Comment on the Proposed Revisions to the Protective Regulations for Grizzly Bears, RIN 1018–BI14

Property and Environment Research Center, Rocky Mountain Elk Foundation,

Boone and Crockett Club, and Wyoming Wildlife Federation

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Dir. Nesvik,

The Property and Environment Research Center, Rocky Mountain Elk Foundation, Boone and Crockett Club, and Wyoming Wildlife Federation applaud the Fish and Wildlife Service for its proposal to separate the revision to the grizzly bear listing from the revision of the 4(d) rule—and to embrace an innovative tiered approach to the 4(d) rule that encourages and extends recovery progress.[1] This new approach is a fitting next step for one of the Endangered Species Act's signature conservation success stories: Increasing the Greater Yellowstone Ecosystem population from a mere 136 bears in 1975 to more than 1,055 bears today.

Abandoning the previously proposed "distinct population segment" (DPS) ensures the 4(d) revision can carry that progress forward to eventual de-listing. The controversial DPS proposal—based on a strained interpretation of "distinct population segment" that disregards connectivity between bears in the lower 48 and Canada while penalizing connectivity between populations in the lower 48—contradicts Congressional intent on when this provision should be applied. It should be discarded. The Service has never adequately explained the ecological significance of international boundaries nor why the significance of the southern portion of the grizzly's range in North America requires anything more than the successful recovery program we have. The 1996 policy on which the needless DPS proposal was based needs reform, but that reconsideration should not delay a much needed revision to the 4(d) rule.[2]

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[1] Fish & Wildlife Serv., *Proposed Revision of the Grizzly Bear Protective Regulations Under Section 4(d)*, 91 Fed. Reg. 44,780 (July 17, 2026).

[2] *See* Prop. & Envt. Res. Center et al., *Comment on the Proposed Grizzly Bear Listing with a Revised 4(d) Rule* (May 16, 2025).

We are especially pleased that the Service has proposed a "tiered" approach to authorizing state management because this adapts recovery policy to the new issues raised by the returning abundance of bears. Addressing those issues will improve social tolerance of bears and increase support for continued conservation progress—and it will also facilitate the eventual transition to full state management upon eventual delisting. We proposed such a tiered approach for these reasons in our comment on the Service's 2025 proposal.[3] Rather than repeat everything we said in that comment, we incorporate it by reference and summarize its main points below.

This is a truly innovative approach that promises to improve conservation not only of grizzly bears but many other species. To date, 4(d) rules have been written statically, taking no account for whether species are improving or declining. The tiered approach, by contrast, makes progress a core structural feature of the rule. It sets demographic objectives for each area and provides enhanced regulatory flexibility for meeting them. This approach provides stronger incentives for progress, allows for a more gradual transition to state management, ties flexibility to areas of abundance, and allows states to build trust in their management prior to delisting.

The tiered approach also respects the expertise and role of state wildlife agencies. While the proposed rule refers to states as in "a unique position to *assist*" in implementing the Endangered Species Act, the reality is that states have been leaders in carrying out grizzly conservation. Under the tiered approach, state agencies will be able to act on their own expertise in areas that have met benchmarks. They are also provided a path to state management as other areas achieve goals.

The proposed rule additionally lowers the stakes of future delisting decisions by breaking the rigid connection between delisting and state management. A tiered approach acts as a sort of insurance policy against future delisting litigation, by locking in a degree of flexibility and state management that would not be disturbed if a future delisting is overturned. And it would allow that delisting decision to be informed by real-world evidence about "existing regulatory mechanisms" rather than speculation.

So we commend the Service for embracing this innovative tiered approach. And we offer these additional thoughts to further strengthen the proposed rule to improve clarity and avoid future conflict:

1) **Incorporate goals and flexibility into the rule itself, rather than relying on an uncertain and discretionary MOU process**

Under the proposed rule, demographic objectives and the transfer of management authority to states is deferred to a subsequent conservation strategy and MOU rather than resolved in the rule. That reliance on a new, uncertain, and apparently discretionary agency process is not necessary because local area objectives already exist in the recovery plan. An uncertain replacement also needlessly raises concerns from both supporters and critics of the general concept of the tiered approach. States and conservation groups like ours have expressed concern that the Service may fail to fully honor the promises of this

[3] *Id.* A copy of this comment has been included as an attachment.

rule by setting unreasonable demographic objectives or withholding flexibility even if they are met.[4] Some other environmental groups have expressed the opposite concern, fearing that objectives will be set unreasonably low or will not be enforced.[5] Since this aspect of the proposed rule maximizes the Fish and Wildlife Service's ongoing discretion, rather than providing clear, enforceable standards, both concerns are plausible.

We recommend the Service provide the demographic objectives in the rule itself and make the additional flexibility triggered by them automatically. This would avoid imposing additional, needless paperwork burdens on state wildlife agencies. And the Service has taken this approach before, in the only other 4(d) rule that adopts something like this tiered model. The 4(d) rule for the Mexican wolf uses the size of the breeding age population as a trigger for additional state flexibility to manage wolves to address impacts to native ungulates, among other flexibilities.[6]

Because the Service has already developed a recovery plan for the grizzly bear and has decades of information about population growth and habitat, it is a good candidate to include clear, objective criteria in the rule itself to be used as the trigger for increased flexibility—and to provide (or withdraw) that flexibility—rather than relying on a separate, discretionary MOU process. This would provide clarity to everyone about expectations and how the rule would work.

Incorporating these details into the regulation rather than relying on a later MOU would also reduce litigation risk. Under the proposed rule, the future conservation strategies and MOUs are potentially vulnerable to litigation. Because they change the operation of the proposed 4(d) rule, opponents of flexibility may argue that the MOUs are themselves rules that must be formally adopted through notice and comment procedures. Incorporating everything into the rule itself, on the other hand, eliminates this concern and needs only to satisfy Section 4(d)'s flexible "necessary and advisable for the conservation of the species" standard. The use of explicit biological triggers for increased flexibility has been specifically upheld under that standard.[7]

2) Clarify the scope of the Tier 2 exception for incidental take for landowners

The previous proposal contained several explicit exemptions for ranchers and other private landowners. The current proposal replaces them with an incidental take exemption for areas in Tier 2 status. However, the proposed rule contains a new definition of incidental take that is inconsistent

[4] As written, the proposed rule makes an area meeting the demographic objectives a necessary condition of Tier 2 status, but not necessarily a sufficient condition. States must demonstrate objectives are met to qualify for Tier 2. But the rule doesn't require the Service to grant a state Tier 2 status whenever the objectives are met.

[5] The proposed rule provides that the Service "may" revoke Tier 2 status if the objectives are not met but does not require the status to be revoked and federal regulation restored in any circumstances.

[6] 50 C.F.R. § 17.84(k).

[7] *See Center for Biological Diversity v. Haaland*, 22-cv-00303, 2025 WL 981686 (D. Ariz. 2025)

with the established understanding of this phrase, narrows the effect of this exemption substantially, and creates unnecessary confusion.[8] No explanation is offered for this narrowing of "incidental take."

We encourage you to use the ordinary definition of incidental take for this rule or provide greater clarity about how this bespoke definition affects Tier 2 status. If the new definition is retained, the Service should offer some justification for it. It should also provide a nonexhaustive list of circumstances in which state and landowner activity will be covered by the incidental take exemption under Tier 2. And it should identify actions that would be incidental take under the ordinary definition but would be excluded under this proposed definition. Providing this clarity now will avoid future confusion and conflict later, benefiting states, landowners, and bears.

Conclusion

Thank you again for your leadership in conservation and embrace of this innovative tiered 4(d) rule approach. We applaud the proposal and offer these suggestions to improve clarity, reduce conflict, and streamline administration of the rule. We look forward to the final rule's release and the conservation it unleashes.

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[8] *Compare* 50 C.F.R. § 17.3 (defining "incidental take" generally as take "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity") *with* 91 Fed. Reg. 44,780, 44,794 (adding to the general definition that take must also be "unintentional and not due to negligent conduct" and further excluding take that results from misidentification of a species during a lawful activity).