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Killing Wolves to Save Them? Legal Responses to 'Tolerance Hunting' in the European Union and United States

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Wolves are protected by law in both the United States (US) and European Union (EU). These laws restrict the harming or killing of individual members of protected species, but allow it in selective circumstances, such as when killing some individuals would benefit the species. In both unions, some states have argued that allowing the public hunting of wolves would in fact benefit the species by improving social tolerance for wolves, a claim that is currently the subject of controversy among scientists. In the absence of clear evidence that hunting is favourable for wolf populations, US courts have repeatedly struck down policies that allowed it. While hunting wolves to achieve their social acceptability is likely to also violate EU law, the EU court has not yet resolved the question and hunting for social acceptance continues in some Member States, such as Sweden and Finland. This article contrasts these legal responses to social 'tolerance hunting' and argues that the Habitats Directive should not be interpreted to allow tolerance hunting of strictly protected species. It then uses the contrasting legal situations to engage with the claim that the EU has become more 'precautionary' than the US on environmental matters.

INTRODUCTION

The legal protections for wolves that have been enacted in United States (US) and European Union (EU) have successfully led to an increase in wolf populations in both unions.¹ This success has proved tenuous, as these recovering wolf populations have been met with hostility from some members of the human population, leading to political conflicts and, too often, the illegal killing of wolves.² Several American states and EU Member States have sought to allow the public to participate in legal hunting seasons of wolves with the stated goal of improving public tolerance for wolves.³ This would in turn, these states argued, increase wolves' 'cultural carrying capacity', that is, the number of individual members of a species that can survive in a given habitat in light of both biological and human factors.⁴ States used this argument that allowing the killing of wolves would be positive for their conservation to further argue that hunting was permissible under restrictive conservation laws.

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¹ A. Trouwborst, 'Global Large Carnivore Conservation and International Law', 24:7 *Biodiversity and Conservation* (2015), 1567; Y. Epstein, 'Population-Based Species Management across Legal Boundaries: The Bern Convention, Habitats Directive, and the Gray Wolf in Scandinavia', 25:4 *Georgetown International Environmental Law Review* (2012), 549; M. Williams, 'Lessons from the Wolf Wars: Recovery v. Delisting Under the Endangered Species Act', 27:2 *Fordham Environmental Law Review* (2015), 106, at 133-136.

² See, e.g., G. Chapron and A. Treves, 'Blood Does Not Buy Goodwill: Allowing Culling Increases Poaching of a Large Carnivore', 283:1830 *Proceedings of the Royal Society B* (2016). 20152939 (noting that several quantitative studies showed that poaching had a large negative impact on several carnivore populations); O. Liberg *et al.*, 'Shoot, Shovel and Shut Up: Cryptic Poaching Slows Restoration of a Large Carnivore in Europe', 279:1730 *Proceedings of the Royal Society B* (2012), 910.

³ E.g., Finnish Ministry of Agriculture and Forestry, *Management Plan for the Wolf Population in Finland* (Förvaltningsplanen för vargstammen) (2015), at 14 (in Swedish, stating that the ban on hunting had led to public approval for illegal killing, and that the purpose of allowing legal hunting was to respond to negative views of wolves and thus reduce illegal killing); see also *Sierra Club v. Clark*, 577 F. Supp. 783, at 790 (discussed below).

⁴ L.H. Carpenter, D. J. Decker, and J.F. Lipscomb, 'Stakeholder Acceptance Capacity in Wildlife Management', 5:3 *Human Dimensions of Wildlife* (2000), at 8.

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However, whether allowing the public to hunt protected or vulnerable species in fact increases public tolerance for the presence of a species has been the subject of considerable scientific disagreement. A review of prior studies published in 2009 found a lack of evidence supporting that conclusion.⁵ More recent publications showed that attitudes towards wolves did not become more positive after legal hunting seasons in Wisconsin,⁶ and suggested that culling by wildlife officials intended to reduce poaching may in fact have the opposite effect.⁷ Other reviews and studies have reached the opposite conclusion, arguing that allowing hunting improves attitudes towards conservation and thus benefits conservation goals.⁸ This article does not take a position on whether or not allowing legal hunting does in fact improve public tolerance and thus result in positive conservation impacts, but takes as a given that there is currently a lack of scientific evidence supporting the proposition. It examines judicial responses to this scientific uncertainty under two legal frameworks, the Endangered Species Act (ESA)⁹ in the US and the Habitats Directive in the EU.¹⁰

Specifically, it contrasts legal responses to what I will refer to as the 'tolerance hunting' of wolves in Wisconsin and Minnesota in the Midwestern US with those in Sweden and Finland in the northern EU. Tolerance hunting is hunting premised on the hypothesis that the negative attitudes towards wolves that lead to illegal killing will be ameliorated to the point of tolerating or even accepting a greater wolf presence if individuals are allowed to legally kill wolves. American courts have repeatedly held that tolerance hunting, and other killing of animals to improve their public relations, is an inappropriate means for improving the status of protected species. In contrast to the US, where questions of federal law are primarily decided by federal courts, cases concerning questions of EU law are most frequently decided by Member State courts.¹¹ While only the Court of Justice creates binding interpretations of EU law, the question has not yet reached that court. Tolerance hunting has been permitted in recent years in both Sweden and Finland. Appeals of these decisions in the national courts were ultimately unsuccessful.¹² The EU system has thus so far been less precautionary in that it has not prevented tolerance hunting despite lack of evidence of its efficacy.

This article analyses whether tolerance hunting is tolerable under EU law. American courts have ruled that tolerance hunting is impermissible under the ESA, and their solution is now part of settled case law. This article explains the American result, and comments on the extent to which that answer should be considered relevant in the EU context. It then argues that tolerance should not be an acceptable justification for allowing hunting in the EU either. Finally, it draws some conclusions about the nature of precaution in both systems.

⁵ A. Treves, 'Hunting for Large Carnivore Conservation', 46:6 *Journal of Applied Ecology* (2009), 1350.

⁶ C. Browne-Nuñez *et al.*, 'Tolerance of Wolves in Wisconsin: A Mixed-Methods Examination of Policy Effects on Attitudes and Behavioral Inclinations', 189 *Biological Conservation* (2015), 59.

⁷ See G. Chapron and A. Treves, n. 2 above.

⁸ A.J. Loveridge, J.C. Reynolds and E.J. Milner-Gulland, 'Does Sport Hunting Benefit Conservation', in: D. Macdonald and K. Service, *Key Topics in Conservation Biology* (Wiley-Blackwell, 2006), 222, 229.

⁹ 16 USC § 1531 ('ESA').

¹⁰ Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, [1992] OJ L206/7 ('Habitats Directive').

¹¹ Despite the fact that only the Court of Justice of the European Union formally interprets EU law, only a small percentage of cases involving EU law reach that court – about 700 in 2015, of which about 400 were requests for a preliminary ruling. CJEU, *Annual Report 2015: Judicial Activity* (2016), found at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-04/en_ap_jur15_provisoire2.pdf>, at 11.

¹² See, e.g., Ruling of the Supreme Administrative Court of 30 December 2016, cases 2406-2408-16 & 2628-2630-16 (Sweden), in which it accepted that hunting could be used to increase social tolerance of wolves; Ruling of the Supreme Administrative Court of 19 December 2016, docket number 4234/1/15 (Finland) not to review a lower court decision allowing a hunting season predicated on increasing social tolerance.

MATERIAL AND METHODS

The materials used in this analysis are the various sources of law on species protection. Some sources of law are binding, while others are merely advisory. In the EU, legislation is binding as are decisions of the Court of Justice. Principles of EU law are also legally binding; however, they generally constitute a tool for interpretation rather than an independent cause of action.¹³ Particularly relevant for this article are the proportionality and precautionary principles. Measures taken to implement the Habitats Directive must be proportionate to their goal, and exceptions to these measures must also be proportionate to the goal of the exemption.¹⁴ The precautionary principle, always especially relevant to environmental legislation, is explicitly referenced in the definition of conservation status, which requires taking into account factors that may affect protected species, and generally uses language indicating precaution is required in the face of uncertainty.¹⁵ Guidance documents and other materials from the European Commission constitute non-binding sources of law.¹⁶ The Court of Justice is free to disregard the Commission's interpretations of EU law, but most often sides with them in court.¹⁷ In the US, the Endangered Species Act is binding, as are federal regulations implementing it. Judicial decisions are legally binding, but only create binding precedent in some situations. Decisions of federal appeals courts are binding on lower courts in the same circuit, and may be persuasive in other circuits. Decisions of federal district courts may also be persuasive, but are not binding precedent.¹⁸ While there are many principles that may be relevant to a particular case, the US has not formally adopted the precautionary principle.¹⁹ Precautionary thinking is nevertheless pervasive throughout American regulatory law, particularly environmental law, and adjudication.²⁰ The ESA, like the Habitats Directive, uses precautionary language in several of its provisions.²¹

Comparative, EU and environmental law methodologies are used in my analysis. While the US and EU are very different in terms of their landscapes, populations and cultures, wolf recovery has taken a similar arc in both unions, from near extirpation in many areas in the mid-20th century to a controversial and tenuous recovery by the beginning of the 21st.²² By focusing on how courts have treated similar cases concerning a particular protected element of the environment, I am able to test broader assumptions about the functioning of the legal systems,

¹³ E. Fisher, B. Lange and E. Scotford, *Environmental Law: Text, Cases and Materials* (Oxford University Press, 2013), at 417.

¹⁴ European Commission, Guidance Document on the Strict Protection of Animal Species of Community Interest under the Habitats Directive 92/43/EEC (2007), at 19 and 62.

¹⁵ See, e.g., Habitats Directive, n. 10 above, Articles 1(i) and 6.3; ECJ, Case C-127/02, *Waddenzee*, [2004] ECR I-7448, at paragraph 58; see discussion in N. De Sadeleer, 'The Precautionary Principle in EC Health and Environmental Law', 12:2 *European Law Journal* (2006), 139, at 145-146.

¹⁶ P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials*, 5th edn (Oxford University Press, 2011), at 107.

¹⁷ A. Hofmann, *Strategies of the Repeat Player: The European Commission between Courtroom and Legislature* (Köln University, 2013).

¹⁸ *Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1570 (Fed. Cir. 1993).

¹⁹ D. Vogel, *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States* (Princeton University Press, 2012), at 253.

²⁰ *Ibid.*; S.G. Wood, S.Q. Wood and R.A. Wood, 'Whither the Precautionary Principle? An American Assessment from an Administrative Law Perspective', 54 *American Journal of Comparative Law* (2006), 581, at 585-586.

²¹ See J.B. Ruhl, 'The Battle over Endangered Species Act Methodology', 34:2 *Environmental Law* (2004), 555 at 592ff. (arguing that despite precautionary language, a precautionary methodology has not been generally implemented).

²² L. Boitani, 'Wolf Conservation and Recovery', in: L. David Mech and L. Boitani (eds.), *Wolves: Behavior, Ecology and Conservation* (University of Chicago Press, 2003), 317, at 319-321.

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utilizing what I call environmental functionalism. Environmental functionalism has its point of departure in functionalism, comparing rules that have the equivalent function in different legal systems, here the protection of species.²³ It asks how the law functions to protect a component of the environment across legal systems. Further, I draw on the environmental law methodology of Swedish legal scientist Staffan Westerlund, as applied to comparative law by Jonas Ebbesson.²⁴ In his article, Ebbesson used the migratory path of the honey buzzard as a device for comparing the laws and legal systems that impact the species during its lifecycle. This strategy allowed him to evaluate the relevant laws from the point of view of the protected object as well as draw conclusions about multiple systems of law in place for the protection of the species. I too have chosen to use a single species – the gray wolf – to illustrate and make arguments about the legal systems in place to protect it. Unlike the honey buzzards of Ebbesson's study, these wolves are of course not members of a single migrating population. It is nevertheless useful to contrast how decisions regarding their conservation have been made under laws in two federal systems²⁵ and whether solutions on one continent are appropriate on the other. By examining the cases surrounding the tolerance hunting of wolves, I am able to explicate features of the two systems relevant to wolf hunting decisions and provide insight into the construction of precaution. Here, precaution is not a fixed legal principle but rather an outcome of multiple, interdependent legal provisions, decisions, and omissions – what might be called 'precautionality'.

PRECAUTION AND PRECAUTIONALITY

To draw conclusions about whether the US or EU is more precautionary, one must first define the term. Precaution has been criticized as an unstable concept that can be used to justify any result. As Cass Sunstein argued, any decision involves a risk to something; for example, a decision to ban a chemical may decrease risk to birds but increase risk to business interests.²⁶ The precautionary principle has many formulations, but generally states that lack of scientific certainty should not be used to justify not taking action to protect human health or the environment.²⁷ Using this definition, one could argue that the precautionary policy would be to allow tolerance hunting, which is hypothesized to be beneficial for conservation of species, despite scientific uncertainty. However, precautionary hunting in the present circumstances would mean not only taking action to kill members of protected species despite lack of scientific certainty that doing so would benefit the species, but in reckless disregard of evidence to the contrary. I therefore define a system as more precautionary with respect to biodiversity if it prevents damage to individual members of protected species, in absence of significant evidence that such damage would be beneficial to the species.

That is to say, this article is not about the precautionary principle, per se, though it is important in interpreting EU law. EU environmental policy is required to be based on the precautionary

²³ R. Michaels, 'The Functional Method of Comparative Law', in: M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), 363.

²⁴ J. Ebbesson, 'Lex Pernis Apivorus: An Experiment of Environmental Law Methodology', 15:2 *Journal of Environmental Law* (2005), 153.

²⁵ The EU has been called 'a federation in all but name'. J. Wouters, H. Cuyckens and T. Ramopoulos, 'The European Union: A Federation in All but Name', in: D. Halberstam and M. Reimann (eds.), *Federalism and Legal Unification* (Springer, 2014), 191. While it may be debated to what extent the EU is truly a federation, it operates as one when regulating; see R.D. Kelemen, *The Rules of Federalism: Institutions and Regulatory Politics in the EU and Beyond* (Harvard University Press, 2004), at 1-2.

²⁶ C.R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, 2005).

²⁷ E. Fisher, 'Is the Precautionary Principle Justiciable?', 13:3 *Journal of Environmental Law* (2001), 315, at 316.

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principle²⁸ and the Court of Justice frequently makes reference to it in interpreting EU environmental law, and the Habitats Directive in particular.²⁹ It therefore is one of the factors contributing to the EU's precautionality, the sum of the techniques and procedures contributing to a precautionary result. While these techniques and procedures emanate from multiple sources, my focus in this article is those within the laws and legal systems of the US and EU.³⁰

The contrasting roles of precaution in the US and EU have been the subject of scholarly analysis. David Vogel argued that the two federal systems have 'traded places' in terms of their willingness to take precautionary measures to protect the environment. In the 1970s and 1980s, according to Vogel, the United States enacted and enforced stronger regulatory environmental protections. After 1990, policies shifted and the EU began taking a more precautionary approach to risk regulation.³¹ Challenging this view that Europe has become more precautionary than the US, Jonathan Wiener *et al.* argued that the 'reality of precaution' was that neither the US nor the EU could be said to be more precautionary.³² Specifically comparing the Endangered Species Act and the Habitats Directive, author Kathryn Saterson supported that conclusion. Evaluation of how precautionary a regulation is, according to Saterson, is based on weighing the extent to which they are 'early, anticipatory, and stringent'.³³ Consideration and weighing of these factors could lead to different conclusions, she claims, about which is more precautionary.³⁴ The example of tolerance hunting is one for which, despite the putative trend towards increased EU precaution explored by Vogel, the EU has not yet become more precautionary than the United States. This precaution is not built on regulatory grounds, however.

Both the ESA and the Habitats Directive are precautionary laws, intended to prevent the loss of species and their habitats. But the construction of precaution is carried out by many actors, including regulators but also adjudicators, administrators, scientists and the public. Mapping these techniques and functions of precaution contributes to an explanation of divergent precautionary outcomes in different jurisdictions. Much has been made of the fact that the precautionary principle has been endorsed in the EU and not in the US. The precautionary principle is a concept that most clearly governs the regulator, rather than the courts.³⁵ However, courts also play an important role in contributing to how precautionary a system is. As argued by Noga Morag-Levine, legal institutions are very important drivers of precaution.³⁶ She argues that although the American regulatory system has been frequently influenced by the European system over the centuries, the common law remains inherently less precautionary than the civil law. Judge-made law responds to harm that has already occurred, whereas codified laws are written prior to damage occurring. Courts can also be more or less precautionary in the evidence

²⁸ Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C326/47 ('TFEU'), Article 191.2.

²⁹ ECJ, n. 15 above, at paragraph 44; A. Trouwborst, 'Conserving European Biodiversity in a Changing Climate: The Bern Convention, the European Union Birds and Habitats Directives and the Adaptation of Nature to Climate Change', 20:1 *Review of European Community and International Environmental Law* (2011), 62, at 76.

³⁰ For a perspective on wolf protection as a technology of government, see H. Stokland, 'How Many Wolves Does it Take to Protect the Population? Minimum Viable Population Size as a Technology of Government in Endangered Species Management (Norway, 1970s-2000s)', 22:2 *Environment and History* (2016), 191.

³¹ See D. Vogel, n. 19 above.

³² J.B. Wiener *et al.* (eds.), *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe* (Earthscan, 2011).

³³ K.A. Saterson, 'Biodiversity Conservation', in: J.B. Wiener *et al.*, *ibid.*, 211.

³⁴ *Ibid.*

³⁵ E. Fisher, *Risk Regulation and Administrative Constitutionalism*, 2nd edn (Hart Publishing, 2010), at 14.

³⁶ N. Morag-Levine, 'The History of Precaution', 62:4 *American Journal of Comparative Law* (2014), 1095, at 1122-1130.

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they require. When it comes to tolerance hunting however, the American judicial system has led to the more precautionary result, not because of differences in how judges view precaution but because of procedural differences in when claims can be brought to courts in the first place.

TOLERANCE HUNTING IN THE COURTS

The ESA and Habitats Directive both prohibit the killing of individual members of certain species in order to promote the conservation and flourishing of the species.³⁷ They also include provisions allowing the killing of protected species in certain circumstances.³⁸ The rules vary depending on whether the protected animal is considered endangered, threatened or experimental according to the ESA in the US, or in need of strict protection or subject to management measures according to the Habitats Directive in the EU.³⁹ The decision to kill or otherwise take animals is usually made by a federal authority in the US, although decision making can be delegated to the states in the case of threatened species, and states and other actors may apply to the federal authority for permission to kill animals or have them killed.⁴⁰ In contrast, such decisions are made by the Member States in the EU, or delegated by the Member States to regional decision makers, although Member States may be forced to change their policies or pay fines if their decisions do not comply with EU law.⁴¹

THE ENDANGERED SPECIES ACT

Under US law, a distinction is made between killing or harming of individual members of a protected species in the course of an otherwise lawful activity, such as construction, and the direct and intentional killing or harming of members of those species.⁴² In contrast to the Habitats Directive, the ESA allows more flexibility to make exceptions to protection in the former situation through what is called an incidental take permit.⁴³ Permits to directly and intentionally kill or otherwise take an individual or individuals of a protected species, however, may be granted under the ESA only in furtherance of conservation interests: 'for scientific purposes or to enhance the propagation or survival of the affected species.'⁴⁴ Administrative regulations implementing the ESA define 'enhance the propagation or survival' to include but not be limited to:

³⁷ ESA, n. 9 above, Sections 2(b) & s 9(a)(B); Habitats Directive, n. 10 above, Articles 2 and 12; M.P. Nelson and J.A. Vucetich, 'Triumph, Not Triage' 32:5 *Environmental Forum* (2015), 32, at 32.

³⁸ ESA, n. 9 above, Section 10; Habitats Directive, n. 10 above, Article 16; J. Verschuuren, 'Effectiveness of Nature Protection Legislation in the European Union and the United States: The Habitats Directive and the Endangered Species Act', in: M. Dieterich and J. van der Straaten (eds.), *Cultural Landscapes and Land Use: The Nature Conservation-Society interface* (Kluwer Academic Publishers 2004), 39, at 46 and 61-62.

³⁹ S. Perry, 'The Gray Wolf Delisting Rider and State Management under the Endangered Species Act', 39:2 *Ecology Law Quarterly* (2012), 439, at 443-444; Y. Epstein, 'The Habitats Directive and Bern Convention: Synergy and Dysfunction in Public International and EU Law', 26:2 *Georgetown International Environmental Law Review* (2014), 139, at 149-150.

⁴⁰ See, e.g., *Humane Society v. Kempthorne*, 481 F.Supp.2d 53, 58 (D.D.C. 2006), discussed below.

⁴¹ D. Hadroušek, 'Speeding Up Infringement Procedures: Recent Developments Designed to Make Infringement Procedures More Effective', 9:3-4 *Journal of European Environmental and Planning Law* (2012), 235.

⁴² ESA, n. 9 above, Section 10(a)(1).

⁴³ H. Schoukens, 'Habitat Restoration on Private Lands in the United States and the EU: Moving from Contestation to Collaboration?', 11:1 *Utrecht Law Review* (2015), 33, at 37.

⁴⁴ ESA, n. 9 above, Section 10(1)(A). While lethal control of endangered species is extremely limited, an exception is made for experimental populations. Experimental populations are those that have been reintroduced into an area, such as wolves in Yellowstone National Park, Idaho, and Montana. While recreational hunting of these animals was never allowed, wolves that caused problems such as attacking livestock or domestic animals could be killed or otherwise removed.

Provision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible⁴⁵

By definition, activities are only considered to 'enhance the propagation or survival' of a species if they are shown not to be detrimental to wild or captive populations of that species.⁴⁶ Culling is explicitly allowed when considered beneficial to species. For instance, it is uncontroversial that sick animals may be killed to prevent infection of a group. Wildlife officials have sometimes sought to use the 'propagation or survival' exception to allow public hunting or culling for the purposes of improving public tolerance for species. As indicated above, using lethal management to improve social acceptance for a species has been rejected by the courts.

In the 1984 case *Sierra Club v. Clark*, the court emphatically rejected the use of a public sport hunting season of wolves in Minnesota, where they were listed as threatened.⁴⁷ The ESA's prohibition on taking applies only to endangered species, but is extended by regulation to threatened species, except where there is a special regulation pertaining to an individual species.⁴⁸ In this case, the federal Fish and Wildlife Service (FWS) had issued special regulation authorizing a trapping season for gray wolves at the request of the Minnesota Department of Natural Resources (DNR). The regulation allowed up to 50 wolves to be trapped and killed through a licensed public trapping season, out of an estimated 1,000-1,200 in the state.⁴⁹ The pelts of wolves lawfully taken could be lawfully sold.⁵⁰ The justification for allowing hunting was the reduction of wolf poaching, estimated to cause the deaths of 250 wolves per year.⁵¹ The FWS and Department of Interior argued that allowing hunting would increase the political tolerance for wolves.⁵²

In granting a summary judgement for the Sierra Club, the court argued that although the federal authority has greater flexibility to allow the taking of threatened species than endangered species,⁵³ lethal taking must nevertheless be consistent with the ESA's goal, which is the conservation of endangered and threatened species.⁵⁴ The definition of conservation further clarifies the limitations on taking.⁵⁵ This definition states that conservation measures may 'in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved' include regulated taking.⁵⁶ The court found that this language ruled out the

⁴⁵ 50 CFR 17.3.

⁴⁶ *Ibid.*

⁴⁷ *Sierra Club v. Clark*, 577 F.Supp. 783 (1984).

⁴⁸ 50 CFR 17.31.

⁴⁹ *Sierra Club v. Clark*, n. 47 above, at 786.

⁵⁰ *Ibid.*, at 790.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ For example, killing of threatened wolves may be allowed if they 'have committed a significant depredation' of livestock. *Ibid.*, at 785, citing *Fund for Animals v. Andrus*, Civil No. 5-78-66 (D.Minn.1978).

⁵⁴ ESA, n. 9 above, Sections 2(b) and 4(d).

⁵⁵ *Ibid.*, Section 3(1)(3).

⁵⁶ *Sierra Club v. Clark*, n. 47 above, at 789.

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killing of threatened species for the purposes of reducing conflicts with humans, and sport hunting in particular.⁵⁷

As to the argument that allowing hunting would reduce poaching, the court argued that:

[w]hile these illegal killings must be stopped, this can hardly be accomplished by allowing a sport season and creating a market in wolf pelts. An attempt to “manage” the wolf in this manner is to treat the wolf as a furbearer, and not as a threatened species whose value is determined by its rightful place in nature. While some may place value on the wolf because of its fur or simply as a game animal, the Endangered Species Act has given the wolf a status much more important – it is a protected animal that all persons must seek to conserve. If this is not done, the result is obvious. There will simply no longer be a wolf-human conflict, for there will be no more wolves.⁵⁸

The court gave several reasons for categorically rejecting the concept of tolerance hunting. One was that the enforcement of the law prohibiting the killing of wolves should not depend on a *quid pro quo* allowing legal hunting – and further, the government had not made a serious effort to prevent poaching through prosecutions or other means.⁵⁹ Tolerance hunting was also not found to be consistent with the conservation purpose of the ESA, which, the court argued, sought an intrinsic rather than financial value for protected species.⁶⁰ But underlying these arguments was the court's assumption that allowing legal hunting would not lead to greater tolerance for wolves. In fact, the court assumed the contrary, arguing that the state's plan to increase wolves' economic value would reduce respect for their intrinsic value. In the absence of evidence that wolf populations would increase if legal hunting were allowed, the court took a precautionary approach and rejected the hypothesis.

On appeal to the 8th Circuit, the appeals court criticized the district court's ‘colorful language’, but upheld its holding that allowing the sport hunting of gray wolves exceeded the FWS' authority.⁶¹ It agreed with the district court that the ESA's conservation goals, and definition of conservation as allowing taking only in extraordinary cases where population pressures could not otherwise be relieved, meant that killing a member of a threatened species required showing that ‘population pressures within the animal's ecosystem cannot be otherwise relieved’.⁶² Additionally, all killing of members of protected species, whether endangered or threatened, must be for the purpose of conserving the species. The court declined to take a position on the factual question of whether treating the wolf as ‘furbearer’ would be negative or positive for their conservation, instead rejecting the hunt on statutory interpretation grounds.⁶³

Since the protections for endangered species are stricter than those for threatened species, tolerance hunting of endangered species is clearly forbidden after *Sierra Club v. Clark*. The FWS continued to argue, however, for the permissibility of tolerance culling – killing of members of protected species by government officials or their agents (rather than members of the public) in order to increase the cultural carrying capacity for a species. This was the subject

⁵⁷ *Ibid.*, at 790.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, at 789.

⁶¹ *Sierra Club v. Clark*, 755 F.2d 608, 618 & 620 (1985).

⁶² *Ibid.*, at 613.

⁶³ *Ibid.*, at 618.

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of the 2006 case *Humane Society v. Kempthorne* (*Kempthorne*).⁶⁴ *Kempthorne* concerned a permit, granted to the state of Wisconsin by the FWS, to kill 43 wolves despite their endangered status.⁶⁵ The purpose of this taking was depredation control, which, Wisconsin argued, would 'enhance the propagation or survival' of wolves by 'fostering greater social tolerance for wolves'.⁶⁶ This argument failed under the plain meaning of the 'propagation or survival' clause, which, the court argued, was 'antithetical to the killing of 43 members of an endangered species barring some direct and immediate danger' to other members of the species.⁶⁷ The court additionally expressed incredulity with the logic of 'kill[ing] wolves to save wolves'⁶⁸ and held that to kill wolves in order to prevent poaching was to 'cater to criminal behavior and cotton to social intolerance as a strategy for endangered species recovery' – i.e., not permitted under the Endangered Species Act.⁶⁹ Like in *Sierra Club*, the court objected to tolerance killing on many grounds, among them the fact that there was no evidence indicating killing individual wolves would aid in the wolf's recovery.⁷⁰

Recent scholarship indicates that the court's skepticism was well justified. *Kempthorne* was vacated following the 2007 removal of the Midwestern wolf population from federal protection due to the fact that it had been deemed to have recovered.⁷¹ The legal status of wolves fluctuated from endangered to recovered several times in the following years, but public hunting and trapping seasons occurred in 2012, 2013 and 2014.⁷² While much continues to be uncertain about the relationship between legal hunting and social tolerance for species, several scientific studies of both public attitudes and population demographics concluded that legal hunting of this wolf population neither improved good will towards wolves nor reduced poaching.⁷³ In returning wolves to the endangered species list in the 2014 case *Humane Society of the US v. Jewell*, the court cited *Kempthorne* with approval, noting that the court had recognized the 'logical deficiency' of killing wolves to save them.⁷⁴ But although the courts have repeatedly decried the use of tolerance hunting or culling, the FWS continues to use tolerance as a justification for seeking to kill or even remove federal protection from species altogether.⁷⁵

THE HABITATS DIRECTIVE

Because the Habitats Directive is a different type of instrument than the ESA, hunting of its listed species is allowed in a wider variety of circumstances. The ESA is designed to be emergency legislation that conserves and facilitates the recovery of species that are endangered or threatened, and is not intended to be used for long term management of species – once a

⁶⁴ *Humane Society v. Kempthorne*, 481 F.Supp.2d 53 (D.D.C 2006)

⁶⁵ *Ibid.*, at 58.

⁶⁶ *Ibid.*, at 54.

⁶⁷ *Ibid.*, at 62.

⁶⁸ *Ibid.*, at 63, citing Pls.' Mem. Prelim. Inj., Ex. F (Tr. of Prelim. Inj. Hearing at 11, *Defenders of Wildlife v. Norton*, Civil Action No. 05-1573 (D.D.C)).

⁶⁹ *Ibid.*, at 72, citing Pls.' reply at 14.

⁷⁰ *Ibid.*, at 71-72.

⁷¹ *Humane Society v. Kempthorne*, 527 F.3d 181 (D.C. Cir. 2008).

⁷² E.R. Olson *et al.*, 'Pendulum Swings in Wolf Management Led to Conflict, Illegal Kills, and a Legislated Wolf Hunt', 8:5 *Conservation Letters* (2015), 351; Wisconsin Department of Natural Resources, 'Wolf Hunting and Trapping', found at: <<http://dnr.wi.gov/topic/hunt/wolf.html>>.

⁷³ See E.R. Olson *et al.*, n. 72 above; G. Chapron and A. Treves, n. 2 above.

⁷⁴ *Humane Society v. Jewell*, 76 F.Supp.3d 69, 92 (D.D.C. 2014).

⁷⁵ Fed Regist FWS-R6-ES-2016-0042, at 13218; J.T. Bruskotter and others, 'Removing Protections for Wolves and the Future of the U.S. Endangered Species Act', 7:4 *Conservation Letters* (2014), 401, at 403.

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species has recovered it should, in theory anyway, be removed from federal protection.⁷⁶ By contrast, while the Directive is designed to be amended when 'necessary for adapting [the lists of protected species] to technical and scientific progress', species have remained listed even when the Directive's goals of achieving their 'favourable conservation status' (FCS) have been fulfilled.⁷⁷ Therefore, it is logical that the Directive must be concerned with the sustainable management and not only the conservation of protected species. The Directive contains several annexes listing species entitled to different types or levels of protection. Member States may choose to allow the hunting of species listed in Annex V, species 'whose taking in the wild and exploitation may be subject to management measures' as long as they are maintained at FCS and certain other conditions are met.⁷⁸ Species listed in Annex IV, on the other hand, must be strictly protected – hunting and other forms of taking must be prohibited.⁷⁹ Wolves are generally listed in Annex IV, with exceptions for northern Finland and Spain and much of Eastern Europe, where they are listed in Annex V.

Like the ESA, the Habitats Directive does allow exceptions from the ban on taking strictly protected species, also only in delimited circumstances. There must be a showing that there is no satisfactory alternative, and the derogation is not detrimental to the maintenance of the species' favourable conservation status in their natural range.⁸⁰ Additionally, the derogation must be one of the following:

- a. in the interest of protecting wild fauna and flora and conserving natural habitats;
- b. to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- c. in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- d. for the purpose of research and education, of repopulating and reintroducing these species...;
- e. to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens...in limited numbers specified by the competent national authorities.⁸¹

The Court of Justice's jurisprudence has confirmed that these provisions regarding derogation must be transposed into national law fully, clearly and precisely. Mere administrative practices are not sufficient. Terms may not be modified and no additional derogations can be allowed.⁸² The Court has not yet weighed in on whether tolerance hunting can constitute a conservation tool according to the Habitats Directive. However, the language of the Habitats Directive as well as the Court's jurisprudence indicate that the possibilities for national authorities to allow

⁷⁶ In reality, only a very small number of protected species have been removed from the ESA's protections due to recovery. This is in part because many types of threats to species cannot be eradicated from a human-dominated landscape, but rather require ongoing management. D.D. Goble *et al.*, 'Conservation-Reliant Species', 62:10 *BioScience* (2012), 869.

⁷⁷ For an analysis and explanation of the term 'favourable conservation status', see Y. Epstein, 'Favourable Conservation Status for Species: Examining the Habitats Directive's Key Concept through a Case Study of the Swedish Wolf', 28:2 *Journal of Environmental Law* (2016), 221.

⁷⁸ Habitats Directive, n. 10 above, Article 14.

⁷⁹ *Ibid.*, Article 12.

⁸⁰ *Ibid.*, Article 16.

⁸¹ *Ibid.*, Article 16.1.

⁸² See European Commission, n. 14 above, at 52, citing: ECJ, Case C-75/01, *Commission v. Luxembourg*, [2003] ECR I-1621.

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hunting of species that are listed in Annex IV are quite narrow. The leading decision from the Court of Justice on the permissibility of hunting a species protected by the Habitats Directive is the 2007 *Finnish wolf* case, which concerned when wolves may be killed with the goal of preventing serious damage.⁸³ In that case, the European Commission sued Finland for failure to properly implement the Habitats Directive. Finnish wildlife authorities had issued hunting permits on an individual basis allowing the killing of wolves in order to prevent serious damage to livestock and dogs, that is, derogation ground (b). During the 2003/2004 hunting season, 22 permits were issued and a total of 12 wolves were legally killed out of a population of an estimated 150-165 wolves.⁸⁴ The Commission argued that where it was considered very likely that such damage would occur, the damage could be avoided by building fences or taking other measures. Further, the Commission argued that since permits did not target particular wolves that had been causing damage, it was unlikely that serious damage would be prevented.⁸⁵ Since wolves did not have favourable conservation status in Finland, and other satisfactory solutions were available that were more likely to prevent serious damage, it concluded, killing wolves under derogation ground (b) was illegal.⁸⁶

Rejecting the first part of the Commission's argument, the Court of Justice found that, according to the clear language of the Habitats Directive, animals could be killed to prevent damage, rather than to avenge damage that had already occurred.⁸⁷ The Court also noted that ability to derogate from strict protection is textually preconditioned on the favourable conservation status of the species population.⁸⁸ However, the Court found that derogation is possible even if a population is not at favourable conservation status if it can be shown that the unfavourability of the conservation status is not worsened and the attainment of favourable conservation status will not be prevented.⁸⁹ The Court agreed with the Commission however, that the hunt must be targeted towards animals likely to cause damage.⁹⁰ Further, decisions allowing derogations must be based on evidence that killing the targeted animal will not negatively impact the conservation status of the population and that there is no satisfactory alternate solution.⁹¹ As it seems likely that killing a healthy member of an endangered species would have a deleterious effect on the population in most circumstances, it should be very difficult to justify killing a member of a strictly protected species that does not have FCS even after this decision.⁹² This case concerned only individual permits to kill wolves to prevent damage to property; it did not touch on the various forms of management and sport hunting. Likewise left open was whether hunting or culling is allowed in order to improve social tolerance for species.

But while the Court of Justice has not ruled on these particular issues, it has, like the American courts, taken a precautionary approach in interpreting nature protection legislation. In the well-known *Waddenzee* case, the Court stated that the Habitats Directive must be interpreted in light

⁸³ ECJ, Case C-342/05, *Commission v. Finland*, [2007] ECR I-4730 ('Finnish wolf case').

⁸⁴ *Ibid.*, at paragraph 14; J. Bisi and S. Kurki, *The Wolf Debate in Finland* (Helsinki University 2008), at 11.

⁸⁵ *Finnish wolf case*, n. 83 above, at paragraph 13.

⁸⁶ *Ibid.*, at paragraph 15.

⁸⁷ *Ibid.*, at paragraph 40.

⁸⁸ *Ibid.*, at paragraph 28.

⁸⁹ *Ibid.*, at paragraph 29.

⁹⁰ *Ibid.*, at paragraphs 30-31.

⁹¹ *Ibid.*, at paragraph 31.

⁹² Members of a population capable of reproducing contribute to the effective population required to ensure the population's genetic viability. See Y. Epstein, n. 77 above, at 232. For an analysis of how many effective members are needed for a viable Scandinavian and Finnish wolf population, see L. Laikre *et al.*, 'Metapopulation Effective Size and Conservation Genetic Goals for the Fennoscandian Wolf (*Canis lupus*) Population', 117 *Heredity* (2016), 279.

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of the precautionary principle.⁹³ As discussed by Vokker Mauerhofer in his analysis of the Court's jurisprudence around the Birds and Habitats Directives, it has consistently held that where there is scientific uncertainty, the burden of proof lies with the Member State wishing to derogate from species protection.⁹⁴ As there is little evidence of the efficacy of tolerance hunting, it is unlikely this burden could be met. Mixed messages from the European Commission on the acceptability of tolerance hunting have been followed by mixed results in the Member States however, as evidenced by recent hunting seasons in Sweden and Finland.

The European Commission has expressed varying views in its guidance documents and its infringement proceedings. In some guidance materials, it appears to support the idea that lethal management or even licensed hunting seasons may be used to increase social tolerance for strictly protected species so long as, pursuant to Article 16(e) of the Directive, the hunt is limited and strictly controlled. In its 2007 Guidance Document on the Strict Protection of Animal Species of Community Interest under the Habitats Directive 92/43/EEC, it described with approval Latvia's management plan for lynx, which allowed an annual lynx harvest through hunting. Lynx are a strictly protected species that has FCS in Latvia.⁹⁵ The Commission stated that this hunt has a positive effect on the lynx population as well as on public perception. However, the European Commission has strongly criticized tolerance hunting in other contexts, such as its ongoing infringement proceeding against Sweden, where, at least according to the Commission, Sweden has still not demonstrated that wolves have reached FCS.⁹⁶

Like in Latvia, tolerance hunting, generally combined with some other environmental and/or damage prevention purpose, has been justified by Swedish authorities under derogation ground (e).⁹⁷ Ground (e) is a catch-all provision, which, unlike the other grounds for derogation, does not contain a specific purpose. After *Finnish wolf*, however, it is clear that a decision to allow hunting must state a legitimate purpose, as well as why derogation is the only satisfactory means to achieve the stated purpose.⁹⁸ After all, if no legitimate purpose is stated, it is not possible to show that there is no alternate way to reach it. In licensing hunting seasons in 2010 and 2011, the rationale for allowing derogation based on ground (e) was that public perception of wolves would be improved. The European Commission disagreed that this was an acceptable justification for hunting wolves, arguing in a 2011 reasoned opinion that Sweden was violating the Habitats Directive.⁹⁹ The Commission noted that social tolerance is not listed as an appropriate reason for derogation in Article 16.¹⁰⁰ Even if it were an acceptable goal, it argued, Sweden should seek other means of attaining that goal.¹⁰¹ The Commission further criticized Sweden's claims that hunting had improved public opinion of wolves as scientifically

⁹³ ECJ, n. 15 above, at paragraph 44; see H. Schoukens, 'Habitat Restoration Measures as Facilitators for Economic Development within the Context of the EU Habitats Directive: Balancing No Net Loss with the Preventive Approach?', 29 *Journal of Environmental Law* (2017, forthcoming).

⁹⁴ V. Mauerhofer, 'Ignorance, Uncertainty and Biodiversity: Decision Making by the Court of Justice of the European Union' (2014), found at: http://www.tradeenvironment.eu/uploads/Mauerhofer_on_Ignorance_and_Uncertainty_and_ECJ_WITH_TRACKS_citat_proposal_NEW_VM_1.pdf.

⁹⁵ See European Commission, n. 14 above, at 57-58.

⁹⁶ European Commission, 'Additional Reasoned Opinion in Infringement Proceeding 2010/4100' (2015) (Swedish only), found at: http://www.jandarpo.se/upload/EU-kommissionen_Motiverat_Yttrande_150619.pdf, at 10.

⁹⁷ See discussion in Y. Epstein, n. 1 above, at 575-578.

⁹⁸ See *Finnish wolf* case, n. 83 above, at paragraphs 30-31; Commission, Reasoned Opinion in Infringement Proceeding 2010/4200 (2011) (Swedish only), found at: <http://www.jandarpo.se/upload/2011%20RO%20om%20varg.pdf>, at 8.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, at 6.

¹⁰¹ *Ibid.*, at 7.

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unsound.¹⁰² However, it did not go so far as to bring an action against Sweden in the Court of Justice, and under Swedish standing laws in place at that time, no one was entitled to sue in the Swedish courts. This changed in 2012, after Sweden's lack of public interest standing was held to violate EU and international law.¹⁰³ A licensed hunting season was once again authorized for 2013, this time with the additional rationale of improving the genetic status of wolves by eliminating some inbred wolves. A Swedish court invalidated the hunt because there were other satisfactory solutions for reducing inbreeding, and because the hunt was not sufficiently limited.¹⁰⁴ A hunting season was also authorized for 2014, but found by a court to violate the Habitats Directive and therefore not allowed to proceed. The right to authorize hunting seasons was then delegated to the counties, and appeals to court were forbidden. Three counties did allow hunting seasons for 2015, giving several justifications including potentially improving public attitudes towards wolves, as well as protecting livestock, game, and hunting dogs. The ban on appealing these hunting decisions was ultimately rejected by the Supreme Administrative Court, but not until after the 2015 hunting season was over.¹⁰⁵

Although Sweden continued to authorize hunting seasons and to use social tolerance as one of its stated goals, in contravention of the European Commission's position that doing so violated the Habitats Directive, the European Commission did not move forward with its infringement proceeding during this time. Presumably, it was waiting to see whether Sweden's national courts would put a stop to hunting without the need for EU intervention. After the 2015 hunt, the Commission chose to involve itself again, and issued an additional reasoned opinion in its infringement proceeding against Sweden in June of that year. In this second reasoned opinion, the Commission again alleged that Sweden's licensed hunting seasons continued to violate the Habitats Directive.¹⁰⁶ This time, it did not take issue with Sweden's stated goals of improving the genetic health of wolves and improving public acceptance for them in justifying making an exception from strict protection. However, the Commission argued, there are other satisfactory alternatives for achieving these goals. For this and several other reasons, permitting a hunting season for wolves was not allowable.¹⁰⁷

Despite the European Commission's continued declarations that Sweden's wolf hunting seasons are illegal, hunting was once again authorized for 2016 by five county boards.¹⁰⁸ One of the stated reasons for allowing the hunting of wolves was decreasing their population density and thus reducing social and economic consequences and increasing the social tolerance for wolves.¹⁰⁹ Courts rejected the hunts as violating the Habitats Directive in three of the five counties on several grounds, including the lack of evidence for the efficacy of tolerance hunting. The Karlstad Administrative Court, for instance, held that while the stated goals of reducing damage and increasing tolerance for wolves were appropriate, hunting was not an appropriate

¹⁰² Ibid., at 9.

¹⁰³ Y. Epstein and J. Darpö, 'The Wild Has No Words: Environmental NGOs Empowered to Speak for Protected Species as Swedish Courts Apply EU and International Environmental Law', 10:3 *Journal of European Environment and Planning Law* (2013), 250.

¹⁰⁴ Ibid., at 256.

¹⁰⁵ Ruling of the Supreme Administrative Court of 18 December 2015, case 312-15 (HFD 2015 ref. 79) (Sweden).

¹⁰⁶ Additional Reasoned Opinion, n. 96 at 8.

¹⁰⁷ Ibid.

¹⁰⁸ Swedish National Veterinary Institute, 'Licensjakt Varg 2016', found at: <<http://www.sva.se/djurhalsa/vilda-djur/stora-rovdjur/licensjakt-pa-varg/vargjakt-2016>>.

¹⁰⁹ See, e.g., Överklaganden av Länsstyrelsens i Dalarnas län beslut om licensjakt efter varg, länsstyrelsens dnr 218-11691-2015 (in Swedish), found at: <<http://www.naturvardsverket.se/upload/stod-i-miljoarbetet/rattsinformation/beslut/varg/201512-overpr-lic/beslut-licensjakt-varg-dalarnas-lan-20151218.pdf>>, at 2.

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means for achieving them. The court noted that there was conflicting science on whether licensed hunting increases public tolerance for wolves. Noting that exceptions from strict protection must be interpreted restrictively, the court held that the available evidence that tolerance hunting worked was insufficient to allow it.¹¹⁰ On appeal however, the Supreme Administrative Court reversed this decision. Although the party seeking to derogate from strict protection has the burden of proving that the conditions for doing so are fulfilled, the court did not analyse the issue, stating only that it 'had no reason to question' the county board's finding that hunting can increase acceptance for wolves.¹¹¹ There is no further recourse available under Swedish law. It remains to be seen whether the European Commission reacts to this or other nations' tolerance hunts.¹¹²

In Finland, recent hunting seasons have been explicitly justified as a tool to increase social tolerance for wolves. After the Court of Justice's 2007 decision condemning Finland's administrative practices allowing hunting to prevent damage as insufficiently supported by evidence, rules on killing wolves were tightened and stricter penalties for violations were enacted.¹¹³ The Finnish wolf population peaked that year with an estimated 270-300 wolves.¹¹⁴ By 2013 however, the population had dropped to 120-135 individuals.¹¹⁵ In response, the Ministry of Agriculture and Forestry commissioned an evaluation of Finland's carnivore management policy, which was published in 2014.¹¹⁶ The report found that the 'social sustainability' of the wolf population had collapsed.¹¹⁷ Poaching was identified as the major cause of the decline in the wolf population.¹¹⁸ The report recommended a number of changes to the management plan for wolf, including allowing regional authorities to grant hunting permits for wolf 'management' and paying a bounty to hunters who successfully killed a wolf according to the terms of their permit.¹¹⁹

In 2015, a new management plan for wolves was implemented.¹²⁰ The new management plan implied that stricter protection for wolves and reduced opportunities for hunting were to blame for the unsustainability of the Finnish wolf, and thus that creating legal hunting opportunities was necessary for the effective management of the population.¹²¹ Relying on the European Commission's guidance that public hunting of lynx in Latvia improved social tolerance and therefore conservation, the plan stated that management hunting was an allowable tool for improving conservation outcomes according to the Habitats Directive.¹²² In arguing that the Commission's guidance on tolerance applies to the Finnish wolf, the plan ignores the fact that the Latvian lynx was already at favourable conservation status and that Latvia's hunt was

¹¹⁰ Decision of the Karlstad Administrative Court of 12 February 2016, in case 5205-5206-15 and others (Sweden), at 22.

¹¹¹ Ruling of the Supreme Administrative Court of 30 December 2016, n. 12 above at 48.

¹¹² It is statistically unlikely that it will do so. A. Hofmann, 'Left to Interest Groups? On the Prospects for Enforcing Environmental Law in the European Union' (2017).

¹¹³ M. Pohja-Mykrä and S. Kurki, 'Evaluation of the Finnish National Policy on Large Carnivores' (University of Helsinki 2014), found at: <<http://www.helsinki.fi/ruralia/julkaisut/pdf/Reports135.pdf>>, at 27.

¹¹⁴ Finnish Ministry of Agriculture and Forestry, 'Management Plan for the Wolf Population in Finland' (Förvaltningsplanen för vargstammen i Finland) (2015), at 7.

¹¹⁵ Ibid.

¹¹⁶ See M. Pohja-Mykrä and S. Kurki, n. 113 above.

¹¹⁷ Ibid., at 81.

¹¹⁸ Ibid., at 73.

¹¹⁹ Ibid., at 89-90.

¹²⁰ Finnish Ministry of Agriculture and Forestry, n. 114 above.

¹²¹ Ibid., at 14.

¹²² Ibid.

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intended primarily to keep in check an abundant population.¹²³ As an additional argument for the conservation benefits of hunting, the plan seeks to increase the value of the wolf as a game animal through the use of these game management derogations, drawing the opposite conclusion than that of the American court noted above, which argued that monetary value diminishes intrinsic value.¹²⁴ While the report's suggestion of a bounty was not adopted, the hunter is compensated by being allowed to keep the pelt, which the management plan explains is intended to enhance the value of the wolf as a natural resource.¹²⁵

The first management hunt since 2007 was held in early 2015. The decree set the ceiling for hunting at 29. Twenty-four permits were granted and 17 wolves were killed.¹²⁶ The maximum number of wolves to be hunted with management derogations during the 2016 hunting season outside the reindeer husbandry area was set at 46, and 43 were killed.¹²⁷ Most appeals to the administrative courts by nongovernmental organizations were dismissed for lack of standing, but others were denied on the merits.¹²⁸ The Finnish Supreme Administrative Court declined to hear an appeal.¹²⁹

US courts have repeatedly and emphatically rejected the use of lethal management and especially sport hunting to improve the public tolerance for wolves. This sort of thinking has been judicially criticized as not only contrary to the clear statutory language and intent of the ESA, but as a failure of logic.¹³⁰ The EU Court has not yet commented on this issue, but generally has taken a precautionary approach towards species protection.¹³¹ Whether tolerance hunting is permissible may depend on whether there is factual evidence that lethal management programs do in fact improve the 'cultural carrying capacity' of wolves or other protected species, and if so, if they exceed the results of other satisfactory alternatives such as education programs. While studies on this topic have produced mixed results,¹³² several recent studies indicate that allowing sport hunting of wolves in Wisconsin has decreased rather than increased social tolerance.¹³³ An earlier 2009 review also showed a lack of evidence that authorizing legal hunting reduced illegal hunting.¹³⁴ In light of conflicting research and no clear evidence that allowing hunting does in fact improve conservation results, tolerance should not be considered an acceptable justification for allowing hunting under EU law whether or not favourable conservation status has been achieved. However, the Court has not been able to resolve this

¹²³ See European Commission, n. 14 above, at 57-58.

¹²⁴ Finnish Ministry of Agriculture and Forestry, n. 114 above, at 17-18.

¹²⁵ *Ibid.*, at 9.

¹²⁶ Finnish Wildlife Agency, 'Fångst av varg i stamvårdande syfte har avslutats för jaktåret' (Capture of wolves with the goal of population management has been completing for the hunting year) (2015), found at: <<http://riista.fi/sv/fangst-av-varg-i-stamvardande-syfte-har-avslutats-for-jaktaret>>.

¹²⁷ Jord- och skogsbruksministeriets förordning om jakt på varg som sker med stöd av dispens utanför renskötselområdet under jaktåret 2015-2016 (Ministry of Agriculture and Forestry's regulation on wolf hunting that happens according to dispensation outside the reindeer husbandry area during the hunting year 2015-2016) (2015) <<http://mmm.fi/documents/1410837/1516659/Susiasetus-2015-sv.pdf/fefa5973-7db6-4b5e-99ae-ab3889f6cc71>>. Statistics on wolves killed during both hunting seasons can be found at: <<http://riista.fi/sv/jakt/bytesuppfoljning/vargbytet-stamvardande-syfte/>>.

¹²⁸ Hämeenlinnan Administrative Court, Decision 15/0466/2 (2015).

¹²⁹ Finnish Supreme Administrative Court, Docket number 4234/1/15 (2016).

¹³⁰ *Humane Society v. Kempthorne*, n. 40 above.

¹³¹ See *V. Mauerhofer*, n. 94 above.

¹³² A. Majić *et al.*, 'Dynamics of Public Attitudes toward Bears and the Role of Bear Hunting in Croatia', 144:12 *Biological Conservation* (2011), 3018, at 3018.

¹³³ J. Hogberg *et al.*, 'Changes in Attitudes toward Wolves Before and After an Inaugural Public Hunting and Trapping Season: Early Evidence from Wisconsin's Wolf Range', 43:1 *Environmental Conservation* (2016), 45, at 51; C. Browne-Nuñez *et al.*, n. 6 above, at 69.

¹³⁴ See A. Treves, n. 5 above, at 1353-1354.

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matter because of limited availability of public interest standing at the EU level, because the national courts of final instance in Sweden and Finland have declined to request a preliminary ruling, and because the European Commission, despite its years of criticism of tolerance hunting of species that have not clearly reached favourable conservation status, has not brought an action in court.¹³⁵

CONCLUSION

Both the US and EU have enacted strong precautionary regulations intended to prevent biodiversity loss as well as remedy declines to species populations that have already occurred. American courts have interpreted the provisions of the Endangered Species Act to prohibit hunting of protected species for the sake of improving their public relations. Although the Habitats Directive allows for hunting in a wider variety of circumstances than the Endangered Species Act, exceptions to strict protection must have a legitimate justification backed up by evidence that hunting is the only satisfactory solution. It is therefore likely that the Court of Justice would also interpret the Habitats Directive to prohibit tolerance hunting. Nevertheless, tolerance hunting continues in some EU Member States. The more precautionary result in the US stems not from the environmental legislation itself, or from a higher burden of proof imposed by the courts, but rather from differing procedural requirements concerning who may litigate, which allow public interest environmental cases to regularly be heard at the federal level.

To the extent American courts may have been more cautious only because they have had the opportunity to be – cases have reached the courts more readily – the result is nevertheless the product of institutional differences. In the more openly litigious American system it has been relatively easy for environmental protection litigants to convince the courts to rule on questions of federal law. In the US, standing to bring lawsuits to interpret the Endangered Species Act in the federal courts is very easily met, the Endangered Species Act allows ‘any person’ to initiate litigation.¹³⁶ Courts have restricted this to any person alleging an injury, but this is an extremely low bar to meet compared with European standards; a desire to see wolves in the wild, for example, is sufficient.¹³⁷ EU law requires Member States to open their national courts to public interest environmental litigation, though it does not require nearly as generous conditions for public interest standing as the US – it must not be impossible or excessively difficult for public interest litigants to challenge Member State violations of EU law¹³⁸ – but there is no individual right to bring a claim to assert the public interest. The opportunity for EU environmental law cases to be adjudicated in Member State courts has increased in recent years through Court of Justice rulings and EU implementation of the Aarhus Convention.¹³⁹ However, there is little opportunity for public interest environmental litigants to directly demand the interpretation of

¹³⁵ Y. Epstein, ‘Through the Eyes of the Wolf: Adversarial Legalism, Federalism, and Biodiversity Protection in the United States and European Union’ (2017) at part V; J. Darpö, ‘The Commission: A Sheep in Wolf’s Clothing? On Infringement Proceedings as a Legal Device for the Enforcement of EU Law on the Environment, Using Swedish Wolf Management as an Example’, 13:3-4 *Journal of European Environmental and Planning Law* (2016), 270.

¹³⁶ ESA, n. 9 above, Section 11.

¹³⁷ See, e.g., *Defenders of Wildlife v. Hall*, 807 F.Supp.2d 972, 981 (2011); L.E. Baier, *Inside the Equal Access to Justice Act* (Rowman & Littlefield, 2016), at 271-273.

¹³⁸ See, e.g., Case C-243/15, *Lesoochránárske zoskupenie VLK v. Obvodný úrad Trenčín* (Advocate General’s Opinion of 30 June 2016), at paragraph 98, citing Case C-240/09, *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, [2011] ECR I-1285, para 48.

¹³⁹ Such as in the case of Swedish wolf litigation. See Y. Epstein and J. Darpö, n. 103 above.

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EU law by a binding authority;¹⁴⁰ instead, only a relatively few applications for such interpretation reach the Court of Justice through requests for preliminary rulings.¹⁴¹ As a result, far fewer questions of Union law are authoritatively decided. In the absence of such authoritative interpretation of EU law, there is a risk that precautionary environmental laws such as the Habitats Directive will remain under-enforced compared with equivalent legislation in the US. While both laws may be precautionary, the more open availability of public interest litigation at the Union level has led to a greater level of precautionality in the American system, at least on the issue of tolerance hunting.

¹⁴⁰ S. Bogojević, 'Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity' 34 *Yearbook of European Law* (2015), 5, at 16.

¹⁴¹ See CJEU, n. 11 above.