EARTHJUSTICE

June 13, 2016

Via Certified U.S. Mail
Return Receipt Requested

Sally Jewell, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Daniel M. Ashe, Director
U.S. Fish & Wildlife Service
1849 C Street, N.W.
Washington, DC 20240

Re: Notice of Intent to Sue Regarding Withdrawal of Proposed Rule to List West Coast Distinct Population Segment of the Fisher (*Pekania pennanti*) as 'Threatened' Under the Endangered Species Act

Dear Secretary Jewell and Director Ashe:

On behalf of the Center for Biological Diversity, Environmental Protection Information Center, Klamath-Siskiyou Wildlands Center, and Sierra Forest Legacy, we hereby provide notice that the U.S. Fish and Wildlife Service ("Service") is in violation of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, and its implementing regulations, 50 C.F.R. § 402, *et seq*., with regard to the Service's withdrawal of its proposed rule to list the west coast distinct population segment of the fisher (the "Pacific fisher") as a threatened species. *See* 81 Fed. Reg. 22,710 (Apr. 18, 2016). This letter is provided pursuant to the sixty-day notice requirements of the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2), to the extent such notice is deemed necessary by a court.

Over 12 years ago—after several years of illegal delay and in response to a judicial order—the Service determined that Pacific fishers warrant federal protection under the ESA. 69 Fed. Reg. 18,770 (Apr. 3, 2004). The Service's determination was based on evidence that "[f]isher populations are low or absent throughout most of their historical range in Washington, Oregon, and California," and the only remaining "fisher populations on the west coast may be in danger of extirpation." *Id*. at 18,792.

Unfortunately, it took a decade and another round of lawsuits before the Service finally published a proposed rule listing Pacific fishers as "threatened" under the ESA. 79 Fed. Reg. 60,419 (Oct. 7, 2014). The Service's proposed rule confirmed that there are only two isolated populations of fishers, likely numbering no more than a few hundred animals, still surviving on

CALIFORNIA OFFICE 50 CALIFORNIA STREET, SUITE 500 SAN FRANCISCO, CA 94111

T: 415.217.2000 F: 415.217.2040 GLOARIE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

the west coast of the United States, the result of decades of deforestation, trapping, poisoning and other harmful human activities. Based on the best scientific data available, as set forth in detail in the draft species report that accompanied the Service's proposed rule, the Service concluded that the Pacific fisher is "likely to become endangered throughout all of its range in the foreseeable future . . . based on multiple threats impacting the remaining two extant [*i.e.*, surviving] native original populations and the cumulative and synergistic effects of the threats on small populations . . ." *Id*. at 60,436. Public comments and peer review overwhelmingly supported the Service's proposed listing rule.

On April 14, 2016, the Service abruptly and inexplicably reversed course and withdrew its proposed listing rule. 81 Fed. Reg. 22,710 (Apr. 18, 2016). In its notice of the withdrawal, the Service claims to have "reevaluated" the scientific record and "arrived at a different conclusion regarding the status of fishers in the west coast States." *Id*. at 22,731. According to the notice of withdrawal, "although stressors to one or more populations of fishers in the west coast States exist, they are not causing significant impacts at either the population or rangewide scales . . ." *Id*. at 22,710. "Absent evidence of significant impacts at either the population or rangewide scales," the Service claims mistakenly that it "cannot conclude that the stressors acting on fishers . . . are so great that the [species] is currently in danger of extinction . . . or that it is likely to become an endangered species in the foreseeable future." *Id*. at 22,732.

As set forth in detail below, the Service's finding that Pacific fishers are not in danger of extinction, either now or in the foreseeable future, throughout all or any significant portion of their range, is contrary to the best scientific and commercial data available, arbitrary, capricious, and otherwise not in accordance with law. The evidentiary record and the plain language of the ESA compel the opposite conclusion: Pacific fishers warrant immediate federal protection under the ESA. We therefore request that the Service reinstate its proposed rule and proceed to publish forthwith a final rule listing Pacific fishers as a threatened species. Should the Service fail to do so, we intend to bring suit once again in United States District Court to ensure that Pacific fishers receive the protection they warrant and require if they are to survive and recover in the 21st century.

I. The Pacific Fisher

Fishers (*Pekania pennanti*) are medium-sized mammals, closely related to minks, otters, martens, wolverines, and other members of the Mustelid family.[1] Fishers are closely associated with dense, old growth forests. According to the Service's Final Species Report ("FSR"), "[t]he key aspects and structural components of fisher habitat are best represented in areas that are comprised of forests with diverse successional stages containing a high proportion of mid- and late-successional characteristics." FSR at 16. Fishers are opportunistic carnivores; their prey includes birds, rodents, and other small animals.

[1] Until recently, taxonomists placed fishers in the genus *Martes*, alongside martens. Based on recent genetic research indicating that fishers are more closely related to wolverines than to martens, the Service now classifies fishers in the genus *Pekania*. FSR at 8.

Fishers are found only in North America. Historically, the species was relatively common and broadly distributed throughout the boreal forests of Canada, the deciduous and evergreen forests of the eastern United States, and the coniferous forests along the west coast. On the west coast of the United States, the Service describes the fisher's historic range as follows:

> In Washington, fishers historically occurred throughout densely forested areas both east and west of the Cascade Crest, on the Olympic Peninsula, and probably in southwestern and northeastern Washington. In Oregon . . . fishers occurred in the boreal forest zones of the Cascade Range from Washington to California, west to the coniferous coastal forests and cool humid Coast Ranges . . . . In the forested, higher mountain masses of California . . . fishers [ranged] from the Oregon border southward through the Coast Range to Lake and Marin Counties, east through the Klamath Mountains to Mount Shasta, and south throughout the main Sierra Nevada to Greenhorn Mountain in northern Kern County.

FSR at 28.

Many decades of deforestation, fur trapping, and other harmful human activities have reduced fishers to a faction of their historic range. Along the west coast in particular, "[a] scarcity of verifiable sightings in Washington, northern Oregon, and central Oregon suggests that these populations appear to be likely extirpated [*i.e.*, extinct], except on the Olympic Peninsula where they have been recently reintroduced." FSR at 37. Today, only two small fisher populations survive on the west coast: the Northern California-Southwestern Oregon ("NCSO") population and the "Southern Sierra Nevada ("SSN") population. According to the Service, the NCSO population estimates "range from a population size of 258 to 4,018." FSR at 43. The SSN is even smaller, and may consist of no more than 100 individual animals. These last two native fisher populations on the west coast occupy less that 15% of the Pacific fisher's historic range, and they are at serious risk of extinction due to continuing habitat loss, climate change, exposure to toxic compounds like anticoagulant rodenticides ("ARs"), and the dangers inherent for extremely small and isolated populations.

II. The Endangered Species Act

Congress enacted the Endangered Species Act in 1973 with the goal of protecting and recovering imperiled species. In the words of the Act, its purpose is "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). In the seminal case on the purpose of the Endangered Species Act, *Tennessee Valley Authority v. Hill*, the Supreme Court confirmed that it is "beyond doubt that Congress intended endangered species to be afforded the highest of priorities." 437 U.S. 153, 174 (1978).

Under Section 4 of the ESA, the Secretary of Interior, acting through the Service, is tasked with determining whether any terrestrial "species" warrants listing as "threatened" or

"endangered." 16 U.S.C. § 1533(a)(1). The term "species" is defined broadly by the statute to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."[2] 16 U.S.C. § 1532(16). A species is considered "endangered" if it "is in danger of extinction throughout all or a significant portion of its range" and "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(6), (20).

The ESA directs the Service to "determine whether any species is an endangered species or a threatened species because of any of the following factors:"

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). Notably, "[t]hese factors are listed in the disjunctive; any one or a combination can be sufficient for a finding that a particular species is endangered or threatened." *Federation of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, at 1164 (N.D. Cal. 2000).

Section 4 further requires the Service to make its listing determinations "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). "With [the] best available data standard, Congress required [the] agency to consider the scientific information presently available and intended to give the benefit of the doubt to the species." *Brower v. Evans*, 257 F.3d 1058, 1070 (9th Cir. 2001) (quoting *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988)). Accordingly, to the extent that the best available data is inconclusive, the Service must "err on the side of the species." *Endangered Species Act Oversight: Hearing on S. 321 Before the Senate Subcomm. on Envtl. Pollution of the Comm. on Env't & Pub. Works*, 97th Cong. 37 (1981) (remarks of Senator Chafee). By so doing, the agency gives effect to Congress' policy of "institutionalized caution," which "lies at the heart" of the ESA. *Tennessee Valley Auth.*, 437 U.S. at 178, 194.

The Service's listing decisions are subject to judicial review in accordance with the standard of review set forth in the Administrative Procedure Act ("APA"). *See Greater Yellowstone Coalition v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011). Specifically, the courts must hold unlawful and set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Supreme Court has clarified that an agency action is arbitrary and capricious "if the agency has relied on factors

[2] The ESA does not expressly define the term "distinct population segment." However, the Service adopted a policy in 1996 to guide its evaluation of whether a particular wildlife population qualifies as a DPS. *See* 61 Fed. Reg. 4,722 (Feb. 7, 1996). In short, the Service's DPS policy directs the agency to analyze the "discreteness of the population segment in relation to the remainder of the species to which it belongs" and the "significance of the population segment to the species to which it belongs." *Id*. at 4,725.

which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

III. Listing Background

A. The Listing Petition and the Service's "Warranted but Precluded" Finding

In November 2000, a coalition of conservation organizations—including the organizations on whose behalf this notice letter is sent—petitioned the Service to list the Pacific fisher as an endangered species under the ESA. The petition described in detail substantial scientific evidence that fisher populations have declined dramatically throughout their west coast range and are at serious risk of extinction as a result of habitat loss, genetic isolation, and other factors. When the Service failed to respond to the listing petition in accordance with the deadlines specified by the ESA, several of the petitioners brought suit in United Stated District Court and secured an order directing the Service to determine by April 2004 whether Pacific fishers warrant listing. *Ctr. for Biological Diversity v. Norton*, No. C 01-2106 SC (N.D. Cal., April 4, 2003).

On April 3, 2004, the Service announced its "12-month finding" in response to the listing petition. 69 Fed. Reg. 18,770 (Apr. 3, 2004). First, the Service concluded that the Pacific fisher is a "distinct population segment" or "DPS" of the fisher—and is therefore eligible for listing under the ESA—because "loss of the species from the west coast range in the United States would represent (1) a significant gap in the species' range, (2) the loss of genetic differences from fisher in the central and eastern United States, and (3) the loss of the species from a unique ecological setting."[3] *Id.* at 18,777-78. Second, the Service concluded that the Pacific fisher warrants listing under the ESA, finding that "the overall magnitude of threats to the West Coast DPS of the fisher is high." *Id.* at 18,792. Despite these findings, however, the Service ultimately declined to publish a proposed rule listing the fisher, on the grounds that "an immediate proposal to list is precluded by other higher priority listing actions." *Id*.

C. Further Litigation and the 2014 Proposed Listing Rule

By 2010, the Service had made no further progress toward listing the Pacific fisher under ESA, forcing several of the petitioners to file suit again. *Ctr. for Biological Diversity* v. *Salazar*, No. 3:10-cv-01501–JCS (N.D. Cal., filed Apr. 8, 2010). The petitioners dismissed that suit in October 2011, after the Service agreed to publish by no later than September 30, 2014 either a proposed rule listing Pacific fishers under the ESA or a final determination that listing Pacific fishers is not warranted.

[3] The Ninth Circuit Court of Appeals has affirmed the Service's finding that the Pacific fisher is eligible for listing as a DPS. *See Sierra Forest Products, Inc. v. Kempthorne*, 361 F. App'x 791, 792 (9th Cir. 2010).

On October 7, 2014, the Service published a proposed rule "to list the West Coast Distinct Population Segment of fisher (*Pekania pennanti*), a mustelid species from California, Oregon, and Washington, as a threatened species." 79 Fed. Reg. 60,419 (Oct. 7, 2014). In announcing the proposed rule, the Service "determined that the main threats to the West Coast DPS of fisher are habitat loss from wildfire and vegetation management; toxicants (including anticoagulant rodenticides); and the cumulative and synergistic effects of these and other stressors acting on small populations." *Id.* at 60,420. Among the Service's key findings:

- "We consider wildfire and fire suppression to be a threat to fisher habitat now and in the future because the frequency and size of wildfires is increasing; we expect this trend to continue into the future; and based on fishers outside of the West Coast range and other related species, we predict that large fires (particularly those of higher severity and larger scale) will cause shifts in home ranges and movement patterns, lower the fitness of fishers remaining in the burned area, and create barriers to dispersal." *Id*. at 60,429.
- "[V]egetation management is a threat because activities that remove or substantially degrade fisher habitat through the removal of large structures and overstory canopy are projected to take place within the analysis area over the next 40 years." *Id*. at 60,430.
- "We view toxicants as a newly identified threat because of reported mortalities of fishers from [anti-coagulant rodenticide] toxicants and a variety of potential sublethal effects." *Id.* at 60,433.
- "We conclude that small population size constitutes a threat to fisher, now and in the future." *Id*. at 60,434.
- "[T]he West Coast DPS of fisher is likely to become endangered throughout all of its range in the foreseeable future . . . based on multiple threats impacting the remaining two extant native original populations and the cumulative and synergistic effects of the threats on small populations in the West Coast DPS of fisher." *Id.* at 60,436.

The Service invited public comments on its proposed listing rule and the accompanying draft species report, and it indicated that it would solicit peer review from a team of fisher experts.

D. Withdrawal of the Proposed Listing Rule

On April 14, 2016—almost 12 years to the day after the Service initially concluded in 2004 that the Pacific fisher warranted protection under the ESA—the Service announced that it had decided to withdraw its proposed listing rule. The Service's notice of withdrawal states that the Service "reevaluated" the evidence and "arrived at a different conclusion regarding the status of fishers in the west coast States." 81 Fed. Reg. at 22,731. Characterizing some aspects of the fisher's status as "uncertain" or "inconclusive," the Service asserts incorrectly that "although stressors to one or more populations of fishers in the west coast States exist, they are not causing significant impacts at either the population or rangewide scales . . ." *Id*. at 22,710. "Absent evidence of significant impacts at either the population or rangewide scales," the Service claims mistakenly that it "cannot conclude that the stressors acting on fishers . . . are so great that the

[species] is currently in danger of extinction . . . or that it is likely to become an endangered species in the foreseeable future." *Id*. at 22,732. The Service claims that its decision to withdraw the proposed listing rule is supported by the agency's final species report for the fisher, which the Service characterizes as "a compilation of the best scientific and commercial data available concerning the biological status of the proposed West Coast DPS of fisher, including present and potential future stressors to fishers in this DPS." *Id.* at 22,713.

IV. Violations of Law

A. The Service Violated the ESA by Failing to Base Its Listing Decision Solely on the Best Scientific and Commercial Data Available and by Failing to Articulate a Rational Basis for Withdrawing Its Proposed Listing Rule.

As discussed above, the ESA requires the Service to determine whether a species warrants listing "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). In making its determination, the Service must consider the relevant factors and must "state a rational connection between the facts found and the decision made." *Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 875 (9th Cir. 2009).

In violation of the ESA, the Service's conclusion that Pacific fishers are not in danger of extinction, either now or in the foreseeable future, throughout all or a significant portion of their range, is not based solely on the best scientific and commercial data available. In many instances, the Service's notice of withdrawal relies on conclusory findings that are contrary to the best available data and unsupported by any rational basis in the record. For example:

- The best scientific and commercial data available indicates that "[m]ixed- and high-severity fires can reduce or destroy key biological legacies and other structural habitat elements, like large snags or large downed wood," FSR at 64, especially "when followed by post-fire salvage logging." *Id*. at 68. "These elements, which are already uncommon in some areas, are used as resting and denning structures for fishers," and "the loss of these elements could render habitat unsuitable as resting or denning habitat for a century or more." *Id.* at 64. "Through much of the analysis area," the best available data projects that "fires are expected to increase in frequency and area burned." *Id.* at 91. Contrary to this best available data, the Service's notice of withdrawal asserts that "[f]uture wildfires are expected to continue at a similar rate and severity across the landscape as has been occurring in the recent past" and concludes without any rational basis that wildfire and subsequent salvage logging operations do not represent a threat to the fisher. 81 Fed. Reg. at 22,719.
- The best scientific and commercial data available indicate that logging and other vegetation treatments have significant negative effects on fisher habitat. For example, "when selecting microsites within their home ranges, fishers tended to avoid using sites within 200 meters of a mechanically thinned area." FSR at 68. "[G]iven the large home range of fishers and the extent of forest management throughout the analysis area," the best available data project that "a moderate portion of fisher individuals are likely

affected [by vegetation management]." *Id*. at 110. Contrary to this best available data, the Service's notice of withdrawal asserts without any rational basis that "there is no information on how different vegetation management activities affect fisher populations and their persistence within the west coast States." 81 Fed. Reg. at 22,722.

- The best data available shows that "first and second generation ARs [*i.e.*, anti-coagulant rodenticides] have been detected in a majority of fishers tested in California." FSR 150. AR exposure has been determined as the direct cause of death for numerous fisher mortalities in California, and "it is reasonable to conclude that the number of fishers killed [by ARs] exceeds the carcasses that have been recovered." *Id.* at 159. Moreover, the best available data indicates that "sublethal exposure to ARs likely results in sickness, which may increase the probability of mortality from other sources." *Id*. at 151. Contrary to this best available data, the Service's notice of withdrawal asserts without any rational basis that ARs do not "rise to the level of a threat." 81 Fed. Reg. 22,725.
- The best scientific data available confirms that "small, isolated populations are subject to an increased risk of extinction from stochastic, genetic, or demographic events." FSR at 133. By all accounts, the remaining two native fisher populations are small and isolated. Nevertheless, the Service's notice of withdrawal concludes without any rational basis that "small population size and isolation are not threats to the proposed West Coast DPS of fisher, currently or in the foreseeable future." 81 Fed. Reg. 22,726.
- The best available scientific data shows that "[c]ombinations of stressors accumulate and interact to increase the risk of extinction." FSR at 159. The best available data confirms "that fishers in the west coast States have been exposed to multiple stressors, in some cases over many decades." 81 Fed. Reg. at 22,728. Contrary to the best available data and without any rational basis in the record, the Service's notice of withdrawal nevertheless asserts without any rational basis that "the cumulative impacts of these potential stressors do not rise to the level of a threat, now or in the future." *Id*.

In these and other respects, the Service violated the ESA by failing to base its listing decision solely on the best scientific and commercial data available and by failing to articulate a rational basis for its key findings regarding threats to the Pacific fisher.

B. The Service Violated the ESA by Misconstruing Ambiguous Information as Affirmative Evidence that Listing the Pacific Fisher Is Not Warranted.

At several key junctures, the Service's notice of withdrawal relies on information regarding the fisher's status and viability that is, at best, inconclusive or uncertain as affirmative evidence that fishers are not threatened throughout all or a significant portion of their range. The Service's reliance on this ambiguous evidence is arbitrary and capricious. *See Pollinator Stewardship Council v. Envt'l Prot. Agency*, 806 F.3d 520, 531 (9th Cir. 2015) ("[A]n agency cannot rely on ambiguous studies as evidence of a conclusion that the studies do not support.").

For example, with respect to population trends, the Service's final species report concludes that "it is difficult to determine whether the [Northern California-Southern Oregon] population as a whole is increasing, decreasing, or stable," and that "there is no information on

whether or not the current population is near its equilibrium size." FSR at 43. Similarly, the Service finds that studies regarding population trends for the Southern Sierra Nevada population are "inconclusive." FSR at 50. At numerous key junctures, however, the Service's notice of withdrawal dismisses threats to the fisher on the mistaken grounds that fisher populations are stable and not in decline. *See, e.g.*, 81 Fed. Reg. at 22,733 ("The fisher is not exhibiting population declines in any portion of its range."); *id*. at 22,725 ("[T]he best available information does not suggest that any of the fisher populations where exposure [to ARs] has been documented are in decline . . ."); *id*. at 22,728 ("[T]he best available information does not suggest that current fisher populations in the west coast States are experiencing population declines. . .").

As the Ninth Circuit Court of Appeals held in an analogous case, "if the science on population size and trends is underdeveloped and unclear, the Secretary cannot reasonably infer that the absence of evidence of population decline equates to evidence of persistence." *See Tucson Herpetological Soc.*, 566 F.3d at 879. Here, however, the Service arbitrarily construed ostensibly ambiguous evidence regarding the fisher's population trends as evidence that fisher populations are stable. Along similar lines:

- The Service's final species report concludes that "there is great uncertainty with regard to the potential effects of climate change on fisher habitat." FSR at 97. The notice of withdrawal, however, arbitrarily construes this uncertainty as evidence that climate change is not "causing or contributing to significant habitat loss or range contraction." 81 Fed. Reg. at 22,720.
- The Service's final species report concludes that "the degree to which fire may affect fisher populations is unknown." FSR at 77. The notice of withdrawal, however, arbitrarily concludes that fishers are not experiencing "significant impacts at either the population or rangewide scales in the future as a result of wildlife [sic] fire . . ." 81 Fed. Reg. at 22,719.

In these and other instances, the Service acted arbitrarily and illegally by misconstruing ostensibly uncertain or ambiguous information regarding threats to the fisher as support for its conclusion that the fisher does not warrant listing. Characterizing the best available evidence as uncertain or inconclusive does not provide a rational basis for the Service's decision to withdraw its proposed listing rule.

C. The Service Violated the ESA by Construing "Stressors" as Threats Only If They Are "Resulting in Significant Impacts at Either the Population or Rangewide Scales."

When the Service proposed to list Pacific fishers as threatened in October 2014, it "determined that the main threats to the West Coast DPS of fisher are habitat loss from wildfire and vegetation management; toxicants (including anticoagulant rodenticides); and the cumulative and synergistic effects of these and other stressors acting on small populations." 79 Fed. Reg. at 60,420. In its notice of withdrawal, by contrast, the Service arbitrarily characterizes these threats

as "stressors," and states that while they "may be impacting some individual fishers or habitat in one or more populations," they are not "functioning as operative threats on the fisher's habitat, populations, or the proposed DPS as a whole . . ." 81 Fed. Reg. at 22,713. "Absent evidence of significant impacts at either the population or rangewide scales," the Service claims incorrectly that it "cannot conclude that the stressors acting on fishers or their habitat within the proposed West Coast DPS are so great that the DPS is currently in danger of extinction (an endangered species), or that it is likely to become an endangered species within the foreseeable future (definition of a threatened species)." *Id*. at 22,732.

The Service's view that "a stressor . . . rise[s] to the level of a threat to the species [only] if the magnitude of the stressor is such that it is resulting in significant impacts at either the population or rangewide scales to fishers or their habitat," *id.* at 22,713, is contrary to the plain language and intent of the ESA. As discussed previously, the ESA defines a species as "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). "The purpose of creating a separate designation for species which are 'threatened', in addition to species which are 'endangered', was to try to regulate these animals before the danger becomes imminent while long-range action is begun." *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 680 (D.D.C. 1997) (quoting S.Rep. No. 307, 93d Cong. 1st Sess. 3 (1973)). "Congress repeatedly explained that it intended to require the FWS to take preventive measures *before* a species is conclusively headed for extinction." *Id*. Indeed, the ESA directs the Service to determine whether any species is threatened based on "the present *or threatened* destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1) (emphasis added).

In short, a species may be "threatened" within in the meaning of the ESA in the absence of "evidence of significant impacts at either the population or rangewide scales." 81 Fed. Reg. at 22,732. The relevant inquiry, which the Service failed to conduct here, is whether the species is likely to be in danger of extinction in the foreseeable future, throughout all or a significant portion of its range.

The Service's proposed listing rule for the Pacific fisher recognized correctly that the determination as to whether a species is threatened "does not necessarily require empirical proof of threat." 79 Fed. Reg. at 60,427. "The combination of exposure and some corroborating evidence of how the species is likely to be impacted could suffice." *Id*. For example, the proposed rule properly concluded that fishers are threatened by anti-coagulant rodenticides, based on the combination of evidence that fishers are frequently exposed to ARs and evidence that exposure to ARs results in indirect and direct mortality. *Id*. at 60,433.

In contrast to the proposed rule, the Service's withdrawal notice dismisses all existing and future "stressors" on the grounds that they are not currently "causing significant impacts at either the population or rangewide scales . . ." 81 Fed. Reg. at 22,710. As in a recent case involving a closely related species, "[r]ather than explain why these [stressors] are no cause for alarm, the Service simply stated there was no threat because there was no data confirming a threat." *Defenders of Wildlife v. Jewell*, No. 14-247-M-DLC, 2016 WL 1363865, at *25

(D. Mont. Apr. 4, 2016). The court in that case concluded that "such conclusory treatment based on a dearth of information is impermissible under the APA and ESA." *Id.*

The Service's wrongheaded insistence on conclusive evidence of existing impacts at the population or rangewide scales is evident from the Service's withdrawal notice. The Service's withdrawal purports to "use a qualitative approach to describe stressors (*i.e.*, stressors are categorized as low, moderate, or high, as defined in that Report)." 81 Fed. Reg. at 22,713. The final species report defines these categories as follows:

> Low-level impact: Stressor is impacting individual fishers within the West Coast DPS currently or in the future, or stressor is resulting in a minor amount of habitat impacts currently or in the future.
>
> Medium-level impact: Stressor is impacting fishers within the West Coast DPS at the population level (one or more of the five populations) currently or in the future, or stressor is resulting in more serious impacts to fisher habitat at the population level (as compared to a low-level impact) currently or in the future.
>
> High-level impact: Stressor is significantly impacting the West Coast DPS of fishers at the rangewide level currently or in the future, or stressor is causing significant impacts to fisher suitable habitat at the rangewide level currently or in the future.

FSR at 58.

As is clear from above, the Service's qualitative approach is inconsistent with the ESA, because a "medium" or "high" level impact is contingent on evidence that the stressor "is impacting" fishers "at the population level." As a practical matter, if the Service denies listing until a stressor is demonstrated to be having a significant impact on the population or rangewide scale, it may be too late to rescue the species from extinction. The Service's assessment of the stressors facing Pacific fishers was contrary to the ESA.

D. The Service Violated the ESA in Concluding that the Pacific Fisher Is Not Threatened Throughout a Significant Portion of Its Range.

Having concluded incorrectly that Pacific fishers are not threatened throughout all of their range, the Service further violated the ESA in concluding that Pacific fishers are not threatened throughout any significant portion of their range. 81 Fed. Reg. at 22,732.

In order to identify any portion of a species' range that may warrant listing under the ESA, the notice of withdrawal provides that the Service determines "whether there is substantial information indicating that (1) the portions may be significant and (2) the species may be in danger of extinction in those portions or likely to become so within the foreseeable future." *Id.* According to the Service, "a key part of this analysis is whether the threats are geographically concentrated in some way." *Id.* "If the threats to the species are affecting it uniformly

throughout its range, no portion is likely to warrant further consideration." *Id*. Applying these principles to the Pacific fisher, the Service's notice of withdrawal asserts:

> We have determined that currently and in the foreseeable future: (1) The stressors affecting the proposed West Coast DPS of fisher occur in most populations within the west coast States but are not having significant impacts at the population scale in any portion of the proposed DPS's range. . . . (2) The fisher is not exhibiting population declines in any portion of its range.

Id. 22,733. Both of these findings are arbitrary, capricious, contrary to the best scientific and commercial data available, and otherwise contrary to the ESA.

First, the best available data shows that the stressors facing the fisher are not uniform throughout its range. Elsewhere in the notice of withdrawal, the Service concedes that "the various stressors were not occurring in equal magnitude across the analysis area and that cumulative effects from these stressors may be occurring more in some sub-regions than others. *Id*. at 22,727. "For example, the population and habitat in the SSN population area likely will continue to be more susceptible to the various stressors than will the NCSO population area given SSN's smaller population size and more limited amount of unoccupied, suitable habitat available." 81 Fed. Reg. at 22,717l; see also FSR at 162 ("Just as stressors, as evaluated, are not occurring in equal scope and severity across range of the DPS, any potential cumulative and synergistic effects from these stressors may be occurring more in some sub-regions than others.").

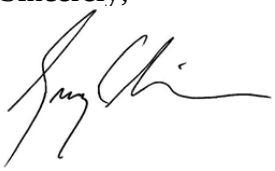
Second, as set forth previously, the Service's assertion that "[t]he fisher is not exhibiting population declines in any portion of its range," is arbitrary and capricious, given the Service's finding that population trend data for the fisher is uncertain or inconclusive. *Tucson Herpetological Soc*., 566 F.3d at 879. Contrary to the Service's finding, the best available data indicates that fishers are likely declining throughout all or a significant portion of their range.

In short, the Service violated the ESA in finding that Pacific fishers are not threatened throughout any significant portion of their range.

V. Conclusion

Unless the Service addresses immediately the violations set forth above, the organizations we represent intend to pursue legal action in federal court. Should you wish to discuss this matter, or if you believe any of the foregoing is in error, please do not hesitate to contact us.

Sincerely,



Gregory C. Loarie, Staff Attorney
Earthjustice

cc: Loretta Lynch, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
AskDOJ@usdoj.gov