



March 10, 2017

Public Comments Processing
Attn: Karen Taylor-Goodrich, Superintendent
North Cascades National Park Service Complex
810 State Route 20
Sedro-Woolley, WA 98284

Submitted via certified mail.

RE: Public Comments on North Cascades National Park Service Complex, North Cascades Ecosystem Grizzly Bear Restoration Plan/Environmental Impact Statement (ID: 44144), Draft EIS (ID: 77025)

Dear Superintendent Taylor-Goodrich,

Thank you for the opportunity to comment on the Draft Grizzly Bear Restoration Plan and Environmental Impact Statement for the North Cascades Ecosystem (hereinafter “DEIS”).¹ WildEarth Guardians is a non-profit organization dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the American West. We operate an office in Seattle, Washington and Missoula, Montana, as well as in five other western states, and have over 207,000 members and supporters. WildEarth Guardians has an organizational interest in the proper and lawful management of grizzly bears in the United States. Our members, staff and board members have significant aesthetic, recreational, scientific, inspirational, educational, and other interests in the conservation and recovery of grizzly bears across their native Western landscape. We appreciate your consideration of the following comments on the DEIS as the National Park Service (“NPS”), in coordination with the U.S. Fish and Wildlife Service (“Service”), works to restore a recovered population of grizzly bears to the North Cascades Ecosystem (“NCE”) in accordance with mandates of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531, *et seq.* These comments are submitted on behalf of our organization and the Western Environmental Law Center.

¹ U.S. DEP’T OF THE INTERIOR, NATIONAL PARK SERVICE AND U.S. FISH & WILDLIFE SERVICE, NORTH CASCADES ECOSYSTEM DRAFT GRIZZLY BEAR RESTORATION PLAN/ENVIRONMENTAL IMPACT STATEMENT (Jan. 2017) [hereinafter “DEIS”] *available at* <https://parkplanning.nps.gov/document.cfm?parkID=327&projectID=44144&documentID=77025>.

INTRODUCTION

Listed as “threatened” in 1975, Grizzly bears were among the first species granted federal protections under the ESA shortly after the Act’s enactment.² The Service believes that there were once roughly 50,000 grizzly bears in the western contiguous United States.³ However, the European settlement of the American West brought dramatic population declines to the species as the result of government-funded programs of eradication.⁴ By the 1930s, the “range and number of grizzly bears were reduced to less than 2 percent of their former range and numbers.”⁵ Thirty-one of 37 known grizzly bear populations present in 1922 were completely extirpated by the 1970s.⁶ There were only approximately 136-312 grizzly bears remaining when the species was listed under the ESA in 1975.⁷ Although grizzly bears in some parts of the country are making a remarkable comeback to the lower 48 today – with approximately 1,200 to 1,400 grizzly bears currently known in the wild – they exist in only a few small, isolated populations and have yet to return to much of their native landscape: including to the outstanding wild habitat of the NCE.⁸

The NCE is “one of the most intact wildlands in the contiguous United States.”⁹ Restoring grizzly bears to this large, protected area of prime grizzly habitat is key to recovering the species as a whole. As required by the ESA, the Service is charged with recovering grizzly bears across their range, and to the point at which the federal protections provided by the Act are no longer necessary.¹⁰ To accomplish this mandate, the Service must restore grizzly bears to the NCE, and thus we generally support the NPS’s proposed reintroduction efforts as described in the DEIS.

² DEIS at i.

³ DEIS at 5; *see also* U.S. Fish & Wildlife Service, Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife, 81 Fed. Reg. 13174, 13181 (Mar. 11, 2016).

⁴ U.S. Fish & Wildlife Service, Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife, 81 Fed. Reg. 13174, 13181 (Mar. 11, 2016).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ DEIS at 6–8 (noting the Selkirk Ecosystem contains approximately 80 grizzly bears; the Cabinet Yaak Ecosystem contains roughly 48-50 grizzly bears; the Northern Continental Divide Ecosystem hosts a population of approximately 1,000 bears; the Greater Yellowstone Ecosystem contains approximately 757 bears, and the Bitterroot Recovery Ecosystem does not contain any grizzly bears).

⁹ DEIS at 1.

¹⁰ 16 U.S.C. § 1531(b) (“The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species”); *id.* § 1532(3) (The Act defines “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.”)

At the outset, we note that there is wide public support for restoring grizzly bears to the NCE.¹¹ A 2016 poll published by Tulchin Research resulted in a finding that Washington voters “overwhelmingly view grizzly bears as a vital part of America’s wilderness and natural heritage, support efforts to help the population in the North Cascades to recover, and believe that those efforts should be science-based and led by expert biologists.”¹² Eighty percent of voters said they supported efforts to help recover the declining population of grizzly bears in the NCE, specifically.¹³

Likewise, the Service and NPS recognize that reintroducing grizzly bears into the NCE is the only viable means to recover the species to this ecologically rich, protected habitat.¹⁴ And, despite an existing state law in the State of Washington that attempts to obstruct the reintroduction of grizzly bears to the state,¹⁵ we appreciate that the federal government has made clear it intends to proceed with carrying out its mandates to recover the species in accordance with the ESA under authority of the Supremacy Clause (Article VI, Clause 2) and the Property Clause (Article IV, Section 3, Clause 2) of the U.S. Constitution.¹⁶

Our comments on the DEIS are generally in support of the federal agencies’ action alternatives to reintroduce grizzly bears into the NCE. However, we caution the NPS and the Service to ensure that the agencies are utilizing the best available science in deciding on a final course of action. Additionally, we oppose the potential use of an ESA Section 10(j) experimental population designation for the reintroduced population. Both of these

¹¹ In 2016, Tulchin Research conducted a “scientific telephone survey among a representative sample of 600 registered voters in the state of Washington regarding efforts to help the declining population of grizzly bears in the North Cascades to recover.” Letter to Interested Parties, From Ben Tulchin et al., Tulchin Research, RE: Polling Finds Washington Votes Strongly Back Grizzly Bear Recovery (June 6, 2016) <http://www.defenders.org/sites/default/files/publications/polling-finds-washington-voters-support-grizzly-bear-recovery-in-north-cascades.pdf>.

¹² *Id.* (“Washington voters hold the grizzly bear in high esteem, with nine out of ten voters (91%) agreeing with the statement that ‘grizzly bears are a vital part of America’s wilderness and natural heritage,’ including two-thirds of voters (67%) who strongly agree with that statement ... [E]ight in ten voters (81%) agree that ‘the State of Washington should make every effort to help grizzly bears recover and prevent their disappearance,’ including a majority (53%) who strongly agree.”).

¹³ *Id.* (“Asked specifically about efforts to help the declining population of grizzly bears in the North Cascades to recover, 80 percent of voters say they support these efforts to just 13 percent of voters who oppose them. Notably, this overwhelming support extends across gender, generational, regional, and even partisan lines — with 89 percent of Democrats, 70 percent of Republicans, and 74 percent of independent voters backing these efforts.”).

¹⁴ *See* DEIS at 6 (“The main threat to grizzly bears in the NCE is the limited number of bears, with resulting demographic and genetic risks. Natural recovery in the NCE is challenged by the absence of verified reproduction and isolation from any contiguous populations in Canada and the United States.”).

¹⁵ DEIS at 13 (describing RCW 77.12.035, *Protection of grizzly bears – Limitation on transplantation or reintroduction – Negotiations with federal and state agencies*, which prohibits State officials from transplanting or introducing grizzly bears into Washington from outside the state).

¹⁶ DEIS at 14 (“To the extent that there is any suggestion that the state statute applies to the federal government, the ESA would preempt this state law, pursuant to the Supremacy Clause of the U.S. Constitution (Article VI, Clause 2). In addition, the Property Clause of the U.S. Constitution (Article IV, Section 3, Clause 2) would also act to preempt the state law because grizzly bear reintroduction would occur on federal lands administered by the NPS or the [U.S. Forest Service].”).

concerns, as well as our comments and suggestions on the proposed action alternatives are addressed below.

I. BEST AVAILABLE SCIENCE

First, the NPS and the Service must ensure that they are using the best available science in making a final determination on the proposed reintroduction of grizzly bears to the NCE. We are concerned with the agencies' reliance on Lyons et al. (2016)¹⁷ to assert that the carrying capacity of the NCE is only 280 bears.¹⁸ This report is an unpublished paper that has not undergone a scientific peer review process. We respectfully request that the agencies ensure this report is scientifically defensible and representative of the best available science before using it in a Final Environmental Impact Statement ("FEIS") and final decision on the grizzly bear reintroduction program for the NCE. Considering that the NCE provides one of the largest contiguous areas of protected wildlands remaining in the Lower 48, we are alarmed that the grizzly bear carrying capacity estimate for the NCE is so relatively low as compared to other ecosystems (e.g., the Greater Yellowstone Ecosystem ("GYE") hosts upwards of 700 bears, the Northern Continental Divide Ecosystem ("NCDE") is home to over 1,000). We expect the federal agencies conducting the reintroduction program to assure the public of its scientific integrity by ensuring studies relied on are scientifically defensible and have undergone proper peer review.

II. SECTION 10(J) EXPERIMENTAL POPULATION DESIGNATION

Second, we caution the federal agencies against using a Section 10(j) experimental population designation for the reintroduced population.¹⁹ Although we realize that a separate rulemaking and associated public comment opportunity will be provided should the Service decide to pursue a Section 10(j) rule for carrying out the NCE grizzly bear reintroduction program, we take this opportunity to briefly outline our

¹⁷ Andrea L. Lyons, William L. Gaines, James Begley, and Peter Singleton, *Grizzly Bear Carrying Capacity in the North Cascades Ecosystem: Final Report*, Submitted to the Skagit Environmental Endowment Commission, Contract #US 15-05 (April 2016) available at <http://skagiteec.org/skagit-research-library/sp-files/grizzly-bear-carrying-capacity-in-the-north-cascades-ecosystem>.

¹⁸ DEIS at 5 ("Based on a qualitative assessment by the IGBC technical committee review team, habitat within the NCE was considered to be of sufficient quality and quantity to support a population of 200 to 400 grizzly bears (Servheen et al. 1991). More recent carrying capacity modeling suggests the most plausible carrying capacity for the NCE is approximately 280 bears (Lyons et al. 2016).").

¹⁹ DEIS at 29 ("[A]n option would be available under any of the action alternatives to designate grizzly bears in the U.S. portion of the NCE as a 10(j) experimental population under section 10 of the ESA."); *see id.* at 29–30 (describing section 10(j): "To relieve concern that translocations may result in restrictions on the use of private, tribal, or public land, Congress added the provision for experimental populations under section 10(j) of the ESA. An experimental population is a group of reintroduced plants or animals that is geographically isolated from other populations of the species that is typically determined to be 'essential' or 'nonessential' to the survival of the species as a whole but contributes to their recovery. Section 10(j) provides for the reintroduction of experimental populations under special regulations that may include protective regulations established under the authority of section 4(d) of the ESA.").

underlying opposition to applying this tool to the reintroduction program for grizzly bears in the NCE.²⁰

First, the reintroduced grizzly bears in the NCE may not legally qualify as an “experimental population,” as that term is defined in the Act.²¹ Section 10(j)(1) defines an “experimental population” as:

any population (including offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but *only when*, and at such times as, *the population is wholly separate geographically from nonexperimental populations of the same species.*²²

However, grizzly bears released into the NCE as part of the reintroduction program will primarily be derived from source populations of “nonexperimental” status. For example, due to their analogous dietary and habitat requirements, grizzly bears in the NCDE and from adjacent populations in British Columbia will serve as the primary source populations for the reintroduction program in the NCE.²³ But, grizzly bears in the NCDE are currently listed as a “threatened” species under the Act,²⁴ and grizzly bears that may be translocated from British Columbia have their own protected status as determined by the Canadian government. In short, the bears released into the NCE will not be “wholly separate geographically from nonexperimental populations of the same species,” and thus, designating the reintroduced population as “experimental” under section 10(j) would violate the plain language of the ESA.²⁵

Second, pursuing an experimental population designation for the reintroduced grizzly bears in the NCE could have an illegal effect practically speaking as well. For example, designating the translocated grizzly bears as “experimental nonessential” would have the arguably illegal effect of stripping the source population of grizzly bears – at least

²⁰ DEIS at 31 (“If the [U.S. Fish and Wildlife Service (“FWS”)] decides to pursue the designation of a 10(j) experimental population under any of the action alternatives, the FWS would conduct a separate rulemaking process, which would be initiated during this environmental review process and would be subject to its own comment period.”).

²¹ 16 U.S.C. § 1539(j)(1).

²² *Id.* (emphasis added).

²³ DEIS at 22–23 (“Dominant foods in the NCE are expected to be similar to the west side of the Northern Continental Divide Ecosystem (NCDE) in northwestern Montana, adjacent grizzly bear habitat in British Columbia, Canada, and grizzly bear habitat in south-central interior British Columbia. In these areas, berries are the dominant food source providing calories and ultimately fat production necessary for a grizzly bear to survive hibernation and to reproduce. As a result, these areas would be the most likely sources selected for capturing bears for release into the NCE.”).

²⁴ U.S. Fish & Wildlife Service, Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species, 40 Fed. Reg. 31734 (July 28, 1975) (listing all grizzly bears in the Lower 48 as a “threatened” species under the ESA). The population currently occupying the NCDE was formerly referred to as the “Bob Marshall Ecosystem,” including the “Flathead National Forest, Bob Marshall Wilderness Area, Mission Mountains Primitive Area, and Glacier National Park.” *Id.* at 31734.

²⁵ 16 U.S.C. § 1539(j)(1).

those deriving from the NCDE population – of their higher protected status as a “threatened” species under the ESA in violation of the listing and delisting requirements of ESA section 4(a).²⁶ In order to change the listed status of NCDE grizzly bears released into the NCE, the Service, arguably, would need to follow the proper procedure and analysis as required by section 4(a) by applying the listing factors to determine whether removing the “threatened” protected status from these bears would be appropriate. In short, the Service likely cannot legally designate the reintroduced population (derived primarily from an already listed population) as an “experimental population” under section 10(j) absent undertaking a separate analysis of the listing and reclassification requirements of section 4 for the source population.

Third, designating a 10(j) experimental population based on geographic boundaries would make for a complicated patchwork of protected status for grizzly bears roaming across the region. For example, bears that may wander naturally into the NCE from populations to the north or east would seem to lose their protected status simply by crossing an arbitrary political line. Such an outcome would frustrate the purpose and recovery mandates of the ESA.

Finally, the Service must consider how designation of a 10(j) experimental population for reintroduced NCE bears would impact the larger distinct population segment (“DPS”) listing for the conterminous Lower 48 states population.²⁷ We remind the Service that they have a duty to ensure that the entire listed population of grizzly bears are recovered throughout their historic range, and it would be illegal to pursue a piecemeal recovery and delisting approach.²⁸ We are concerned that separating out the listing status of the reintroduced NCE population of grizzly bears could effectively hamper connectivity and recovery efforts for the species as a whole.

Accordingly, we suggest that the NPS and the Service discontinue contemplation of designating the reintroduced population of grizzly bears to the NCE as a Section 10(j) experimental population in all action alternatives.

III. SUPPORTED ALTERNATIVES

We support the NPS and the Service’s efforts to restore a viable and recovered population of grizzly bears across the species’ historic range, including by restoring the species to the valuable habitat of the NCE. Thus, we generally support all of the proposed

²⁶ 16 U.S.C. § 1533(c); 50 C.F.R. 424.11(d) (explaining that the same factors for listing an imperiled species as endangered or threatened under the Act (section 1533(a)(1)) are used for reclassifying the species).

²⁷ U.S. Fish & Wildlife Service, Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species, 40 Fed. Reg. 31734 (July 28, 1975) (listing all grizzly bears in the Lower 48 as a “threatened” species under the ESA).

²⁸ See e.g. *Humane Society of the United States v. Jewell*, 76 F. Supp. 3d 69 (D.D.C. 2014) (holding the Service cannot designate a DPS for the sole purpose of delisting, nor can the Service simultaneously designate and delist a DPS); *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1211 (D. Mont. 2010) (holding the Service cannot create a sub-DPS: “The plain language of the ESA does not allow the agency to divide a DPS into a smaller taxonomy.”).

action alternatives (Alternatives B, C, and D). We agree with the NPS’s assertion that adoption of the No Action Alternative (Alternative A) would not meet the purpose and need for action, nor would it allow for the species to achieve recovered status under the ESA, and thus oppose adoption of Alternative A as the preferred course of action.²⁹ Instead, we encourage the NPS and the Service to adopt Alternative D as the preferred action alternative.³⁰

We support Alternative D because this is the only action alternative that serves to achieve the recovery mandates of the ESA in a timely fashion. The ESA is our nation’s preeminent wildlife conservation law enacted “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”³¹ The Supreme Court has acknowledged the crucial significance of the Act, noting that “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”³² An “examination of the language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”³³ “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution’.”³⁴ As a district court recently reminded the Service, “if there is one thing required of the Service under the ESA, it is to take action at the earliest possible, defensible point in time to protect against the loss of biodiversity within our reach as a nation.”³⁵

In accordance with the ultimate goal of the Act to use “all methods and procedures ... necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary,”³⁶ we suggest NPS and the Service pursue Action Alternative D: Expedited Recovery. This alternative seeks “to expedite grizzly bear restoration by releasing additional grizzly bears into the NCE over time until the restoration goal is reached.”³⁷ Grizzly bears should be restored across their historic range as soon as possible. Alternative D rightfully allows recovery to

²⁹ DEIS at 36 (noting the dismissed “Natural Recovery” alternative as being characterized by the no-action alternative, and stating: “[A]lthough a very small number of grizzly bears still inhabit the NCE, the number of grizzly bears in the NCE does not meet the accepted definition for a population (2 adult females with cubs or 1 adult female tracked through two litters)(FWS 2000a) and it is unlikely the small number of bears in the ecosystem is sufficient for a population to recover on its own. Additionally, the ecosystem is isolated from other ecosystems in the United States and Canada, making it highly unlikely that grizzly bears could migrate from other populations. As a result, this alternative would not enhance the probability of long-term survival of grizzly bears in the NCE, and therefore would not meet the purpose and need of this draft plan/EIS.”).

³⁰ DEIS at 29 (describing Alternative D: Expedited Restoration).

³¹ 16 U.S.C. § 1531(b).

³² *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

³³ *Id.* at 174.

³⁴ *Id.* at 194.

³⁵ *Defenders of Wildlife v. Jewell*, 176 F. Supp. 3d 975 (D. Mont. 2016).

³⁶ 16 U.S.C. §§ 1531(b), 1532(3).

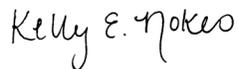
³⁷ DEIS at 29.

occur by not limiting the number of bears that may be released into the ecosystem each year, but rather allows the number of suitable bears captured in a given year to be released as resources allow.³⁸ We support this approach and believe that bringing the NCE grizzly bear population to at least 200 bears in 25 years is a realistic and commendable timeframe.³⁹

CONCLUSION

Thank you for your consideration of our comments on the DEIS. In sum, we hope the NPS and the Service will (1) ensure it utilizes the best available science in rendering a final decision, (2) abdicate potential plans to designate the reintroduced population as an “experimental population” under section 10(j) of the ESA, and (3) employ the expedited recovery plan as outlined in Alternative D to restore grizzly bears to the NCE as soon as possible. Please keep us informed of future developments as the NPS and the Service finalize and implement its grizzly bear restorations plans for the NCE.

Respectfully,



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³⁸ *Id.* Notably, the approach proposed by Alternative D would be self-limiting. *Id.* (“It is anticipated that the logistics and capacity of management agencies to carry out capture and release would constrain the ability to release a large number of grizzly bears in any single year under this alternative (the actual number of grizzly bears to be released per year would likely be 5 to 7)... This alternative could be constrained somewhat by the availability of candidate bears if one or more of the source area populations reaches a point where it can no longer sustain the effective mortality that capture of candidate grizzly bears would entail. In such a case, it may become necessary to re-evaluate the use of certain source areas over the course of the restoration effort.”).

³⁹ DEIS at iv (“Alternative D is expected to result in the achievement of the restoration goal of approximately 200 grizzly bears within roughly 25 years.”).