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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JOHN HUSKINSON, GENEVIEVE JAQUEZ-SCHUMACHER, and TIMOTHY COLEMAN,

Petitioners,

v.

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE and KELLY SUSEWIND, in his official capacity as Director of Washington Department of Fish and Wildlife,

Respondents.

No. 19-2-20227-1 SEA

FINDINGS OF FACT, AND CONCLUSIONS OF LAW DENYING PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

(CLERK'S ACTION REQUIRED)

THIS MATTER was before the Court on Petitioners' Amended Petition for Declaratory and Injunctive Relief, which challenges a July 31, 2019 decision by Kelly Susewind, Director of the Washington Department of Fish and Wildlife ("WDFW"), authorizing the lethal removal of members of the Old Profanity Territory ("OPT") gray wolf pack (the "Lethal Removal Authorization"). The Petition alleges that the Lethal Removal Authorization was unlawful because it was arbitrary and capricious under the Administrative Procedure Act, chapter 34.05 RCW ("APA"), and because WDFW failed to fulfill the requirements of the State Environmental Policy Act, chapter 43.21C RCW ("SEPA") in formulating the 2017 Wolf-Livestock Interaction Protocol. The Petition also contended that the July 31, 2019 lethal removal actions as authorized violated

1 SEPA, but on January 10, 2020, the Court determined that the authorization
2 determination and resulting actions were categorically exempt from SEPA analysis.

3 I. INTRODUCTION

4 This matter, as presented, is limited to consideration of the record of WDFW
5 actions related specifically to the July 31, 2019 authorization for the lethal removal of
6 wolves in the OPT pack by WDFW Director Susewind. Accordingly, the Court only
7 considered information that was available to WDFW before July 31, 2019. The record
8 before the Court is extensive with the Agency Record submitted and Supplemental
9 Record materials included at the request of the Petitioners. From this record, the Court
10 considered and answers the questions presented in this case which are, generally:

- 11 1. Whether the July 31, 2019 WDFW decision to lethally remove gray Wolves
12 in the OPT pack was arbitrary and capricious? and
- 13 2. Whether WDFW violated the State Environmental Policy Act, SEPA, in the
14 formulation of the 2017 Wolf-Livestock Interaction Protocol that WDFW
15 utilized in developing Director Susewind's lethal removal authorization on
16 July 31, 2019?

17 Before addressing these two questions, it is important to have an awareness of
18 what the Court is unable to address in the case as presented. While there is broad
19 interest in many aspects of wolf recovery, conservation and management, this Court
20 lacks jurisdiction to consider many questions, including, but not limited to:

- 21 1. Whether or not the Federal government should allow for grazing on
22 Federal land and whether the Federal government should more strictly
23 regulate grazing permits? Issues related to livestock grazing on
24 Federal land may be better addressed with the legislative and executive
25 branches of the Federal government.
- 26 2. Whether the lethal removal of wolves by WDFW is the appropriate or
best way to address wolf–livestock interactions and whether lethal
removal as conducted is humane?

- 1 3. What is the best way for livestock producers to raise livestock in wolf
2 habitat areas, including how they should respond to wolf-livestock
3 interactions? and
- 4 4. What approach should WDFW take in interactions with livestock
5 producers under the direction of the 2011 Wolf Conservation and
6 Management Plan and the 2017 Wolf-Livestock Interaction Protocol?

7 To be clear, the Court’s scope of review and authority in this case is limited in
8 addressing whether the July 31, 2019 decision was arbitrary and capricious and
9 whether WDFW violated SEPA in the formulation of the 2017 Wolf-Livestock
10 Interaction Protocol.

11 On June 22, 2020, the parties presented extensive and informative oral
12 argument on the merits of the Petition. The Court carefully considered that argument,
13 as well as:

- 14 1. All briefing and pleadings filed in this matter, including the Amended
15 Petition, Petitioners’ Opening Brief, Respondents’ Response Brief, and
16 Petitioners’ Reply Brief, as well as the prior briefing on the preliminary injunction,
17 the motion to dismiss, the motion to reconsider the motion to dismiss, and the
18 motions to supplement the Agency Record;
- 19 2. Relevant sections of WDFW’s certified agency record (“Agency Record”
20 or “AR _”);
- 21 3. Relevant portions of the 86 documents, videos, and photographs
22 admitted by the Court as supplements to WDFW’s certified agency record
23 (“Supplemental Record” or “PSE _”);
- 24 4. Appendix A and B to Petitioners’ Opening Brief, which collect information
25 from the Agency Record related to prior lethal control actions and related
26 scientific studies, though in support of argument rather than as part of the
 record;

1 5. The Declaration of Jonathon Bashford in Support of Opening Brief (Dkt.
2 125), to the extent that it aids the Court in understanding the Agency Record by
3 supplying information to assist in correlating pseudonyms used in that record;

4 6. The Declaration of Kara Clauser ISO Petitioners' Opening Brief (Dkt.
5 119), and the maps attached thereto, because those maps aided the Court in
6 understanding the raw GPS coordinate data in Section 11 of the Agency Record
7 and GPS coordinates appearing in various WDFW injury/mortality investigation
8 reports in the record;

9 7. Portions of WDFW's Washington Gray Wolf Conservation and
10 Management 2019 Annual Report ("2019 Report") for the limited purpose of
11 evaluating WDFW's claim that this matter has been rendered moot by events
12 since the case was filed; and.

13 8. Portions of briefing and hearing transcripts from prior related cases
14 against WDFW brought by other plaintiffs to challenge prior lethal removal
15 orders, which were attached to the Declaration of Claire Loeb Davis (Dkt. 124)
16 and Supplemental Declaration of Claire Loeb Davis (Dkt. 166).

17 After considering the above referenced argument, briefing, and evidence, the
18 Court hereby enters the following FINDINGS OF FACT and CONCLUSIONS OF LAW.

19 **II. FINDINGS OF FACT**

20 **A. Petitioners - Standing**

21 1. Petitioners John Huskinson and Genevieve Jaquez-Shumacher are residents
22 of King County, Washington. PSE 103 ¶ 2; PSE 104 ¶ 2. Petitioner Timothy Coleman
23 is a resident of Ferry County, Washington. Declaration of Timothy Coleman. PSE 102
24 ¶1.

25 2. Petitioners are concerned with the long-term survival and recovery of the gray
26 wolf in the Pacific Northwest. PSE 102 ¶ ¶ 3, 8, 13; PSE 103 ¶ ¶ 3-5, 9-10. PSE 104

1 ¶ ¶ 5-6, 9. They have regularly engaged in recreational activities in the Colville
2 National Forest and have plans to continue to do so in the future. PSE 102 ¶ ¶ 4-7,
3 11; PSE 103 ¶ 6; PSE 104 ¶ 6. They take aesthetic enjoyment from observing and
4 attempting to observe wild wolves, hearing wolves, seeing signs of wolves, and
5 enjoying ecosystems that have been enhanced by the presence of wolves. PSE 102
6 ¶ ¶ 5, 11, 12; PSE 103 ¶ 5; PSE 104 ¶ ¶ 6, 8. Each of the Petitioners is saddened
7 and upset when WDFW kills wolves. PSE 102 ¶ ¶ 13-14; PSE 103 ¶ 7; PSE 104
8 ¶ ¶ 10.

9 **B. Procedural History**

10
11 3. Petitioners filed the initial Petition for Declaratory and Injunctive Relief on
12 August 1, 2019 (Dkt. 1) and an amended petition on August 15, 2019 (“Petition”) (Dkt.
13 37).

14 4. Petitioners immediately sought a temporary restraining order, which was denied
15 by the Court Commissioner Henry Judson on August 1, 2019. Dkt. 10. Commissioner
16 Judson also denied Petitioners’ motion to reconsider, but granted a request for WDFW
17 to produce certain materials to the Court and Petitioners in advance of the hearing on
18 Petitioners’ motion for a preliminary injunction. Dkt. 36.

19 5. The Court issued a preliminary injunction from the bench following a hearing on
20 August 16, 2019, which was memorialized and extended by an order entered August
21 22, 2019. Dkt. 60. The order enjoined Respondents from taking additional action to
22 execute the lethal removal authorization against remaining members of the OPT Pack
23 or any wolves remaining in the OPT Pack territory, until a final judgment on the merits.

24 6. WDFW killed four OPT wolves between August 1, 2019 and August 16, 2019,
25 the date of the above referenced preliminary injunction hearing. Prior to argument on
26 the morning of this hearing on August 16, 2019, counsel for WDFW informed the Court

that WDFW had killed four more wolves earlier that very morning, leaving only one

1 member of the pack alive. Later that day, WDFW announced that it believed it had
2 actually killed the entire OPT Pack. Subsequently, WDFW's counsel asserted that the
3 remaining wolf was "likely" a dispersing wolf passing through the territory that had
4 never actually been a member of OPT Pack. Dkt. 55 at 3.

5 7. Per the 2019 Report, the former OPT territory is now occupied by a pack
6 referred to by WDFW as the "Kettle Pack." Ex. 6 at 3. WDFW's counsel conceded at
7 oral argument that WDFW cannot be certain that the wolf that it had formerly identified
8 as a surviving member of the OPT Pack after the August 16, 2019 lethal removal
9 actions, is not now a member of the Kettle Pack.

10 8. On January 10, 2020, the Court initially granted Respondents' motion to dismiss
11 Petitioners' SEPA claims in their entirety. (Dkt. 81) However, on Petitioners' Motion
12 for Reconsideration, the Court amended that order on February 20, 2020 (Dkt. 92).
13 The Court's amended order concluded that the Lethal Removal authorization and
14 related actions were categorically exempt from SEPA requirements under WAC 197-
15 11-800(12)(c) and (d), as a law enforcement action and an action to abate a nuisance,
16 respectively; and under WAC 197-11-880 as an emergency action. However, upon
17 reconsideration, the Court concluded that the Petition properly stated claims regarding
18 the applicability of SEPA to the 2017 Wolf-Livestock Interaction Protocol ("Protocol"),
19 which guides the agency's issuance of lethal removal authorizations.

20 9. By two orders entered May 15, 2020 (Dkts. 151, 152), and an addendum to
21 those orders entered May 22, 2020 (Dkt. 156), the Court granted Petitioners' motions
22 to supplement the Agency Record, in part, admitting 86 documents, photographs, and
23 videos as supplements to the Agency Record.

24 10. On June 11, 2020, the Court granted Respondents' request to seal unredacted
25 portions of the record (Dkt. 167), allowing WDFW to redact from the publicly filed
26 Agency Record sensitive wolf location information and personal identifying information

1 of WDFW staff who respond to wolf predations or assist with wolf lethal removal, range
2 riders who protect livestock from wolves, and certain livestock producers.¹

3 11. In briefing on the merits and in oral argument, Respondents did not contest
4 jurisdiction, venue or standing. However, they do contend that this matter is moot,
5 claiming that WDFW has fully executed the July 31, 2019 lethal removal authorization
6 and eliminated the OPT Pack.

7 12. Respondents contend the lethal removal authorization was reasoned and well
8 supported, and that they properly considered agency guidance and goals, and other
9 facts and circumstances relevant to the agency action.

10 13. Respondents claim the Protocol is not subject to SEPA analysis because it is
11 nonbinding guidance, which does not qualify as a “non-project action” under SEPA,
12 and that Petitioners have not timely presented this issue for review. Respondents
13 further contend that the relief sought by Petitioners is unavailable under the APA and
14 that lethal removal as authorized with reference to the Protocol on July 31, 2019 is
15 exempt from SEPA review.

16 14. Petitioners counter that the matter is not moot because one wolf that may have
17 been part of the OPT pack may still be alive, because WDFW has arguably repeated
18 the same alleged wrongful conduct for the past four years and is likely to repeat it again
19 absent intervention by this Court, and because the Court may grant meaningful relief
20 under both the APA and SEPA. Petitioners request that, even if the action is technically
21 moot, that the Court apply the public interest exception to mootness and consider their
22 claims because the case presents an issue of public interest that is likely to recur, the
23 short-term nature of lethal removal orders makes it likely that they will perpetually
24 evade review, a determination by this Court will help WDFW avoid the same errors in
25 future actions, and because there is genuine adverseness.

26 ¹ The Court intends to grant Petitioners’ motion to seal unredacted versions of the Supplemental Record
by separate order based on the same Findings of Fact and Conclusions of Law contained in its June
11, 2020 order. (Dkt. 128)

1 15. Petitioners argue that the Lethal Removal authorization was arbitrary and
2 capricious because in issuing the authorization, WDFW: (1) violated its own policies
3 and ignored the goals it had set for itself regarding lethal control; (2) refused to consider
4 substantial information about the livestock producer involved in the wolf-livestock
5 conflict that led to the July 31, 2019 Lethal Removal Order, hereinafter identified as
6 Producer X, including claims that Producer X may be creating conflict with wolves by
7 failing to reasonably protect its cattle; and (3) failed to learn from its past mistakes,
8 after killing wolves in the same area for the same producer for the prior three years,
9 without making progress toward reducing wolf-livestock conflict or increasing tolerance
10 for wolves.

11 16. Petitioners contend WDFW violated SEPA by refusing to perform even a
12 threshold environmental analysis on the development of the 2017 Wolf-Livestock
13 Interaction Protocol claiming that the Protocol is a non-project action under SEPA
14 because it is a policy that governs WDFW's authorization of lethal removal actions.
15 Petitioners assert this challenge is timely under SEPA, alleging that WDFW commits a
16 new SEPA violation every time WDFW authorizes lethal removal using the Protocol.

17 17. Petitioners ask the Court to issue a declaratory judgment finding that the lethal
18 removal authorization is invalid because it is arbitrary and capricious under the APA,
19 and because WDFW did not perform the required SEPA environmental analysis in
20 developing the Protocol. Petitioners also ask for injunctive relief to prevent WDFW from
21 issuing further lethal control authorization until it complies with SEPA, and considers
22 factors including its own goals and policies, and the history and culpability of Producer
23 X before authorizing any further lethal removal actions against wolves in the former
24 OPT Pack territory.

1 **C. General Background**

2 18. Although there were reportedly as many as 5,000 gray wolves in Washington at
3 one time, the species was extirpated from the state by the 1930s due to trapping,
4 poisoning, and shooting on behalf of farming and ranching interests. AR 8-118. The
5 first documented breeding pair of wolves returned to the state in 2008. AR 8-114. Per
6 the Washington Gray Wolf Conservation and Management 2018 Annual Report, since
7 adoption of the Wolf Plan in 2011, Washington’s wolf population grew from five “packs”
8 and three “successful breeding pairs” in 2011 to 27 packs and 15 successful breeding
9 pairs in 2018. AR 8-013—AR 8-015. The number of gray wolves in Washington has
10 increased every year for the past 8 years. AR 1-077.

11 19. The gray wolf has been on the Washington state endangered species list since
12 1980. WAC 220-610-010. Wolves in the western part of Washington are also on the
13 federal endangered species list, but the species has been removed from federal
14 protection in the eastern third of the state, leaving WDFW with full management
15 authority over the population east of the Cascades. AR 8-114.

16 **D. Wolf Conservation Plan and EIS and 2017 Wolf-Livestock Interaction**
17 **Protocol**

18 20. After extensive SEPA review, WDFW adopted the Wolf Conservation and
19 Management Plan (“The Plan”) in 2011, as part of its obligation to plan for and ensure
20 the recovery of wolves as a state endangered species. WAC 220-610-110 §11.1; AR
21 8-103 – AR 8-403. PSE 1-001. The Plan was developed to guide recovery and
22 management of gray wolves as they naturally disperse into the state and reestablish a
23 breeding population.

24 21. WDFW prepared an environmental impact statement (“Plan EIS”) in conjunction
25 with the Plan, which was a SEPA “non-project action.” PSE 1-016. The Plan as
26 reviewed under SEPA provided for “phased review,” which allows an agency to “focus

1 on issues that are ready for decision and exclude from consideration issues...not yet
2 ready.” PSE 1-001. The Plan EIS indicates that “[s]pecific actions that may be
3 proposed in the future related to gray wolf management” would be “evaluated through
4 a supplemental environmental impact statement process.” PSE 1-018. The Plan EIS
5 notes that “wolf-livestock conflict management,” including the use of lethal control of
6 wolves, was one of three continuing “areas of controversy and uncertainty” at the time
7 the Plan was adopted stating that “*The plan includes both proactive, non-lethal (e.g.
8 modified husbandry methods and lethal deterrents) and lethal management options to
9 address wolf-livestock conflicts and that The plan emphasizes prompt response to
10 reported depredations and includes a program to compensate livestock producers for
11 livestock killed or injured by wolves.* PSE 1-002.

12 22. The Plan EIS does not specifically evaluate WDFW approaches to lethal control
13 of wolves. AR 8-056. It notes that allowing any lethal control of an endangered species
14 is “unusual” in a recovery plan, but that it may be necessary for the purpose of
15 “build[ing] public tolerance” essential to wolf recovery, but it also identifies lethal control
16 by state or federal agents when wolves are determined to have been involved in
17 repeated livestock depredations. as a preferred alternative when the preferred
18 alternative. PSE 1-021, PSE 1-024.

19 23. The Plan anticipated that wolf-livestock conflicts would increase as the wolf
20 population increased. AR 8-178. The purpose of the Wolf Plan “is to ensure the
21 reestablishment of a self-sustaining population of gray wolves in Washington and to
22 encourage social tolerance for the species by addressing and reducing conflicts.” AR
23 8-115. The Plan identified four goals. The three goals set forth below are relevant to
24 the arguments in this case:

- 25 a. “Restor[ation of] the wolf population in Washington to a self-sustaining
26 size and geographic distribution that will result in wolves having a high

1 probability of persisting in the state through the foreseeable future (>50-100
2 years)” *id.*;

3 b. “Manage[ment of] wolf-livestock conflicts in a way that minimizes
4 livestock losses, while at the same time not negatively impacting the recovery
5 or long-term perpetuation of a sustainable wolf population.” and

6 c. Development of public understanding of the conservation and
7 management needs of wolves in Washington, thereby promoting the public’s
8 coexistence with the species. *Id.*

9 24. The Plan acknowledges that “Lethal control of wolves may be necessary to
10 resolve repeated wolf-livestock conflicts and [would be] performed to remove problem
11 animals that jeopardize public tolerance for overall wolf recovery.” AR 8-186. The Plan
12 indicates that lethal removal “may be used to stop repeated depredation” under certain
13 circumstances, including when “non-lethal methods have been tried, but failed to
14 resolve the conflict, when depredations are likely to continue, and when there is no
15 evidence of intentional feeding or unnatural attraction of wolves by the livestock
16 owner[.]” AR8-194. The Plan EIS emphasizes that any state lethal control of wolves
17 would be used only as a “last resort.” PSE 1-115.

18 25. The Plan does not provide specific directions to guide WDFW’s use of lethal
19 control against wolves. Accordingly, under the umbrella of the Plan, WDFW has
20 developed Wolf-Livestock Protocols for guidance. In 2017, WDFW adopted the current
21 Protocol, which describes the approach the agency takes toward non-lethal deterrent
22 measures and outlines the circumstances under which WDFW “may consider” killing
23 wolves in response to wolf-livestock conflict. AR 8-055 - AR 8-072. The Protocol
24 establishes a “framework” for response to wolf-livestock conflict and describes the
25 “criteria for and implementation of lethal removal of wolves.” AR 8-055 – AR 8-056.

26 26. The Protocol was not developed through a separate SEPA analysis process as

1 it was derived from the SEPA analyzed Plan. WDFW developed the Protocol (and is
2 now working to amend the Protocol) through a lengthy process that involves
3 consultation with an entity known as the Wolf Advisory Group (WAG) a select group of
4 individuals representing hunting, ranching, and environmentalist interests. PSE 25-
5 001, PSE 58-185.

6 27. The stated goal of the tools and approaches described in the Protocol is “to
7 influence/change wolf pack behavior to reduce the potential for recurrent wolf
8 depredations on livestock while continuing to promote wolf recovery.” AR 8-056. To
9 that end, the Protocol states that WDFW “may consider lethal removal of wolves to
10 attempt to change pack behavior to reduce the potential for recurrent depredations
11 while continuing to promote wolf recovery when the following conditions are met: (1)
12 WDFW has documented “at least 3 depredation events within a 30-day rolling window
13 of time, or at least 4 depredation events within a 10-month rolling window of time”; (2)
14 “[a]t least two (2) proactive deterrence measures and responsive deterrence measures
15 have been implemented and failed” to meet the goal of influencing/changing pack
16 behavior to reduce the potential for recurrent wolf depredations on livestock; (3)
17 “WDFW expects depredations to continue (e.g. deterrence measures have not
18 changed pack behavior, and overlap between wolves and livestock is expected to
19 continue in the near future).”; (4) WDFW “has documented the use of appropriate
20 deterrence measures,” and notified the public of wolf activities in a timely manner , and
21 (5) the “lethal removal of wolves is not expected to harm the wolf population’s ability to
22 reach recovery objectives statewide or within individual wolf recovery regions. [.]” AR
23 8-068 – AR 8-069.

24 28. Per the Protocol, WDFW expects livestock producers to collaborate with WDFW
25 to “identify and plan the proactive deployment of the best suited deterrence measures,”
26 and that following a wolf predation, WDFW will work with producers to “assess the local

1 on-the-ground conditions and risk to determine which responsive deterrence measures
2 should be employed (i.e., which techniques are best suited for the specific livestock
3 operation, have the best chance to reduce the likelihood of future depredations, and
4 are the most feasible).” AR 1-059 – AR1-060.

5 29. The number of livestock producers implementing non-lethal deterrence
6 measures has significantly increased over time to the point that available WDFW funds
7 for livestock producer cooperation have been exhausted with additional funding made
8 available through grants from the Washington State Department of Agriculture. AR 8-
9 023 - AR 8-025; AR8-059.

10 30. WDFW used the term “policy” in referencing the wolf-livestock protocol in a
11 Public Weekly Wolf Pack Update of November 15, 2018. WDFW has stated that the
12 Protocol, in concert with the Plan sets the standards by which it “may,” “can” or is
13 “allow[ed]” to undertake lethal control. See AR 17-92 – AR 17-94, AR 17-111, AR 17-
14 114, AR 17-123, AR 17-126 – AR 17-128, AR 17-130, AR 17-158, and AR 17-353,
15 and WDFW has characterized the Protocol as a primary source upon which WDFW
16 will “activat[e],” “initiate,” “implement[]” or “revert[]” to, once minimum thresholds are
17 met. AR 17-152, AR 17-187, AR 17-213, AR 17-239, AR 17-61, AR 17-290, AR 17-
18 291.

19 31. As written, the 2017 Wolf Livestock Interaction Protocol uses the permissive
20 “may” rather than the mandatory “shall” in providing that the Department “may”
21 consider lethal removal of wolves to attempt to change pack behavior to reduce
22 potential for recurrent depredations while continuing to promote wolf recovery when
23 certain criteria are met. AR 8-068 - AR 8-069. The document anticipates a case-by-
24 case evaluation of facts and circumstances, recognizing a “number of variables and
25 complexities and the record indicates that WDFW has conducted case by case
26 evaluations of unique facts in addressing lethal removal decisions prior to the July 31,

1 2019 decision at issue. Moreover, decisions to implement lethal removal of wolves are
2 ultimately made by the WDFW Director. AR 8-068 - AR 8-069. In WDFW's July 31,
3 2019 public notice of Director Susekind's reauthorization of lethal action against the
4 OPT pack, WDFW wrote:

5
6 *Today, WDFW Director Kelly Susewind reauthorized WDFW staff to*
7 *lethally remove wolves from the OPT pack in response to repeated*
8 *depredation of cattle on federal grazing lands in the Kettle River range of*
9 *Ferry county under the guidance of the state's Wolf Conservation and*
Management Plan and the lethal removal provisions of the department's
wolf-livestock interaction protocol. AR 17-004.

10 32. In advising DWDFW Director Susewind regarding the July 31, 2019 lethal
11 removal authorization, WDFW staff considered the Protocol as guidance, but noted
12 specifically that the Protocol did not provide guidance in the unique situation they were
13 facing, "a situation where chronic depredations and lethal removals have occurred in
14 the same territory for multiple years." AR 1-006, AR 1-013.

15 33. WDFW did not make a threshold determination of environmental significance
16 on the Protocol under SEPA. However, RCW 43.21C.110(1)(a) does not require SEPA
17 analysis of categorically exempt activities, and the lethal removal order at issue and
18 the specific actions taken in accordance with the order were previously determined by
19 the Court to be exempt from SEPA analysis per WAC 197-11-800(12)(c) and (d) as
20 law enforcement actions and actions to abate a nuisance, respectively, and under 197-
21 11-880, which categorically exempts emergency actions. As such, the Court
22 determined that the lethal removal at issue by state agents was in SEPA compliance
23 and allowed as consistent with applicable state and federal law.

1 **E. Lethal Removal of the OPT pack**

2
3 34. Director Susewind first authorized lethal removal action against the OPT pack
4 in September 2018, after which WDFW killed two OPT wolves. Following additional
5 depredations, Director Susewind authorized the complete removal of the pack in
6 October 2018. Despite authorization, WDFW agents were unable to kill additional
7 wolves that fall. AR 8-049.

8 35. Following one predation on Producer X’s cattle on July 6, 2019, Director
9 Susewind issued an order allowing for the lethal removal of the breeding male of the
10 pack, which WDFW shot on July 13, 2019. AR 1-008, AR 1-015. After additional
11 predations followed, Director Susewind authorized the lethal removal at issue on July
12 31, 2019. At the time, WDFW believed the remaining OPT Pack consisted of four
13 adults and four pups. AR 1-001 – AR 1-003.

14 36. Director Susewind’s authorization followed consideration of a recommendation
15 from WDFW’s Regional Director Steve Pozzanghera and Mr. Pozzanghera’s
16 recommendation followed the recommendation of the WDFW District One Team. AR
17 1-007 – AR 1-014. These two sets of recommendations, and the attachments thereto
18 are the primary decisional documents explaining WDFW’s reasoning, and factors
19 considered, before the authorization of lethal removal on July 31, 2019.

20 37. Petitioners arguments as to whether the decision to authorize lethal removal
21 on July 31, 2019 was arbitrary and capricious are premised significantly on the
22 actions or inactions of one Livestock Producer, Producer X; the interactions between
23 Producer X and WDFW; and the alleged failure of WDFW to properly consider
24 Producer X’s actions and history of collaboration with WDFW prior to the
25 authorization for lethal removal on July 31, 2019.

1 38. Between September 5, 2018 and July 26, 2019, the OPT pack attacked and
2 injured or killed at least 27 calves and cows.² AR 1-003; AR 6-001—AR 6-010, AR
3 17-004—AR 17-005. All of these depredations involved cattle that belonged to
4 Producer X. AR 1- 15.

5 39. At least 8 depredations occurred in the 30 days prior to the July 31, 2019
6 decision. AR 1-006; AR 1-015 - AR 1-106. This exceeds three depredations in 30 days,
7 and four depredations in 10 months as criteria as set forth in the Protocol. AR 1-006.

8 40. Two additional depredations, on July 30, 2019 and July 31, 2019, were
9 attributed to the OPT pack while the lethal removal authorization process was
10 underway bringing the total number of OPT depredations in July 2019 to 10. AR 6-
11 001—AR 6-010.

12 41. In making the challenged decision, WDFW considered the number and
13 sufficiency of non-lethal deterrence measures set forth in the Protocol and used by four
14 producers in the OPT territory, including non-lethal measures used by Producer X,
15 who owned all of the cattle killed or injured by the OPT pack. AR 1-010 —AR 1-011.
16 Examples of deterrent measures in the 2017 Protocol include: “Protecting
17 Calving/Lambing Areas;” “Delay Turnout to Forested/Upland Grazing Pastures;”
18 “Monitoring livestock;” “Using Scare Devices;” and “Human Presence.” AR 8-060 - AR
19 8-063. The record reflects that throughout 2019, WDFW maintained contact with
20

21 ²Three depredations in January, 2019 were reportedly not considered in the recommendation for lethal
22 removal authorization at issue. The Agency Record and argument indicated that each year some of
23 Producer X's cattle are left on the USFS grazing allotments after the end date of the permits. In January
24 2019, WDFW documented that three of Producer X's cattle were killed by wolves after they were left
25 behind. AR 6-058 – AR 6-074. WDFW staff reflected that leaving cattle out unprotected in the winter
26 would teach wolves to prey on cattle, causing cattle to be at “greater risk” during the summer. AR 12-
133. It was explained in argument that despite permit requirements that livestock be taken off the USFS
permitted grazing allotments by dates in October of each year, some cattle are not located at end of
season round-ups and are left with the hope that they will be found later as colder weather drives them
into lower elevations. Petitioners assert that this negatively reflects on husbandry practices of Producer
X. It is concerning to the Court that some cattle are left behind in known wolf habitat areas, but the
Court lacks information as to how difficult it maybe to round up all cattle in an area as large as the
involved USFS allotments are reported to be.

1 Producer X in an attempt to implement multiple non-lethal deterrence measures with
2 limited success in some areas. E.g., AR 1-010 - AR 1-012; AR 2-007 - AR 2-009; AR
3 sections 7 and 16;” AR 8-60 - AR 8-063; AR 15-1608; AR 15-1639; AR 15-1649; AR
4 15-1706; AR 15-2009; AR 15-2119.

5 42. Specific non-lethal deterrence measures that WDFW assessed as having been
6 implemented prior to the lethal removal authorization of July 31, 2019, include those
7 referenced in paragraph 41 and discussed below.

8 **a. (Calving away from areas occupied by wolves)**

9 WDFW documented that “Producer X” practiced traditional calving away from
10 areas occupied by wolves in internal recommendations and in WDFW
11 Livestock-Wolf Mitigation Measures checklists. AR 7-001, AR 7-013, AR 1-010.
12 Calving away from areas occupied by wolves as described in the 2017 Protocol
13 occurs when producers “establish calving or lambing areas away from areas
14 occupied by wolves.” AR 8-061. Petitioners have offered no evidence to refute
15 WDFW’s assessment that “Producer X” calved away from areas occupied by
16 wolves. However, Petitioners make a good point that this deterrence method is
17 a nominal deterrent factor because calving away from the USFS grazing
18 allotments is part and parcel of the federal permit agreements. Petitioners
19 correctly indicate that per the terms of the Federal Grazing allotment permits, it
20 is expected that cattle are not born on the allotments. Nevertheless, calving
21 away is a listed deterrence measure Producer X agreed to take and there is no
22 evidence that Producer X failed to comply in 2018 or 2019. PSE 17-001 – PSE
23 17-008.

24
25 **b. (Delayed turnout of cattle onto the grazing allotment)**

26 WDFW assessed and understood that “Producer X” delayed turnout of cattle

1 onto the grazing allotment in a manner that made Producer X's cattle less
2 susceptible to predation. AR1-010. This practice is listed as an example of a
3 deterrence measure in the 2017 Protocol with the description "[t]urnout when
4 livestock calves reach at least 200 lbs (e.g., early calving so calves are older
5 and heavier at turn-out)" and "[t]urnout after wild ungulates are born
6 (approximately mid-June)." AR 8-063. The purpose of this measure is similarly
7 described in WDFW's Public Update regarding the July 31, 2019 lethal removal
8 decision. AR 17-005. WDFW wolf-livestock mitigation measure checklists for
9 "Producer X" indicate that the producer would delay turnout until (1) calving was
10 finished, (2), the "calves were larger (approx. 200 lbs)", and (3) after June 10th
11 when wild ungulates are born. AR 7-002, AR 7-014. Petitioners did not present
12 evidence in the record to contradict information gathered by WDFW staff and
13 documented in these checklists during the relevant period of time. While
14 Petitioners presented evidence that some cattle under 200 pounds may have
15 been turned out into the grazing allotments in prior years, the Court does not
16 see this as relevant to the 2019 decision other than as a reflection on Producer
17 X's past practices. WDFW relied on Producer X's checklist representations.
18 There is no indication in depredation reports provided that any of the cattle found
19 to have been subject to wolf depredation between September 6, 2018 and July
20 31, 2019 were under 200 pounds or were small enough to have likely been
21 under 200 pounds in weight at the time of turnout in June, 2019.

22
23 **c. (Removal of sick or injured cattle when feasible and discovered)**

24 WDFW contends that it assessed and understood that "Producer X" agreed to
25 "removal of sick or injured cattle when feasible and discovered" and that it
26 complied with this agreement. AR 1-010. However, the box referencing

1 this deterrent was not checked in Producer X’s WDFW wolf-livestock mitigation
2 measure checklists. AR 7-001, AR 7- 013. This practice is described in the
3 2017 Protocol under Monitoring Livestock and occurs when producers “remove
4 sick or injured livestock from pastures within a wolf territory.” AR 8-061. Multiple
5 entries in WDFW checklist documentation indicate that, during deterrence
6 patrols, WDFW staff and/or the producer’s employees would inspect cattle for
7 injuries and take appropriate action. See, e.g., AR 7-008 – 010.”

8 A September 21, 2018 incident is documented in which six cows were
9 brought off the range with injuries consistent with wolf attacks. AR 7-006.
10 Petitioners presented evidence that on or about July 19, 2019, following a
11 depredation incident with two calves, Producer X would not provide WDFW staff
12 with information about whether one euthanized calf was removed from the
13 range and whether the other injured calf was returned to the range. AR 4-003.

14 Petitioners also contend that after three calves were found to be the
15 subject of wolf depredations on July 26, 2019, that Producer X improperly
16 allowed cattle to return to the range. However, the record indicates that
17 Producer X promptly contacted the Ferry County Wildlife Specialist upon
18 discovering the injured calves on July 26, 2019 and that he Wildlife Specialist
19 contacted WDFW so that the cattle could be examined. Producer X was present
20 for the examinations and the examinations were conducted with a battery
21 powered shaver to assist in searching for injuries that are sometimes difficult to
22 find in the long and thick hair of the cattle. Photographs were taken of the
23 injuries to the three calves before they were released back onto the range. The
24 estimate for injuries to calf No 2 was that they were 4 to 5 days old. Nothing in
25 the record indicated that these calves were injured to such an extent that release
26 back onto the range was inappropriate. AR 6-011 – AR 6-022. Evidence

1 presented did not indicate that Producer X failed to “remove sick or injured
2 cattle when discovered, though the failure to agree to this deterrent method in
3 the checklist and the July 19, 2019 failure to provide information are concerning.
4

5 **d. (Use of Scare Devices - Fox Lights)**

6 In June and July 2019, WDFW worked with “Producer X” to deploy “fox lights”
7 in three areas where the cattle were gathered. These lights were placed by a
8 WDFW Conflict Specialist as a wolf deterrent on June 23, 2019 in two active
9 salt block areas and near one small pond; locations where cattle were then
10 congregating outside of historic problem areas. AR 1-010, AR 7-002, AR 7-014.
11 Fox lights are blinking lights referenced as an appropriate deterrence measure
12 in the 2017 Protocol, as a “scare” or “hazing” device. AR 8-062. Because the
13 fox lights were deployed subsequent to 2018 depredations by the OPT pack,
14 their use is seen as a “responsive deterrence measure” under the 2017
15 Protocol. AR 8-058. Petitioners do not dispute that fox lights were deployed,
16 but question their efficacy and WDFW’s reliance on them as a true deterrent.

17 Petitioners’ challenge to fox light use as a deterrent measure includes
18 reference to WDFW indicating in 2018 that they were experimental in a lethal
19 removal recommendation memorandum of September 11, 2018. AR 12-073.
20 The 2018 memorandum indicated that use of fox lights in areas where cattle are
21 not highly congregated or within fences was atypical and that there were
22 concerns about whether the lights would work in an area where a depredation
23 pattern appears to be entrenched. AR 12-077. In 2018, WDFW did not credit
24 Producer X with this use as an appropriate non-lethal measure in considering
25 lethal removal, but noted that such use reflected “a continuing effort by producer
26 X to consider and employ husbandry techniques as part of their operations,

1 something the environmental community has been concerned about in the
2 past.” AR 12-077.

3 Despite the 2018 Memorandum, the record indicates that during the 2019
4 grazing season, as of June 23, 2019, fox lights were deployed as a responsive
5 deterrent measure in areas where 120 cow/calf pairs primarily congregated
6 outside of historic problem areas. AR 1-010. Producer X was in compliance
7 with its WDFW wolf-livestock mitigation measure checklist agreement to utilize
8 hazing practices to frighten wolves away from livestock by collaborating with
9 WDFW to use this deterrent at WDFW’s suggestion prior to the July 31, 2019
10 lethal removal authorization. Though fox light use was seen as experimental in
11 the September 11, 2018 memorandum, the record describes a different location
12 use in 2019 under WDFW direction.

13
14 **e. (Human Presence – Range Riding)**

15 The 2017 Protocol identifies “Human Presence” as an appropriate
16 deterrent and WDFW contends that there was sufficient human presence in the
17 area of the depredations leading up to the July 31, 2019 lethal removal
18 authorization to constitute an appropriate deterrent. AR 8-061. Human
19 presence under the Protocol includes “range riders, ranch employees, [or]
20 family members...,” among others, taking steps “to protect livestock by
21 patrolling the vicinity occupied by livestock on a daily or near daily basis.” AR 8-
22 061. WDFW contracted range riders are the preferred deterrent in the OPT
23 allotment area and WDFW se. AR 1-014.

24 Per Producer X’s Livestock-Wolf Mitigation Measures checklists and
25 WDFW documentation related thereto, Producer X agreed to and used
26 contracted range rider services from 2016 through the fall of 2018, though one

1 WDFW staff person opined that Producer X has “never had actual, quality
2 range riding on [the Kettle Range] landscape.” AR 4-004, AR 7-002 – AR 7-
3 014. Whether range riders were “quality” or not, due to suspected fraudulent
4 record keeping by the WDFW contracted range riders used by Producer X
5 regarding whether they were actually on sites as they reported that they were
6 in 2018, WDFW terminated their contracts on May 21, 2019. AR 1-010, AR 22-
7 078. Accordingly, no WDFW contracted range riders were working for Producer
8 X in the OPT territory between the end of May, 2019 and July 31, 2019. AR 1-
9 010. WDFW encouraged Producer X to use newly contracted, available range
10 riders during this period, but Producer X declined stating that he would begin to
11 use the Ferry County Wildlife Specialist to patrol as of July 25 or July 26, 2019.
12 AR 1-004 – AR1-005. WDFW did not see this decision as ideal, but lacked
13 authority to require use of WDFW contracted range riders because the
14 allotments are on federal land managed by the USFS through USFW permits
15 rather than on state land. AR1-004; AR8-236.

16 Though WDFW contracted range riders were not present on Producer
17 X’s allotment when 8 OPT depredations occurred between July 6, 2019 and July
18 26, 2019 and when 2 additional depredations were discovered on July 30, 2019
19 and July 31, 2019, the record indicates that human presence in the allotment
20 remained consistent with WDFW staff, Producer X and the County Wildlife
21 Specialist partaking in human presence deterrence patrols.³ AR7-002 – AR7-
22 022; AR 15-2099 - AR 15-2100.

23 WDFW clearly preferred and recommended WDFW contracted range
24 riding on Producer X’s allotments prior to the July 31, 2019 lethal removal
25 authorization. WDFW also considered whether to require additional range

26 ³ The County Wildlife Specialist range riding Producer X agreed to use did not begin until July 25,
2019 or July 26, 2019. AR 1-005.

1 riding as a responsive non-lethal deterrent prior to the lethal removal
2 authorization at issue, but ultimately the WDFW staff consensus was that
3 depredations were likely to continue regardless of whether additional range
4 riding was attempted. AR 1-001; AR 1-006; AR 1-0012—AR 1-013; AR 3-001-
5 AR 3-002. Moreover, WDFW lacked authority over the USFS permitted
6 allotments to require Producer X to use the services of WDFW contracted range
7 riders and WDFW feared that failure to pursue lethal removal with such prolific
8 depredation activity occurring would jeopardize collaboration progress that staff
9 felt had been made with Producer X over time. The record demonstrates that
10 failure of WDFW to pursue lethal removal authorization when it did would likely
11 have resulted in additional depredations and impacted cooperation with
12 Producer X.

13 43. WDFW evaluated the sufficiency of the non-lethal deterrence measures by
14 referencing the expectations established in the 2011 Wolf Plan (2 proactive measures)
15 and in the 2017 Protocol (at least two (2) proactive deterrence measures and
16 responsive deterrence measures have been implemented and failed). AR 8-194; AR
17 8-068. WDFW found that the expectations established in both documents were
18 exceeded. Moreover, the situation at issue with 27 OPT pack depredations since
19 September, 2018 including 7 confirmed depredations and one probable depredation
20 since July 6, 2019 and a consensus among WDFW staff that depredations would likely
21 continue even with the current and reactive non-lethal tools being utilized, supported
22 the July 31, 2019 WDFW lethal removal authorization provided by Director Susewind.⁴
23 AR 1- 006.

24 44. In making the challenged decision, WDFW concluded that statewide and
25 regional recovery of wolves would not be jeopardized by lethal removal of the
26

⁴ Depredations did indeed continue, as two more occurred on July 30, 2019 and July 31, 2019. AR 6 – 001, AR 6-004.

1 | depredate OPT pack. AR 1-013; AR 1-078—AR 1-084. In its analysis, WDFW noted
2 | that based on the distribution of packs in the northeastern segment of the Eastern
3 | Washington recovery region, the wolf population in Eastern Washington is “beginning
4 | to reach occupancy in all potential areas.” AR 1-083.

5 | 45. As to consideration of reaching the goal of increasing social tolerance for
6 | wolves, the record indicates that the WDFW’s Division One Wolf Team looked at the
7 | July, 2019 situation as unique and this indicates that it was indeed looking at the facts
8 | presented individually rather than making a simple compromise as Petitioners allege.
9 | WDFW staff reluctantly recommended prompt lethal removal even when some staff
10 | preferred and recommended utilization of collaring efforts and deployment of WDFW
11 | contracted range riders prior to lethal removal. AR 1–005. Ultimately, however, the
12 | record shows that the decision was believed by all involved to be a decision of last
13 | resort to facilitate social tolerance in light of the number of depredations occurring
14 | regardless of who owned the cattle subject to depredation.

15 | 46. While there is nothing in the decisional record of specific consideration about
16 | how the lethal removal decision of July 31, 2019 would impact the goal of increasing
17 | social tolerance, the complete record reflects that WDFW’s paramount concern with
18 | wolf-livestock interaction is balancing the preservation, protection and management of
19 | the return of wolves to our state with a need to, at the same time, meaningfully respond
20 | when wolves damage livestock and impact rural communities that depend on livestock
21 | for a living. WDFW wolf management staff exist in a difficult position in working with
22 | some who may believe that we were better off in Washington without wolves after
23 | 1930’s extirpation and others who appreciate and revere wolves and the role they play
24 | in the environment to the point that they do not believe wolves should be killed at all,
25 | particularly by state agents acting as wildlife conservationists and managers.

1 47. The Protocol indicates that the goal of lethal removal is to change pack
2 behavior. WDFW attempted to change pack behavior with the authorized lethal
3 removal of one wolf on July 13, 2019. This action did not change pack behavior as
4 hoped, as depredations continued up to July 31, 2019. As a last resort to change the
5 depredating behavior of the OPT pack, lethal removal authority was requested and
6 authorized. AR 1 001 – AR1 -016.

7 48. None of the non-lethal deterrence measures described in Paragraph 42 above
8 averted depredations between September 5, 2018 and July 31, 2019. As noted, after
9 a single wolf believed to be a pack leader was removed on July 13, 2019, WDFW
10 confirmed nine additional OPT pack depredations up to July 31, 2019. AR 1-003; AR
11 6-001—AR 6-010.

12 **F. Specific Producer X considerations**

13
14 49. Beyond contending that WDFW did not sufficiently require Producer X
15 cooperation with non-lethal deterrents before the July 31, 2019 lethal removal
16 authorization, Petitioners also contend that WDFW did not consider Producer X's
17 outspokenness and history regarding wolf-livestock interaction and lethal removal
18 before the July 31, 2019 lethal removal authorization.

19 50. As referenced in the preceding paragraphs, WDFW considered whether
20 Producer X was deploying non-lethal deterrence measures prior to obtaining lethal
21 removal authorization on July 31, 2019. AR 7-001, AR 7-013, AR 1-010, AR 7-001—
22 AR 7-022. WDFW also considered that “chronic depredations and lethal removals had
23 occurred in the same territory for multiple years.” AR 1-006, AR 1-013. WDFW staff
24 compared Producer X's actions in 2019 to his actions in prior years. AR1-010 (noting
25 cattle locations “outside of historic problem areas” and characterizing efforts “in
26 contrast to previous years...”); AR 3-010 (characterizing cattle locations as “a step up

1 from where we were last year.”).

2 51. Though WDFW considered the above referenced deterrence measures agreed
3 to and taken by Producer X for the 2019 grazing season, the record presented
4 indicates that Producer X has not been a model of collaboration. Petitioners assert
5 that WDFW’s July 31, 2019 lethal removal authorization was, in part, arbitrary and
6 capricious because it acquiesced in Producer X’s requests for lethal removal rather
7 than holding Producer X to the fire in engaging in collaborative non-lethal deterrence
8 attempts, most significantly using WDFW contracted range riders.

9 52. The record indicates that Producer X is outspoken about his concerns regarding
10 wolf-livestock interaction and how it impacts his business and that he is unhappy about
11 the presence of wolves on grazing allotments his ranch has used for years, including
12 in the years prior to the reintroduction of wolves in Washington. WDFW has admitted
13 that Producer X’s statements are “problematic.” PSE 58-161 – PSE 58 – 162. Despite
14 this concern, the record shows that Producer X has reported suspected wolf
15 depredations, has moved cattle to believed to be safer areas within grazing allotments,
16 has patrolled the allotments and has allowed WDFW staff and others to patrol the
17 allotments and examine cattle subjected to wolf depredation.

18 53. Between the adoption of the 2011 Plan and the Preliminary Injunction hearing
19 on April 16, 2019, WDFW conducted nine lethal removal actions against wolves, killing
20 30 wolves which either eliminated or virtually eliminated four wolf packs. Of the 30
21 wolves killed, 26 of them (roughly 87%) were killed as a result of wolf-livestock conflicts
22 involving Producer X’s cattle. A WDFW’s biologists concluded, in a published study,
23 that Producer X’s cattle were 14 times more likely to suffer wolf predations than the
24 cattle belonging to other producers in wolf country. AR 19-1156. Perhaps this high
25 percentage is because of the size of Producer X’s operation in comparison to others,
26 but no substantive evidence was presented to support such a claim. The only

1 information provided in the record about the size of Producer X's operation was in
2 WDFW Livestock-Wolf Mitigation Measures checklists where Producer X is referenced
3 as operating "one of the largest and diverse ranches [sic]" in the District where the
4 federal grazing allotments are located. AR 7-001, AR 7-013.

5 54. Each year, between June and October, Producer X releases more than 500
6 cow-calf pairs onto the federal grazing allotments within the Kettle River Range of the
7 Colville National Forest, where grazing is permitted by the United States Department
8 of Agriculture through the United States Forest Service "USFS". PSE 17-001.
9 Producer X is not the only producer using this area for livestock grazing. There are at
10 least three other producers grazing cattle on these allotments. AR 1 -010 – AR 1-012.

11 55. Producer X has not been as cooperative with WDFW as other producers, who
12 have voluntarily entered into Damage Prevention Cooperative Agreements for
13 Livestock that can provide compensation when cattle are injured and/or killed by wolf
14 depredation, and who have consistently used WDFW and NEWCC contracted range
15 riders. AR 1-011. Of concern, and noted in the record is Producer X's lack of
16 cooperation with WDFW in using recommended available WDFW contracted range
17 riders after the first depredation of the 2019 grazing season on July 6, 2019. AR 1 -
18 015. This is particularly troubling, if as is referenced in a District One Weekly
19 Conference Call record from July 29, 2019, that Producer X did not want to use WDFW
20 contracted range riders out of concern that these ranger riders would report allotment
21 violations to USFS representatives. AR 5-002.

22 56. As noted, in paragraph 53, 26 of the 30 wolves killed since 2012 and prior to
23 the July 31, 2019 lethal removal authorization were as a result of depredations
24 involving Producer X's cattle. Conflicts with Producer X's cattle have led WDFW to kill
25 wolves from the Wedge, Profanity Pack, Sherman, Smackout, and OPT Packs, which
26 ranged in distinct territories. The Agency Record does not specifically make note of

1 this common thread history in development of the lethal removal authorization of July
2 31, 2019. However, the rationale for and efficacy of these prior lethal removal actions
3 are not before the Court in this case. Moreover, WDFW asserts that it looks to the
4 unique situations presented under the direction of the Plan and the Protocol regardless
5 of which producer is facing depredations resulting in the loss of livestock or livestock
6 injury.

7 57. While the Agency Record references other producer's non-lethal deterrent
8 measures, it does not indicate that WDFW took the success of those measures into
9 consideration when determining whether genuine non-lethal deterrent measures had
10 been tried and failed on Producer X's grazing allotments prior to the July 31, 2019
11 lethal removal authorization. Nothing in the record specifically addresses that WDFW
12 considered why cattle belonging to other producers on the USFS grazing allotments
13 were not subjected to depredations as were those belonging to Producer X.

14 58. WDFW removed wolves from the territory occupied by the OPT pack in the three
15 years prior to the July 31, 2019 lethal removal authorization, only to have predations
16 continue each year as wolf packs reformed or reconstituted. Some WDFW staff
17 questioned why the agency would continue to use lethal control if it was not working.
18 AR 4-002. However, the staff consensus recommendation to Director Susewind on
19 July 29, 2019 and July 30, 2019 was that lethal removal authorization was necessary
20 in light of the unique situation presented with 27 OPT depredations since September
21 5, 2018, including 7 since one wolf was removed on July 13, 2019 because
22 depredations would likely continue in the near future even with current and non-lethal
23 tools being used. AR 1 – 004, AR1 - 013. While the decisional documents supporting
24 the lethal removal authorization did not address why or how lethal removal would
25 achieve the Protocol's goal of reducing the potential for recurrent livestock predations
26 when similar removal actions in the same territory had failed to achieve that goal, the

1 record indicates that the frequency of depredations in July of 2019 was reaching an
2 emergent level that needed to be curtailed.

3 59. WDFW could have been harder on Producer X in pushing for WDFW contracted
4 range riders with authority to move Producer X cattle as deemed necessary and could
5 have held off on pursuing lethal removal authorization until Producer X agreed to have
6 WDFW contracted range riders patrol. However, based on the situation at hand in
7 late July, 2019 as addressed by WDFW Division One staff most familiar with OPT pack
8 depredations, depredations would have likely continued in the near future.

9 60. WDFW could have been stricter and precise in confirming that Producer X was
10 in compliance with all non-lethal deterrence measures agreed to over time and
11 checked off in Livestock-Wolf Mitigation Measures checklists, particularly for the 2019
12 grazing season, However, WDFW noted that Producer X completed necessary
13 checklists and remained in contact with Producer X during grazing seasons to
14 document compliance, including during the 2019 season, in an attempt to collaborate
15 to prevent depredations.

16 61. WDFW could have carefully examined the differences in the way other
17 producers successfully prevented depredations with non-lethal deterrents in their
18 USFS allotments as compared to Producer X and worked with Producer X to achieve
19 similar success. It is unfortunate that this information was not documented, if it was
20 considered and also unfortunate and concerning if was not considered before the lethal
21 authorization of July 31, 2019. However, the OPT depredation situation in late July,
22 2019 was dire.

23 62. Producer X has a right to speak out about his thoughts on wolf-livestock
24 interactions and the impact wolves and compliance with WDFW protocols have on his
25 operation and Producer X is not obligated to agree to participate in the voluntary
26 Damage Prevention Cooperative Agreements for Livestock program. WDFW was

1 aware of Producer X’s published statements presented in the record and despite these
2 expressed strong feelings, WDFW continued to work with Producer X in an attempt to
3 maintain a balance between Producer X’s losses as a result of wolf-livestock
4 interaction and its obligations to protect wolves under the 2011 Wolf Plan.

5 **CONCLUSIONS OF LAW**

6 **A. Jurisdiction, Venue, and Standing⁵**

7 1. This Court has jurisdiction to decide this matter pursuant to RCW Chapters 7.24
8 (declaratory relief) and 7.40 (injunctive relief), RCW 34.05.570 (APA), and RCW
9 43.21C.075 (SEPA).

10 2. Because two of the Petitioners are residents of King County, venue is proper in
11 this Court pursuant to RCW 4.92.010 and RCW 34.05.514(1)(b).

12 3. Petitioners have standing under the APA if they have been “aggrieved or
13 adversely affected by the agency action.” RCW 34.05.530. Petitioners meet this
14 standard if (1) the agency action has prejudiced, or is likely to prejudice them; (2) their
15 interests are “among those that the agency was required to consider” when engaging
16 in the challenged action; and (3) a judgment in their favor would substantially eliminate
17 or redress the prejudice caused by the agency action.

18 4. Petitioners have demonstrated standing for their APA claims because the lethal
19 removal authorization reportedly prejudiced or would prejudice their interest in
20 observing wolves and signs of wolves in the Colville National Forest and their interest
21 in protecting endangered wolves throughout Washington. WDFW was required to
22 protect those interests because it holds wildlife in trust and manages it for the benefit
23 of all Washingtonians. *State v. Longshore*, 97 Wn. App. 144, 150, 982 P.2d 1191
24 (1999). Declaratory and injunctive relief in Petitioners’ favor, if provided would
25

26 _____
⁵ Respondents did not contest venue, jurisdiction or standing.

1 substantially redress this prejudice by helping to ensure that WDFW adheres to its
2 obligations under the APA when issuing future lethal removal orders.

3 5. There is a two-part test to determine if Petitioners have standing to bring a
4 challenge for the failure to comply with SEPA: (1) the alleged endangered interest must
5 fall within the “zone of interests” protected by SEPA; and (2) they must allege injury in
6 fact. *Kucera v. DOT*, 140 Wn.2d 200, 212, 995 P.2d 63 (2000).

7 6. Damage to wildlife and its habitat is within the zone of interests protected by
8 SEPA. *Lands Council v. Washington State Parks Recreation Comm’n*, 176 Wn. App.
9 787, 799, 309 P.3d 734 (2013).

10 7. In environmental cases, the “injury in fact” requirement is satisfied by an
11 individual who has an “aesthetic or recreational interest in a particular place, or
12 animal...and that...interest is impaired by defendant’s conduct.” *Save Our Sonoran,*
13 *Inc. v. Flowers*, 408 F.3d 1113, 1119 (9th Cir. 2005).

14 8. Petitioners have met the necessary requirements to bring a SEPA challenge
15 because they allege that the killing of endangered wolves damages their aesthetic and
16 recreational interests in observing wolves and signs of wolves in Washington generally,
17 and specifically, in the Colville National Forest, which they have visited in the past and
18 plan to visit in the future.

19
20 **B. Mootness**

21 9. An issue is moot if the matter is “purely academic.” *City of Sequim v. Malkasian*,
22 157 Wn.2d 251, 258, 138 P.3d 943 (2006) (internal citation omitted). However, a case
23 is not moot if a court can still provide “effective relief.” *Id.* at 259. An action for injunctive
24 relief is not moot unless it is absolutely clear the allegedly wrongful behavior could not
25 reasonably be expected to recur. *State v. Ralph Williams’ North West Chrysler*
26 *Plymouth*, 82 Wn.2d 265, 272, 510 P.2d 233 (1973).

1 10. If any OPT Pack members remain on the former OPT Pack territory, this matter
2 is not moot and WDFW cannot say for sure whether a former OPT Pack wolf survives,
3 or whether that wolf might be part of the “Kettle Pack” that has taken over the former
4 OPT pack territory and nothing in the record confirmed that the July 31, 2019 lethal
5 authorization was withdrawn or rescinded. In light of the uncertainty of survival of an
6 OPT pack member and lack of evidence of rescission of the July 31, 2019 lethal
7 removal authorization, the case is not seen as moot.

8 11. Had Respondents demonstrated that WDFW had destroyed the entire OPT
9 pack as alleged, that still would not be sufficient to render the case moot, because the
10 Court could still provide effective relief requested by Petitioners in the form of an
11 injunction that could have directed WDFW to exercise its discretion in accordance with
12 the requirements of the APA, and prevented WDFW from continuing to kill wolves until
13 it performed the required SEPA review on its Protocol.

14 12. Finally, Petitioners’ SEPA claims are not moot because WDFW continues to
15 operate under the guidance of the 2017 Wolf-Livestock Interaction Protocol which has
16 not been subjected to SEPA review. There is no indication that WDFW intends to
17 subject this Protocol, or any successor protocol, to SEPA review absent a declaratory
18 judgment that such review is required, or an injunction requiring WDFW to perform
19 SEPA review before it uses the Protocol as guidance in determining whether lethal
20 removal is necessary in a future situation.

21 13. Even when a case is technically moot, a court may exercise its discretion to
22 render a decision in a moot case if it presents issues of “continuing and substantial
23 public interest.” *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004).
24 Three factors are key to determining whether this exception applies: “(1) whether the
25 issue is of a public or private nature; (2) whether an authoritative determination is
26 desirable to provide future guidance to public officers; and (3) whether the issue is

1 likely to recur.” *Id.* at 892 (quoting *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d
2 1067 (1994). Courts may also consider the “level of genuine adverseness and the
3 quality of advocacy of the issues,” as well as “the likelihood that the issue will escape
4 review because the facts of the controversy are short-lived.” *Id.* (quoting *Westerman*,
5 125 Wn.2d at 286).

6 14. The case satisfies all the elements of the public interest exception.
7 Wildlife management is a public issue, and, in particular, the management of wolves is
8 a matter of great public interest. An authoritative determination of the facts presented
9 in this case is desirable because similar situations and issues involving lethal removal
10 authorization are likely to recur. The quality and quantity of the briefing and oral
11 argument presented demonstrate excellence in advocacy on both sides and show
12 genuinely adverse positions. Finally, the short-lived nature of WDFW’s lethal removal
13 authorizations, which occur only during the grazing season, make it likely that the
14 issues presented will continue to escape review.

15 15. In considering whether to exercise its discretion to consider this case under the
16 public interest exception, the Court is mindful of the fact that a similar challenge to the
17 lethal removal order against the Sherman Pack was dismissed as moot in 2018.

18
19 **C. Arbitrary and Capricious Consideration**

20 16. WDFW has broad legal authority to manage wildlife in Washington State, which
21 includes the “killing, taking and use of [wildlife].” *Citizens for Responsible Wildlife*
22 *Mgmt. v. State*, 124 Wn. App. 566, 570, 103 P.3d 203 (2004).

23 17. By statute, WDFW’s Director may “authorize the removal or killing of wildlife that
24 is destroying or injuring property, or when it is necessary for wildlife management...”
25 RCW 77.12.240. Per the 2017 Wolf-Livestock Interaction Protocol, the decision to
26 implement lethal removal is made by the Director in accord with this statutory authority.

1 18. The challenged lethal removal authorization was heavily based on facts and
2 was squarely within WDFW's expertise in managing wildlife, and thus, is entitled to
3 deference. *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002).

4 19. In reviewing an agency action challenged under the APA, the role of the Court
5 is not to assess whether the Court agrees with the agency's decision, but rather to
6 determine whether an agency acted within its authority. *Rios v. Dep't of Labor & Indus.*,
7 145 Wn.2d 483, 501, 39 P.3d 961 (2002). This Court may review the lethal removal
8 authorization as an "other" agency action under the APA and invalidate it only if it is
9 arbitrary and capricious. RCW 34.05.570(4).

10 20. Agency action is arbitrary and capricious if it is "willful and unreasoning and
11 taken without regard to the attending facts or circumstances." *Wash. Indep. Tel. Ass'n*
12 *v. Wash. Utils. and Transp. Com'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). Where
13 there is room for different opinions, an action taken by an agency after due
14 consideration is not arbitrary and capricious, even if a court would have made a
15 different decision. *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961
16 (2002)

17 21. By statute, this Court must limit its function "to assuring that the agency has
18 exercised its discretion in accordance with law, and shall not itself undertake to
19 exercise the discretion that the legislature has placed in the agency." RCW 34.05.574.

20 22. Though substantive concerns were raised, Petitioners have not met their burden
21 to demonstrate that the challenged action of WDFW authorizing lethal removal of the
22 OPT pack through the decision of Director Susewind on July 31, 2019 was arbitrary
23 and capricious. The certified Agency Record shows that the challenged action was
24 taken after due consideration by WDFW staff and WDFW Director Susewind with
25 substantial input from WDFW staff, and thus, is not arbitrary and capricious.

1 23. WDFW's interpretation of its own documents, the 2011 Wolf Plan and the 2017
2 Protocol, including each documents' description of the number of non-lethal deterrence
3 measures expected to be implemented by livestock producers, was reasonable and is
4 entitled to deference.

5 24. The record before the Court shows that WDFW acted consistently with the goals
6 set forth in its 2011 Wolf Plan and the 2017 Wolf-Livestock Interaction Protocol, as
7 presented in the record and explained by WDFW in the record and in argument.

8 25. Petitioners did not demonstrate that WDFW failed to consider the use of range
9 riding as a responsive nonlethal deterrence measure or that WDFW failed to consider
10 the role played by Producer X prior to the July 31, 2019 lethal removal authorization.
11 Range riding and the actions and inactions of Producer X were considered. In the
12 WDFW process leading up to lethal removal authorization, WDFW staff discussed
13 past, irregular range riding and concerns about the failure to use available WDFW
14 contracted range riders, but the consensus was that additional range riding would not
15 deter future, imminent depredations by the OPT pack. The Agency Record also
16 showed that WDFW considered the use of nonlethal deterrents that Producer X and
17 other neighboring producers had used proactively and reactively to deter wolf
18 depredations prior to the July 31, 2019 lethal removal authorization. In addition, the
19 record shows that WDFW considered the overall history of wolf-livestock conflict in the
20 OPT territory, and explicitly acknowledged chronic conflict in the area. AR1-006, AR1-
21 013; see also AR19-1126—AR19-1173 (study by WDFW biologist); AR8-551
22 (chronology of wolf-livestock conflict); AR 8-562 – AR 8-762 (2016 Profanity Peak Wolf
23 Pack removal); and AR 17 (public updates).

24 26. The capacity of reasonable minds to differ regarding whether WDFW contracted
25 range riding might have been a responsive deterrent to be tried prior to lethal removal
26 authorization and whether WDFW should have pushed Producer X harder to

1 collaborate in non-lethal deterrence measures do not undermine WDFW's lethal
2 removal authorization of July 31, 2019. WDFW's determination is entitled to deference.

3
4 **D. SEPA Consideration**

5 27. SEPA does not allow independent review of an agency's failure to perform the
6 required environmental analysis of its policies but requires that Petitioners wait until
7 the policy is implemented through an agency action subject to challenge under the
8 APA. RCW 43.21C.075(6)(c). Statements of policy are not subject to independent
9 challenge under the APA. *Sudar v. Fish & Wildlife Comm'n*, 187 Wn. App. 22, 33-35,
10 347 P.3d 1090 (2015). Petitioners challenge to WDFW's failure to perform SEPA
11 analysis on its Protocol is timely.

12 28. SEPA "ensures state agencies..... consider environmental impacts and
13 alternatives before taking certain actions." *Cornelius v. Dept of Ecology*, 182 Wn.2d
14 574, 598, 344 P.3d 199 (2015).

15 29. For every SEPA-covered action not subject to a categorical exemption, an
16 agency must make a threshold determination of whether an action "is likely to have a
17 probable significant adverse environmental impact[.]" WAC 197-11-330(1)(b).
18 Agencies must prepare an environmental impact statement for covered actions "having
19 a probable significant, adverse environmental impact." RCW 43.21C.031(1).

20 30. The Court previously determined on January 10, 2020 that the lethal removal
21 authorization of July 31, 2019 and the specific actions taken in accordance with the
22 authorization are categorically exempt from SEPA analysis per WAC 197-11-
23 800(12)(c) and (d) as law enforcement actions and actions to abate a nuisance,
24 respectively, and under 197-11-880, which categorically exempts emergency actions.
25 The Final EIS for the 2011 Wolf Conservation and Management Plan, in addressing
26 wolf-livestock conflict, stated as its Final Preferred Alternative that lethal control by

1 state and federal agents of wolves involved in repeated livestock depredations would
2 be allowed consistent with state and federal law. PSE 1 – 024.

3 31. SEPA applies to both “project actions,” involving decisions on a specific project,
4 and “nonproject actions,” including the adoption of “any policy, plan, or program that
5 will govern the development of a series of connected actions.” WAC 197-11-704(2)(a),
6 (2)(b)(iii).

7 32. The SEPA rules do not define what constitutes a “policy” or a “program,” or how
8 to determine whether such a policy or program “governs” the development of other
9 actions, and the parties have not identified any case law that addresses the meaning
10 of these terms.

11 33. Nothing in the plain terms of the SEPA rules requires that a program or policy
12 be legally binding upon an agency in order to be covered by SEPA. Nor do WDFW’s
13 rules for SEPA compliance specify or imply that only legally binding policies are
14 covered.

15 34. The 2017 Wolf-Livestock Interaction Protocol is not a SEPA covered “nonproject
16 action” under WAC 197-11-704(1)(b), because it is not a policy that governs the
17 development of a series of connected actions.

18 35. The Protocol, though referenced as “policy” by WDFW in a Public Weekly Wolf
19 Pack Update of November 15, 2018 and referred to periodically with the Plan as
20 rationale for lethal removal actions, is not determinative. The Protocol provides
21 guidance to WDFW in considering lethal removal authorization when addressing wolf-
22 livestock interactions (depredations) in unique factual situations that arise. These
23 situations are considered case by case. Rather than governing the development of a
24 series of connected actions, the Protocol provides guidance as to what should be
25 considered before lethal removal authorization is ultimately determined under the sole
26 discretion of the WDFW Director. Lethal removal authorization is the Director’s call and

1 the Director’s decision is guided by, but not governed by, the Protocol. In the process
2 leading to the July 31, 2019 authorization at issue, WDFW recognized that the Protocol
3 did not provide guidance in the situation presented, “a situation where chronic
4 depredations and lethal removals have occurred in the same territory for multiple
5 years.” The Protocol, though heavily referenced did not govern the challenged
6 authorization.

7 36. The record before the Court does not establish that the 2017 Wolf-Livestock
8 Interaction Protocol establishes a program or policy to further, as Petitioners assert,
9 an unstated goal of killing wolves. Rather, the evidence presented indicates that
10 WDFW’s effort to restore the wolf population in Washington through the 2011 Wolf
11 Plan and the 2017 Wolf-Livestock Interaction Protocol uses lethal action as a last
12 resort, after careful case-by-case analysis, in an attempt to balance the interests of
13 those living in rural communities who depend on livestock to earn a living with the
14 important interest in wolf population restoration supported under the law and by all
15 who appreciate wolves and the many positive aspects of their impact on the
16 environment.

17 37. Relief available in a case brought under RCW 34.05.570(4) is limited to relief
18 identified in RCW 34.05.574(1):

19 The court may (a) affirm the agency action or (b) order an agency
20 to take action required by law, order an agency to exercise
21 discretion required by law, set aside agency action, enjoin or stay
22 the agency action, remand the matter for further proceedings, or
23 enter a declaratory judgment order. . . . In reviewing matters
24 within agency discretion, the court shall limit its function to
25 assuring that the agency has exercised its discretion in
26 accordance with law, and shall not itself undertake to exercise the
discretion that the legislature has placed in the agency.

Accordingly, the Court **DENIES** Petitioners’ request for declaratory and
injunctive relief by affirming the July 31, 2019 lethal removal authorization of Director

1 Susewind for the Washington Department of Fish and Wildlife. Included in the Court's
2 denial of the petition is denial of Petitioners' request that the Court find that WDFW
3 violated the State Environmental Policy Act in its development and use of the 2017
4 Wolf-Livestock Interaction Protocol.⁶

5
6
7 DATED this _____ day of _____, 2020.
8
9

10 _____
11 Judge John F. McHale
12 King County Superior Court
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22 _____
23 ⁶ While the Court did not determine that the decision to authorize lethal removal of the OPT pack was
24 arbitrary and capricious or that SEPA review was required in formulating the 2017 Wolf-Livestock
25 Interaction Protocol, the Court is cognizant of Petitioners' concerns and of the delicate role WDFW
26 plays in working with community members with strong feelings about the presence of wolves and
about wolf conservation. The Court's ruling is in accord with the applicable scope of review and with
applicable law. The ruling does not provide WDFW with carte blanche authority for lethal removal
actions, as WDFW's authority to use lethal removal must be carefully and transparently exercised. It
is the Court's hope that all impacted by wolf-livestock interactions will listen to each other and work
with open minds in addressing concerns about lethal removal of wolves. Perhaps through Governor
Inslee's request of Director Susewind in September of 2019, interested parties will come together to
develop a way for the Wolf Plan to work successfully for all.

King County Superior Court
Judicial Electronic Signature Page

Case Number: 19-2-20227-1
Case Title: HUSKINSON, ET ANO vs WASHINGTON DEPT OF FISH AND
WILDLIFE, ET ANO
Document Title: FINDINGS OF FACT AND CONCLUSIONS OF LAW

Signed by: John McHale
Date: 7/23/2020 2:13:43 PM



Judge/Commissioner: John McHale

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