July 30, 2004

Gale Norton
Secretary
Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Re: Petition for Rulemaking - Request for Clarification and Re-Consideration

Dear Secretary Norton:

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), and the Department of the Interior's regulations, 43 C.F.R. § 14.2, Defenders of Wildlife hereby requests clarification and re-consideration of your response dated March 31, 2004 ("Response") to our February 2, 2004 Petition for Rulemaking ("Petition"). As you will recall, our Petition sought the immediate issuance of interpretive regulations under the Airborne Hunting Act ("AHA" or "Act"), 16 U.S.C. § 742j-1, which would make clear that the State of Alaska is in violation of the AHA as it has reinstated the aerial hunting of wolves. Your Department, through the Acting Assistant Secretary for Fish, Wildlife and Parks, determined that such interpretive regulations were "not warranted" and "would be inconsistent with the intent of the Act." We believe that your determination failed to address several core issues in our Petition and therefore was incorrect. For these reasons, we request that you clarify your response and re-consider your determination.

National Headquarters
1130 17th Street, NW
Washington, DC 20036
Telephone 202-682-9400

Findings of the Board of Game
2003-145-BOG

Authorization of Airborne or Same Day Airborne Shooting
in Unit 19D East Predation Control Program
December 15, 2003

Purpose

The purpose of this action of the Board of Game is to reconfirm and clarify previous actions of the Board authorizing a predator control program that involves airborne or same day airborne shooting in Unit 19D East in accordance with AS 16.05.783.

Identified big game prey population and wolf predation control area

The Board of Game identified moose in Game Management Unit 19D East as important for providing high levels of harvest for human consumptive use in accordance with AS 16.05.255(e)-(g). The initial Intensive Management Objectives for moose, set by the Board in 1999 in accordance with 5 AAC 92.106 and 5 AAC 92.108, were 300-400 and 6000-8000 for the harvest and population objectives, respectively. These objectives were reduced to 130-150 and 3000-3500 in 2001 at the recommendation of the Adaptive Wildlife Management Team as part of a compromise to reach consensus on a predator management program for this area. The Board established a Wolf Predation Control Implementation Plan for Unit 19D East in accordance with 5 AAC 92.110 and 5 AAC 92.125.

Failure to meet moose harvest objective

The current level of moose harvest in Unit 19D East is not meeting the Intensive Management Harvest Objective of 130-150. This conclusion is based on assessment of harvest data from the most recent hunting season, fall 2003 (regulatory year 2003-04), for registration permit hunt RM650. These data indicate a harvest of 75. Two hundred and fifty-six permits were issued; 189 individuals hunted; 53 did not hunt; and there are 14 delinquent reports as of December 12, 2003. Based on past experience with registration permit reports, it is likely that most of the delinquent reports were not used.

The Department is confident that most of the harvest was reported under the current registration permit system. McGrath, where most of the households in Unit 19D East are located, likely reported at least 95% of its actual harvest. The surrounding communities of Takotna, Nikolai, Medfra, and Telida may have a lower reporting of actual harvest, but it is doubtful the net effect on total harvest exceeded 5-10% of the reported value. Illegal take tends to be accidental and incidental, and was documented in the research on moose in the 528 square mile Experimental Micro-Management Area surrounding McGrath. However, this area contains the highest density of moose and human activity in Unit 19D East, and it is not characteristic of the remaining 7,985 square miles in the unit. Illegal harvest outside of the EMMA is subjectively estimated to be less than 5% of the actual harvest.

Even when applying the most liberal expansion factor (unreported harvest, illegal take) to the reported harvest, all available information indicates that the number of moose being taken is well below the harvest objective.

Status of moose population

Analysis of the November 2003 moose population estimation survey is in progress as of December 15, 2003 and the results are not yet available. A fall 2001 survey conducted in a 5,204 square mile portion of Unit 19D East yielded estimates that were extrapolated to the remaining 3,309 square miles of the unit to arrive at a total estimate of about 2,800 moose (range 2,200-3,300). The lower and upper values in the range have equal probabilities of being correct. The actual number of moose may or may not fall within the population objective of 3,000-3,500.

The 2001 estimated density of moose in the 5,204 square mile survey area was 0.43 moose per square mile. This is considered a relatively low population level, well below 1.0 moose per square mile which is the upper limit of the "Low Density Dynamic Equilibrium" phenomenon common throughout much of interior Alaska. As is characteristic of this phenomenon, it appears that predation, not lack of forage, is preventing the moose population in 19D East from increasing to a higher level.

Intensive field studies during the past 4 years indicate that a population of 3,000-3,500 moose in Unit 19D East is insufficient to meet the intensive management harvest objective of 130-150. Although a population of this size can, in theory, support this level of harvest, much of this moose population is not accessible to hunters largely confined to river corridors.

Predation an important cause for failure to achieve harvest objective

Intensive field studies initiated in 2000 and continuing to the present demonstrate that predation by wolves, black bears, and grizzly bears is an important cause for the failure to achieve the moose harvest objective of 130-150. The results of these studies were presented to the Board of Game at the March 2003 and November 2003 meetings in Anchorage, Alaska.

Reduction of predation provides reasonable expectation of achieving harvest objective

Analyses of biological data collected in Unit 19D East studies indicate there is a reasonable expectation of achieving the harvest objective of 130-150 if predation is reduced. Removal of bears in late May and early June 2003 substantially improved survival of calf moose through November as reflected in fall 2003 sex and age composition surveys indicating calf-to-cow ratios of 53:100 in the bear removal area compared to 25-30:100 in other areas of Unit 19D East. This means that about 79 more calf moose survived through November in the EMMA compared to the 2 years previous to bear removal. Removal of wolves can reasonably be expected to further increase the survival of calf moose, as well as older moose. Removal of both predators in concert can reasonably be expected to accelerate accomplishment of management objectives.

The Board establishes the following:

1) Removal of wolves will be confined to a portion of Unit 19D East designated by the Department, and total take of wolves in the designated area will not exceed the limits set forth in 5 AAC 92.125(1)(B)(i);

2) Methods and means to take wolves will be designated by the Department in accordance with 5 AAC 92.039;
3) Permits shall be issued to members of the public qualified to operate within the constraints of the program, and able to accomplish the objectives of the program, as designated by the Department.

Vote:_____
December 15, 2003
Fairbanks, Alaska (teleconference)

_____
Mike Fleagle, Chair
Alaska Board of Game

Findings of the Alaska Board of Game
2003-144-BOG

Authorizing Wolf Control in Portions of Unit 13
December 15, 2003

Background
Unit 13 long has been an important hunting area for resident subsistence users as well as for the bulk of the state's population in Anchorage, the Matanuska-Susitna valley, and Fairbanks. It is recognized under the state's intensive management law as an area where moose and caribou are to be managed for high levels of human consumptive use.

For the past decade, the Board of Game has heard persistent concern from local residents, hunters and wildlife managers about a continuous and steep decline in the moose population across most of Unit 13.

The Board has concurrently heard the equally persistent concern that predation is causing the moose decline. Researchers and public testimony identify the primary causes of poor calf survival and dwindling population:

- Year-round predation by wolves, and
- Late spring/early summer brown bear predation on calves.

Under the Wolf Conservation and Management Policy adopted by the Board in 1991, and revised in 1993, "in areas managed for high consumptive use where predation is keeping prey at low levels, ADF&G may implement wolf population regulation or reduction to allow prey species to increase to population management objectives." Under this policy, the Board will consider wolf control when:

- Wolf predation is a factor in an unacceptable decline in prey population size or productivity, or
- Wolf predation is a factor preventing attainment of approved population or human use objectives.

Both situations clearly apply to Unit 13.

In an effort to initiate predation control activity, the Board established in 1999 a wolf predation control area covering much of Unit 13 under 5 AAC 92.125(5). While this wolf predation control area has been in place since 1999, the state has taken no action. The Board hereby incorporates 5 AAC 92.125(5) by reference, and reaffirms its ongoing validity, with updates noted herein, based on the most current information from the department.

Under AS 16.05.783, the Board of Game may authorize a predator control program involving airborne or same day airborne shooting as part of a game management program if the Board determines, based on information provided by the department, certain steps are met:

- Objectives set by the Board for the big game prey population and human harvest have not been achieved,
- Predation is an important cause for failure to achieve the set objectives, and
- Reducing predation can reasonably be expected to help achieve those objectives.

Board Objectives for the Big Game Prey Population Have Not Been Achieved
For the purposes of implementing AS 16.05.255(e) – (g), the Board of Game identified the moose populations in Units 13A, 13B, and 13E as important for providing high levels of harvest for human consumptive use and has established the following population and harvest objectives (5AAC 92.108):

- Unit 13A, 3,500 – 4,200 moose with harvest objective of 210 – 420.
- Unit 13B, 5,300 – 6,300 moose with harvest objective of 310 – 620.
- Unit 13E, 5,000 – 6,000 moose with harvest objective of 300 – 600.

Additionally, the Board adopted a Wolf Predation Control Implementation Plan for Unit 13 (5 AAC 92.125(1)) with program objectives designed to stop the decline of the moose population within the wolf predation control area and maintain the following moose population composition and density objectives during fall surveys:

- Unit 13A, 1.0 cows per square mile and 25 calves per 100 cows.
- Unit 13B, 1.2 cows per square mile and 30 calves per 100 cows.
- Unit 13E, 0.9 cows per square mile and 30 calves per 100 cows.

The fall 2003 moose population, composition and density estimates are:

- Unit 13A, 2,200 moose with 1.0 cows per square mile and 19 calves per 100 cows.
- Unit 13B, 4,200 moose with 0.9 cows per square mile and 17 calves per 100 cows.
- Unit 13E, 4,100 moose with 0.6 cows per square mile and 15 calves per 100 cows.

The moose population in each unit is below intensive management population objectives and below the population composition and density objectives contained in the Wolf Predation Control Implementation Plan.

The human harvest for the past 5 years has averaged:

- Unit 13A, 169 moose.
- Unit 13B, 223 moose.
- Unit 13E, 154 moose.

Based on information provided by the department, the Board determines that the intensive management moose population and human harvest objectives as well as the

Wolf Predation Control Implementation Plan, moose population objectives are not being met in Units 13A, 13B, and 13E.

Predation is an Important Cause for Failure to Achieve Objectives Set by the Board

Through a series of incremental steps over time, the Board has moved to reduce wolf and bear numbers in Unit 13 in order to meet the objectives set by the Board under the state's intensive management law. Longer seasons, more liberal bag limits and additional methods and means are now in place. These actions have not stemmed the moose decline, nor have they provided the hoped-for predator reduction.

Concurrent with its efforts to ease predation, the Board reduced human harvests of moose by shortening resident hunting seasons, eliminating nonresident hunters, and adopting more selective antler restrictions. Fewer people are hunting and human harvest is declining.

The moose population in Units 13A, 13B, and 13E has declined 52% between 1988 – 2002 and it continues to decline. Pregnancy rates for adult cow moose haven't declined and productivity has remained constant. Calves are being born but are not surviving.

Moose and caribou make up the bulk of a wolf's diet in Unit 13. It is estimated one wolf kills 12 moose or 36 caribou, or some combination thereof, each year to support itself. Wolves take moose of all ages and both sexes, mostly during early winter through late spring.

The Board has already established wolf hunting and trapping seasons that are as long as reasonably practical. Any further liberalization would have little impact on overall wolf numbers. Few additional wolves would be taken due to poor access and poor pelt quality.

Wolf harvests are at record levels, averaging 211 over the past 3 years. Nevertheless, due to high productivity, the spring 2003 wolf population estimate was 253. Even with another high harvest, the wolf population will probably remain well above the Board-established spring objective of 135-165.

Several studies have shown that brown bears take more than half of the moose calves born each spring. The predation rate remains high until calves are about six weeks old. After that, brown bears can and do kill moose of all ages and both sexes, but the rate at which they do so is greatly diminished.

In actions similar to liberalizing wolf seasons, the Board has gone as far as possible to reduce the number of brown bears given current hunting regulations, including establishing a year-round season for most of Unit 13. A series of record brown bear harvests averaging 141 bears per season over the past 6 years resulted. Although recent high harvest rates exceed estimates of sustainable levels, the Board has no evidence the bear population is being – or even will be – reduced. Based on information provided by

the department, the Board determines that predation is an important cause for failure to achieve the set objectives.

Reducing Predation Can Reasonably Be Expected to Help Achieve Objectives Set by the Board

Despite Board actions via standard hunting and trapping regulations to liberalize wolf and bear hunting, those predator populations remain high. Meanwhile, the moose population remains below objective levels despite Board actions that have curtailed human harvest.

It is clear, based on information provided by the department, that removing predators will help the moose population to recover so that human harvest objectives can be achieved.

While it is Board policy to manage wolf populations and predation through routine hunting and trapping, predation control programs using methods not generally approved for hunting and trapping may be implemented. One such method is the use of aircraft. Given the experience over the past decade, it is clear to the Board that the moose population cannot be restored, and wolf numbers cannot be reduced enough, to meet management objectives without the use of aircraft to control wolves.

It should be emphasized that under the Board's wolf management policy, such control programs "are not expected to be permanent, on-going activities" and control of wolves must be done in such a way as to "assure continued viability of wolves in the ecosystem." The use of aircraft will not jeopardize the long-term viability of wolves in Unit 13 or the state as a whole, where the wolf population is estimated at 7,700 to 11,200.

Once the objectives of the wolf predation control program are achieved, the program should cease. However, any future increase in wolf population with a commensurate decrease in moose population should trigger another predator control activity.

The Board of Game hereby authorizes a Predator Control Program using aircraft for the Wolf Predation Control Implementation Plan for Unit 13 in accordance with 5 AAC 92.125(5).

Vote:_____
December 15, 2003
Anchorage, Alaska

_____
Mike Fleagle, Chair
Alaska Board of Game

The Response Did Not Address "Sport Hunting"

The aerial wolf killing programs in Alaska conducted this past winter and spring, and scheduled to begin again in the fall and continue annually for the next several years, violate the AHA and its implementing regulations. These regulations, specifically 50 C.F.R. § 19.31, regarding permit notifications from the states, conclude with this prohibition: "States may not issue permits for the purpose of sport hunting." As our Petition clearly stated, increasing game populations throughout the state was the primary reason for the enactment of the bill which re-instituted public aerial wolf killing. Alaska SB 155 (Exhibit 11 from Petition). The reason for such increase is to provide more opportunities for hunters to kill game populations for "human consumptive use," Findings of the Board of Game, Nos. 2003-144-BOG, 2003-145-BOG (Exhibit A-1, A-2), which can include sport as well as subsistence purposes, as evidenced in part by the thousands of urban sport hunters from both major Alaska cities who hunt for game in these areas. The aerial wolf killing programs therefore include sport as well as subsistence purposes, and any such non-subsistence killing violates the AHA.

It should be noted that the AHA was enacted to stop so-called "sport hunting." When the AHA was enacted, the killing of wolves in Alaska was primarily conducted by hunters seeking a state bounty on wolves, based on the mistaken belief that such predators were depleting game populations of moose and caribou. A House Report in 1971 described this practice as "abominable" and noted that the bill was intended to put an end to the practice. H.R. Rep. No. 1632, 91st Cong., 2d Sess. 3 (1971) (Exhibit B). The current programs, based on a management policy that seeks to improve game populations for hunters by killing predators, fall within the same barbaric practice sought to be outlawed by the original law. Indeed, the Alaska Department of Fish and Game still pays hunters and

trappers a $45 “research fee” for wolf carcasses, essentially amounting to a sport bounty on wolves.

The Fish and Wildlife Service’s Regional Director stated these concerns in a letter to the Alaska Department of Fish and Game as early as 1992. He stated that:

> The Airborne Hunting Act...offers very limited conditions under which wildlife may be hunted or harassed with aircraft....States may not issue permits for the purpose of sport hunting. (emphasis in original)

Letter to Dick Burley from Walter Steiglitz (Oct. 30, 1992) (Exhibit 12 from Petition). Because the current programs include sport hunting purposes and therefore violate the AHA, we request that you respond to this claim from our Petition.

The Response Failed to Address All Areas and Programs

Our Petition addressed the aerial killing occurring in several areas in the state, as well as programs currently under consideration, yet your Response did not address these areas and programs. Instead, the Response relied on the aerial killing occurring in GMU 19D East, the guidelines for which state that the killing is for “people who depend heavily on moose for food,” i.e. for subsistence purposes. Guidelines for a Unit 19D East Predation Control Program, March 12, 2003 (Exhibit C). The Response failed to address the aerial killing which has occurred and will begin in many other areas, in which the purpose is primarily for sport hunting. For instance, in GMU 13A, B & E, areas which are frequented by thousands of urban sport hunters, at least 120 wolves have been killed. The Board recently added two additional aerial and same-day airborne wolf killing programs encompassing tens of thousands of square miles in interior Alaska in GMU 16B and 19A (Exhibits D, E). Wolf killing in these areas is expected to begin in late fall or early winter

of this year and continue for at least four to five years. The killing in all of these areas is in part for sport hunting purposes and therefore violates the prohibition on sport hunting discussed above.

The Response Improperly Relied on Alaska's Assertion of Legitimacy

Your Response appears to rely on the State of Alaska's assertion that its aerial killing programs are being done to "administer or protect" wildlife, an exception found within the AHA. (16 U.S.C. § 742j-1(b)(1)). Yet it is unclear what documentation your Department relied upon in making this determination, as all scientific evidence points to the illegitimacy of these programs.

As our Petition previously noted, prey population objectives for the areas were scientifically unsound and unrealistic, and there is no sound evidence that wolf predation is an important cause of any past failure to meet the prey objectives (Petition, p.8). Instead, the unrealistic quotas and the inability of the areas to support such a population are the likely causes. Such reckless "management" policies can hardly be a sound basis on which to "administer or protect" wildlife under the purpose of the AHA.

With regard to GMU 19D East, in 1995, the Board of Game established moose population objectives of 6,300, despite the fact that there were less than 2,100 moose in the area, with an annual harvest of about 80 moose (Exhibit 6 from Petition). It was understood at that time that the only way to meet the significantly higher objectives was to implement a wolf control program. In 2000, the Commissioner himself made a statement that the Board's population and harvest objectives were "not realistic" (Exhibit 7 from Petition). At the request of an Adaptive Wildlife Management Team, the Board lowered

the population objectives to between 3,000 and 3,500 moose, and a November 2001 survey found that the objectives had been met (Exhibit 8 from Petition).

Despite the survey data indicating that the population objectives were met, in 2003, the Board adopted findings and made a determination that "human consumptive use is the preferred use of moose in Unit 19D...and that predation control in the McGrath area is necessary to restore the abundance of the moose population to provide for human harvest" (Exhibit 9 from Petition). At their March, 2004 meeting, the Board of Game reset the moose population objective for Unit 19D East at 6,000 - 8,000 moose, which flies in the face of what the area is clearly capable of sustaining (Exhibit F). The Board also set unrealistic harvest objectives of 400-600 moose to justify the wolf killings (Id.). Applying aerial predator control to meet harvest objectives is clearly gross mismanagement of wildlife resources, given that such objectives can be vastly influenced by largely immeasurable factors such as unreported harvest, accessibility, weather, expertise of hunters and location of moose.

In addition to having set unrealistic prey and harvest population objectives for the area, there is no sound evidence that wolf predation is an important cause of any past failure to meet the prey objectives. Instead, the former unrealistic quota and the inability of the area to support such a population are the likely causes. The State's own former regulations acknowledge that "wolf predation may not be a significant factor initiating declines in prey abundance or productivity" 5 AAC 92.125(b)(3) (Exhibit 10 from Petition). Indeed, the Dept. of Fish and Game's former Record of Decision concedes that "short-term weather-induced nutritional stress...is the dominant factor affecting productivity" (Petition, p. 11). The most recent survey indicates 3,600 moose in the area (Exhibit G), which renders the population objectives of 6,000 - 8,000 moose absurd.

In GMU 13A, B and E, and in which at least 120 wolves have been killed to date, similar unscientific motivations have driven the program. On December 15, 2003, the Board of Game approved Findings #2003-144-BOG authorizing wolf control in these areas (Exhibit H). The Board determined that moose population objectives are not being met in GMUs 13A, 13B and 13E, and under A.S. § 16.05.783 authorized a predator control program involving airborne or same-day airborne shooting as part of a game management program (Id.), though the vast majority of population estimates in these areas is based solely on anecdotal information. Thirty-four permits were issued under this program in late January; the killing began on or about January 20, immediately after issuance of the permits (Exhibit I).

Public testimony identified the primary causes of poor calf survival and dwindling population as year-round predation by wolves and late spring/early summer brown bear predation on calves, though these causes are not supported by any scientific research (Exhibit J). Few actual moose or wolf surveys have been conducted in this area, so biologists have little knowledge about the true populations of animals in the area. Most information is based upon extrapolations of data from a small sample area, or from anecdotal information provided by hunters and trappers. Further, this area is accessible by less than three hours by road from Anchorage, and similarly from Fairbanks. Thousands of urban sport hunters from both major Alaska cities hunt for moose and caribou using four-wheelers in this area.

The aerial wolf killing programs in GMU 19D East, 13A, B and E thus are clearly not based on sound wildlife management. While the AHA indicates an intent to except state wildlife management activities from its restrictions, the limiting factors are the soundness and legitimacy of such programs. Indeed, Representative Pelly noted in 1970

that the bill "does not prohibit the use of airplanes when necessary for *legitimate wildlife conservation activities*...." 117 Cong. Rec. 40204 (1970) (emphasis added) (Exhibit K). Yet your Response does not indicate the basis upon which you determined that Alaska's programs fall within the "administer or protect" clause of the Act.

As a part of our request for clarification, therefore, we request copies of any evidence upon which your Department relied in making its determination that Alaska was in compliance with the Act. Such evidence may include, but is not limited to, documentation of oral and written communications regarding the legitimacy of Alaska's programs and its compliance with the AHA. A Freedom of Information Act request for this information is being sent under separate cover.

The Department is Failing to Implement and Enforce the AHA

As Secretary of the Interior, you are responsible for implementation and enforcement of the Airborne Hunting Act. Your duties under the Act include, but are not limited to, issuance of administrative regulations, monitoring reporting requirements and other administrative duties. 16 U.S.C. § 742j-1. Regarding enforcement, section 742j-1(d) of the Act begins by stating that "[t]he Secretary of the Interior *shall* enforce the provisions of this section...." (emphasis added). This non-discretionary duty applies to the aerial wolf killing programs which occurred in Alaska this past winter and spring, and which are scheduled to begin again in fall or early winter and continue for several years. As noted throughout this Request for Clarification and Re-consideration, we believe that the Act is being violated by the State of Alaska and its permittees, and we therefore demand that you issue interpretive regulations and enforce its provisions.

Thank you for your consideration of this matter. We look forward to your prompt reply.

Sincerely,

/s/ *Rodger O. Schlickeisen*
Rodger O. Schlickeisen
President

/s/ *William J. Snape, III*
William J. Snape, III
Vice-President for Law and Litigation