Summary of WildEarth Guardian's comment regarding DPS analysis in GYE 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.

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

The SPR Policy is fatally flawed – The commenter cites the 2001 9th Circuit Court Opinion in Defenders of Wildlife vs. Norton to support the contention that historic range can be a significant portion. Further, threats in the significant portion do not have to render the entire species at risk of extinction. Commenter contends that the Service must consider lost historic range in the SPR analysis and must conduct an evaluation of whether the lost habitat is a significant portion of that range. The Service must also consider threats in areas where the population is either extirpated or home to only a few individuals. The 2001 court opinion states that it is insufficient to point out one area or class of areas where a population persists to support a finding that threats elsewhere are not significant. Commenters contend that the analysis of lost historic range must consider the entire population of grizzly bear across the lower 48 states and loss historic range of the GYE DPS, including an analysis of what constitutes the GYE DPS historic range, how that compares with the GYE DPS current range, and whether or not the loss of historic range is significant.

Commenter believes the Service's 2014 SPR Policy is not reflective of Congressional intent. The threshold for consideration is too high – specifically, the exclusion of lost historic range and the requirement that the existence of members in the significant portion be essential to ensuring that the species is not endangered or threatened across its entire range. Commenter cites 1978 record stating that "the term 'range' is used in the general sense, and refers to the historic range of the species". Also commenter cites WGL DPS 2014 court opinion when stating that the Service's interpretation of range renders meaningless the word "curtailment" since it is impossible to determine the present curtailment of a species habitat or range without knowing what the species historic range was prior to being curtailed.

Commenter believes that the proposal relegates grizzlies to small portions of the lower 48 states and ignores the species lost historic range in the remainder of the lower 48 states. Commenter contends that lost historic range must be considered for both the lower 48 states population and the GYE DPS population.

SPR analysis fails to consider lost historic range of the listed entity (lower 48 states) and threats found elsewhere – Commenter contends that the Service should have quantified and considered loss of historic range throughout the lower 48 states and determined if this loss amounts to a significant portion. The Service also should have considered threats in other areas outside the GYE DPS, including incidental take from hunting/trapping, lack of connectivity to other populations, genetic diversity issues, road densities etc., are significant. Our determination is flawed because we only considered grizzly bear population in a small portion of its range.

SPR analysis fails to consider lost historic range of the DPS and other threats to portions of the DPS – Commenter contends that the Service did not quantify or explain weather the loss of the proposed DPSs historic range in the GYE is a significant portion. The Service also did not adequately analyze other threats to the bears within portions of the proposed DPS including but not limited to trophy hunting of grizzly bears, incidental take from hunting and trapping activities, lack of connectivity to other populations and genetic diversity issues, increased road densities, human development. For example, many activities that have potentially adverse effects on bears are only found outside of Yellowstone National Park, outside of the PCA, or outside the DMA. The Service acknowledges some of these but discounts their importance. The standard applied, localized threats must threaten extinction of the GYE DPS as a whole, is inappropriate and illegal. Further the Service's SPR analysis ignores that loss of bears in the peripheral areas would result in range contraction and that, according to our own policy, such lost range may never be reclaimed or considered in future listing decisions. This can be significant and the Service owes the public a more complete analysis of the significance of these threats to portions of the proposed DPS.

Neither the SPR analysis nor the proposed rule considers lost historic range of either the currently listed entity or the proposed DPS – Commenter contends that nowhere in the proposed rule do we provide an analysis of the grizzly bear's historic range, loss to that historic range, and whether or not this loss impacts the present listing of the grizzly bear. Instead we only summarize the 2016 draft conservation strategy and how habitat is managed both inside and outside the PCA. This section minimizes the importance of habitat connectivity, and appears to contradict other portions of the rule finding that barriers to habitat connectivity exist. The analysis of historic range should occur based on the lower 48 states and the proposed DPS level. The rule is deficient because these analysis have not been done. The Service can't claim that it will not consider lost historic range in the SPR analysis but then not consider it elsewhere. The proposed rule violates the law and should be withdrawn.