



June 2, 2021

*Via Electronic and Certified Mail*

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Martha Williams, Acting Director  
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**RE: Sixty-day Notice of Intent to Sue for violations of the Endangered Species Act relating to the Service's denial of endangered species protection for the West Coast Distinct Population Segment of the Fisher (*Pekania pennanti*).**

Dear Secretary Haaland and Principal Deputy Director Williams,

The Center for Biological Diversity (“Center”), Environmental Protection Information Center, and Klamath-Siskiyou Wildlands Center provides this 60-day notice of its intent to sue the U.S. Fish and Wildlife Service (“Service”) for violations the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, in connection with its decision to deny protections to the West Coast Distinct Population Segment of the fisher (“West Coast population”).<sup>1</sup> Specifically, the Service failed to explain why the West Coast Population, which was petitioned for listing by the groups on this notice and found to warrant protection in 2004 and subsequent years,<sup>2</sup> no longer warrants protection as a threatened or endangered species. Such failure violates the ESA, fails to consider all relevant factors, and is otherwise arbitrary and capricious.

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<sup>1</sup> U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Endangered Species Status for Southern Sierra Nevada Distinct Population Segment of Fisher, 85 Fed. Reg. 29,532 (May 15, 2020) (“2020 Final Listing Rule”).

<sup>2</sup> U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; 12-month Finding for Petition to List the West Coast Distinct Population Segment of the Fisher (*Martes pennanti*), 69 Fed. Reg. at 18,792 (April 8, 2004); U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Proposed Rule for Threatened Species Status for West Coast Distinct Population Segment of Fisher, 79 Fed. Reg. 60,419 (October 7, 2014); U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Proposed Rule for Threatened Species Status for West Coast Distinct Population Segment of Fisher, 84 Fed. Reg. 60,278 (November 7, 2019).

Instead of listing the West Coast population- a population that the Service had repeatedly found to warrant protection- the Service considered protecting two populations in a fraction of the West Coast Population's Range: the southern Sierra Nevada (SSN) population and northern California and the southern Oregon (NCSO) population. The Service ultimately decided that only the SSN population warranted listing as endangered.<sup>3</sup> In drastically scaling back potential protection for the West Coast population, the Service ignored the loss of fisher populations and threats to the species in significant portions of its range in direct contravention of the language and purpose of the ESA.

Even if it were proper for the Service to drop consideration of the West Coast population, the decision to deny the NCSO population protection failed to follow best available science and was arbitrary and capricious. As the Service had previously determined, the NCSO population is undergoing declines and remains threatened by logging, wildfire, rodenticide poisoning and other threats.

The Center for Biological Diversity is a national, nonprofit conservation organization with more than 1.7 million members and online activists dedicated to the protection of species hovering on the brink of extinction, including the West Coast fisher.

## **BACKGROUND**

A close relative of the mink, otter and marten, the fisher (*Pekania pennanti*) has a long slender body with short legs, a triangular head with a sharp muzzle and large, rounded ears, and dark brown fur. Fishers are one of the few animals that regularly prey on porcupines. They also eat birds, small mammals, insects, deer carrion, vegetation and fruit. On the West Coast, the fisher depends on old-growth and mature forests, using cavities and other structures in large trees and snags for resting and denning.<sup>4</sup> Logging of most forests in the range of the West Coast population have drastically reduced the fisher's habitat, which along with historic fur-trapping, eliminated the species from large portions of its historic range.<sup>5</sup>

Fishers once occurred from British Columbia south through Washington and Oregon and into northern California and the Sierra Nevada mountains.<sup>6</sup> Fishers survived in northern California and southwest Oregon and the southern Sierra Nevada, but were elsewhere extirpated.<sup>7</sup> Reintroduction efforts have returned fishers to a small area in the Northern Sierra Nevada and the Olympic Peninsula and central and north Cascades in Washington, but it's too soon to tell if these efforts will result in self-sustaining populations.<sup>8</sup> A non-native population of fishers from Minnesota and British Columbia was established in the southern Oregon Cascades in the 1970s, but has remained quite small and appears to be contracting in range.<sup>9</sup>

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<sup>3</sup> 85 Fed. Reg. 29,532.

<sup>4</sup> 84 Fed. Reg. at 60,278.

<sup>5</sup> U.S. Fish and Wildlife Service, Final Species Report Fisher (*Pekania pennanti*), West Coast Population (March 2016) ("SSA") 8.

<sup>6</sup> 84 Fed. Reg. at 60,282.

<sup>7</sup> SSA at 16.

<sup>8</sup> 84 Fed. Reg. at 60,280.

<sup>9</sup> SSA at 38

## LISTING HISTORY

In 2000, the Center and other organizations petitioned to list the West Coast population as a threatened or endangered species.<sup>10</sup> Following litigation, the Service determined in 2004 the West Coast population qualified as a DPS that warranted protection, but that such protection was precluded.<sup>11</sup> The Service reaffirmed that listing the fisher remained warranted (e.g. the species is at risk of extinction) in annual candidate notices of review, but that listing continued to be precluded through 2014.<sup>12</sup>

Following more litigation, the Service proposed listing the West Coast population in 2014, finding that “both the discreteness and the significance elements of the DPS policy are met for fisher in the species’ West Coast range,” and thus “the West Coast Population of fisher is a listable entity under the Act” that warrants listing.<sup>13</sup> The West Coast population included western Washington, western Oregon, and California through the Sierra Nevada and contained two surviving native populations—the NCSO population, the SSN population, and three reintroduced populations: Northern Sierra Nevada reintroduced population (“NSN”) in California, the southern Oregon Cascades reintroduced population (“SOC”) in Oregon, and the Olympic Peninsula reintroduced population (“ONP”) in Washington.<sup>14</sup>

In 2016, the Service withdrew the proposed listing of the West Coast population alleging that the potential threats to the species were not sufficient enough to indicate listing under the ESA.<sup>15</sup> Notably, the Service still recognized the West Coast population of fisher in its withdrawal of the proposed listing.

The Center and other conservation organizations successfully challenged the Service’s withdrawal in *Center for Biological Diversity v. U.S. Fish & Wildlife Service*.<sup>16</sup> As a result, the Northern District of California Court issued an order requiring the Service to prepare a new determination for the West Coast DPS of the fisher “based solely on the ‘best scientific and commercial data available.’”<sup>17</sup>

In November 7, 2019, the Service published a proposed rule listing the West Coast population as threatened.<sup>18</sup> However, the Service arbitrarily altered the boundaries of the West Coast population and stated that the new “West Coast Population is now identified as comprising the two extant historically native subpopulations, NCSO and SSN, as well as the NSN and SOC subpopulations

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<sup>10</sup> 79 Fed. Reg. at 60,423.

<sup>11</sup> 69 Fed. Reg. at 18,769.

<sup>12</sup> 84 Fed. Reg. at 60,280.

<sup>13</sup> *Id.* at 60,425.

<sup>14</sup> *Id.*

<sup>15</sup> U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule to List the West Coast Distinct Population Segment of Fisher, (April 18, 2016) 81 Fed. Reg. 22,701.

<sup>16</sup> *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 342 F.Supp.3d 968 (N.D. Cal. 2018); 84 Fed. Reg. at 60,280.

<sup>17</sup> *Id.* at 980.

<sup>18</sup> 84 Fed. Reg. at 60,278.

that resulted from reintroductions within a portion of the historical range of the DPS.”<sup>19</sup> The Service stated that the decision was based on the “apparent absence” of extant populations in Washington and Northern Oregon and the “marked separation” of populations in the NSCO, SOC, NSN, and SSN from fishers in Washington.<sup>20</sup> In sum, the Service limited the DPS to a small portion of the current range of the fisher and excluded significant portions of the species historic and current range, specifically the central and northern Sierra Nevada, Washington and the majority of Oregon. The Service’s decision to shrink the West Coast DPS constitutes a de facto negative 12-month “not warranted” finding for the petitioned entity.

In the 2020 Final Listing Rule, the Service again decided to revise the West Coast Population delineation: “We have now determined that the singular West Coast Population configuration should instead be two separate DPSs: The NSCO DPS and the SSN DPS.”<sup>21</sup> Thus, after years of determining that the entire West Coast Population warranted listing, the Service reversed course and only considered listing for two different populations, listing only one of them.<sup>22</sup> In doing so, the Service never explained why the West Coast Population no longer warranted listing—the definition of arbitrary and capricious decision making.

### **THE ENDANGERED SPECIES ACT**

Congress enacted the Endangered Species Act “to halt and reverse the trend toward species extinction, whatever the cost.”<sup>23</sup> The ESA does so by conserving endangered and threatened species and the ecosystems upon which they depend.<sup>24</sup> The ESA’s success is attributable to its strong science mandate, which requires the Service to make listing decisions “solely on the basis of the best scientific and commercial data available.”<sup>25</sup> Congress aptly described Section 4 of the ESA<sup>26</sup> as “[t]he cornerstone of effective implementation of the Endangered Species Act . . . .”<sup>27</sup>

The Service must list a species as “endangered” if that species is “at risk of extinction throughout all or a significant portion of its range” or as “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”<sup>28</sup> The Service considers a species “endangered” if it “faces catastrophic threats that are both imminent and certain.”<sup>29</sup> The term “species” is defined to include “any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”<sup>30</sup> Under these definitions, the Service can list or delist a distinct population segment (“DPS”) of a vertebrate species, when it is determined that the species as a whole would not warrant such a listing or delisting action.

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> 85 Fed. Reg. at 29,534.

<sup>22</sup> *Id.* at 29,532.

<sup>23</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

<sup>24</sup> 16 U.S.C. § 1531(b).

<sup>25</sup> 16 U.S.C. § 1533(b)(1)(A).

<sup>26</sup> *Id.* § 1533.

<sup>27</sup> S. Rep. No. 418, 97th Cong., 2d Sess. at 10; *see also* H. Rep. No. 567, 97th Cong., 2d Sess. at 10.

<sup>28</sup> 16 U.S.C. § 1532(6), (20).

<sup>29</sup> Memorandum from Acting FWS Director Dan Ashe Re: Determination of Threatened Status for Polar bears, December 21, 2011 (“Polar Bear memo”) at 4.

<sup>30</sup> 16 U.S.C. § 1532(16).

In making all listing determinations, including a DPS, Service must consider five statutory criteria: (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.<sup>31</sup>

The goal of the ESA is to recover endangered and threatened species to the point at which ESA protections “are no longer necessary.”<sup>32</sup> Any determination that a species listed as endangered is fully recovered or warrants reclassification as threatened must be made “solely on the basis of the best scientific and commercial data available.”<sup>33</sup>

## **ENDANGERED SPECIES ACT VIOLATIONS**

### **1. The Service improperly reduced the scope of a listable entity and failed to explain why the West Coast population no longer warrants listing.**

The Service failed to provide a rational explanation for abandoning listing the West Coast population and instead only considered listing two limited populations found in a fraction of the West Coast population’s overall range. In cases over bull trout, gray wolves and grizzly bears, courts have ruled that while the Service has *some* discretion to consider more limited populations in the context of listing and delisting, it must first determine if the species or population *as a whole* warrants listing.<sup>34</sup> In the case over the bull trout, the court concluded:

. . . nothing in the ESA or [the Service’s] rules preclude [the Service] from proceeding on a population segment basis if it legitimately concludes, *after proper and sustainable analysis, that listing of the entire species or [a] population [of the species] in the coterminous United States is either not warranted or warranted but precluded.* Indeed, such a two-tiered approach would promote the ESA’s goals of protecting endangered and threatened species and endangered and threatened population segments as quickly as possible.<sup>35</sup>

Courts have also ruled that the Service cannot designate a DPS for the purpose of listing or delisting in order to avoid protections for species in remnant portions of their range. The Ninth Circuit found that delisting the Greater Yellowstone population of grizzly bears without ensuring protections would be maintained for the remainder of the bear’s range in the lower 48 States was improper.<sup>36</sup> For gray wolves, the D.C. Circuit likewise found that carving out a DPS from a larger listable population without any determination of the status of the remaining range was arbitrary

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<sup>31</sup> 16 U.S.C. § 1533(a)(1).

<sup>32</sup> *See id.* § 1532(3).

<sup>33</sup> *Id.* § 1533(a), 1533(c).

<sup>34</sup> *Friends of the Wild Swan v. U.S. Fish and Wildlife Service*, 12 F. Supp. 2d 1121, 1134 (D. Or. 1997); *Crow Indian Tribe v. U.S.*, 343 F.Supp.3d. 999, 1008 (D. Mont. 2018) affirmed 956 F.3d 662 (9th Cir. 2020); *Center for Biological Diversity v. Haaland*, 2021 WL 1222167 \*18 (D. Ariz. 2021).

<sup>35</sup> *Friends of the Wild Swan*, 12 F. Supp. 2d at 1134 (emphasis added).

<sup>36</sup> *Crow Indian Tribe v. U.S.*, 343 F.Supp.3d. 999, 1008 (D. Mont. 2018) affirmed 956 F.3d 662 (9th Cir. 2020).

and capricious.<sup>37</sup> As with these species, the Service's sudden and inadequately explained switch to only consider the NCSO and SSN and ignore the question of whether the West Coast population warrants protection runs afoul of court precedent, the ESA, and the Service's own policy, which states that "it is always the Services' prerogative to broaden (but not lessen) the scope of review if available information indicates such an action is appropriate."<sup>38</sup>

The Service's decision to reduce the scope of the fisher's listable entity is particularly egregious because the Service previously determined that the West Coast population warranted listing due to the extirpation of fishers from much of its remaining range outside the NCSO and SSN populations due to habitat destruction from logging and wildfire, rodenticide poisoning, road mortality and other factors.<sup>39</sup> Thus, the Service has also failed to provide a rational connection between facts found and the choice made in violation of the ESA.

**2. In denying protections to the West Coast population, the Service ignored the fact that the West Coast population of fisher is threatened or endangered in a significant portion of range.**

The Service's decision to only consider the NSCO and SSN populations for listing allowed it to inappropriately circumvent its requirement to determine whether the fisher is threatened or endangered in a significant portion of its range. An adequate analysis of whether the fisher is threatened or endangered in a significant portion of its range would require the Service to list the West Coast Population as endangered.

In interpreting the term, "significant portion of its range," the Ninth Circuit held that "a species can be extinct throughout a significant portion of its range if there are major geographical areas in which it is no longer viable but once was."<sup>40</sup> The Court held that where the species is expected to survive in a range smaller than its historical range, at a minimum the Service *must explain the conclusion that the area where the species can no longer live is not a "significant portion of its range."*<sup>41</sup>

As part of failing to consider whether listing the West Coast population continued to be warranted, the Service failed to analyze the impact of the fisher's lost historical range on the survival of the species as a whole or in various segments. The Service's decision to only consider the NCSO and SSN populations wrongly omits consideration of the species historic range - specifically the majority of Washington, Oregon and the central and northern Sierra Nevada range.

The D.C. Circuit found that "an adequate evaluation of the threats confronting the survival of a species within its current range, requires looking at more than just the current moment in time."<sup>42</sup>

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<sup>37</sup> *Humane Society of the U.S. v. Zinke*, 865 F.3d 585, 603 (D.C. Cir. 2017).

<sup>38</sup> U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1996. Endangered Species Petition Management Guidance, Washington, D.C.

<sup>39</sup> See *Infra* at pages 9-12.

<sup>40</sup> *Defenders of Wildlife et al. v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001).

<sup>41</sup> *Id* (emphasis added).

<sup>42</sup> *Humane Soc'y*, 865 F.3d at 606.

The failure to analyze the impact of the loss of a species historical range on the species as a whole is a failure to address an important aspect of the problem.<sup>43</sup>

Further, the Service’s Significant Portion of Range Policy requires a consideration of the scope of the species historical range and the impact that material contraction or relocation might indicate for survival within a currently constricted or confined range.<sup>44</sup> Similarly, the Policy requires that the Service consider historical range of a species in evaluating other aspects of the agencies listing decision.<sup>45</sup> “The Policy recognizes that loss of historical range can lead to reduced abundance, inhibited gene flow, and increase susceptibility to extinction.”<sup>46</sup>

Here, the Service previously determined in 2004 that fisher populations “are low or absent throughout most of their historical range in Washington, Oregon, and California. Because of small population sizes and isolation, fisher populations on the West Coast may be in danger of extirpation.”<sup>47</sup> In 2014, the Service again acknowledged that fishers in Washington, Oregon, and the central and northern Sierra Nevada are an important part of the West Coast Population due to their contribution to diversity across the West Coast Population.<sup>48</sup> Yet now, the Service actively omits these significant portions of the species’ range in its analysis. By only considering the NCSO and SSN populations for listing, the Service entirely fails to consider the impact of the loss of the historic range in Washington, Oregon, and California on the West Coast population as a whole.

Further, the SSN DPS should be considered a significant portion of the larger West Coast DPS- the entity that the Service previously considered a listable entity. Thus, because a significant portion of the West Coast DPS should be considered endangered, the entire West Coast DPS warrants listing as endangered.

The Service’s failure to consider whether the West Coast population is threatened or endangered in a significant portion of range, particularly its failure to consider lost historic range, was not adequately explained, is arbitrary and capricious and contrary to the conservation purposes of the ESA.

**3. Even if the failure to list the West Coast population was appropriate, the Service failed to consider and apply the best available science which indicates that the NSCO population faces serious threats.**

In issuing the 2020 Final Listing Rule denying listing of the NCSO population, the Service disregarded science and otherwise acted arbitrarily in violation of the ESA’s mandate to make listing and delisting determinations “solely on the basis of the best scientific and commercial data available[.]”<sup>49</sup> Thus, even if the Service’s complete dismissal of listing the West Coast population wasn’t illegal- which it was- the 2020 Final Listing Rule denying the NCSO population protection

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 605-6.

<sup>45</sup> *Center v. Zinke*, 900 F.3d at 1067

<sup>46</sup> *Id.*

<sup>47</sup> 69 Fed. Reg. at 18,792.

<sup>48</sup> 79 Fed. Reg. at 60,424

<sup>49</sup> 16 U.S.C. §1533(b)(1)(A).

violates the ESA and fails to provide a rational connection between facts found and the choice made because it completely disregards the Service’s own findings that indicate that 1) the NCSO DPS should include Washington, Oregon and central and northern California; and 2) the threats to the NSCO population are increasing in severity resulting in a decline in population. Moreover, the 2020 Final Listing Rule violates the Northern District of California’s Order in *Center for Biological Diversity v. U.S. Fish & Wildlife Service*.<sup>50</sup>

First, as set forth above, the Service arbitrarily and capriciously determined the boundary of the NCSO DPS by excluding fishers in Washington, Oregon, and central and northern California. By doing so, the Service violates its DPS Policy and fails to analyze lost historic range or a “significant portion” of the fishers range in violation of ESA Section 4.

Second, the Service, in 2014, identified specific and concerning threats from vegetation management, fire, anticoagulant rodenticides, and small population sizes that warrant listing the NCSO population.<sup>51</sup> Specifically, the Service found that “within the northwest California-southwest Oregon sub-region, 22 percent of fisher habitat is expected to be affected by non-Federal **vegetation management** that downgrades or removes habitat.<sup>52</sup>” In regards to **fire**, the Service stated it “will likely have a negative effect on NCSO because fire will decrease connectivity in the highly fragmented habitat of NCSO.”<sup>53</sup> The Service also concluded that “proximity of a large number of marijuana cultivation sites to fisher populations in California and southwestern Oregon and the lack of other probable sources of [**anticoagulant rodenticides**] within occupied fisher habitat have led researchers to implicate marijuana cultivation sites as the source of [anticoagulant rodenticides] exposure in fishers.”<sup>54</sup> Finally, the Service found that “populations of fishers in southwestern Oregon and California are isolated from fishers elsewhere in North America” and “that [the] **small population** size constitutes a threat to fisher, now and in the future.”<sup>55</sup> The Service concluded, “Considered collectively, cumulative and synergistic effects of habitat and mortality-related stressors are particularly problematic in the SSN and NCSO.”<sup>56</sup>

Then in the 2020 Final Listing Rule, the Service again acknowledged the existence of these threats to the NSCO population but also disclosed that many threats are increasing.

For example, the Service acknowledged that “**vegetation management**” (e.g. logging) is an increasing threat to the NSCO population, concluding:

. . . timber harvest on non-Federal lands (11.1 percent since 1993) was substantially greater than on Federal lands (1.0 percent since 1993), in combining all ownerships, the percent loss due to timber harvest from 1993 to 2012 was low (5.0 percent). This translates to a 2.5 percent loss per decade. However, this may underestimate future harvest trends because timber harvest volume within the NWFP area on Federal lands has been on a general

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<sup>50</sup> *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 342 F.Supp.3d 968 (N.D. Cal. 2018).

<sup>51</sup> 79 Fed. Reg. at 60429, 60433, 60434, 60435.

<sup>52</sup> 79 Fed. Reg. at 60430.

<sup>53</sup> 79 Fed. Reg. at 60429.

<sup>54</sup> 79 Fed. Reg. at 60433.

<sup>55</sup> 79 Fed. Reg. at 60434.

<sup>56</sup> 79 Fed. Reg. at 60435 (emphasis added).

upward trend since 2000. During the first decade of NWFP implementation, Federal agencies offered, on average annually, 54 percent of the timber harvest sale goals (probable sale quantity or PSQ) identified in the Plan, whereas volume offered in 2012 was at about 80 percent of the PSQ identified in the NWFP, as agencies became more familiar with implementing the NWFP (BLM 2015, p. 340; Spies et al. 2018, pp. 8–9). In addition, BLM has recently revised their management plans in western Oregon and is no longer operating under the NWFP. Consequently, that agency is predicting an increase in timber volume above the NWFP sale quantity in the first decade of implementation (through circa 2025) (BLM 2015, pp. 350–352). Recent litigation may also increase timber harvest on BLM (see Existing Regulatory Mechanisms section).<sup>57</sup>

In regards to loss of habitat to **fire**, the Service concluded:

Overall, high- and intermediate-quality fisher habitat in the NCSO DPS decreased by 526,424 ac (213,036 ha) from 7,050,035 ac (2,853,047 ha) to 6,523,610 ac (2,640,011 ha), or approximately 7.5 percent was lost as a result of wildfires since 2008; this is an average loss of 6.8 percent per decade. For comparison purposes, in our 2014 draft Species Report, we estimated 4 percent of fisher habitat would be lost over the next 40 years due to high-severity wildfire, or 1 percent per decade (Service 2014, p. 64).<sup>58</sup>

Likewise for **anticoagulant rodenticides**, the Service concluded that for populations including the NSCO,

. . . mortalities due to rodenticide toxicosis increased from 5.6 to 18.7 percent since the collection and testing of fisher mortalities using data comparing the periods 2007–2011 to 2012–2014 (Gabriel and Wengert 2019, unpublished data, p. 2). From 2015 to 2018, additional NCSO DPS fisher mortalities due to both anticoagulant and neurotoxicant rodenticides have been documented.<sup>59</sup>

Moreover, the Service presented additional information indicating that climate change is an increased cause for concern, stating:

In particular, Siskiyou and Trinity Counties in interior northern California are projected to see the greatest temperature increases for the North Coast Region (Grantham 2018, p. 17). In the Klamath Mountains, models suggest precipitation is likely to fall increasingly as rain rather than snow, becoming mainly rain-dominated by mid-century (Dalton et al. 2017, p. 17). Significant or amplified wildfire activity, with increased area burned and severity can result in reduced denning habitat availability for fishers in the Coast Range and Klamath Mountains. These two areas are projected to experience wildfire return intervals decreased by half and thus result in a near tripling of the annual area burned in this century compared to last (Sheehan et al. 2015, pp. 20–22; Dalton et al. 2017, p. 46).<sup>60</sup>

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<sup>57</sup> 85 Fed. Reg. at 29552.

<sup>58</sup> 85 Fed. Reg. at 29551.

<sup>59</sup> 85 Fed. Reg. at 29553

<sup>60</sup> 85 Fed. Reg. at 29551.

Even though the Service acknowledged in the 2020 Final Listing Rule that the above threats to the NCSO population are increasing, the Service arbitrarily found that the NSCO population does not warrant listing under the ESA. The Service fails to offer any rational explanation that indicates that the NCSO population has increased or that threats to the NSCO population have been reduced. To the contrary, as indicated above, best available science shows that threats to the NCSO population have increased particularly in regards to loss of habitat to fire, climate change, vegetation management and rodenticides, and thus warrants listing.<sup>61</sup>

Moreover, the Service utilizes the same tactics expressly rejected in *Center for Biological Diversity v. U.S. Fish and Wildlife Service* to downplay current threats to the NCSO population. In that case, the court held that simply stating that the impact from a potential threat to the fisher was “uncertain” is insufficient to satisfy the Service’s obligations under the ESA.<sup>62</sup> The Court also clearly rejected the use of the Hoopa study (Higley 2014) and the Easter Klamath study (Green et al. 2016).<sup>63</sup>

In the 2020 Final Listing Rule, the Service again simply pointed to the uncertainty of the lethal level of toxicant exposure to support its position that toxicants are not a operative threat to the NCSO population.<sup>64</sup> Further, despite the court’s clear directive otherwise, the Service again cites to the Hoopa and Eastern Klamath studies to alleged that “widespread distribution and relative commonness” of the NCSO population lessen the impact of toxicants to the NCSO population.<sup>65</sup> The Service’s dismissal of threats as “uncertain” and its use of circumstantial evidence in the Hoopa and Eastern Klamath studies to support the position that threats are not operative is contrary to the holding in *Center for Biological Diversity v. U.S. Fish and Wildlife Service*.

Thus, even if the Service’s decision to disregard listing the West Coast population was legal, the Service’s determination of the boundary of the NSCO DPS and its decision to deny the NCSO population protection violates the ESA and fails to provide a rational connection between facts found and the choice made because it completely disregards the Service’s own findings, and also violates the court’s directive in *Center for Biological Diversity v. U.S. Fish and Wildlife Service*.

## CONCLUSION

In sum, the Service’s disregard of the West Coast population of fishers and its decision to deny protections to the NCSO DPS in the 2019 Proposed Rule and the 2020 Final Rule is arbitrary and capricious, contrary to the best available science, and violates the ESA. If the Service does not act to correct this violation within 60 days, the Center will pursue litigation in federal court. Please contact us should you have any questions or if you would like to discuss this matter.

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<sup>61</sup> See 85 Fed. Reg. at 29551, 29552, 29553.

<sup>62</sup> *Id.* at 976 (“. . . that these Pacific fisher deaths could not be pinned on toxicant exposure directly or that it may be uncertain as to what level of toxicant exposure fishers may be experiencing adverse impacts *do not provide the Service a rational connection to its conclusion that toxicant exposure does not rise to the level of a threat.*”).

<sup>63</sup> *Id.* at 979.

<sup>64</sup> 85 Fed. Reg. at 29555.

<sup>65</sup> 85 Fed. Reg. at 29554

Sincerely,



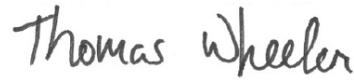
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