



October 7, 2016

Public Comments Processing
Attn: Docket No. FWS-R6-ES-2016-0042
U.S. Fish and Wildlife Service
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Dear U.S. Fish and Wildlife Service:

On September 7, 2016, the U.S. Fish and Wildlife Service (“FWS” or “Service”) reopened the public comment period regarding its proposed rule to establish the Greater Yellowstone Ecosystem (“GYE”) grizzly bear distinct population segment (“DPS”) and simultaneously remove that DPS from the Federal List of Endangered and Threatened Wildlife (“Proposed Delisting Rule”). See U.S. Fish and Wildlife Serv., Endangered and Threatened Wildlife and Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife, 81 Fed. Reg. 61,658 (Sept. 7, 2016) (“Reopening Notice”). The Service’s Reopening Notice specifically solicited public input on the Proposed Delisting Rule in light of Montana, Idaho, and Wyoming’s respective regulations managing discretionary mortality within their jurisdictions, as well as five peer reviews of the Proposed Delisting Rule. Id. Please accept these comments in response to the Reopening Notice on behalf of Center for Biological Diversity, Defenders of Wildlife, Endangered Species Coalition, Greater Yellowstone Coalition, Jackson Hole Conservation Alliance, National Parks Conservation Association, Natural Resources Defense Council, Park County Environmental Council, Sierra Club, Western Watersheds Project, WildEarth Guardians, and Wyoming Wildlife Advocates.

In its Reopening Notice, FWS stated that it has reviewed recently finalized state regulations and the states’ Memorandum of Agreement Regarding the Management and Allocation of Discretionary Mortality of Grizzly Bears in the GYE (“Tri-State MOA”) and determined that “the regulatory framework in Montana, Wyoming, and Idaho, in combination with the Tri-State MOA, will maintain a recovered population of grizzly bears in the GYE.” Reopening Notice, 81 Fed. Reg. at 61,660. This statement appears to reflect the Service’s judgment regarding the adequacy of regulatory mechanisms under the Endangered Species Act (“ESA”) to prevent imperilment of the GYE grizzly bear DPS if the population is delisted and regulation of grizzly bear management falls to the states of Montana, Wyoming, and Idaho. See 16 U.S.C. § 1533(a)(1)(D) (requiring FWS to consider “the inadequacy of existing regulatory mechanisms” in listing determinations).

As set forth below, this statement is premature and unjustified in light of the following:

- the absence of a final Conservation Strategy that would otherwise provide a long-term framework for grizzly bear management;

- the states’ recent retreat from key conservation commitments that were assured by the Service in the Proposed Delisting Rule;
- the states’ failure to commit to recalibrating mortality thresholds in the event of a revised stable population target;
- efforts by federal land management agencies to weaken habitat protections under the 1998 baseline for developed sites on federal lands; and
- ongoing uncertainty regarding grizzly bear habitat protections under the U.S. Forest Service’s 2012 forest planning rule.

As the following discussion makes clear, a detailed assessment regarding the adequacy of regulatory mechanisms to address numerous grizzly bear conservation measures is impossible at this time due to the unresolved nature of critical conservation measures that apparently will be undertaken by state and federal agencies in the post-delisting management scheme. Not only does this point render any current FWS analysis of regulatory mechanisms premature and illegitimate, it also deprives the public of a meaningful opportunity to comment on the Proposed Delisting Rule with a full understanding of the post-delisting regulatory regime. Such an opportunity for meaningful public comment is mandated by the ESA before publication of a final delisting rule. See 16 U.S.C. § 1533(b)(4); 5 U.S.C. § 553(c). Accordingly, FWS must offer a further public comment opportunity on the issue of adequacy of regulatory mechanisms after the post-delisting regulatory and management framework becomes final.

I. THERE IS NO FINAL CONSERVATION STRATEGY TO GUIDE POST-DELISTING GRIZZLY BEAR MANAGEMENT

At the outset, FWS’s apparent determination that state regulatory mechanisms are adequate to support GYE grizzly bear delisting is premature and unjustified—and the public’s ability to comment on that determination is hobbled—because there is not yet any final Conservation Strategy to guide post-delisting grizzly bear management.

A. FWS Considers the Conservation Strategy the Linchpin of Post-Delisting Grizzly Bear Management But Has Not Reviewed the Final Conservation Strategy or Offered It for Public Review

FWS’s asserted approval of state regulatory mechanisms is particularly troubling because the Service has not yet reviewed the final Conservation Strategy, which FWS previously identified as the linchpin of post-delisting grizzly bear management in the GYE. In 2007, FWS finalized a rule that established the GYE grizzly bear DPS and removed it from the Federal List of Endangered and Threatened Wildlife. U.S. Fish and Wildlife Serv., Endangered and Threatened Wildlife and Plants; Final Rule Removing the Yellowstone Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, 72 Fed. Reg. 14,866-01 (Mar. 29, 2007) (“2007 Final Delisting Rule”). That rule was challenged in litigation that eventually came before the U.S. Court of Appeals for the Ninth Circuit. In its argument to the Ninth Circuit, FWS touted the 2007 version of the Conservation Strategy as the primary document on which it based its conclusion that adequate regulatory mechanisms were in place to secure grizzly bear conservation after delisting. See Greater Yellowstone Coal. v. Servheen, Fed. Defendants’ Br., No. 10-35052, Dkt. 9-1 at 22 (Aug. 9, 2010) (stating that “[t]he Service largely based its conclusion that adequate regulatory mechanisms existed on the

Conservation Strategy”). Although the Ninth Circuit vacated the 2007 Final Delisting Rule, it accepted FWS’s argument on the regulatory-mechanisms issue, holding that the Service’s reliance on the 2007 Conservation Strategy sufficed to demonstrate that adequate regulatory mechanisms existed to protect the GYE grizzly bear population in the post-delisting period. Greater Yellowstone Coal., 665 F.3d at 1030-32.

Given the Service’s, and the Ninth Circuit’s, emphasis on the Conservation Strategy as the central instrument demonstrating the adequacy of post-delisting regulatory mechanisms, it is remarkable that FWS in the Reopening Notice has asserted the adequacy of the states’ post-delisting regulatory framework even though the Conservation Strategy is now subject to ongoing negotiation and revision by the signatory parties. The Service’s position is even more striking considering that FWS, in the current delisting process, has called the Conservation Strategy “the document guiding management and monitoring of the Yellowstone grizzly bear population and its habitat upon recovery and delisting.” U.S. Fish and Wildlife Serv., Draft 2016 Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Ecosystem, 2 (Feb. 19, 2016) (“2016 Draft Conservation Strategy”). See also Proposed Delisting Rule, 81 Fed. Reg. 13,174, 13,183 (March 11, 2016) (calling the Conservation Strategy “the comprehensive post-delisting management plan for a recovered [GYE grizzly bear] population”). Put simply, the absence of a final Conservation Strategy prevents FWS from rendering an informed evaluation of post-delisting regulatory mechanisms, and the Service must comprehensively reevaluate the adequacy of regulatory mechanisms in light of the final Conservation Strategy.

B. The Peer Reviewers Did Not Assess a Final Conservation Strategy

The absence of a final Conservation Strategy also calls into question the utility and accuracy of the five peer reviews addressing the Proposed Delisting Rule. Scientific Peer Review for Delisting of Greater Yellowstone Ecosystem Grizzly Bears (June 9, 2016) (“Peer Review”). Moreover, it leaves the public in the dark as to whether the Conservation Strategy will be amended to align with suggestions from the scientists who reviewed the Proposed Delisting Rule.

Importantly, the chosen reviewers did not have the opportunity to review a final version of the Conservation Strategy. Instead, the reviewers assessed only a draft strategy published with the Proposed Delisting Rule. Accordingly, the peer reviewers had no opportunity to address any substantive changes that will be made to the draft Conservation Strategy before it is finalized. However, the Service has indicated that it will not release the Conservation Strategy for public review and evaluation until after the close of public comment on the Proposed Delisting Rule, and will not conduct another round of peer review. Thus, it appears that any revisions incorporated into the final Conservation Strategy will escape peer review.¹

¹ The Yellowstone Ecosystem Subcommittee (“YES”) of the Interagency Grizzly Bear Committee held a meeting on September 8, 2016, one day after FWS released the Revised Proposed Delisting Rule. The YES members spoke at length about the remaining issues to be resolved in the final Conservation Strategy, without sharing the document with call participants. It then solicited public comment; in response, members of the public (including signatories to this letter) commented on the difficulty of submitting meaningful comments on a final Conservation Strategy without knowing what it contains.

This is significant because all five peer reviewers flagged weaknesses in the draft document and proposed edits to strengthen grizzly bear habitat and population management. For instance, the peer reviewers concluded that the 2016 Draft Conservation Strategy failed to adequately ensure connectivity between the GYE population and other extant grizzly bear populations throughout the species' range. See, e.g., Peer Review, Reviewer 2 at 6 (concluding that connectivity “is not adequately assessed” in the 2016 Draft Conservation Strategy); id., Reviewer 3 at 3 (“[W]e are told that habitat connectivity will be monitored but how this will be done has not been explained. Really, the only connectivity discussion [in the 2016 Draft Conservation Strategy] appears to relate to roads.”); id., Reviewer 4 at 4 (stating that the 2016 Draft Conservation Strategy contains “no planned action to facilitate” recolonization or connectivity.); id., Reviewer 5 at 4 (“[M]any of the practices outlined [in the 2016 Draft Conservation Strategy] appear narrow and limited relative to ensuring grizzly bear connectivity”). Without knowing whether and how the Conservation Strategy will be revised to address the peer reviewers' comments, it is impossible to determine whether the final Conservation Strategy is an adequate management tool for grizzly bear conservation pursuant to the best available science and, accordingly, whether adequate regulatory mechanisms exist to secure the GYE grizzly bear population after delisting.

C. FWS Impermissibly Requires Commenters to Assess State Regulatory Mechanisms Without a Final Conservation Strategy

As discussed supra, FWS considers the Conservation Strategy a central document that establishes key provisions for grizzly bear habitat, population, and human-bear conflict management moving forward. But without a final Conservation Strategy to evaluate, the public has no way to determine whether the states' management plans will sufficiently protect grizzly bears in the post-delisting era. Thus, it is impossible for the public to meaningfully comment on this critical issue.

Further, the opportunity for meaningful public comment is undermined by misleading and confusing information provided by FWS in connection with the Reopening Notice. For example, the Reopening Notice advises the public that Montana, Wyoming, and Idaho “approved the Tri-State MOA on the following dates: Wyoming, on May 11, 2016; Montana, on July 13, 2016; and Idaho, on August 8, 2016.” Reopening Notice, 81 Fed. Reg. at 61,659. The Reopening Notice directs the public to the states' respective actions on these specified dates to identify the document that embodies the states' “coordinated plans for grizzly bear management and allocates discretionary mortality of grizzly bears in the GYE between the three States.” Id. However, the states subsequently adopted a revised version of the Tri-State MOA reflecting substantive changes from the version referenced in the Reopening Notice, with the last such approval—from Wyoming—finalized on August 22, 2016. See Tri-State MOA (Aug. 22, 2016). Accordingly, the Reopening Notice directs the public to preliminary, superseded versions of the Tri-State MOA to inform comment on the adequacy of regulatory mechanisms.

The Reopening Notice further sows public confusion in its presentation of key grizzly bear population management parameters that would be applied under the post-delisting management regime within the Demographic Monitoring Area (“DMA”). Under the Tri-State MOA, the states agreed that, if grizzly populations numbered equal to or less than 674 bears, then mortality rates would be less than 7.6% for females and for dependent young. However, the presentation of these parameters in Table 1 of the Reopening Notice states that, if grizzly

populations were equal to or less than 674 bears, then mortality rates for females and dependent young could be equal to or less than 7.6% (rather than less than 7.6% as indicated in the Tri-State MOA). Compare Reopening Notice, 81 Fed. Reg. at 61,659 with Tri-State MOA, § IV.2.c. Again, the public's ability to present informed and meaningful public comment is undermined by this discrepancy, which creates confusion about a key parameter that FWS itself has identified as essential to post-delisting management for a stable GYE grizzly bear population.

These misleading and confusing statements underscore a central problem with FWS's approach to the GYE grizzly bear delisting process: FWS is rushing the delisting process in an apparent attempt to meet a predetermined deadline at the expense of the public's opportunity for informed and meaningful public comment on critical post-delisting management measures. There is no apparent reason—other than the Service's apparent desire to maintain a politically driven schedule—why FWS could not have scheduled a public comment opportunity after completion of a final Conservation Strategy and finalization of associated state management measures. Relatedly, there is no apparent reason why FWS could not have scheduled such a significant public comment period after the Service had ensured accuracy and consistency of critical information presented to the public. Instead, FWS rushed to offer the public what is apparently its only opportunity to comment on the adequacy of post-delisting regulatory mechanisms for the GYE grizzly bear population before critical aspects of the post-delisting management regime have even been finalized and, in its rush, supplied mistaken and confusing information to the public. FWS's conduct has therefore prevented informed and meaningful public comment on the adequacy of post-delisting regulatory mechanisms.

II. FWS'S APPROVAL OF REGULATORY MECHANISMS IGNORES THE STATES' RETREAT FROM CRITICAL PROMISES TO MAINTAIN POPULATION STABILITY, CONNECTIVITY, AND LONG-TERM IMPLEMENTATION OF THE CONSERVATION STRATEGY

FWS's approval of the states' regulatory mechanisms is equally flawed because it ignores recent statements from Montana, Wyoming, and Idaho representatives that call into question key conservation commitments underlying the Proposed Delisting Rule. The Service's Proposed Delisting Rule assured the public of state commitments that the population would be managed to ensure a stable population of 674 bears throughout the DMA; that connectivity between the GYE and the Northern Continental Divide Ecosystem ("NCDE") would be prioritized by state managers; and that the Conservation Strategy would remain in place on a long-term basis with interagency management among state and federal agencies. Yet state management agencies have subsequently called each of these commitments into question through their comments on the Proposed Delisting Rule, as well as several proposed amendments to the final Conservation Strategy as part of ongoing meetings of the Yellowstone Ecosystem Subcommittee ("YES"), part of the Interagency Grizzly Bear Committee ("IGBC") charged with steering the Conservation Strategy's final iteration. The states' evolving positions raise significant and unresolved questions about the adequacy of post-delisting state management measures for the GYE grizzly bear population that FWS must address prior to publishing any final delisting rule.

A. The States Are Seeking to Roll Back Any Commitment to a Stable Population Objective

First, the states are attempting to withdraw any commitment to manage for a stable population of 674 bears. The Proposed Delisting Rule assured the public that the states “have decided that the population in the DMA will be managed around the long-term average population size for 2002-2014 of 674.” Proposed Delisting Rule, 81 Fed. Reg. at 13,201. However, in their formal comments on the Proposed Delisting Rule, state management agencies disavowed any commitment to a management objective of 674 bears and instead asserted that they are committed only to “a tri-state management objective for the DMA of at least a range between 600 and 747.” Letter from Virgil Moore, et al. to FWS Public Comments Processing, at 4 (May 9, 2016) (“State Comment Letter”). While the states couch this assertion in the context of contrasting ESA recovery criteria with “state objectives for management of a non-listed population,” *id.*, the fact remains that their comments create unresolved uncertainty whether they will seek to manage for an objective of 674 bears, as assured in the Proposed Delisting Rule, or instead for an objective as low as 600 bears. Notably, the latter objective would mean that the states could kill 117 grizzly bears from the 2015 GYE population estimate without violating their management objective. See Interagency Grizzly Bear Study Team, Yellowstone Grizzly Bear Investigations 2015, 14 [attached as Exhibit 1] (estimating population of 717 GYE grizzly bears within DMA). The uncertainty on this point is only exacerbated by the State Comment Letter’s demand for FWS to omit references to population stability. The State Comment Letter recommends deleting all references to “stability,” and “instead refer to growth rate, reaching apparent carrying capacity, and population fluctuation.” State Comment Letter at 6. The states’ position on this point raises significant concerns that the states are not committing to long-term management for a stable GYE grizzly bear population.

B. The State Management Plans and Draft Conservation Strategy Do Not Commit to Manage for Connectivity

Second, the states are calling into question any commitment to manage for connectivity between the GYE and Northern Continental Divide grizzly bear populations. Connectivity between the GYE and NCDE grizzly bear populations is crucial for the long-term viability of the GYE grizzly bear population’s genetic health. In this regard, the Proposed Delisting Rule assured the public that “efforts will continue to facilitate occasional movement of male bears between the GYE and the NCDE,” and, specifically, that Montana “has indicated they will manage discretionary mortality in this area in order to retain the opportunity for natural movements of bears between ecosystems.” Proposed Delisting Rule, 81 Fed. Reg. at 13,212. Nevertheless, the 2016 Draft Conservation Strategy contains no meaningful direction on how state officials will manage the population for improved connectivity; in fact, the peer reviewers almost unanimously panned the document’s failure to adequately discuss the topic. See, e.g., Peer Review, Reviewer 2 at 6 (concluding that connectivity “is not adequately assessed” in the 2016 Draft Conservation Strategy); *id.*, Reviewer 3 at 3 (“[W]e are told that habitat connectivity will be monitored but how this will be done has not been explained. Really, the only connectivity discussion [in the 2016 Draft Conservation Strategy] appears to relate to roads.”); *id.*, Reviewer 4 at 4 (stating that the 2016 Draft Conservation Strategy contains “no planned action to facilitate” recolonization or connectivity.); *id.*, Reviewer 5 at 4 (“[M]any of the practices outlined [in the 2016 Draft Conservation Strategy] appear narrow and limited relative to ensuring grizzly bear connectivity”).

The 2016 Draft Conservation Strategy's sparse language addressing this issue notes that "[m]aintaining presence of non-conflict grizzly bears in areas between the NCDE management area and the [DMA] of the GYA" would facilitate connectivity. 2016 Draft Conservation Strategy at 53. Yet it indicates that Montana's management plan "will retain a priority around conflict management and removal of problem grizzly bears in this area, similar to the rest of Montana." *Id.* Further, the YES Conservation Strategy team appears content to forego any changes to the final Conservation Strategy to address this key issue. *See* YES Conservation Strategy Revision Steering Comm. Meeting Minutes (July 6, 2016) ("YES July 6, 2016 Meeting Minutes") [attached as Exhibit 2], available at: http://igbconline.org/wp-content/uploads/2016/03/160706_YES_CS-SC_Mtg_Minutes.pdf (acknowledging that connectivity is "a big issue for the public," that the 2016 Draft Conservation Strategy language is "not publically acceptable", and that "making additional changes regarding connectivity may help to get a rule in place," but agreeing to leave connectivity language "as is").

More troubling, the states' formal comment on the Proposed Delisting Rule demands that FWS withdraw any requirement for management to facilitate connectivity as a prerequisite for delisting. *See* State Comment Letter at 12-13. This state position, coupled with generally vague and unenforceable language concerning connectivity in operative state management documents, creates a clear threat that any management steps to facilitate connectivity will be subordinated to other state concerns.

C. The States Are Attempting to Retreat from A Long-Term Commitment to the Conservation Strategy

Third, the states are retreating from any long-term commitment to apply the Conservation Strategy. The Proposed Delisting Rule assured the public that the Conservation Strategy "will remain in effect indefinitely—beyond the 5-year post-delisting monitoring period required by the [ESA]—to facilitate and assure continued successful management of the population and its habitat across multiple land ownerships and jurisdictions." Proposed Delisting Rule, 81 Fed. Reg. at 13,188. It also asserted that the Conservation Strategy "will remain in effect in perpetuity" because grizzly bears "will always be conservation reliant because of their low resiliency to excessive human caused mortality." *Id.* at 13,209 (citation omitted). Further, the 2016 Draft Conservation Strategy recognizes that the Conservation Strategy "will remain in place beyond recovery and delisting" and that "[o]ngoing review and evaluation of the effectiveness of this Conservation Strategy is [an interagency] responsibility." 2016 Draft Conservation Strategy at 2. Finally, the 2016 Draft Conservation Strategy notes that the strategy itself will be "evaluated by the [state, tribal, and federal] management agencies every five years or as necessary, allowing public comment in the updating process." *Id.*

However, in the May 9, 2016 State Comment Letter, the state wildlife management agencies reject any long-term commitment to the Conservation Strategy and, indeed, seek to strike any language in the Proposed Delisting Rule indicating that the Conservation Strategy will remain in place beyond the five-year post-delisting monitoring period required by the ESA. *See* State Comment Letter at 3-4 (seeking to redact all language that would permit the Conservation Strategy to remain in effect "in perpetuity" or "indefinitely"). The states give a variety of reasons for requesting these changes, hinging primarily on the Tri-State MOA and the states' management strategies. *Id.* But those strategies do not bind the states to long-term conservation-oriented management in a manner consistent with FWS's conclusion that grizzly bears will

always be conservation reliant due to low resiliency to human caused mortality. For instance, the Tri-State MOA—which embodies population management provisions in the 2016 Draft Conservation Strategy—provides any of the states an off-ramp from ongoing commitment to the Conservation Strategy. It permits “any party [to] terminate its participation in the MOA” at any time after giving 180 days’ notice. Tri-State MOA, § VII. Also, the Tri-State MOA remains in effect only until the parties agree to terminate it. Id.

Moreover, despite claims in the State Comment Letter that the management plans demonstrate a “commitment” to mortality limits and other regulatory mechanisms to maintain the grizzly bear population, the individual state management plans contain little that would explicitly tie their wildlife management agencies to management policies consistent with the Conservation Strategy. Montana’s Southwest Montana Grizzly Bear Management Plan—published in 2013—predates the Proposed Delisting Rule and Tri-State MOA and so does not adopt the mortality limits presented in those two documents. See generally Mont. Fish, Wildlife, and Parks, Grizzly Bear Management Plan for Southwestern Montana and Final Programmatic Environmental Impact Statement, 48-9 (Dec. 2013) (“Southwest Montana Management Plan”) [attached as Exhibit 3]. Instead, its calculation of “sustainable mortality limits” assumes a 9% annual mortality limits for females, see Southwest Montana Management Plan at 30 (Fig. 4), and also notes that mortalities recorded outside the DMA will not count against sustainable mortality limits, see id. at 34 (Fig. 5). Montana’s hunting regulations, the state’s only “management” document included in the Service’s delisting package, similarly excludes discretionary mortality limits; instead, it consists of vague hunting regulations containing no firm hunting quotas. Mont. Fish, Wildlife, and Parks, Grizzly Bear Montana Hunting Regulations, 4 (Feb. 11, 2016).² Idaho opted not to update its management plan and instead submitted a March 2002 version of the plan as its contribution to GYE grizzly bear population management. Idaho Yellowstone Grizzly Bear Management Plan (March 13, 2002). Thus, the Idaho plan predates the Conservation Strategy by over a decade, and so does not reflect that state’s commitment to the tenets of the Conservation Strategy. Wyoming’s management plan is unique only to the extent that it adopts the Service’s table specifying mortality limits for grizzly bears; yet Wyoming’s table contains more permissive mortality limits than those agreed upon in the Tri-State MOA, or stated in the Proposed Delisting Rule. Wyo. Game and Fish Dep’t., Wyoming Grizzly Bear Mgmt. Plan, 5 (Table 1).

In sum, the states’ retreat from key commitments assured in the Proposed Delisting Rule gives rise to critical conservation concerns that must be addressed by the Service in any delisting decision. The Service’s stated approval of the states’ regulatory frameworks in the Reopening Notice simply disregards this significant development undermining the adequacy of post-delisting grizzly bear management.

² When Montana Fish, Wildlife, and Parks first drafted grizzly bear hunting regulations in 2002, the agency included language outlawing hunting in certain linkage zones and core grizzly bear habitat adjacent to Yellowstone National Park to facilitate connectivity. The current regulations walk back these restrictions.

III. NEWLY-RELEASED DOCUMENTS DO NOT ADDRESS CRITICAL GRIZZLY BEAR MANAGEMENT ISSUES ABSENT FROM THE DRAFT CONSERVATION STRATEGY

The remainder of this comment concerns the failure of existing management provisions to resolve critical issues left unaddressed by the 2016 Draft Conservation Strategy. These issues must be considered by the Service in assessing the adequacy of post-delisting regulatory mechanisms.

A. New Population Estimate Methodology Must Trigger Recalibration of Mortality Thresholds

First, the state management documents evaluated by FWS in the Reopening Notice do not adequately provide for recalibration of mortality thresholds in the event that the methodology for estimating the size of the GYE grizzly bear population is modified in the future. FWS currently uses the so-called Chao2 method to estimate grizzly bear population size in the GYE. This method is known to be conservative. Conservative methods are appropriate in the case of a slow-reproducing species such as the grizzly bear; their use is precautionary and ensures that overly optimistic population estimates do not derail species conservation efforts. See Proposed Delisting Rule, 81 Fed. Reg. at 13,187 (noting that Chao2 “has the lowest amount of annual variation, and it is the most sensitive method to detect increasing or decreasing population trends over time”).

In discussing post-delisting management of the grizzly bear, FWS stated in the Proposed Delisting Rule that the Chao2 method will be used by the Interagency Grizzly Bear Study Team (“IGBST”) to annually estimate population size inside the DMA, as it represents the best available science. Id. at 13,201. This “annual model-averaged Chao2 population estimate for a given year within the DMA will[,]” in turn, “be used to set the total mortality limits from all causes for the DMA.” Id. As FWS made clear throughout the proposed rule, these mortality limits are the heart of the post-delisting management strategy. See, e.g., id. at 13,188 (discussing the role of mortality limits in maintaining the GYE grizzly bear population).

However, FWS did not foreclose the possibility of applying alternative methods of calculating grizzly bear populations in the future. In fact, in the Proposed Delisting Rule, the agency suggested that the Chao2 method may, after delisting, be replaced by a different methodology. See Proposed Delisting Rule, 81 Fed. Reg. at 13,187-88. Specifically, FWS and the IGBST have considered another method (the “mark-resight” method), which estimates grizzly bear population size at a level higher than the Chao2 method. See, e.g., Interagency Grizzly Bear Study Team, Yellowstone Grizzly Bear Investigations 2014 13, 17-20 (2015) [attached as Exhibit 4] (describing mark-resight method); Kelsey Dayton, Reports Say Yellowstone Grizzly Population is Strong, Wyofile (Oct. 30, 2014) [attached as Exhibit 5] (quoting Frank van Manen, head of the IGBST, as saying that the mark-resight population estimate for the GYE grizzly bear population was 1,000, compared to a Chao2 estimate of 757), available at <http://www.wyofile.com/column/reports-say-yellowstone-grizzly-population-strong/>. If management agencies decide in the future that mark-resight represents the best available scientific methodology to estimate grizzly bear population size, it appears likely that they would generate a higher population estimate. However, if the existing population management goal of 674 bears were not also adjusted to reflect a higher objective commensurate with such a new

population estimating methodology, the states could exploit a change in counting methodology to dramatically increase the amount of discretionary grizzly bear mortality available to them. See YES July 6, 2016 Meeting Minutes (YES Conservation Strategy Revision Steering Committee Meeting Minutes in which Yellowstone National Park superintendent Dan Wenk expressed concern that failure to recalibrate would make “200-300 bears available for harvest.”) In this regard, there would not actually be more bears on the ground; rather, the increased estimate would be merely an artifact of the estimation method. But that would not matter—states would be able to kill all of those “extra” bears as long as they maintained a population estimate of 674 (or perhaps 600 given the recent state retreat from a management objective of 674 bears, as discussed above). FWS must address this situation by requiring that, if the population estimation methodology changes, the population management target is recalibrated accordingly.

The YES Conservation Strategy team appears to have considered this question, but state wildlife management representatives strongly opposed recalibration. See YES July 6, 2016 Meeting Minutes. Nonetheless, the subcommittee decided to present a suite of options for consideration in the final Conservation Strategy. YES Conservation Strategy Revision Steering Comm., Themes (July 29, 2016) [attached as Exhibit 6], available at: http://igbconline.org/wp-content/uploads/2016/03/160729_Cons_Strat_Steering_Comm_Themes.pdf. However, without the ability to review a final Conservation Strategy, it is impossible to know whether any such measure has been adopted and, if so, whether it is adequate to address the recalibration issue. In any event, the states’ resistance to a clear commitment to recalibration in the event of a change in population estimating methodology creates a clear threat that such recalibration may not occur or that any recalibration methodology that might be used by the states would be inadequate to ensure long-term conservation of the GYE grizzly bear population.

B. Habitat Management Near Developed Sites on Federal Public Lands

1. *Failure to Assess Federal Land Management Agencies’ Deviations from 1998 Baseline for Developed Site Standards within the Primary Conservation Area*

Second, federal agencies appear to be seeking exemptions from, or changes to, a key habitat protection requirement in the post-delisting regulatory framework. The 2016 Draft Conservation Strategy requires that the number and capacity (or size) of developed sites on federal lands within the primary conservation area (“PCA”) for GYE grizzly bears must be maintained at or below their 1998 levels, when habitat was deemed suitable for grizzly bear population growth. See 2016 Draft Conservation Strategy at 56, 65. FWS acknowledges that “levels of human development on the landscape have been shown to be an important predictor of grizzly bear mortality” because developed sites “increase the spatial and temporal extent of human presence on the landscape.” Id. at 73. Therefore, “increased numbers of people using an area and potentially interacting with grizzly bears is an important issue in evaluating [developed sites’] impacts” on grizzly bears. Id.

Nevertheless, recent information indicates that the U.S. Forest Service and National Park Service are pursuing efforts to weaken the developed site standards, giving the agencies more leeway to depart from the 1998 baseline on sites located within the PCA. However, the Service’s own analysis in the Proposed Delisting Rule explicitly relied on the continued

application of the 1998 baseline to determine that “we do not foresee that the existing number of, nor an increase in the number of, developed sites within the PCA will pose a threat to the GYE grizzly bear DPS now, or in the future.” Proposed Delisting Rule, 81 Fed. Reg. at 13,195. Accordingly, this FWS determination is called into question if the 1998 baseline standard is weakened. Yet that information remains unresolved due to ongoing federal land management agency efforts to modify the developed site standards. FWS cannot lawfully determine the adequacy of post-delisting regulatory mechanisms absent detailed consideration of this issue.

2. *Lack of Consistent Habitat Management Standards for Developed Sites on Forest Service Land Under 2012 Forest Planning Rules*

Third, the Forest Service management framework for conserving grizzly bears on National Forest lands pursuant to the agency’s 2012 forest planning rules remains unresolved. Under Forest Service management regulations and the Conservation Strategy, any project under the agency’s oversight “must not result in loss of species viability or create significant trends toward federal listing[;]” the agency in all cases must “assist states in achieving their goals for conservation of endemic species.” 2016 Draft Conservation Strategy at 59-60 (citations omitted). Thus, on federal public lands throughout the GYE grizzly bear’s range, the Forest Service must impose habitat protections that are adequate to conserve grizzly bears.

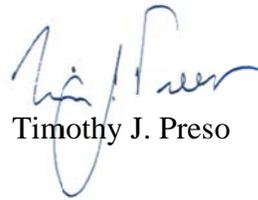
The 2016 Draft Conservation Strategy assures that, upon delisting, the U.S. Forest Service will add the grizzly bear to its list of sensitive species for the national forests within the GYE. *Id.* at 59. However, under the 2012 forest planning regulations adopted pursuant to the National Forest Management Act, the Forest Service did away with the concept of “sensitive species,” replacing it with “species of conservation concern.” U.S. Forest Serv., Final Rule: National Forest System Land Management Planning, 77 Fed. Reg. 21,162, 21,175 (Apr. 9, 2012). The Forest Service concluded that sensitive species are “similar to species of conservation concern,” and that “species of conservation concern are those plant and animal species whose long-term persistence within the plan area is of known conservation concern” because doubts may exist over the species “capability to persist over the long term in the plan area.” *Id.*, 77 Fed. Reg. at 21,175. The 2012 forest planning regulations created a set of “ecosystem requirements” as the baseline for species conservation, meaning that each forest plan must contain standards to maintain ecological integrity. *See* 36 CFR § 219.9. However, if the regional forester (or other responsible Forest Service official) determines that a species of conservation concern will require additional protections, then the Forest Service must develop additional species-specific plan components to protect the ecological conditions required for that species. 36 CFR § 219.9(b)(1).

The application of this new regulatory framework to the GYE grizzly bear population remains unresolved. The 2016 Draft Conservation Plan fails to explain how or whether the Forest Service will apply the species-specific planning components of the 2012 forest planning regulations to protect grizzly bear habitat conditions. Absent detailed specification of how the Forest Service intends to ensure consistent habitat protection standards for grizzly bears throughout the GYE, FWS cannot rationally determine the adequacy of regulatory mechanisms for post-delisting grizzly bear management.

CONCLUSION

For the reasons stated above, FWS's determination that state regulatory frameworks are adequate to maintain a recovered population of grizzly bears in the GYE is premature and unjustified. For this and the other reasons discussed in this letter, the current comment period fails to provide the public with a meaningful opportunity to review and evaluate the adequacy of regulatory mechanisms to protect and conserve the GYE grizzly bear population after delisting. Further, FWS must consider the issues specified above in light of the best available scientific information to render a legally required determination as to the adequacy of post-delisting regulatory mechanisms.

Sincerely,

A handwritten signature in blue ink, appearing to read "Timothy J. Preso", is written over the printed name.

Timothy J. Preso