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Western Environmental Law Center

October 10, 2016

Listing and Recovery Section Manager, Wildlife Program
Washington Department of Fish and Wildlife
600 Capitol Way North
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RE: WDFW draft periodic status review for the lynx and proposal to uplist Canada lynx as endangered under Washington law.

Thank you for the opportunity to submit comments on the Washington Department of Fish and Wildlife's (WDFW) draft Periodic Status Review for the Lynx and proposal to uplist Canada lynx to endangered status under Washington state law.

These comments are submitted by the Western Environmental Law Center on behalf of WildEarth Guardians, Cascadia Wildlands, and Kettle Range Conservation Group. Each of these organizations is committed to ensuring the long-term survival and recovery of Canada lynx in Washington, and across its historic range in the contiguous United States. Each organization has members and/or supporters that reside in and recreate in Canada lynx habitat in Washington, and more broadly have an interest in Canada lynx in Washington. Notably, WildEarth Guardians—represented by the Western Environmental Law Center—sued the U.S. Fish and Wildlife Service over its failure to designate portions of the Kettle Range as lynx critical habitat under the federal ESA, amongst other claims.¹

We would like to express our strong support for uplisting Canada lynx to endangered status under state law. Given the data included in the June 2016 draft Periodic Status Review for the Lynx (“draft status review”) and data from federal agencies, we wholeheartedly agree that Canada lynx qualify as endangered under

¹ WDFW submitted comments supportive of federal critical habitat designation for Canada lynx in Washington's Kettle range.

Washington state law. *See* W.A.C. 232-12-297 § 2.4 (definition of endangered). Given the numerous threats to lynx, including population decline, human-caused habitat modification, habitat contraction, climate change, and other stressors, it is clear that lynx are “seriously threatened with extinction throughout all or a significant portion of its range within” Washington. *Id.*

Although we generally agree with the content in the draft status review, we would encourage WDFW to consider the following comments addressing certain components of the draft status review or some detail that is currently not included.

I. The status review should consider the availability of lynx denning habitat.

Notably, the draft status review only mentions lynx denning habitat in passing. However the importance of adequate denning habitat for lynx is clear. The U.S. Fish and Wildlife Service discussed the importance of denning habitat to lynx, and included denning habitat as a Primary Constituent Element “that provide[s] for a species' life-history processes and [is] essential to the conservation of the species” when determining which lands should be designated as Canada lynx critical habitat. 79 Fed. Reg. 54782, 54811-2 (Sept. 12, 2014). FWS explained “a feature or habitat variable need not be limiting to be considered an essential component of a species' habitat. Both denning and matrix habitats are essential components of landscapes capable of supporting lynx populations in the DPS because without them lynx could not persist in those landscapes.” 79 Fed. Reg. at 54786. Because lynx denning habitat “is an essential component of the boreal forest landscapes that lynx need to satisfy a key life-history process (reproduction),” FWS identified “denning habitat to be a physical or biological feature needed to support and maintain lynx populations over time and which, therefore, is essential to the conservation of the lynx [distinct population segment].” 79 Fed. Reg. at 54810.

Because denning habitat is “a physical or biological feature needed to support and maintain lynx populations over time,” WDFW should devote more attention to the availability of denning habitat in Washington for lynx as a component of its status review. In particular, the prospect for salvage logging in burned areas, and the impact of the lack of downed woody debris left on the landscape that could serve as lynx denning habitat should be looked at in detail.

II. The Kettle Range should be considered occupied.

Although the Kettle Range’s lynx population has been decreasing over time, we believe that the Kettle Range should be considered occupied. Indeed, this is supported by the August 2016 documentation of a lynx in the Kettle Range by

Washington State University researchers. *See* <http://www.conservationnw.org/news/updates/lynx-photographed-in-washingtons-kettle-range> (last accessed October 7, 2016). Although it is unknown whether this individual is a transient individual or a resident of the Kettle Range, that does not matter. Under federal law, even transient individuals count towards considering an area occupied. The Ninth Circuit Court of Appeals has recognized that occupancy is “a highly contextual and fact-dependent inquiry” involving a number of factors and considerations. *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1164-65 (9th Cir. 2010). Indeed, a “species need not be present continuously for habitat to be considered ‘occupied,’” nor is occupied habitat “limited to areas in which the species ‘resides.’” *Id.* at 1165. This is also the definition used by the U.S. Fish and Wildlife in its ESA Section 7 Consultation Handbook. *Id.*

As such, we encourage WDFW to also recognize that occupancy and residency are two different things, and adopt the federal definition for occupied habitat. Given the August 2016 photographic evidence of lynx presence in the Kettle Range, we believe that the Kettle Range should be considered occupied. That classification, however, should not detract from lynx and lynx habitat protections that are needed to ensure that the Kettle Range can continue to support a lynx population, including a resident, breeding population. As part of this classification, we request that page 5 of the draft status review to be updated to state that not all occupied areas of Washington are designated as critical habitat under the federal ESA.

III. The importance of Washington for connectivity between lynx populations.

The draft status review fails to discuss the importance of Washington, and specifically the Kettle Range, as an important connectivity bridge between lynx populations in the northern Rocky Mountains and the North Cascades. A discussion of Washington’s unique geography providing this connectivity should be included in the status review.

IV. More research is needed into lynx response to massive habitat altering events such as wildfire and beetle kill.

The draft status review states that significant amounts of lynx habitat has been lost to wildfire in recent years. Although we agree that this likely does have significant effects to lynx, we also believe that conclusions about the effects of massive habitat altering events such as wildfire and beetle kill are premature. Dr. John Squires of the U.S. Forest Service’s Rocky Mountain Research Station is currently conducting research on the Rio Grande National Forest in Colorado on lynx response to beetle kill. The Rio Grande has been hit particularly hard by beetle kill: “By 2013, a spruce

beetle outbreak impacted 85% of the mature spruce-fir forests on the Rio Grande National Forest. In many cases the forest canopy is 90-100% dead.” U.S.F.S. Rocky Mountain Research Station Research Summary, October 2015, available at: <http://www.fs.fed.us/rmrs/projects/lynx-and-snowshoe-hare-response-spruce-beetle-tree-mortality-evaluating-habitat-suitability> (last accessed October 7, 2016). As a result, Dr. Squires, and others, have sought to determine what lynx response to this massively disruptive event actually is: “the uncertainty of how lynx, and their primary prey snowshoe hares, will respond to insect-impacts to spruce-fir forests has important management and conservation implications. Many key management assumptions for this species may or may not remain valid.” *Id.*

Preliminary results from Dr. Squires’ research shows that lynx are continuing to use areas hit by beetle kill and lynx reproduction has also been documented in these same areas. *See* Looking for Lynx in a Changing Habitat, Pueblo Chieftain (December 24, 2015), available at: <http://www.chieftain.com/news/4259319-120/lynx-beetle-forest-spruce> (last accessed October 7, 2016).

Although we admit that Colorado and Washington forests are different in a variety of ways, and that massive wildfire and beetle kill events have differences in effects on the landscape (including effects to a forest’s overstory versus effects to the understory), we also believe that Dr. Squires research is instructive and at least raises the question of what lynx response to wildfire actually is. We believe that WDFW could become a leader in lynx research by developing a more robust lynx research program that actually tracks lynx movement in different habitats in Washington and their response to changes in the environment. For example, in Colorado, Colorado Parks and Wildlife has had an extensive lynx monitoring program that has provided valuable insights in lynx behavior, biology, and habitat needs.

Further, we would believe that wildfire does not cause loss of lynx habitat, but rather at most it results in lynx habitat being in a temporarily unsuitable state. This may seem like semantics, but we believe it to be an important distinction with significant management implications for lynx habitat.

V. The Lynx Conservation Assessment and Strategy.

The draft status review notes that federal lands in Washington “are managed under the federal lynx conservation strategy.” Draft Status Review at 5. This, however, is not entirely accurate. Although the 2013 Lynx Conservation Assessment and Strategy (LCAS) is an important document highlighting the state of the science related to lynx and lynx habitat and includes recommendations for land management to conserve lynx, it is a guidance document. The draft status review should be updated

to reflect this distinction. The LCAS has been used in the development of forest plan amendments in the Northern Rockies and Southern Rockies. The LCAS has also identified core, secondary, and peripheral areas that are important for lynx conservation. And those areas are protected under some forest plans. However, Washington forests are still operating under dated Forest Plans (from the 1980's and 1990's).

Some Washington forests are undergoing forest plan revision processes right now, however those processes are notoriously slow and may not result in needed lynx protections. One Forest, the Colville National Forest, has included some lynx protections in the standards and guidelines that are part of the draft proposal, however that Forest Plan will not be finalized until spring 2017 at the earliest. As such, the draft status review should account for the fact that while individual National Forests and the U.S. Fish and Wildlife Service do consult the LCAS in making management decisions (and in completing consultation under ESA Section 7), it remains a guidance document. As such, we believe that there remains a lack of adequate regulatory mechanisms (beyond the protections afforded Canada lynx by the federal ESA) protecting Canada lynx in Washington.

VI. WDFW should consider updating the 2006 Lynx Habitat Management Plan.

As admitted by WDFW, lynx habitat in Washington has changed considerably in the years since 2006. As such, we encourage WDFW to update its 2006 Lynx Habitat Management Plan to ensure that its recommendations are still valid in light of changed conditions on the ground. Similarly, WDFW and the Washington Fish and Wildlife Commission should consider adopting binding and enforceable rules to guide management of state and privately owned lands that contain lynx habitat in Washington.

VII. The status review should note gaps in knowledge and research needs.

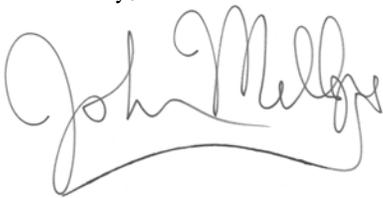
Although much lynx research has been conducted across Washington, across the country, and around the world, there remain gaps in our collective knowledge of lynx behavior, biology, and habitat needs. We encourage WDFW to explicitly identify those knowledge gaps, and also identify the most pressing research needs to support conservation of lynx and lynx habitat in Washington. Additionally, we encourage WDFW to confer with the U.S. Fish and Wildlife Service to ensure that any research conducted by WDFW (or others) conforms to U.S. Fish and Wildlife Service requirements for scientific data related to lynx, including lynx occupancy, lynx presence, lynx reproduction, and verified lynx sightings.

VIII. Conclusion.

Again, we sincerely appreciate WDFW's efforts to protect and conserve Canada lynx in Washington and are very interested in having a continuing conversation with WDFW regarding lynx recovery in Washington. Thank you in advance for taking the time to carefully review and consider the issues and concerns contained in these comments.

Please do not hesitate to contact us if we may be of assistance to you as you finalize the status review, or if we can clarify anything in our comments for you.

Sincerely,

A handwritten signature in black ink that reads "John Mellgren". The signature is fluid and cursive, with a long horizontal flourish at the bottom.

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