Summary of WildEarth Guardian's comment regarding DPS analysis in GYA DPS proposed rule

GYE grizzly DPS designation violates the law -

Commenter contends that the DPS designation is in violation of the plain language of the ESA because we are not allowed to designate a DPS for the purposes of delisting it. No provision in the ESA allows this and legislative history weighs heavily against such an action.

In addition, the commenter contends that our action (designating a DPS for the purposes of delisting) has repeatedly been rejected by Federal Courts. Commenter cites the December 2014 D.C. District Court Opinion of the Services 2012 final rule delisting gray wolves in the Great Lakes region whereby the judge states that "the creation or initial designation of a DPS operates as a one-way ratchet to provide ESA protections to the covered vertebrates. " The commenter cites several additional statements from the Court Opinion supporting their claim that the ESA does not permit delisting a threatened species by individual sub-population if the species is not listed as individual sub-populations in the first place (e.g., we can only delist entities as they are listed).

Even if GYE grizzly DPS were allowed, the analysis is in error –

GYE DPS doesn't exist - The GYE DPS does not exist because in their opinion our DPS policy requires that we consider three factors (discreteness, significance, status) and we only considered discreteness and significance in order to support the validity of the GYE grizzly DPS. The commenters argue that the DPS policy states that a DPS can only be designated if it qualifies for listing as either endangered or threatened and we "skipped" the status factor analysis. We instead "rolled" the status factor analysis of the DPS Policy into the proposed rule's section 4 analysis. If we followed the "requirement" that the status analysis be done in the context of the DPS designation we could not have designated the DPS because we would conclude that the population doesn't qualify as threatened or endangered.

Discreteness - Commenter contends that our discreteness analysis is weak at best. We determine that the GYE population is "markedly separated" from other populations of grizzly bear because connectivity to other populations (such as the NCDE population) has yet to occur. However, we also state that future connectivity is desirable and will be actively managed for but that such "future connectivity" would not undermine our discreteness analysis because absolute separation of the populations is not required. Commenter states that it is well accepted in the scientific community that the GYE grizzly population will need to be well connected with other recovery area populations across the western landscape in order to foster the species' true recovery. The ESA demands that we make every effort to achieve this goal. Our use of the GYE population's current lack of this connectivity to justify delisting is nonsensical.

Additionally, the commenter finds our reliance on genetic data to justify discreteness unconvincing. The proposed rule notes that GYE bears are separated from other populations because they show 60% heterozygosity, while NCDE bears show 67% heterozygosity. The Service is relying on the current lack of connectivity to help justify the delisting. Commenters found this illogical because they contend that the Service is required to recovery grizzly bears throughout the lower 48 states, not just isolated pockets. They further contend that the Service is inconsistent in our position with respect to genetics because we

make the opposite argument when stating, in our DPS analysis of significance, that we cannot state with certainty that the GYE grizzly population's genetics differ 'markedly' from other grizzly bear populations.

Significance - With respect to our DPS analysis of significance the commenter agrees that we made the correct determinations in our consideration of "persistence in an ecological setting unusual or unique for the taxon" and "population's genetics differ 'markedly' from other grizzly populations". However, they find our conclusion that the population's "loss would represent a significant gap in the range of the taxon" to be hypocritical because it results in the delisting of the population and, in their opinion, loss of the bears more likely. They argue that our DPS significance determination undermines our duty to recovery the "species as a whole". Basically, it doesn't make sense that we could argue the GYE population's essentiality to the species overall in order to support delisting the bears. The Service's duty is to recover grizzly bears across their native range. The Service's duty under the ESA is to get listed species to a point where the law's protections are no longer required, not undermine recovery efforts for the listed entity by using conflicting interpretations of scientific data.

Reliance on Past Practice – The Service's position that the proposed rule is consistent with Service's past practice is without merit. Some of our examples relate to listings that predate the DPS Policy. Of the four "relevant" examples three resulted in retaining protections for the species. Regardless, none justify our current approach because the federal courts have already determined that our approach is not a reasonable interpretation of the law (citing the 2014 WGL DPS Opinion). Our reliance on the 2008 Solicitors opinion supporting the approach is not legally binding in a court of law. Furthermore, the Solicitors reasoning is refutable on multiple accounts under the plain language of the ESA and the courts have already spoken on the issue and the Service is bound by law.