Public Consultation for the inclusion of all Spanish populations of Iberian wolf (canis lupus signatus) in the List of Royal Decree 139/2011.

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ClientEarth Written Allegations

This report contains ClientEarth's allegations for the public consultation initiated on May 19, 2021 by the Ministry of Ecological Transition and Demographic Challenge on the Draft Order amending the Annex to Royal Decree 139/2011, of February 4, for the inclusion of the Iberian wolf in the List of Wild Species under Special Protection Regime and the Spanish Catalogue of Threatened Species, regulated in Title III of Law 42/2007.

ClientEarth already submitted its allegations to the previous public consultation on this draft Ministerial Order on February 25, 2021, and we hereby refer to them in full.

# 1. Allegations regarding the content of the preamble or explanatory memorandum

The first Chapter of Title III of Law 42/2007 establishes the possibility of granting special protection regimes to certain species, subspecies and populations of wild flora and fauna. Article 56 of the Law creates the List of Wild Species under Special Protection Regime (hereinafter "List"), and Article 58 establishes the Spanish Catalog of Threatened Species (hereinafter "Catalog"). Until now, only the populations of Canis lupus south of the river Duero were included in the List, according to the modification made through Order TEC/596/2019, of April 8. According to the explanatory memorandum, this modification adapted the protection regime for this species to Annexes II and IV of the Habitats Directive, as well as Annex V of Law 42/2007.

At the request of the Association for the Conservation and Study of the Iberian Wolf (ASCEL), and following the procedure established in Article 6 of Royal Decree 139/2011, of February 4, a mandatory consultation of the Scientific Committee was carried out for the inclusion of all Spanish wolf populations in the Catalog, in the category of "Vulnerable" or, subsidiarily, in the List. According to the Explanatory Memorandum, the opinion of the Committee advised against the inclusion in the Catalog, as the information available on the historical distribution area of this species was not conclusive, and therefore the Guiding Criteria published in 2017 for the inclusion in the Catalog were not applicable. However, the Scientific Committee did recommend its inclusion in the List, considering that the available information highlights its importance as a cultural and scientific heritage, as well as the keystone role this species plays in ecosystems.

The Memorandum states that "The order is also in accordance with the principle of proportionality, as it contains the minimum regulation necessary to meet the need to cover the adoption of conservation measures for species that require it". However, it must be remembered that the order must be in accordance, in the first place, with the principle of legality, which would require that it contains the appropriate regulation to ensure the adoption of all conservation measures necessary to guarantee the favourable conservation status of all Iberian wolf populations in Spain. It should be taken into account that article 3 of Law 42/2007 (basic state legislation) defines the favourable conservation status of a species in its paragraph 16, which should be related to paragraphs 5, 6 and 8. However, as we will explain in the following paragraphs, it cannot be stated that this draft order contains the appropriate regulation to ensure such favourable conservation status as defined by the legislation, and we cannot agree with the statement included in the explanatory memorandum that this regulation "is consistent with the rest of the national and international legal system".

# 2. Allegations referring to the sole article: Modification of the Annex to Royal Decree 139/2011, of February 4, for the development of the List of Wild Species under Special Protection Regime and the Spanish Catalogue of Threatened Species.

The modification of this annex implies the inclusion of all Spanish populations of wolf (Canis lupus) in the annex of Royal Decree 139/2011, which develops the List of Wild Species under Special Protection Regime. This will entail the obligation to periodically evaluate its conservation status, as well as a series of generic prohibitions, such as hunting [articles 56.3 and 57 Law 42/2007].

ClientEarth agrees with this modification of the annex, and we support the inclusion of all Spanish wolf populations in the List, as well as the adoption and application of all necessary measures to guarantee their favourable conservation status.

In addition, we reiterate the indications and requests contained in our allegations to the previous consultation. According to the Scientific Committee, the results of wolf captures in the mid-19th and 20th centuries seem to indicate an important reduction of the distribution area that could fulfill sub-criterion B.3 for its classification as "Vulnerable" if scientifically verifiable information were found, and it is probable that there is a genetic flow between individuals located to the south and north of the Duero River.

Therefore, given the possibility that the criteria for the cataloguing as Vulnerable are already fulfilled, as indicated by the Scientific Committee, and based on the precautionary principle of Article 191 TFEU, we request that, besides including all the Spanish wolf populations in the List, the Ministry compiles the technical and scientific information necessary to initiate the process of Cataloguing it as Vulnerable, and if necessary, that the Ministry commission research on the aspects indicated by the Scientific Committee.

The precautionary principle enables administrative bodies to make decisions when scientific research on an environmental hazard is uncertain and important interests are at stake. The principle calls for governance to be applied in a cautious manner until the relevant scientific research has been carried out to clarify the uncertainty. The application of the principle also involves protecting the object in question from degradation while research is underway.

# 3. Allegations related to the sole additional provision. Compatibility of existing measures

According to this additional provision, the measures adopted by the competent bodies of the Autonomous Communities, in accordance with Article 61.1.b) and c) of Law 42/2007, may continue to be applied, provided that they are compatible with the actions foreseen in the aforementioned Article 61 and in the Strategy for the conservation and management of the wolf (Canis lupus) in Spain.

Article 57 of Law 42/2007 establishes prohibition of killing, damaging or disturbing, capturing, pursuing or disturbing, as well as the traffic and trade, of all species included in the List. However, the single additional provision of the draft order would allow the anticipated and general application of two of the exceptions in Article 61 to these prohibitions:

"(b) To prevent significant damage to crops, livestock, forests, fisheries and water quality. (...) also (...) in case of significant damage to other forms of property.

c) For imperative reasons of overriding public interest, including those of a socio-economic nature and beneficial consequences of primary importance for the environment (...)".

It must be taken into account that article 61 establishes specific exceptions to the generic prohibition of killing, hunting or disturbing these species, which must be applied in a restrictive manner. It is not possible to apply the exceptions of article 61 as a general and permanent exception since they must be analysed on a case by case basis. In other words, Article 61, by authorizing exceptions to the general regime of protected species, aims at a concrete and punctual application to respond to precise requirements and specific situations, rather than a broad and generalized practice that departs from the general principle of protection (see, by analogy, the judgments of the CJEU in C-247/85 and C-118/94).

As an exception to the general principles of wildlife protection, Article 61 must be interpreted strictly, and the burden of proof that the requirements for each exception are met rests with the authority adopting the decision. Decisions must be precisely and adequately motivated, and exceptions may only be applied if there is no other satisfactory solution, without prejudice to the maintenance in a favourable conservation status, complying with a series of requirements and controls (art. 61). That "no other satisfactory solution exists" means that an exception may only be authorized when no other solution can be adopted that does not imply non-observance of these prohibitions.

In any case, the wording of this single additional provision is not clear. The indication that these two exceptions to Article 61 may be applied "provided that they are compatible with the actions provided for in the said Article 61" is confusing and redundant, especially since Article 61 does not provide for "actions" but for exceptions to a general prohibition, under a series of strict conditions.

This general regime of protection of listed species and exceptions is regulated in our legislation through Law 42/2007 on Natural Heritage and Biodiversity, with the character of basic legislation that must be respected by the Autonomous Communities, which are competent to authorize exceptions, as established in article 61 of said Law. Therefore, the objective of this additional provision is not understood, since by accrediting strict compliance with all its requirements, the exceptions of article 61 could be applied by the Autonomous Communities, although this single additional provision does not say so.

And in any case, due to its content and regulation, this single additional provision violates Article 61 of Law 42/2007 and the conditions and requirements for its application.

It should be recalled that, similarly, the Court of Justice of the European Union has already ruled on the application of the exceptions of Article 16 of the Habitats Directive and "management hunting" in relation to the prohibition of killing or capturing wolves.

As stated in case C-674/17, derogations from Article 16 must be interpreted restrictively so they cannot be applied across the board; they must be ad hoc exceptions and not common practice; and it also places the burden on the competent authority to prove that each and every condition for each given derogation is met. The derogation has to be strictly supervised, has to be selective (specific animals identified as problem animals) and limited.

The most important requirement is that the favourable conservation status of the wolf is a necessary precondition for derogations under Article 16 to be granted. Paragraph 66 of Case C-674/17 states that "... in accordance with the precautionary principle enshrined in Article 191(2) TFEU, if, after examination of the best available scientific data, uncertainty remains as to whether or not a derogation will prejudice the maintenance or restoration of populations of a threatened species in a favourable conservation status, the Member State must refrain from granting or applying such a derogation." In the absence of an updated census that includes all Iberian populations, it cannot be said that this requirement has been met.

# 4. Allegations to the first final provision. Strategy for the conservation and management of the wolf (Canis lupus) in Spain and effectiveness of the modification of the List of Wild Species under Special Protection Regime.

In the explanatory memorandum and first additional provision of the draft Order it is established that the Autonomous Communities together with the Ministry for Ecological Transition and Demographic Challenge are preparing a Strategy for the conservation and management of the wolf (Canis lupus) in Spain, as a conservation instrument foreseen in article 60 of Law 42/2007, of December 13.

However, we consider it necessary that the draft order establishes a deadline for the elaboration and approval of this strategy. As we requested in the previous consultation, and reiterate in this one, it is necessary that a state conservation plan for all Spanish populations of the species be approved as soon as possible.

In any case, the Strategy to be approved should ensure the adoption of all conservation measures necessary to guarantee the favourable conservation status of all Iberian wolf populations in Spain (article 3 of Law 42/2007, paragraphs 16, 5, 6 and 8). Therefore, the Strategy should be binding with regard to the measures necessary to guarantee the favourable conservation status.

The Strategy should also guarantee an effective coordination of the necessary conservation measures to ensure that the Iberian wolf is maintained in the long term as a viable component of its natural habitats, that its natural range is not reduced in the foreseeable future, and that there will continue to be a sufficiently large habitat to maintain its populations in the long term.

It should be taken into account that the List includes species for which the administrations must make a special effort to monitor and periodically evaluate their conservation status (article 56.3 Law 42/2007). Also, Article 11 of the Habitats Directive establishes the binding obligation to carry out periodic monitoring of the conservation status of the species. This census should take into account the fluctuating populations and the natural distribution of the wolf throughout the peninsula. Carrying out individual actions by Autonomous Communities does not respond to the ecological requirements of a species with such a wide range as the wolf; the census should be coordinated and homogeneous to avoid double or triple counting of the animal in each Autonomous Community where it performs biological functions. The census should take into account the best scientific techniques available, such as radio-tagging or genetic analysis of individuals for better categorization.

This Strategy should establish a coordinated framework between the conservation status of the wolf and the necessary measures to ensure that this is favourable. The Strategy should also contain the necessary measures to guarantee the ecological viability of the Iberian wolf and the preservation of the genetic heritage in the long term. This includes measures to minimize conflict with livestock, such as ensuring sufficiently stable populations of wild ungulates. It also involves analysing the degree of problems posed by their hybridization with abandoned and feral dogs; measures to combat the 'impassable borders' of this species; measures to ensure that legal hunting complies with legislation; measures to reduce illegal hunting, especially at the hands of groups of armed individuals, traps and poisons that cause the death of other elements of Spanish biodiversity; measures to reduce incidental kills especially on roads, based on wildlife crossings or other similar infrastructures; measures to ensure that the tourism that is being generated around this animal is sustainable; and measures to ensure a homogeneous management of the wolf not only within the peninsula but also aimed at transboundary effects [[1]](#footnote-1).

This provision also establishes that the incorporation of the whole wolf population to the List foreseen in the order will take effect from the publication of the summary of the approval of the Strategy in the "Official Gazette of the State" and, in any case, on September 25, 2021. We understand that if the criteria for the inclusion of the whole wolf population in the List are fulfilled, this inclusion should take effect from the publication of the present order in the Official State Gazette, and that its postponement to another date would not be justified.

For the foregoing reasons,

We request

1. That this Ministerial Order be processed and approved, modifying the annex of Royal Decree 139/2011 to include all Spanish populations of the wolf (Canis lupus) in the List of Wildlife Species under Special Protection Regime.

2º. Given the possibility that the criteria for the cataloguing as "Vulnerable" are already fulfilled, as indicated by the Scientific Committee, and based on the precautionary principle of article 191 TFUE, we additionally request that the Ministry compiles the technical and scientific information necessary to initiate the process of Cataloguing as Vulnerable, and if necessary, that the necessary studies and investigations on these aspects indicated by the Scientific Committee are commissioned by the Ministry.

3º. That a state conservation plan/strategy be approved as soon as possible that includes all the necessary measures to guarantee the favorable conservation status of the Spanish populations of the species, and that in any case this order establishes a date for its approval.

4º. That the single additional provision "Compatibility of existing measures" in its current wording be deleted from the order, as it is not in accordance with national and EU law.

5º. That the inclusion of the whole Spanish wolf population in the List will take effect from the publication of the present order in the Official Gazette of the State.

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1. Following the LCIE (Large Carnivore Initative for Europe) Guidelines for Population Level Management Plans for Large Carnivores (2008), available at: <https://ec.europa.eu/environment/nature/conservation/species/carnivores/pdf/guidelines_for_population_level_management.pdf> . [↑](#footnote-ref-1)