



By electronic submission

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Public Comments Processing
ATTN: FWS-R6-ES-2017-0089
U.S. Fish and Wildlife Service
MS: BPHC
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Falls Church, Virginia 22041-3803

Re: U.S. Fish and Wildlife Service Regulatory Review; Request for Comments; 82 Fed. Reg. 57698 (Dec. 7, 2017); Docket No. FWS-R6-ES-2017-0089

Dear U.S. Fish and Wildlife Service:

On December 7, 2017, the U.S. Fish and Wildlife Service (“FWS”) published a regulatory review and request for comments (“Request”) regarding the impact that the recent court decision in *Humane Society of the United States v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017) (“*Humane Society*”) had on FWS’s final rule removing Endangered Species Act (“ESA”) protections from the Greater Yellowstone Ecosystem (“GYE”) grizzly bear distinct population segment (“DPS”). See 82 Fed. Reg. 57,698 (Dec. 7, 2017). *Humane Society* involved a situation nearly identical to GYE grizzly bears in which FWS also simultaneously designated and delisted the Western Great Lakes (“WGL”) gray wolf DPS. See *Humane Society*, 865 F.3d 585.

Specifically, FWS has invited comment on “whether the *Humane Society* opinion affects the GYE grizzly bear final rule and what, if any, further evaluation the Service should consider regarding the remaining grizzly bear populations and lost historical range in light of the Service’s decision regarding the GYE grizzly bear.” 82 Fed. Reg. at 57,699.

On behalf of our more than three million members and supporters, the Natural Resources Defense Council (“NRDC”) submits the following comments. In short, we believe the *Humane Society* decision directly and significantly impacts FWS’s GYE grizzly bear final rule because of the strikingly similar factual and procedural circumstances and the nearly identical legal shortcomings in both the WGL wolf and GYE grizzly final rules. FWS must examine the impact that delisting the GYE grizzly DPS has on the legal status of remaining grizzly bear populations and ensure that those populations remain protectable.

Further, FWS must define the spatial and temporal scope of lost grizzly bear habitat and assess the impact of that lost habitat on the recovery status of the GYE DPS. Finally, because FWS did not sufficiently address these issues in its final GYE grizzly rule, FWS should rescind the rule and restore ESA protections for GYE grizzly bears while it considers whether and how to move forward with a rule that comports with the holdings in *Humane Society*.

I. The *Humane Society* Decision Affects the GYE Grizzly Delisting Rule.

The *Humane Society* decision affects FWS's final GYE grizzly bear delisting rule because the factual and procedural circumstances, and legal deficiencies, of both the WGL wolf DPS and GYE grizzly DPS delisting rules are nearly identical. Both situations involve large carnivores listed as a species throughout the conterminous United States. In both cases, FWS simultaneously designated and delisted distinct population segments of those species. In both instances, FWS failed to address the impacts that delisting the DPSs had on the legal status of the remnant populations, and to ensure that those remnant populations remained legally protectable under the ESA. And in both situations, FWS neglected to address the impacts that loss of the species' historical range in the lower 48 states had on the recovery status of those DPSs. Therefore, the D.C. Circuit Court's holding in *Humane Society* is directly relevant to, and should guide and inform, any actions taken by FWS toward removing federal protections from GYE grizzly bears.

II. FWS Must Assess the Other Grizzly Bear Populations and Ensure They Remain Legally Protectable.

To comport with the Court's holdings in *Humane Society*, FWS must assess the impact that delisting the GYE DPS has on the legal status of the remaining grizzly bear populations and ensure those populations remain listed in a way that allows them to continue to be protected under the ESA. In *Humane Society*, the Court determined that the ESA permits FWS to identify and reclassify a DPS within an already listed species. *See Humane Society*, 865 F.3d at 600. However, the Court also held that, in doing so, FWS must "address the impact that extraction of the segment would have on the legal status of the remaining wolves in the already-listed species." *Id.* Further, the Court held FWS must ensure the remaining wolves continue to be listed in a way that enables them to retain ESA protections. *Id.* As the Court explained, FWS "cannot find that a population segment is distinct . . . without determining whether the remnant itself remains a species so that its own status under the Act will continue as needed." *Id.*

In support, the Court pointed to both the text of the ESA and the language of FWS's Distinct Population Segment Policy. First, the Court noted that the ESA requires FWS, when reviewing and redetermining a species' status, to review the "status of *the species*" (16 U.S.C. § 1533(b)(1)(A) (emphasis added)) and to "conduct . . . a review of all *species* included in a list" (16 U.S.C. § 1533(c)(2)(A) (emphasis added)). In other words, under the ESA, when reviewing and redetermining a species' status, FWS must assess the status of the *entire species*—i.e., the

entire listed entity—as a whole, and may not just review and redetermine a particular DPS or other portion of the listed species in isolation.

In addition, the Court pointed to the language of FWS’s Distinct Population Segment Policy. *See* Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996) (“Segment Policy”). It noted that the Segment Policy’s definitions of the two critical factors for determining a DPS—discreteness and significance—both contemplate a comparison between the population segment and the rest of the species, as opposed to an analysis of the DPS characteristics in a vacuum. *See Humane Society*, 865 F.3d at 601-602.

Specifically, regarding discreteness, the Segment Policy requires consideration of the “[d]iscreteness of the population segment in relation to the *remainder of the species* to which it belongs.” 61 Fed. Reg. at 4725 (emphasis added). Further, to be distinct, a population segment must be “markedly separated from *other populations of the same taxon*” as a consequence of one of several factors. *Id.* (emphasis added). Those two considerations, the Court found, “clearly envision a comparative analysis of a potential segment to the remnant and consideration of the segment’s independent severability.” *Humane Society*, 865 F.3d at 601.

Similarly, regarding significance, the Segment Policy considers the “significance of the population segment *to the species* to which it belongs.” 61 Fed. Reg. at 4725 (emphasis added). In determining significance, the Segment Policy lists four factors FWS may consider, all of which measure the potential segment’s significance in relation to the “taxon” or “other populations of the species.” *Id.* Accordingly, the Court determined that these factors likewise contemplate an evaluation of *both* the potential segment *and* the remaining population or populations. The Court concluded, “Requiring the Service to look at the implications for both the segment and the remnant during the delisting, uplisting, or downlisting process thus flows naturally from the Endangered Species Act’s text and the Service’s own Segment Policy.” *Humane Society*, 865 F.3d at 601.

Finally, as “part and parcel” of its segment analysis, the Court held that FWS must also ensure that the remnant population remains protectable under the ESA. *Id.* at 602. Failing to do so would turn the DPS analysis “into a backdoor route to the *de facto* delisting of already-listed species, in open defiance of the Endangered Species Act’s specifically enumerated requirements for delisting.” *Id.* Instead, the Court concluded, FWS must “ensure that the remnant, if still endangered or threatened, remains protectable under the Endangered Species Act.” *Id.*

To illustrate this point, the Court explained that, for example, “gray wolves outside the Western Great Lakes segment” were never recognized as a taxonomic species, nor were they analyzed or determined by FWS to be a subspecies or a segment. *Id.* Thus, when FWS attempted to carve the WGL DPS out of the already listed entity, “it left the remnant of that already-statutorily-protected group in legal limbo without any determination that the gray wolves in the continental United States outside of the Western Great Lakes segment were themselves a species,

subspecies, or segment that could continue to be protected under the Endangered Species Act.” *Id.*

FWS must do the same in the closely analogous context of GYE grizzly bears. Like wolves, grizzly bears were listed throughout the conterminous United States.¹ Therefore, FWS could not simply review and redetermine the status of the GYE grizzly DPS in isolation. Instead, it should have “address[ed] the impact that extraction of the [GYE grizzly DPS] would have on the legal status of the remaining [grizzly bears] in the already-listed species.” And, as “part and parcel” of such an analysis, FWS was required to ensure that the remnant populations of grizzly bears remained protectable under the ESA.

It is clear, however, that FWS failed to do so. In its final delisting rule, FWS did not address the impact that creating and removing the GYE grizzly DPS would have on the remaining grizzly bear populations. It did not analyze how or whether “grizzly bears outside the Greater Yellowstone Ecosystem segment” was a legally protectable entity. Nor did it ensure that the remaining grizzly populations were classified in a way that ensured they would retain legally protectable statuses. Indeed, in its final GYE grizzly delisting rule, in response to public comments urging it to conduct these exact analyses, FWS specifically declined to do so, stating, “[C]onsideration and analyses of grizzly bear populations elsewhere in the lower 48 States is outside the scope of this rulemaking.” 82 Fed. Reg. 30502, 30624 (June 30, 2017).

In its Request, FWS explains that it has long held an “overarching vision for recovery of grizzly bears in the lower 48 States, to recover and delist populations individually in each of the ecosystems as recovery is achieved.” 82 Fed. Reg. 57698. In accordance with *Humane Society*, however, FWS must ensure that, before delisting any population, it analyzes the impact of doing so on every other population within the already listed species, and ensures that any remnant populations are categorized in ways (i.e., as a species, subspecies, or DPSs) that ensure they can continue to be protected under the ESA as needed. In the case of the GYE grizzly DPS, FWS has so far failed to do so.

III. FWS Must Adequately Analyze Lost Historical Range.

FWS must also adequately analyze the impact that lost historical habitat has had on the GYE grizzly DPS. In *Humane Society*, the Court held that FWS acted arbitrarily by failing to address the impact of lost historical range on the recovery status of WGL wolves. While the Court found that FWS’s interpretation of “range” as “current range” was reasonable, *Humane Society*, 865 F.3d at 605, the Court nonetheless explained, “Just because the Endangered Species Act does not compel the Service to interpret ‘range’ to mean historical range, that does not mean that the Service can brush off a substantial loss of historical range as irrelevant to the species’ endangered or threatened status.” *Id.*

¹ See FWS, Environmental Conservation Online System, Species Profile for Grizzly Bear (*Ursus arctos horribilis*), available at <https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=A001> (last visited Jan. 8, 2018).

On the contrary, the Court determined that FWS needed to consider wolves' lost historical range for two reasons. First, FWS's own Range Policy requires it. The policy makes clear that a species may be "endangered or threatened throughout all or a significant portion of its current range *because [a] loss of historical range is so substantial that it undermines the viability of the species as it exists today.*" Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species," 79 Fed. Reg. 37,578, 37,584 (July 1, 2014) ("Range Policy") (emphasis added). Consistent with this policy, FWS must "consider the scope of the species' historical range, and the impact that material contraction or relocation might indicate for survival within a currently constricted or confined range." *Humane Society*, 865 F.3d at 606.

Second, undisputed estimates in the case's administrative record indicated that 95% of the gray wolf's historical range has disappeared. *Humane Society*, 865 F.3d at 606. The Court found that such a significant amount of lost historical range was an important aspect of the future viability of the WGL wolf DPS. *Id.* Accordingly, the Court held FWS's failure to address such "an important aspect of the problem that is factually substantiated in the record is unreasoned, arbitrary, and capricious decisionmaking." *Id.* (citing *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotations omitted).

Finally, the Court identified two specific "predicate questions" regarding lost historical range that FWS would be required to address in any future WGL wolf delisting rule. *Humane Society*, 865 F.3d at 606-607. First, FWS must "[d]efin[e] the physical boundaries of the relevant historical range." *Id.* at 606. Second, FWS must "[e]stablish[] the appropriate timeframe for measuring a species' historical range, such as the enactment of the 1973 Endangered Species Act, the enactment of its predecessor statutes in 1966 and 1969, the Nation's founding, or some other date." *Id.* at 607.

In the case of GYE grizzly bears, FWS has also failed to adequately address the impact of lost historical range on the recovery status of the species. Similar to gray wolves, grizzly bears currently inhabit less than two percent of their historical range. *See* 83 Fed. Reg. at 30508, 30527, 30557. In light of such massive losses, public commenters "expressed concern that the proposed [GYE grizzly delisting] rule . . . ignores the species' lost historical range in the remainder of the lower 48 States." *Id.* at 30624. Public commenters also told FWS that its "analysis of lost historical range should consider the entire population of grizzly bears across the lower 48 States." *Id.*

Nonetheless, FWS specifically declined to conduct such an analysis, concluding, "consideration and analyses of grizzly bear populations elsewhere in the lower 48 States is outside the scope of this rulemaking." *Id.* Contrary to the holding in *Humane Society*, FWS thus deliberately chose not to "consider the scope of the species' historical range, and the impact that material contraction or relocation might indicate for survival within the currently constricted or confined range" of GYE grizzlies.

As with the WGL wolf delisting rule, FWS did include some discussion of historical range *within the boundaries of the DPS* in its GYE grizzly rule. *See* 82 Fed. Reg. at 30510. That is insufficient. The Court in *Humane Society* made clear that the necessary analysis must consider lost range outside the DPS. *See Humane Society*, 865 F.3d at 606 (directing FWS to “contend with the implications of massive range loss” and “immense losses in the gray wolves’ historical range” outside the WGL wolf DPS).

Finally, as part of its lost historical range analysis, FWS must address the two predicate issues identified by the court. That is, it must define the physical boundaries of the relevant historical range of grizzly bears, and it must establish the appropriate timeframe for measuring grizzly bears’ historical range.

IV. FWS Must Start Over with a New Proposed Rule.

FWS cannot simply patch up the shortcomings of its final GYE grizzly delisting rule by requesting public comment on the *Humane Society* decision and trying to append new information to an already final rule. Instead, it must begin anew with a new proposed rule that contains the omitted analysis and allow the public an opportunity to review it and comment.

In *Humane Society*, the Court found that the failures of FWS’s WGL wolf rule were so severe that simply remanding that rule and allowing the agency to cure its defects was not an appropriate remedy. Instead, the significance of the omissions raised fundamental questions about whether FWS decided correctly in publishing the rule: “Given the serious and pervading role those deficiencies played in the agency’s decisionmaking, there is substantial doubt whether the Service chose correctly in promulgating the 2011 Rule.” *Humane Society*, 865 F.3d at 614-615 (citing *Sugar Cane Growers Co-op of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002) (internal quotations omitted).

Further, the Court noted that vacatur “would not trigger disruptive consequences.” *Humane Society*, 865 F.3d at 615. It pointed to FWS’s repeated failures to make a lawful gray wolf delisting decision and lack of any showing that vacatur would be any more disruptive in this case than it had been in the past. *Id.* Further, the Court determined that federal regulations permitting wolf depredation control were sufficient to “protect[] domestic animals in the interim.” *Id.*

The same reasoning should govern FWS’s final GYE grizzly rule. The deficiencies are identical. Starting over would not be any more disruptive than the last time FWS’s attempt to delist GYE grizzlies was vacated, and the agency was required to develop a new rule. *See Greater Yellowstone Coalition v. Servheen*, 665 F.3d 1015, 1032 (9th Cir. 2011). In addition, in the interim, federal regulations would permit grizzly bear depredation control. *See* 50 C.F.R. § 17.40(b). FWS should voluntarily rescind the final GYE grizzly delisting rule and restore ESA protections for GYE grizzly bears while it considers whether and how to move forward with a rule that comports with the holdings in *Humane Society*.

Respectfully,

A handwritten signature in black ink, appearing to read "Zack Strong". The signature is fluid and cursive, with the first name "Zack" being more prominent than the last name "Strong".

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