

**BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA**

**In the matter of the adoption and amendment of rules pertaining to the incidental snaring, trapping, and poisoning of grizzly bears and other wildlife in Montana) RULEMAKING PETITION
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TO: All Concerned Persons

1. Petitioner's name and address is:

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2. Facts showing petitioner will be affected: NRDC has over 6,000 members and online activists in Montana, and more than two million members and online activists nationwide. Many of our members and activists watch, enjoy, care deeply about, and advocate on behalf of Montana’s wildlife. NRDC and its members are negatively affected by the incidental and unnecessary injuries and deaths of grizzly bears, eagles, mountain lions, wolverines, pronghorn antelope, and other species of wildlife in Montana—including many species which the state has designated “species of concern”—due to snares, traps, and poison.

This petition asks the Montana Fish and Wildlife Commission (“Commission”) to amend and adopt administrative rules that would protect and conserve Montana’s wildlife by: 1) instating a statewide 24-hour visual trap inspection requirement; and 2) prohibiting the use of neck snares and M-44 sodium cyanide ejectors within occupied grizzly bear habitat. Adoption of these proposals would positively affect multiple species of wildlife and NRDC’s members in Montana and across the nation.

3. Reason for the proposed agency action: The reason for the proposed action is to reduce and prevent incidental injury and death caused by traps, snares, and M-44s every year to grizzly bears and other wildlife in Montana, including species that are so sensitive that they have been designated by the state as “species of concern.”

First, this petition asks the Commission to amend Montana’s administrative rules to require that all traps and snares be checked every 24 hours. As explained in more detail below, Montana regulations, and agreements entered into between the Montana Department of Fish, Wildlife & Parks (“Department”) and USDA Wildlife Services, currently require that certain snares and traps be checked every 24 or 48 hours, depending on the circumstances and target species. Montana regulations

also encourage (but do not require) trappers to check traps set for furbearers every 48 hours. In the interest of regulatory consistency, and in order to minimize the likelihood of injury or death to accidentally captured wildlife, the Commission should adopt a single, statewide, 24-hour trap-check requirement for all traps and snares set for all applicable species.

Second, this petition asks the Commission to prohibit the use of neck snares and M-44s within occupied grizzly bear habitat. As explained in more detail below, the Department has entered into agreements with Wildlife Services that already prohibit Wildlife Services officials from using neck snares and M-44s within occupied grizzly habitat to avoid incidental take of grizzlies and other species. However, Wildlife Services personnel are not the only ones using these devices. Neck snares are also used by recreational trappers, and M-44s can be used by anyone in Montana who has been certified to do so. See §§ 4.10.1401 et seq., A.R.M. Thus, this petition asks the Commission to amend and adopt administrative rules that would extend the prohibition of the use of these devices within occupied grizzly habitat to all users of neck snares and M-44s, not just Wildlife Services officials.

Adopting these requirements would ensure that Montana's rules regarding the trapping, snaring, and poisoning of wildlife are consistent with existing regulations and agreements between the Department and Wildlife Services. It would further ensure that Montana's rules apply equally to all users of traps, snares, and M-44s (not just agency personnel) and to all impacted species. These requirements would help increase regulatory consistency and decrease the likelihood of injury or death to incidentally captured or poisoned wildlife in Montana, including grizzly bears and many other sensitive species designated as "species of concern."

4. Discussion:

I. This Petition Is Appropriately Before the Commission.

This petition is appropriately before the Commission pursuant to the Montana Administrative Procedures Act ("MAPA"). Under MAPA, any "interested person . . . may petition an agency requesting the promulgation, amendment, or repeal of a rule." § 2-4-315, M.C.A; see also § 1.3.308, A.R.M. MAPA defines "agency" as "any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules" §§ 2-4-102(2)(a); 2-3-102(1), M.C.A. (emphasis added).

The Commission is authorized by law to make rules regarding, among other things, the "protection, preservation, management, and propagation" of Montana's wildlife. § 87-1-301(1)(a), M.C.A. As discussed in more detail below, the Commission has the specific authority to adopt and amend rules regarding the snaring, trapping, and poisoning of wildlife in the state. Thus, the Commission is the appropriate agency to conduct rulemaking, and take final action, with respect to this petition. See § 12.2.101, A.R.M.; §§ 1.3.101 et seq., A.R.M.

II. The Commission Must Hold a Public Hearing and Provide an Opportunity for Public Comment.

The Commission must provide an opportunity for public participation regarding this petition by, at a minimum, holding a public hearing and providing an opportunity for public comment. The Department has adopted the Montana Attorney General's model procedural rules. See § 12.2.101(1), A.R.M. These rules state that, "prior to making a final decision that is of significant interest to the public, the agency shall afford reasonable opportunity for public participation." § 1.3.102(1), A.R.M. Reasonable opportunity for public participation may be afforded through a public hearing. See § 1.3.102(1)(b), A.R.M.; see also § 2-3-104(3), M.C.A. And "a hearing is required if the proposed action is the adoption of rules in an area of significant interest to the public." Id. (emphasis added). "Significant interest to the public" is defined as "agency actions . . . regarding matters that the agency knows to be of widespread citizen interest." § 2-4-102(12)(a), M.C.A.

Here, the amendment or adoption of rules regarding the protection and conservation of wildlife is a matter of widespread citizen interest. Montanans—and millions of people who reside outside of Montana—care deeply about Montana's wildlife. Every year, thousands of people comment on Montana's proposed wildlife management regulations. Articles about bison, wolves, grizzly bears, elk, bighorn sheep, sage grouse, and other wildlife species and issues regularly feature prominently in Montana newspapers.¹ During the 2015 Montana legislative session, more bills regarding fish and wildlife were introduced (57) than bills regarding economic development (15), health (39), or education (56).² One study showed that 85% of visitors to Yellowstone National Park engage in wildlife watching—and for many that is the primary reason for their trip.³ Last year's decision by Yellowstone National Park to euthanize a grizzly bear that killed a hiker generated international discussion and debate.⁴

In any event, the Commission must provide an opportunity for public comment. Even if the Commission declines to hold a public hearing, "the opportunity to submit written comments must be provided." § 1.3.311(1), A.R.M. In addition, this petition constitutes a public matter, and "[p]ublic comment on any public matter within the jurisdiction of [the Commission] must be allowed at any public meeting" held in connection with this petition. § 1.3.102(3), A.R.M.

¹ See, e.g., http://www.bozemandailychronicle.com/news/environment/governor-issues-decision-on-year-round-bison-habitat/article_3f907cf0-0b5e-5530-a925-f05793625b9a.html; <http://www.greatfallstribune.com/story/news/2015/12/30/grizzly-bear-deaths-rise-yellowstone-population-grows/78113816/>; and http://billingsgazette.com/lifestyles/recreation/some-birds-have-amazing-cold-weather-adaptations/article_b46ab89f-07c4-5dd4-b36f-108f1bd81a96.html.

² See [http://laws.leg.mt.gov/legprd/law0203w\\$.startup?P_SESS=20151](http://laws.leg.mt.gov/legprd/law0203w$.startup?P_SESS=20151) (last visited Feb. 28, 2016).

³ See Duffield et al., *Wolves and People in Yellowstone: Impacts on the Regional Economy* (Sept. 2006), pp. 28-30.

⁴ See, e.g., <http://news.nationalgeographic.com/2015/08/150820-grizzly-yellowstone-maul-wenk-blaze/> (last visited Feb. 28, 2016).

III. The Commission Has a Responsibility to Protect Montana’s Wildlife— Particularly Species of Concern.

The Commission has a duty to protect and conserve all wildlife species in Montana—and especially those species designated as “species of concern.” Montana law directs the Commission to “set the policies for the protection, preservation, management, and propagation of the wildlife, fish, game, furbearers, waterfowl, nongame species, and endangered species of the state” § 87-1-301(a). Similarly, the Department must manage listed or sensitive species “in a manner that assists in the maintenance or recovery of those species.” § 87-1-201(9)(a)(ii), M.C.A.

There are currently more than 200 wildlife species designated as species of concern in Montana.⁵ Specifically, “species of concern” are wildlife species designated by the Montana Natural Heritage Program and Montana Fish, Wildlife & Parks as “native animals breeding in the state that are considered to be ‘at risk’ [of global or state-wide extinction] due to declining population trends, threats to their habitats, and/or restricted distribution.”⁶ Although the “species of concern” designation “is not a statutory or regulatory classification,” it still “provide[s] a basis for resource managers and decision-makers to make proactive decisions regarding species conservation and data collection priorities in order to avoid additional extirpations.”⁷

As discussed in more detail below, many species of concern are susceptible to incidental injury and death by neck snares, foothold traps, and M-44s. Thus, adopting the proposed rules outlined below will help the Commission fulfill its duty of protecting these and many other species of wildlife in the state.

IV. The Commission Should Propose Rules Requiring that All Traps Be Checked Every 24 Hours and Prohibiting the Use of Neck Snares and M-44s within Occupied Grizzly Bear Habitat.

The Commission should propose administrative rules that would: 1) require that all traps and snares be visually inspected every 24 hours; and 2) prohibit the use of neck snares and M-44 sodium cyanide ejectors within occupied grizzly bear habitat. Such rules would reduce incidental take of multiple species of wildlife in Montana, including many designated as “species of concern.”

⁵ See <http://mtnhp.org/SpeciesOfConcern/?AorP=a> (last visited Feb. 28, 2016).

⁶ See <http://fwp.mt.gov/fishAndWildlife/species/speciesOfConcern/> (last visited Feb. 28, 2016).

⁷ Montana Fish, Wildlife & Parks and Montana Natural Heritage Program, Montana Animal Species of Concern (July 2009), p. 1 (“Over the last 200 years, 5 species with historic breeding ranges in Montana have been extirpated from the state: Woodland Caribou (*Rangifer tarandus*), Greater Prairie-Chicken (*Tympanuchus cupido*), Passenger Pigeon (*Ectopistes migratorius*), Pilose Crayfish (*Pacifastacus gambelii*), and Rocky Mountain Locust (*Melanoplus spretus*)”).

A. The Commission Should Require that All Snares and Traps Be Visually Inspected Every 24 Hours.

The Commission should propose adopting new rule 12.6.1002, A.R.M., requiring that all snares and traps be checked every 24 hours to reduce and prevent unintentional injury and death to incidentally captured wildlife—particularly those species designated as “species of concern.”

i. Threat posed by snares and traps to species of concern and other nontarget wildlife in Montana

Snares and traps are indiscriminate and pose a threat of injury or death to many species of wildlife in Montana. For example, since 2010, traps and snares in Montana unintentionally captured, injured, or killed at least 89 mountain lions, 12 black bears, three grizzly bears,* four wolves, 21 bobcats, 31 river otters, four wolverines,* three lynx,* three fishers,* nine deer, one elk, one pronghorn antelope, 5 raptors,* and ten badgers, among other species.^{8,9} These are just the reported incidents.

The longer an animal remains in a snare or trap, the higher the likelihood of injury or death. As one report on the impacts of snaring explains:

The extent of injuries and distress experienced by a trapped animal is strongly influenced by the length of time it is restrained in the trap. A long restraint time is a factor in the development of dehydration (Powell 2005, Marks 2010), starvation, effects of exposure (e.g. hypothermia), and capture myopathy.¹⁰ . . . Females may be prevented from returning to their offspring, who will subsequently die of starvation.¹¹

Likewise, “[i]ncreased periods of confinement in leg-hold traps are associated with correspondingly larger exertion, struggling and injury.”¹² Thus, using “daily or almost daily (1.4 days), early-morning trap checks have reduced injuries to trapped animals.” Andelt et al. 1999 (citing Novak 1987, Saunders et al. 1988, Proulx et al.

⁸ See https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/sa_reports/sa_pdrs (last visited Feb. 28, 2016); Montana Fish, Wildlife & Parks, Incidental Captures in Montana 2009-2014 License Years (provided Jan. 2016).

⁹ Those species with an asterisk (*) following their name are currently designated as “species of concern” in Montana. From records provided by Montana Fish, Wildlife & Parks, it is not clear which raptors were captured; multiple raptor species are designated as species of concern in the state.

¹⁰ “Capture myopathy is a degenerative disease of skeletal muscle associated with the increased muscular exertion and over stimulation of the nervous system as a result of the capture, restraint, and transportation of animals. Illness and death may result due to disruption of normal circulation, muscle tissue damage, and electrolyte imbalance.” See https://bloomington.in.gov/documents/viewDocument.php?document_id=5711 (last visited Feb. 28, 2016).

¹¹ Ochlitz, Dr. Irene, OneKind Report on Snaring: The Impacts of Snares on Animal Welfare, Center for Animal Welfare and Anthrozoology (Oct. 2010), p. 8.

¹² Nocturnal Wildlife Research Pty Ltd, Welfare Outcomes of Leg-hold Trap Use in Victoria (“Leg-hold Trap Use in Victoria”) (Sept. 2008), p. 76.

1994). Devices such as remote trap monitors have been developed in order to “reduce the amount of time an animal spends in the trap or snare, thus minimizing injury to animals that are captured.” Darrow and Shivik 2008 (citing Larkin et al. 2003, O’Neill et al. 2007). In a study involving the trapping of black bears and other large carnivores, Wildlife Services researchers explained that “[d]ecreased time between trap checks could also ensure quicker responses by trappers, thus reducing the likelihood of stress or injury to captured animals.” Halstead et al. 1995.

Further, daily trap inspections are a widely recommended and adopted standard. In 1999, Andelt et al. noted that “Bogges and Henderson (1981) and the Fur Institute of Canada (1989) recommended that all live-holding devices set on land should be checked daily.” As of 2007, the U.S. Association of Fish and Wildlife Agencies found that “[d]aily or 24 hour trap check is required for traps set on land in most states: foothold traps (69%), bodygrip traps (67%) and snares (60%).”¹³ Indeed, “[d]aily (i.e., once each 24 hour period) inspection appears to be a minimum accepted world-wide standard to reduce trapping injury”¹⁴

Montana currently requires trap checks for two species—wolves and bobcats. In their cooperative management agreement, the Department and WS have agreed that “[t]raps or snares set for wolves will be checked every 24 hours . . . March through November” and “at least every 48 hours from November through March.”¹⁵ Montana regulations also require recreational trappers to visually check wolf and bobcat traps at least every 48 hours.¹⁶ They further state that traps for other furbearers “should [but are not required to] be checked at least once every 48 hours.”¹⁷

Given the indiscriminate nature of traps and snares—and the many studies showing that less time spent in traps means less injury and death—frequent, visual inspection requirements make sense. It does not make sense, however, that such requirements apply to only two species. Fishers, eagles, bears, beavers, mountain lions, wolverines, deer, antelope, and other species—target and nontarget alike—should also be released or killed as quickly as possible, to avoid unnecessary suffering, injury, and death. In the interest of regulatory consistency, the Commission should extend Montana’s current trap-check requirements to apply to all traps and snares set for any furbearer, predator, nongame, or other wildlife species in the state. If the Commission believes that trappers should regularly check their traps, as its furbearer regulations currently indicate, there is no reason not to make that policy mandatory. Further, in order to minimize stress, struggling, exertion, injury, and

¹³ Association of Fish and Wildlife Agencies Furbearer Conservation Technical Work Group, Summary of Trapping Regulations for Fur Harvesting in the United States (2007), p. 17

¹⁴ Review of Welfare Outcomes in Victoria, p. 76.

¹⁵ Memorandum of Understanding Between Montana Fish, Wildlife & Parks and United States Department of Agriculture Animal and Plant Health Inspection Service Wildlife Services Regarding the Cooperative Wildlife Damage Management Program for Grizzly Bear, Gray Wolves, Black Bears, and Mountain Lion in the State of Montana (2014) (“2014 MOU”) Art. V, ¶ E.

¹⁶ See Montana Fish, Wildlife & Parks 2014 Wolf Hunting Regulations, p. 5; Montana Fish, Wildlife & Parks 2015 Furbearer Hunting and Trapping Regulations, p. 6.

¹⁷ Montana Fish, Wildlife & Parks 2015 Furbearer Hunting and Trapping Regulations, p. 3 (emphasis added).

death to target and nontarget species alike, the Commission should require that all traps and snares be visually inspected at least once every 24 hours.

ii. Legal authority

The Commission has the legal authority to establish trap and snare inspection requirements not only for wolves and furbearers, but also for predators and nongame species. The Montana Department of Agriculture has the authority to control some predatory animals (see § 81-7-102, M.C.A.); however, this authority does “not interfere with or impair the power and duties of the department of fish, wildlife, and parks in the control of predatory animals by the department of fish, wildlife, and parks as authorized by law . . .” (§ 81-7-102(4), M.C.A.). Indeed, the Department has a duty to “supervise all the wildlife, fish, game, game and nongame birds, waterfowl, and the game and fur-bearing animals of the state . . .” and “possesses all powers necessary to fulfill the duties prescribed by law” § 87-1-201(1), M.C.A. (emphases added).

In turn, the Commission “shall set the policies for the protection, preservation, management, and propagation of the wildlife, fish, game, furbearers, waterfowl, nongame species, and endangered species of the state and for the fulfillment of all other responsibilities of the department related to fish and wildlife as provided by law” and “shall establish the hunting, fishing, and trapping rules of the department.” § 87-1-301(1)(a)-(b), M.C.A. (emphases added).

Montana’s Nongame and Endangered Species Conservation Act broadly defines “wildlife” as “a wild mammal, bird, reptile, amphibian, fish, mollusk, crustacean, or other wild animal or any part, product, egg, or offspring or the dead body or parts of the animal.” § 87-5-102(9). Thus, under this broad definition, and according to the plain meaning of “wildlife,” the Commission has the authority to protect, preserve, and manage wildlife, and establish the trapping rules with respect to all wildlife within Montana. The Commission may thus establish visual trap and snare check requirements for all wildlife in Montana, including wolves, furbearers, predators, and nongame species.

iii. Proposed new rule

In order to implement a 24-hour trap and snare inspection requirement, we urge the Commission to propose adopting the following new rule:

12.6.1002 TRAP AND SNARE INSPECTION REQUIREMENT

All traps and snares used to capture or attempt to capture any wildlife must be visually checked at least once every 24 hours.

B. The Commission Should Prohibit the Use of Neck Snares Within Occupied Grizzly Bear Habitat.

The Commission should propose amending section 12.6.1001, A.R.M., to prohibit the use of neck-snare traps within occupied grizzly bear habitat between at least March 1 and December 1, or if grizzly bear sign is present, to prevent unintentional injury or death to grizzly bears and other nontarget wildlife.

i. Specific responsibility to protect grizzly bears

The Commission has a specific duty to protect and conserve grizzlies. Grizzly bears—Montana’s state animal¹⁸—are listed as threatened throughout the lower-48 states under the federal Endangered Species Act.¹⁹ They are also designated a species of concern in the state.²⁰ Montana’s Grizzly Bear Policy explains that “the secure habitat for the grizzly has been greatly reduced as a result of the human development and population growth from 1850 through 1950 in the bear’s traditional range in all western states.” § 12.9.103(1), A.R.M.

The Commission has a specific policy “to promote the preservation of the grizzly bear in its native habitat.” § 12.9.103(1), A.R.M. Further, the Commission “has the responsibility for the welfare of the grizzly and advocates the protection of the bear’s habitat.” *Id.* at § 12.9.103(1)(a)(i). By law, the Commission “is dedicated to the preservation of grizzly bear populations within the state of Montana.” *Id.* at § 12.9.103(1). In addition, Commission guidelines direct the Department to “perpetuate and manage grizzly bear in suitable habitats of this state for the welfare of the bear and the enjoyment of the people of Montana and the nation.” *Id.* at § 12.9.103(1)(a).

Importantly, the 2002 final biological opinion issued by the U.S. Fish and Wildlife Service (“FWS”) on impacts of grizzly bears associated with Montana’s grizzly bear conservation plan does not authorize the incidental take²¹ of grizzlies by traps, snares, or poisons.²² Under the Endangered Species Act, such take is unlawful. See 16 U.S.C. § 1538(a).

¹⁸ See § 1-1-508, M.C.A.

¹⁹ See 40 Fed. Reg. 31734 (July 28, 1975); see also <http://ecos.fws.gov/speciesProfile/profile/speciesProfile?spcode=A001> (last visited Feb. 28, 2016). Though the U.S. Fish and Wildlife Service (“FWS”) may propose to remove Endangered Species Act protections for some grizzly bears in the near future, the “delisting” process will take time, and even if they are delisted, grizzly bears and their habitat should be free of unnecessary and life-threatening hazards such as neck snares and M-44s while the species continues to recover.

²⁰ See <http://mtnhp.org/SpeciesOfConcern/?AorP=a&OpenFolders=S&Species=Mammals> (last visited Feb. 28, 2016).

²¹ The Endangered Species Act defines “take” as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

²² See FWS Memorandum regarding Intra-Service Section 7 Consultation on an Amendment to Montana’s Section 6 Cooperative Agreement to Incorporate an Amended Conservation Plan for the Grizzly Bear in Montana (May 1, 2002). It is not clear whether a new biological opinion is being developed. Regardless, according to the Department, the 2002 agreement currently governs the incidental take of grizzly bears in Montana.

ii. Threat posed by neck snares to grizzlies and other nontarget species

Neck snares are notoriously indiscriminate and pose a threat to grizzly bears and many other wildlife species. In 2003, a neck snare unintentionally caught and killed a grizzly in Wyoming.²³ A study in Canada noted that within one week of a trapper in Alberta setting out neck snares for wolves, a grizzly bear had been snared (along with a white-tailed deer and a black bear). Proulx et al. 2015. Over a period of five years, in the Little Smokey region of Alberta, at least three grizzlies were reported unintentionally killed by neck snares used to kill wolves.²⁴

In January 2014, grizzly bear tracks were seen near Denali National Park in Alaska “accompanied by a substantial amount of blood.”²⁵ One observer noted, “It looks like he’s got a dangling appendage My photo clearly shows him dragging something. The drag marks don’t leave the ground. The track looked like he pulled a bloody mop head behind him.”²⁶ Though the cause of injury was unclear, a spokesperson for the Alaska Department of Fish and Game stated that having been caught in a trap or snare was a possibility.²⁷ A local resident who saw the tracks suspected the bear was caught in a wolf snare, noting that there were several trappers actively trapping in a nearby valley.²⁸

The same year, a team of biologists and rangers in Katmai National Park in Alaska removed a neck snare from a mother grizzly that was “cutting into the flesh on her neck.”²⁹ Similarly, in 2012, a grizzly bear was seen in Denali National Park with “a bloody stump for a right foot.”³⁰ Though the cause of the injury was unclear, a wildlife biologist with the park stated that one possibility was that “the leg got caught in a trapping snare meant for a wolf or lynx.”³¹

These are just incidents that were reported.

²³ See Wildlife Services Table 10T: Number of Animals Taken and Control Methods Used by WS, available at https://www.aphis.usda.gov/wildlife_damage/annual%20tables/03table10t.pdf (last visited Feb. 28, 2016).

²⁴ See <http://www.raincoast.org/2015/01/alberta-wolf-slaughter/> (last visited Feb. 28, 2016).

²⁵ See http://www.newsminer.com/news/local_news/bloody-grizzly-tracks-are-wake-up-call-for-denali-park/article_979387b2-79aa-11e3-b76b-001a4bcf6878.html (last visited Feb. 28, 2016).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* The spokesperson did not specify whether the snare might have been a foot snare or neck snare. However, most snares set for wolves in Alaska appear to be neck snares. See, e.g., <http://juneauempire.com/stories/102898/snares.html#.VpBWw113l-8>; <http://www.outdoorhub.com/how-to/2014/12/11/wolf-trapping-tips-canadas-premier-trapper/>; and <http://www.adfg.alaska.gov/index.cfm?adfg=trapping.breakaway> (last visited Feb. 28, 2016).

²⁹ See <http://www.nps.gov/katm/learn/news/wire-snare-removed.htm> (last visited Feb. 28, 2016).

³⁰ See <http://www.adn.com/article/20120510/denali-bear-missing-half-leg-seems-healthy> (last visited Feb. 28, 2016).

³¹ *Id.*



Mother grizzly bear with wire snare around her neck near Katmai National Park, Alaska, in July, 2014. Photo credit: National Park Service (<http://www.nps.gov/katm/learn/news/wire-snare-removed.htm>).



Young adult grizzly bear missing the lower half of its right front leg near Denali National Park, Alaska, in May, 2012. The injury was possibly a result of having been caught in a wolf or lynx snare. Photo credit: National Park Service (<http://www.adn.com/article/20120510/denali-bear-missing-half-leg-seems-healthy>).



Bloody grizzly tracks near Denali National Park on Jan. 4, 2014. The injury may have been caused by wolf snare. Photo credit: Bruno Rathke (used with permission) (http://www.newsminer.com/news/local_news/bloody-grizzly-tracks-are-wake-up-call-for-denali-park/article_979387b2-79aa-11e3-b76b-001a4bcf6878.html).

Neck snares also threaten many other species. In the Little Smokey region of Alberta mentioned above, neck snares were primarily responsible for unintentionally killing at least 12 black bears, two caribou, 163 mountain lions, 40 bald and golden eagles, 173 fishers, 70 lynx, 12 moose, 73 otters, 12 owls, and 38 wolverines.³² Many of the nontarget species captured, injured, or killed by traps and snares in Montana as described in section IV.A.i. above were caught by neck snares (though it is unclear from Department records exactly how many). All of those species have ranges that overlap with occupied grizzly bear habitat; thus, prohibiting neck snares within grizzly habitat would protect not just grizzlies but a multitude of other wildlife species—including species of concern—as well.

A study conducted by Wildlife Services empirically demonstrated the indiscriminate nature of neck snares. In that study, neck snares used to capture 374 coyotes incidentally captured 91 deer and six cows or calves. Phillips 1996. Of the 91 deer captured, 47 died. The study acknowledged that, “[i]n snaring coyotes, areas frequently used by livestock or deer should be avoided to prevent capturing these species.” *Id.* at p. 110.

Neck snares are so indiscriminate that the Department and Wildlife Services have agreed that “[n]eck snares, with or without stops, may not be used for control actions within occupied grizzly habitat between March 1 and December 1,”³³ and that “[n]eck snares should never be used in areas where any grizzly bear sign has been observed.”³⁴ Indeed, the agencies have recognized that even outside of those areas

³² See <http://www.raincoast.org/2015/01/alberta-wolf-slaughter/> (last visited Feb. 28, 2016).

³³ 2014 MOU Art. IV, ¶ B(2).

³⁴ Memorandum of Understanding Between Montana Fish, Wildlife & Parks and United States Department of Agriculture Animal and Plant Health Inspection Service Wildlife Services Regarding the Cooperative Wildlife Damage Management Program for Grizzly Bear, Gray Wolves, Black Bears, and Mountain Lion in the State of Montana (2006) (“2006 MOU”) Art. IV, ¶ C(2).

and time frame, “extreme caution should still be used as neck snares can catch non-target wildlife.”³⁵

To try to avoid non-target capture, Montana regulations require that snares “be equipped with a breakaway lock device designed to release when more than 350 pounds of force is applied.”³⁶ However, these regulations acknowledge that if a snare is not placed correctly, the breakaway device may not work.³⁷ Further, smaller or younger bears may not weigh enough to be able to exert sufficient force to activate the breakaway device. Phillips et al. 1990.

Even adult bears that are large and strong enough to break away from a leg snare may not be able to escape a neck snare, because animals tend to exert significantly less force when caught by the neck. *Id.* Phillips 1996, referenced above, explains that deer snared around the neck are less able to escape “because neck muscles tend to cushion or reduce the force applied by the lock,” and, therefore, “most neck-caught deer asphyxiate without breaking the locks.” Phillips 1996, p. 109. For this and other reasons, the study concluded that “it will be difficult to design a breakaway system that holds all coyotes and releases all deer.” *Id.* at p. 110.

Moreover, “there is a wide array of behavioral differences in the way individual animals respond to snares. Some animals will remain passive in the snare while others will exert substantial force against the snare lock or release the device.” Phillips et al. 1990, p. 258. Thus, even bears with the physical ability to break a neck snare still might not do so if they remain passive. In such a situation, a grizzly bear could be seriously injured or killed before it was found and released.

As a result of a recent lawsuit, Montana trapping regulations also now require the use of relaxing locks—i.e., locks that in theory relax when the captured animal stops pulling—on snares set for bobcats within special Lynx Protection Zones.³⁸ However, significant portions of occupied grizzly habitat in Montana occur outside of these zones. Further, this does not apply to neck snares set for other species, such as coyotes, that also occur within both the Lynx Protection Zones and occupied grizzly habitat. Also, according to the Association of Fish and Wildlife Agencies, a multitude of factors could prevent relaxing locks from actually relaxing (thus rendering them lethal), even under normal field conditions:

Under normal field application, numerous external factors may affect the ability of a lock to perform as designed. For example, if a significant bend or kink forms in the cable just outside the lock position, if the lock becomes bound in the animal’s hair, or if the animal cannot release

³⁵ 2014 MOU, Art. IV, ¶ B(2).

³⁶ Montana Fish, Wildlife & Parks, 2015 Furbearer Hunting and Trapping Regulations, p. 3.

³⁷ *Id.* at p. 15.

³⁸ Montana Fish, Wildlife & Parks 2015 Furbearer Hunting and Trapping Regulations, pp. 6, 9.

tension on the cable due to 'entanglement', a relaxing lock may not be able to 'relax' as designed.'³⁹

We appreciate the Department's and Wildlife Services' efforts to avoid the unintentional injury or death of grizzly bears by neck snares. However, Wildlife Services personnel are not the only people using these devices. Recreational trappers may use neck snares to take "predators, furbearers, unprotected nongame animals, and unprotected nongame birds." § 12.6.1001, A.R.M. Further, "[l]ivestock owners, employees of the [Department of Fish, Wildlife & Parks] and the federal Fish and Wildlife Service may use snare traps to lawfully take depredating bears and depredating mountain lions." *Id.* The use of neck snares by these groups in occupied grizzly habitat also creates the risk that grizzlies will be unintentionally injured or killed. Thus, the same prohibition on the use of neck snares in these areas should apply to all users.

iii. Legal authority

For the same reasons explained in Section III.A.iii. above, the Commission has the legal authority to prohibit the use of neck snares to capture not just furbearers, but all wildlife, including predators and nongame species.

iv. Proposed rule amendment

In order to implement a prohibition on the use of neck snares within occupied grizzly bear habitat, or where grizzly sign is present, we urge the Commission to propose amending section 12.6.1001 of the Administrative Rules of Montana as follows:

12.6.1001 SNARE TRAPS

(1) Snare traps may be used to lawfully take predators, furbearers, unprotected nongame animals, and unprotected nongame birds. Livestock owners, employees of the department and of the federal Fish and Wildlife Service may use snare traps to lawfully take depredating bears and depredating mountain lions.

(2) Notwithstanding the provisions of subsection (1), no person may use neck snare traps to take or attempt to take any wildlife within occupied grizzly bear habitat between March 1 and December 1 or if grizzly bear sign is present.

C. The Commission Should Prohibit the Use of M-44s Within Occupied Grizzly Bear Habitat.

The Commission should propose adopting new rule 12.9.107, A.R.M., to prohibit the use of M-44 sodium cyanide ejector devices within occupied grizzly bear habitat

³⁹ Association of Fish and Wildlife Agencies Furbearer Conservation Technical Work Group, *Modern Snares for Capturing Mammals: Definitions, Mechanical Attributes and Use Considerations* (2009), p. 9.

between at least March 1 and December 1, or if grizzly sign is present, to prevent unintentional injury or death to grizzly bears and other wildlife.

i. Threat posed by M-44s to grizzly bears and other nontarget species

Like neck snares and foothold traps, M-44s are indiscriminate and pose a lethal threat to grizzly bears. There has been at least one documented incident of a grizzly being killed by an M-44 in Montana.⁴⁰ One former FWS employee has explained that M-44s have killed grizzly bears, black bears, and even cows.⁴¹ “They’re indiscriminate, even placed with the utmost care.”⁴²

FWS has reported that “[t]he registration of sodium cyanide capsules for use in the M-44 device for control of canid predators could result in the mortality of a gray wolf or grizzly bear” because “these two species have a very wide range and thus could be inadvertently taken in areas not mapped and/or prior to the applicator’s knowledge that the species may be in the control area.”⁴³ Accordingly, the agency has advised that “[t]he following reasonable and prudent measures should be adopted: prohibit the application of sodium cyanide (M-44s) in the geographic range of the gray wolf and grizzly bear until after the user has contacted the local Fish and Wildlife Service office and that office has determined that there are no known wolves or grizzly bears in the general vicinity of where the M-44s are going to be applied.”⁴⁴

M-44s also pose a threat to many other species. Nationwide, between 2010 and 2014, M-44s used by Wildlife Services unintentionally killed more than 250 wild and domestic animals, including 10 black bears, two golden eagles, and seven swift foxes (golden eagles and swift foxes are species of concern in Montana whose ranges overlap with grizzly bears).⁴⁵ FWS has reported that “any carrion feeding animal able to activate the trigger of the M-44’s cyanide ejector device is at risk.”⁴⁶ Further, FWS has noted that “[i]t is reasonable to believe bird deaths are underestimated in non-target kill reports because the bird’s flight response on activation of an M-44 could easily remove them from the vicinity of the device in a few seconds.”⁴⁷

⁴⁰ James Jonkel, Montana Fish, Wildlife & Parks, Living with Predators Project Working Paper 0004, Preliminary Overview of Grizzly Bear Management and Mortality 1998-2005 (March 2006), p. 20.

⁴¹ See <http://www.sacbee.com/news/investigations/wildlife-investigation/article2574606.html> (last visited Feb. 28, 2016).

⁴² *Id.*

⁴³ FWS Biological Opinion: Effects of 16 Vertebrate Control Agents On Threatened and Endangered Species (March 1993) (“FWS 1993 Bi. Op.”), pp. II-85 to II-86.

⁴⁴ *Id.* at p. II-86.

⁴⁵ See Wildlife Services PDR G Information Reports 2010-2014, available at https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/sa_reports/sa_pdrs (last visited Feb. 28, 2016).

⁴⁶ FWS 1993 Bi. Op., p. II-82 (emphasis in original).

⁴⁷ *Id.*

Between 2010 and 2014 in Montana, M-44s killed at least 25 nontarget animals, including two wolves.⁴⁸ Fourteen of the nontarget animals taken by private applicators were reported as “unknown,” meaning it is unclear what wildlife species may have been injured or killed. And again, these are only the reported incidents; Montana Department of Agriculture regulations governing the use of M-44s (discussed in more detail below) do not require the reporting of unintentionally killed animals.

Because of the risk that M-44s pose to grizzly bears and other nontarget species, the Department and Wildlife Services have agreed that Wildlife Services “may not use M-44’s between March 1st and December 1st within occupied grizzly bear habitat unless specifically authorized.”⁴⁹

Again, we appreciate the Department’s and Wildlife Services’ efforts to avoid the unintentional injury or death of grizzly bears by M-44s. But, as with neck snares, Wildlife Services personnel are not the only people using these devices. Any individual certified as a government, commercial or farm applicator may use M-44s. See § 4.10.1404(4), A.R.M. Indeed, in 1993 “[t]he M-44 [was] the mainstay of the Montana [Animal Damage Control] program.” Lee 1993, p. 158. As of that time, “[p]rogram use [was] about 1000 capsules per year” and about 40-50 different applicators used M-44s each year. Id. According to the Montana Department of Agriculture, there are currently at least 30 different applicators operating in the state, 10 of which are non-Wildlife Services personnel.⁵⁰ The use of M-44s by these individuals within occupied grizzly habitat creates the risk that grizzlies and other wildlife species who share grizzly habitat will be unintentionally injured or killed. Thus, the same prohibition should apply to these users.

ii. Legal authority

The Commission has the legal authority to limit the use of M-44s within grizzly habitat. As discussed above, under Montana law, the Commission has a duty to conserve and protect grizzly bears and their habitat. See, e.g., § 12.9.103(1), A.R.M. Further, the Commission “shall set the policies for the protection, preservation, management, and propagation” of all wildlife in Montana. § 87-1-301(1)(a)-(b). M.C.A.

Though the Department of Agriculture has established rules governing who may sell and register to use M-44s, it has not established rules regarding where, geographically, M-44s may or may not be used. Thus, a rule promulgated by the Commission limiting the geographic scope of the use of M-44s would not conflict with Department of Agriculture rules.

⁴⁸ Id.; Montana Department of Agriculture, 2013-2014 MT M-44 Kill Data (provided Dec. – Jan. 2016).

⁴⁹ 2014 MOU Art. IV, ¶ B(1).

⁵⁰ Personal comm. with Stephen Vantassel, Montana Department of Agriculture Vertebrate Pest Specialist (Dec. 2015 and Jan. 2016).

Further, Department of Agriculture rules make clear that the only species that may be intentionally targeted by M-44s are coyotes, red and gray foxes, and wild dogs “that depredate livestock and poultry.” § 4.10.1401(1), A.R.M. Thus, the Commission retains the authority to promulgate rules protecting the take of all other non-target wildlife species, including grizzly bears.

Moreover, the Commission and the Department of Agriculture have exercised joint authority over regulating the use of poisons used to kill wildlife in the past. In 1972, the Commission adopted a rule restricting the use of 1080 poison baits. See § 12.9.106 (repealed in 1996 when the federal government banned their use); see also Notice of Repeal Before the Fish, Wildlife & Parks Commission of the State of Montana (April 15, 1996), p. 1015. Later, in 1986, the Department of Agriculture established rules regarding the use of 1080 poison in livestock protection collars. See §§ 4.10.1201 et. seq. These rules coexisted for ten years (until 1996, as mentioned above). This demonstrates that the Commission shares the authority to promulgate rules regarding the use of M-44s today.

iii. Proposed new rule

In order to implement a prohibition on the use of M-44s within grizzly habitat, we urge the Commission to propose adopting the following new rule:

12.9.107 M-44 SODIUM CYANIDE CAPSULES AND M-44 DEVICES

(1) Notwithstanding the provisions of ARM sections 4.10.1401 et seq., no person may use M-44s to take or attempt to take any animal within occupied grizzly bear habitat between March 1 and December 1 or if grizzly bear sign is present.

5. Persons known to petitioner to have an interest in the proposed agency action are:

- NRDC members and activists in Montana and nationwide
- Members of the public in Montana and wildlife enthusiasts nationwide
- Montana Fish and Wildlife Commission
- Montana Department of Fish, Wildlife & Parks
1420 East Sixth Avenue
P.O. Box 200701
Helena, MT 59620-0701
- Montana Department of Agriculture
302 North Roberts
Helena, MT 59620-0201
- USDA APHIS Wildlife Services

P.O. Box 1938
Billings, MT 59103

- U.S. Fish and Wildlife Service
585 Shepard Way, Suite 1
Helena, MT 59601

6. Petitioner requests a hearing and oral presentation for expression of petitioner's and other interested persons' views.

WHEREFORE, petitioner requests the Montana Fish and Wildlife Commission to propose to amend or adopt the Administrative Rules of Montana as discussed above.



Zack Strong

March 1, 2016

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