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*By E-mail and Certified Mail*

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***Re: Notice of Intent to Sue to Remedy Violations of the Endangered Species Act Regarding the U.S. Fish and Wildlife Service's and the National Park Service's Notice of Termination of the Environmental Impact Statement for a Grizzly Bear Restoration Plan in the North Cascades Ecosystem, 85 Fed. Reg. 41624 (July 10, 2020)***

To Secretary Bernhardt, Director Skipwith, Deputy Director Vela, Superintendent Taylor-Goodrich, and Acting State Supervisor Thompson,

The Center for Biological Diversity ("Center") hereby provides notice, pursuant to Section 11(g) of the Endangered Species Act ("ESA"), that the U.S. Fish and Wildlife Service ("FWS") and the National Park Service ("NPS") are in violation of the ESA with regard to the Notice of Termination of the Environmental Impact Statement for a Grizzly Bear Restoration Plan in the North Cascades Ecosystem in Washington, 85 Fed. Reg. 41624 (July 10, 2020) ("Termination Notice").

The Center is a non-profit conservation organization dedicated to the protection of native species and their habitats through science, policy and environmental law. The Center has more than 67,000 members across the world.

FWS and NPS violated the ESA by failing to conserve grizzly bears in the Northern Cascades Ecosystem, by failing to implement the grizzly bear recovery plan calling for grizzly bear recovery in the North Cascades, and by failing to complete consultation to consider the impacts of their actions in abandoning plans to take action to facilitate conservation and recovery of North Cascades grizzly bears.

This letter serves as notice that unless FWS and NPS withdraw the Termination Notice within 60 days receipt of this notice, the Center intends to challenge the agencies' unlawful conduct in court.

## I. STATUTORY BACKGROUND

Enacted in 1973, the ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The ESA provides a means to conserve endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). To receive the full protections of the ESA, a species must first be listed by the Secretary of the Interior as “endangered” or “threatened” pursuant to ESA Section 4. *See id.* § 1533. The ESA defines an “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range.” *Id.* 1532(6). A “threatened species” is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

Section 4(f) of the ESA directs FWS to develop and implement recovery plans for the “conservation and survival” of listed species unless the agency makes a finding that “such a plan will not promote the conservation of the species.” *Id.* § 1533(f)(1). The ESA defines “conservation” to mean “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 this Act are no longer necessary.” *Id.* § 1532(3). Additionally, “the [FWS] shall, prior to the final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan.” *Id.* § 1533(f)(4).

Section 2(c)(1) of the ESA provides that “all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.” *Id.* § 1531(c)(1). This creates an affirmative conservation mandate for federal agencies.

Section 7(a)(1) also provides an affirmative duty for federal agencies to conserve listed species, providing that all federal agencies “shall utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed . . . .” *Id.* § 1536(a)(1).

Section 7(a)(2) of the ESA requires each federal agency, in consultation with a federal wildlife agency (FWS for the grizzly bear) to insure that any proposed action is not likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of critical habitat. *Id.* § 1536(a)(2). Under the ESA, to “jeopardize the continued existence of” means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

To carry out the consultation mandates, the action agency must first ask FWS whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the action agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. The biological assessment must generally be completed within 180 days. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i).

If an agency determines that its action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, the regulations permit “informal consultation,” during which FWS must concur in writing with the agency’s determination. 50 C.F.R. §§ 402.14(a), (b). If the agency determines that the action is “likely to adversely affect” a listed species or critical habitat, or if FWS does not concur with the agency’s “not likely to adversely affect” determination, the agency must engage in “formal consultation,” as outlined in 50 C.F.R. § 402.14. *Id.* §§ 402.02, 402.14(a).

To comply with formal consultation regulatory requirements, FWS must evaluate both the current status of listed species as well as the effects of the proposed action and cumulative effects on the listed species. *Id.* § 402.14(g)(2)-(3). Agencies are required to “use the best scientific and commercial data available” in assessing impacts to protected species during the consultation process. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). Based on this information, FWS must reach a “biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species . . . .” 50 C.F.R. § 402.14(g)(4).

## II. FACTUAL BACKGROUND

Grizzly bears once ranged throughout most of western North America, from the high Arctic to the Sierra Madre Occidental of Mexico, and from the coast of California across most of the Great Plains. Prior to European settlement, scientists believe that approximately 50,000 grizzly bears occupied the western United States between Canada and Mexico. With European settlement of the American West and a federally funded bounty program aimed at eradication, grizzly bears were shot, trapped, and poisoned, reducing the population to just two percent of their historic range. As a result of its precipitous decline, FWS listed the grizzly bear as a threatened species in the lower 48 states under the ESA in 1975.<sup>1</sup>

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<sup>1</sup> 40 Fed. Reg. 31734 (July 28, 1975).

In accordance with the ESA, FWS first approved a grizzly bear recovery plan in 1982, which it revised in 1993, to “delineate reasonable actions that are believed to be required to recover and/or protect” the grizzly bear.<sup>2</sup> FWS initially identified four recovery zones—Yellowstone, Northern Continental Divide, Cabinet-Yaak, and Selkirks—and three evaluation areas—Bitterroot, North Cascades, and San Juan Mountains—for potential recovery. FWS also committed to evaluate other potential recovery areas.

Following publication of the 1993 Recovery Plan, FWS prepared supplements specific to the recovery zones previously identified. A 1996 Supplement provided a recovery chapter for the Bitterroot Ecosystem and a 1997 Supplement provided a recovery chapter for the North Cascades Ecosystem. The North Cascades Grizzly Bear Recovery Zone is one of the largest contiguous blocks of federal land remaining in the lower 48 United States, comprising approximately 9,565 square miles. 1997 Supplement at 1. It includes all of the North Cascades National Park, and most of the Mount Baker-Snoqualmie, Wenatchee, and Okanogan National Forests. *Id.* Approximately 40 percent of the recovery zone is within wilderness of the North Cascades National Park and about 72 percent has no motorized access. *Id.* For these reasons, FWS has recognized that the North Cascades Recovery Zone provides ample habitat to maintain and recover a grizzly bear population. *Id.* at 2.

The 1997 Supplement provides goals and sub-goals for the recovery of grizzly bears in the North Cascades, and outlines “the recovery contribution that should be made within the US portion of the [North Cascades Recovery Zone] in compliance with the Endangered Species Act.” *Id.* at 4. One of these steps includes conducting a process under the National Environmental Policy Act (“NEPA”) “to evaluate a range of alternatives to recover this population including the augmentation of the existing small population by placement of a small number of bears into the ecosystem and/or other recovery alternatives.” *Id.* “Eventual delisting of the grizzly bear should be determined by the achievement of a viable, well distributed, reproducing population.” *Id.* at 5.

Today grizzly bears have been nearly extirpated from the North Cascades Recovery Zone. There have been only four confirmed detections of grizzly bears in the North Cascades in the past ten years, all of which occurred in British Columbia.<sup>3</sup> Scientists believe that the population may actually comprise just two individuals.<sup>4</sup> Since 1990, FWS has received and reviewed five petitions requesting a change in the listing status for the North Cascades grizzly bear population, and determined that grizzly bears in the North Cascades Ecosystem (“NCE”) warrant a change to endangered status.<sup>5</sup> However, FWS has continually found that the uplisting from threatened to endangered under the ESA is precluded by higher priority listings.<sup>6</sup> FWS has

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<sup>2</sup> See U.S. Fish and Wildlife Service, Revised Grizzly Bear Recovery Plan (1993) (hereinafter, “1993 Recovery Plan”).

<sup>3</sup> U.S. Department of the Interior, U.S. Fish and Wildlife Service, and National Park Service, Draft Grizzly Bear Restoration Plan/Environmental Impact Statement, North Cascades Ecosystem (Jan. 2017), at i (hereinafter, “DEIS.”).

<sup>4</sup> *Id.*

<sup>5</sup> 55 Fed. Reg. 32103 (Aug. 7, 1990); 56 Fed. Reg. 33892 (July 24, 1991); 57 Fed. Reg. 14372 (Apr. 20, 1992); 58 Fed. Reg. 43856 (Aug. 18, 1993); 63 Fed. Reg. 30453 (June 4, 1998).

<sup>6</sup> See, e.g., 78 Fed. Reg. 70104 (Nov. 22, 2013).

acknowledged that given the current state of the grizzly bear population in the North Cascades, grizzly bears in the NCE are unlikely to recover on their own.

Thus, to comply with the ESA's recovery and conservation mandates and to implement the 1997 Supplement of the 1993 Grizzly Bear Recovery Plan, in February 2015 FWS and NPS initiated a process under NEPA "to determine how to restore the grizzly bear (*Ursos arctos horribilis*) to the North Cascades ecosystem (NCE), a portion of its historical range."<sup>7</sup> The agencies noted that "[g]iven the low number of grizzly bears, very slow reproductive rate, and other recovery constraints, grizzly bears in the NCE are the most at-risk grizzly bear population in the United States today."<sup>8</sup> The agencies further acknowledged that grizzly bears in the North Cascades are at risk of local extinction, and found that action was necessary to avoid local extinction, contribute to biodiversity of the ecosystem, enhance the probability of long-term survival and conservation of the grizzly bears, contribute to overall grizzly bear recovery, and support the eventual delisting of grizzly bears.<sup>9</sup> The Center provided timely comments during this scoping process.

In January 2017, FWS and NPS released the DEIS for public review and comment.<sup>10</sup> The DEIS included a no-action alternative and three action alternatives. "All of the action alternatives would seek to restore a self-sustaining population of at least 200 bears through the capture and release of grizzly bears into the NCE." DEIS at iii. The agencies noted in the DEIS that "[b]iological consensus is that grizzly bears in the NCE would have difficulty recovering on their own and need some form of human intervention to achieve reproduction and eventual recovery," and that the no-action alternative would not likely achieve reproduction and recovery goals. *Id.* at v. The DEIS repeated the purposes and objectives from the 1997 Supplement to the 1993 Recovery Plan, including the need to support the recovery of the grizzly bear. *Id.* at 3. The Center submitted timely comments on the DEIS.

After two years of inaction, in July 2019, the agencies reopened the comment period on the DEIS.<sup>11</sup> The agencies did not provide information as to why they were reopening the comment period.

On July 10, 2020, FWS and NPS filed a Termination Notice, abruptly announcing that they are no longer proposing to take any action to conserve or recover grizzly bears in the North Cascades Ecosystem and that "the EIS process has been terminated."<sup>12</sup> The agencies provided no rationale in the Federal Register's Termination Notice as to why they decided to discontinue the NEPA process to determine how best to recover grizzly bears in the North Cascades.

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<sup>7</sup> Department of the Interior, North Cascades Ecosystem Grizzly Bear Restoration/Environmental Impact Statement, Washington, Notice of Intent, 80 Fed. Reg. 8894 (Feb. 19, 2015).

<sup>8</sup> *Id.* at 8894-95.

<sup>9</sup> *Id.* at 8895.

<sup>10</sup> See 82 Fed. Reg. 4336 (Jan. 13, 2017); 82 Fed. Reg. 4416 (Jan. 13, 2017).

<sup>11</sup> 84 Fed. Reg. 36099 (July 26, 2019).

<sup>12</sup> 85 Fed. Reg. 41624 (July 10, 2020).

### III. LEGAL VIOLATIONS

The 1997 Supplement to the 1993 Recovery Plan identifies the North Cascades Ecosystem as one of six recovery zones for grizzly bears, thus asserting that recovery of grizzly bears in the NCE is necessary for overall grizzly bear recovery in the lower 48 states. Section 4(f) of the ESA directs FWS to develop and implement recovery plans for the “conservation and survival” of listed species. 16 U.S.C. § 1533(f)(1). The ESA defines “conservation” to mean “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 this Act are no longer necessary.” *Id.* § 1532(3). By abandoning the ongoing process to take actions necessary to conserve grizzly bears in the NCE, FWS and NPS are failing to implement the recovery plan in violation of the ESA. In addition, FWS has engaged in a de facto amendment of the recovery plan without providing for public notice and comment on that amendment, as required by the ESA. *See id.* § 1533(f)(4).

Moreover, Section 7(a)(1) of the ESA requires agencies to carry out programs for the conservation of listed species. *Id.* § 1536(a)(1). By refusing to pursue grizzly bear recovery in the NCE, FWS and NPS are violating their affirmative duty to conserve under Section 7(a)(1). *See id.* These actions similarly fail to fulfill the ESA’s conservation mandate under Section 2(c)(1) of the ESA. *Id.* § 1531(c)(1) (“It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.”).

Finally, although the agencies originally acknowledged the need to complete consultation under Section 7(a)(2) of the ESA, it appears the agencies did not complete their consultation obligations. *See id.* § 1536(a)(2). If the agencies take affirmative action to terminate the NEPA process and decide not to take necessary action to conserve and recover grizzly bears in the NCE, they must complete consultation to consider the impacts of those actions, including whether those actions may jeopardize the continued existence of the species.

### IV. CONCLUSION

As set forth above, the Center intends to pursue litigation in federal court after sixty days, and will seek injunctive, declaratory, and other relief, including an award of fees and expenses incurred in investigating and prosecuting this action. To avoid litigation, FWS and NPS should immediately vacate the Termination Notice until the agencies lawfully comply with the ESA and its implementing regulations.

If you have any questions or wish to discuss this matter further, please feel free to contact me.

Sincerely,

*Andrea Zaccardi*

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