collisions, increase human contact, decrease habitat use, or restrict bears' movement to other areas.⁴ Despite the primary causes of habitat loss and mortality being human caused, FWS has claimed that healthy “subpopulations” of this species will be viable for at least the next 100 years without ESA protection. In reaching this determination, FWS argued that there is sufficient protected habitat to support breeding and movement of individuals between “subpopulations” so that the subspecies is not currently, and is not likely to again become, a threatened species. This conclusion is not supported by the best available scientific data, as shown below.

Currently, FWS identifies four major areas of Louisiana that are inhabited by black bears: Tensas River Basin (TRB), Three Rivers Complex (TRC), Upper Atchafalaya River Basin (UARB), and Lower Atchafalaya River Basin (LARB). Only the TRB and LARB contain populations (FWS uses the term “subpopulations”) of the native subspecies (*luteolus*) that have been continually present in those areas. The UARB contains an introduced non-native population descended from Minnesota black bears (*Ursus americanus americanus*) brought to the UARB in the 1960s to support game hunting. Although FWS has indicated uncertainty as to whether any native Louisiana black bears existed in the UARB when the Minnesota bears were introduced, the UARB population likely only consists of the subspecies *americanus*. See 81 Fed. Reg. 13,146 (discussing Comment 37 which argued that the UARB was a “bear free” zone at the time the Minnesota bears were introduced). The TRC population is largely made up of bears translocated from the TRB as part of the FWS recovery plan, and includes some hybrids of TRB and UARB bears.

One of the major points relied upon by FWS in delisting the Louisiana black bear is the connection between populations in the TRB and the UARB via the TRC. However, as discussed more fully below, the connection is erroneously relied upon because in fact the UARB population does not consist of the subspecies *luteolus*. The connection of the UARB population with Louisiana black bear populations should not be considered to constitute

change, the long term threat of sea level rise, than other subpopulations due to its occurrence within low-elevation coastal habitats.”

⁴ *Louisiana Black Bear*, U.S. Fish and Wildlife Service, <https://www.fws.gov/southeast/wildlife/mammals/louisiana-black-bear>.

sufficient recovery, and in fact threatens the remaining Louisiana black bears with hybridization.

Basis of Notice of Intent to Sue

At the time of the Louisiana black bear's listing, the subspecies had been declining for the past 200 years and probably numbered fewer than 200 individuals. Admittedly, the listing likely saved the bear from extinction. *See* 81 Fed. Reg. 13124 (noting that the bear was listed in response to increasing threats caused by habitat degradation and human-related mortality). However, errors in methodology used and reliance on faulty scientific assumptions erroneously led to the delisting of the bear. Agency reliance upon these errors presents a continued threat to the viability of the Louisiana black bear and its habitat. At present, the only remedy to this problem is the relisting of the bear and redesignation of its critical habitat.

I. Evaluation of Listing/Delisting Factors

FWS violated the ESA by delisting the Louisiana black bear despite the fact that the best available science does not “indicate that the population is no longer threatened.” 50 C.F.R. § 424.11(d)(2). If any one of the five listing/delisting factors contained in Section 4(a)(1) of the Act is present, the ESA requires that the bears remain listed. *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) (holding that the Secretary is required to list a species as endangered or threatened if “any of § 1533(a)(1)’s five factors are sufficiently implicated”). Because the delisting here had recovery as its basis, FWS must also substantiate that the species has recovered. 50 C.F.R. 424.11(d). Thus, FWS must look at population size and population trends, the stability of habitat quality and quantity, and whether any one or more of the five factors threaten the survival of the species. FWS must also substantiate the recovery has been achieved. Following are the applicable factors for ESA delisting and relevant descriptions as to FWS violations.

A. Factor 1. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range.

The Louisiana black bear does not in fact have the habitat or range claimed by FWS, because not all of the bears FWS considers to occupy Louisiana black bear habitat are in fact of the *luteolus* subspecies, and the corridors claimed to be connecting different

populations are inadequate to assure connectivity between true populations of *luteolus*. Therefore, this factor does not support delisting. Under the FWS recovery plan for the Louisiana black bear (which itself was flawed and greatly insufficient to assure anything approaching true recovery), there were three major goals: establishment of two viable populations of Louisiana black bears; establishment of a secure corridor between the populations; and long-term protection of the corridors. *See* 81 Fed. Reg. 13135-13137; Laufenberg and Clark⁵ at 4 (discussing the recovery plan criteria). FWS declared recovery on the basis of the supposed viability of the TRB and UARB populations and the supposed establishment of a corridor between those two populations. 81 Fed. Reg. 13136-A, 13137-B. As explained above, the FWS approach is flawed because the UARB population does not consist of true Louisiana black bears, and connecting the TRB and the UARB would only result in hybridization, rather than recovery.

The FWS approach to a secure corridor is flawed as well. In promulgating the final rule delisting the Louisiana black bear, FWS stated that the “Louisiana black bear corridor” is defined as “a landscape of ‘stepping stones’ of habitat such as large forested tracts that support reproducing subpopulations.” 81 Fed. Reg. 13149. However, this contradicts the prevailing view that population corridors should be contiguous. *See e.g.* Hellgren and Vaughan,⁶ p. 277 (noting that “a likely strategy to keep viable bear populations is to maintain large, contiguous forest tracts”). Such a deviation from generally accepted practice as a basis of recovery is a faulty reason upon which to claim recovery. Regardless of the acceptable definition of corridor, FWS erroneously concluded that there were two viable populations of Louisiana black bears.

In order to actually meet its recovery plan criteria, FWS would have to demonstrate viability, not of the UARB population, but of the LARB population, as well as of the TRB population, and would have to demonstrate secure connectivity between the TRB and, not the UARB, but the LARB. Such would not in itself achieve true recovery but might be a step in that direction. However, secure connectivity between the TRB and LARB would

⁵ Jared S. Laufenberg and Joseph D. Clark, Population Viability and Connectivity of the Louisiana Black Bear (*Ursus americanus luteolus*) (2014).

⁶ Hellgren, E. C. and M. R. Vaughan. 1994. Conservation and management of isolated black bear populations in the Southeastern Coastal Plain of the United States. Proceedings of the Annual Conference of Southeastern Fish and Wildlife Agencies 48:276-285.

require elimination of the current UARB population, as well as those individuals in the TRC resulting from interbreeding with bears from the UARB. This would preferably be accomplished by live-trapping the animals and offering them for reintroduction to other states closer to their ancestral origin, such as Kentucky, Missouri, and Ohio.

B. Factor 4. The inadequacy of existing regulatory mechanisms.

The premise of a delisting is that regulatory mechanisms outside of the ESA will be sufficient to protect the species. This is not the case here, because even with ESA protections, the species has not achieved recovery, and it certainly cannot be expected to do so without ESA protection. In fact, there are continuing threats to the bear that will no longer be addressed with delisting. For example, human caused mortality (hunting, vehicular mortality), hybridization, and loss of habitat from climate change will all increase with both a delisting and the passage of time. There are no regulatory mechanisms in place to alleviate these threats.

Even if we accepted the FWS recovery strategy as legitimate, the population growth of the Louisiana black bear does not represent recovery, and the delisting of the bear fails to consider the critical status of the LARB population. At a maximum, the total estimated population level for the Louisiana black bear was around 700 individuals (including the non-*luteolus* UARB population) in an area of 2,823 square miles at the time the final rule was promulgated. This density is well below that of other comparable American black bear populations in places such as Alaska, the northwestern United States, Minnesota, the Great Smoky Mountains National Park, and the Great Dismal Swamp.⁷ Additionally, the population of the LARB is numerically much smaller than the TRB population, and its overall distribution has not improved since the initial listing. The probability of its long-term

⁷ For example, the population density of *americanus* in the Great Smoky Mountains National Park is 1.84 bears per square mile. See Great Smoky Mountains: Black Bears, Nat'l Park Serv. (last updated Jan. 17, 2017), <https://www.nps.gov/grsm/learn/nature/black-bears.htm> (listing the *americanus* population around 1,500 bears in 816 square miles). This is nearly ten times higher than the population density for the largest and best protected population of *luteolus*, 0.19 bear per square mile in the TRB. Other populations are similarly denser than the *luteolus* population in Louisiana. See Dale Bumpers White River, U.S. Fish and Wildlife Serv. (last updated Apr. 14, 2014), https://www.fws.gov/refuge/White_River/wildlife_and_habitat/index.html (listing the *americanus* population around 350 bears in Dale Bumpers White River National Wildlife Refuge, which equals a density of 1.39 bears in 251 square miles); Great Dismal Swap, Nature Conservancy, <https://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/virginia/placesweprotect/our-work-great-dismal-swamp.xml?redirect=https-301> (listing the *americanus* population between 300 to 350 bears in Great Dismal Swamp National Wildlife Refuge, which equals a density of 1.71–2.00 bears in 175 square miles).

persistence is unknown—only 5.8 percent of its breeding habitat is protected—and it is potentially threatened by human development and anticipated sea level rise.

Specifically, without ESA protection, continued human-caused impacts and lack of protected habitat will continue to threaten the existence of the Louisiana black bear. When FWS delisted the Louisiana black bear, the Agency also removed the critical habitat designation protecting 1,868 square miles of the bear's range. Such was done without the slightest explanation or assessment of the consequences, particularly those stemming from the removal of any reasonable assurance that there would never again be actions authorized, funded, or carried out by federal agencies that might be detrimental to such habitat. The combination of the delisting of the bear and removal of the critical habitat designation places the subspecies in a precarious situation. Without these protections, human development will continue to encroach upon the bear's natural habitat, there will be less control of illegal killing, and the ominous hybridization process will continue to spread unchecked. Slight recoveries in population will not be able to reverse the trend toward extinction that existed before the listing of the Louisiana black bear.

C. Factor 5. Other natural or manmade factors affecting its continued existence.

FWS also failed to account for the potential for the manmade risk of hybridization between the Louisiana black bear (subspecies *luteolus*) and the American black bear (subspecies *americanus*). As illustrated in the Laufenberg and Clark study, there used to be distinct populations in the TRB, UARB, and LARB. The TRB and LARB populations each contained genetically distinctive groups of Louisiana black bears; however, the bears in the UARB are genetic descendants of *Ursus americanus americanus* from Minnesota. These groups remained geographically separated until, as part of the FWS recovery efforts, bears from the TRB were brought to the TRC, which is significantly closer geographically to the UARB. FWS did this for the specific purpose of encouraging interbreeding between the TRC bears and UARB bears in order to increase population size and to hopefully connect the TRB, TRC, and UARB populations. However, this actually threatens the Louisiana black bear more than it helps it because the American black bears (subspecies *americanus*) in the UARB will dilute the native genome of the Louisiana black bear (*luteolus*). Such hybridization is ignored by the final rule because FWS assumes that the UARB bears are Louisiana black bears, regardless of the genetic analysis results and historical evidence to the

contrary. Genetic analysis shows that interbreeding of the TRB and UARB populations already is proceeding in the TRC. *See* Laufenberg and Clark figure 16a p. 53.

FWS also did not adequately take into consideration habitat loss due to climate change. The delisting states that due to their “adaptability, mobility, and demonstrated resiliency ... we conclude that the effects of climate change are not a threat to the Louisiana black bear now or within the foreseeable future.” *See* 81 Fed. Reg. 13,167. As evidence for their adaptability, FWS tells of the 2011 Morganza floodway operation, where 60% of the UARB breeding habitat was covered in floodwaters. Approximately 90% of the bears relocated to the 40% of the habitat that was not flooded, while the remainder fled. Ultimately, “most” of the bears returned. *Id.* Laufenberg and Clark have a different take on the situation: they state, “the Morganza Spillway is prone to catastrophic flooding, and O’Connell and others (2014) report that repeated bouts of inundation could negatively affect those bears.” *See* Laufenberg and Clark, p. 91. Their study also states that flooded wetlands are not used by bears. *Id.* at 29. Given that climate change is rapidly changing the landscape, particularly in low-lying areas like Louisiana, FWS must take into account the impacts of climate change on the continued existence of the Louisiana black bear.

D. FWS has failed to substantiate that the Louisiana black bear is recovered.

As noted above, the delisting here was premised on the claim that recovery had been achieved. FWS has failed to make the required showing to substantiate that the species is no longer threatened due to recovery, based on the “best scientific and commercial data available.” 50 CFR 424.11(d).

1. Population size of the Louisiana black bear was overestimated.

One of the most significant violations by FWS in not considering the best scientific and commercial data available is disregarding the genetic and historical evidence regarding the purported success of FWS’s recovery plan in establishing two viable populations (FWS uses the term “subpopulations”) of Louisiana black bear connected by an immigration and emigration corridor. The final rule claims that recovery efforts have: increased the number of bear populations from three (TRB, UARB, LARB) to four (adding TRC); created stable or increasing populations; led to viable TRB and UARB populations; and improved movement among populations due to “evidence of interchange between the TRB and UARB subpopulations by way of the TRC.” *See* 81 Fed. Reg. 13124, 13135–36. While this

notice does not directly question the stability and rate of reproduction of individual populations, we maintain, supported by genetic and historical research data, that the UARB population is not the *luteolus* subspecies, but rather a population of the non-native introduced *americanus* subspecies. Therefore, the population size, and indeed the number of populations, of Louisiana black bears was overestimated to support the claim that recovery has been achieved.

In the 1960s, American black bears were shipped into the UARB from Minnesota by the Louisiana Wildlife and Fisheries Commission. Based on historical accounts and a detailed genetics study by Laufenberg and Clark, funded in part by FWS and the most oft-cited document used in developing the delisting, there appears to have been no Louisiana black bear population in the UARB at the time of introduction. Moreover, the current genetic makeup of the UARB bears more closely resembles that of Minnesota *americanus*, not *luteolus*. See Laufenberg and Clark p. 50 and figure 15a p.52. The final delisting rule claims that Louisiana black bears already were hybridized at the time of listing and that this was not a significant cause for concern. See 81 Fed. Reg. 13146–47. However, this argument runs counter to the Agency’s own analysis, which shows that the threat of hybridization for the Louisiana black bear is directly caused by the introduction of *americanus*. Specifically, the Laufenberg and Clark study reported little or no evidence of interbreeding between the various Louisiana populations prior to translocations to the TRC. See 81 Fed. Reg. 13164–65 (admitting that the threat of hybridization of *luteolus* resulted from the introduction of Minnesota bears and that there was very likely no breeding population in the UARB at the time of introduction of the Minnesota bears); Laufenberg and Clark at 92 (describing the UARB bears as a “substantially distinct genetic group” compared to the historic *luteolus* population of the TRB). Therefore, FWS used its population statistics incorrectly in such a way to suggest stronger population recovery, and that the secure corridor supposedly established between the TRB, TRC, and the UARB is a connection between two *luteolus* populations (which it is not).

2. Recovery is claimed despite the fact that the subspecies has reached less than one percent of its original numbers.

As noted above, the Louisiana black bear originally had a range of over 120,000 square miles and numbered over 80,000 individuals. And yet FWS declared “recovery” and

proceeded to delist when, even by its own calculations, the subspecies had a breeding habitat of just 2,823 square miles and numbered about 700 animals. FWS asserted that the current population was sufficient to meet the goals of the recovery plan. However, as acknowledged in the delisting rule (81 Fed. Reg. 13143), “recovery plans are not regulatory documents.” Thus, even assuming the goal of the recovery plan had been met, that would not mean the species was actually recovered in accordance with the meaning of that term in the ESA. For the delisting rule to claim that an entire subspecies has recovered, when it has reached less than one percent of its original numbers, and to argue that historical population status is irrelevant to recovery (81 Fed. Reg. 13145), is extremely arbitrary and capricious.

3. Recovery is improperly claimed without regard to historic range.

FWS claims in the delisting rule that the consideration of whether the Louisiana black bear is still threatened in “a significant portion of its range” (SPR) only requires that it look at whether the Louisiana black bears in any portion of the *now-existing* range are threatened more than in other areas and still need protection. If so, FWS admits, it would necessitate retaining threatened status for the entire subspecies. 81 Fed. Reg. 13168. However, FWS claims that there are not such significant portions of the range where the Louisiana black bear is still threatened, and thus the entire subspecies can be delisted. 81 Fed. Reg. 13170. FWS has improperly discounted the significant ongoing threats to the LARB population. But, in any case, as the D.C. Circuit has ruled, the analysis of threats to areas of the existing range does not obviate the necessity of an analysis of how the dramatic reduction in historic range still impacts the status of the species. *See Humane Society of United States v. Zinke*, 865 F.3d 585, 603, 605-07 (D.C. Cir. 2017) (failure to consider loss of historical range renders delisting decision arbitrary and capricious); *see also Defenders v. Norton*, 258 F.3d 1136 (9th Cir. 2001) (discussing the consideration of historic range in listing decisions, and in particular in rejecting the “clarification interpretation” of SPR analysis).

The Louisiana black bear originally was listed at least in part because of severe “curtailment of its habitat or range.” *See* 57 Fed. Reg. 590-591 (January 7, 1992). In fact, FWS stated that the “bear meets the criteria for protection under the Act on the basis of past habitat loss alone.” FWS has not shown that this is no longer the case. While the large amount of land on which the Louisiana black bear once roamed is no longer a viable habitat due to human development, at least parts of the 98 percent of the historic range that is still

not occupied (including the vast Texas portion) would have to be considered in a delisting decision. Delisting only further subjects the bear to reduction of numbers, habitat, and genomic integrity. Without protection of the Endangered Species Act, the bear's numbers and range, now at hardly one or two percent of historic levels, may ultimately be reduced to zero.

4. FWS reliance on “peer review” to support the conclusion of recovery is misplaced.

The delisting rule (81 Fed. Reg. 13138) indicates that the final decision to delist was made in accordance with an FWS “peer review policy,” *See* 59 Fed. Reg. 34270 (July 1, 1994), and that three “independent” peer reviewers all “supported our conclusions.” However, a review of the comments by those three parties suggests further FWS violations. First, we question whether the reviewers were truly independent. Two of them are employed by state agencies that deal with wildlife, and one of those is with the Florida Fish and Wildlife Conservation Commission. There recently has been extensive controversy regarding whether the Florida black bear, like the Louisiana black bear, should be fully protected as a threatened species or open to hunting. A petition to add the Florida black bear to the U.S. List of Endangered and Threatened Wildlife was recently submitted. The third peer reviewer is employed by a federal agency, the U.S. Geological Survey, which not long ago assumed FWS research functions, and thus cannot be said to be “independent.” Moreover, we question whether the reviewers actually supported the conclusion that true recovery of subspecies *luteolus* had occurred, or simply supported the FWS contention that recovery plan criteria had been met, and also question whether the reviewers were even familiar with the above information showing that the UARB population is not the subspecies *luteolus*.

II. Violation of the Administrative Procedure Act

A. Additional justifications not subject to notice and comment.

The question of whether *luteolus* is a valid subspecies was mentioned in the proposed delisting rule but was not presented as a reason for delisting. As stated on the first page of the proposal (80 Fed. Reg. 29394), the delisting was based only on “recovery.” The final delisting rule (81 Fed. Reg. 13147, 13164-65), however, twice suggests taxonomy as a factor being considered in the delisting. Specifically, research work is introduced and used to

provide purported evidence that *luteolus* may have disappeared through hybridization and/or that it may never have been valid. Such introduction at this point indicates a final action is being taken for a reason not used in the proposed action and thus not open for public review.

B. Additional justification is arbitrary and capricious.

The justification that *luteolus* was never a valid subspecies is also more akin to claiming error in the original listing than it is to the ostensible basis for the delisting, which is recovery. Yet, the final rule does not explicitly claim error as a basis for delisting, but only recovery. These inconsistent claims render the delisting decision illogical and arbitrary and capricious.

III. Determination made for impermissible reasons.

In addition to the violations set forth above, FWS violated the ESA because the determination to delist the Louisiana black bear was not made “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). Not only was the scientific data relied upon flawed, as explained above, but the evidence indicates that FWS considered impermissible, non-scientific factors in its decision to delist. This evidence includes the fact that FWS rushed to propose delisting only a year after its five-year review had concluded that continued listing as threatened was warranted,⁸ without explaining how and why its views had changed so suddenly, or why it did not follow the usual course of awaiting the next five-year review to reconsider the status of the sub-species. These circumstances indicate the likelihood of impermissible, non-scientific reasons for delisting.

In addition, FWS gave this controversial and expensive delisting priority over numerous straightforward and what would have been relatively inexpensive listings of species under severe threat of extinction. At the time of the proposed delisting rule, FWS had a list of 146 species/subspecies/populations that were designated candidates, not for declassification but for addition to the Lists of Endangered and Threatened Wildlife and Plants (http://ecos.fws.gov/tess_public/reports/candidate-species-report. Accessed July 18, 2015). Some of those species, subspecies, and vertebrate populations, for example, the Puerto Rico

⁸ Deborah Fuller, Louisiana black bear (*Ursus americanus luteolus*) 5-Year Review: summary and evaluation, Louisiana Ecological Services Field Office, U.S. Fish and Wildlife Service, Lafayette, Louisiana (2014).

harlequin butterfly (*Atlantea tulita*), were considered to be in imminent danger but had been awaiting listing proposals for years. *See* 81 Fed. Reg. 87260 (December 2, 2016).

IV. The Louisiana Black bear should be listed as endangered.

Finally, we contend that FWS violated ESA not only in delisting the Louisiana black bear but in originally listing the subspecies as “threatened,” rather than as “endangered.” 57 Fed. Reg. 588 (January 7, 1992). At that time, the bear’s occupied habitat had declined by over 99 percent, remnant populations were subject to regular illegal killing, and an insidious hybridization process jeopardized the entire native genome. What is more, we can provide data showing that, at the time of listing, the estimated numbers of the Louisiana black bear (about 100–300) were lower than reasonable estimates for at least 75 percent of the 53 native United States mammals then officially classified as endangered and far below the numerical estimates for all 7 native mammals then listed as threatened.

CONCLUSION

In delisting the Louisiana black bear, the FWS failed to consider the best scientific and commercial data available, thus violating the ESA. Its conclusions concerning the five factors set out in 16 U.S.C. §1533(a)(1),(c); 50 C.F.R. § 424.11(c), were not made “solely on the basis of the best scientific and commercial data available” and are unsupportable. Moreover, FWS did not substantiate its conclusion that the subspecies had recovered. 50 C.F.R. § 424.11(d). The signatories here will be injured if the Louisiana black bear is not relisted as threatened or endangered and its critical habitat redesignated, because they are interested in studying, observing and enjoying the Louisiana black bear and its habitat for personal and academic reasons.

Should the Department of the Interior and its respective agents fail to initiate actions to remedy these issues within 60 days of receipt of this letter, the NOI signatories intend to commence a civil action in the appropriate federal court to see that the ESA is properly enforced.

During the 60-day notice period we will be willing to discuss effective remedies for the issues noted herein. Please direct any response to this Notice of Intent to the counsel for the NOI signatories listed below.

Sincerely,

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