

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**[Docket No. FWS-R9-ES-2011-0031]**

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**RIN 1018-AX49; 0648-BA78**

**Draft Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species”**

**AGENCIES:** Fish and Wildlife Service, Interior; National Marine Fisheries Service, NOAA, Commerce.

**ACTION:** Notice of draft policy; request for public comments.

**SUMMARY:** We, the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services), announce a draft policy to provide our interpretation of the phrase “significant portion of its range” in the Endangered Species Act’s (Act’s) definitions of “endangered species” and “threatened species.” The purpose of this notice is to provide a draft interpretation and application of “significant portion of its range” that reflects a permissible reading of the law and its legislative history and minimizes undesirable policy outcomes, while fulfilling the conservation purposes of the Act. We seek public comments on this draft policy. It is our intent to publish a final policy that will provide a consistent standard for interpretation of the phrase and its role in listing determinations that will be accorded deference by the federal courts.

**DATES:** We will consider comments and information we receive from all interested parties on or before **INSERT DATE 60 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION**.

**ADDRESSES:** You may submit comments by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments on docket number FWS-R9-ES-2011-0031.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-R9-ES-2011-

0031; Division of Policy and Directives Management; U.S. Fish and Wildlife Service;  
4401 North Fairfax Drive, MS 2042; Arlington, VA 22203.

We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Public Comments** section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Rick Sayers, U.S. Fish and Wildlife Service, Endangered Species Program, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703-358-2171; facsimile 703-358-1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910; telephone (301-713-1401); fax (301-713-0376). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

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**I. Background**

*A. Introduction*

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act) provides for the classification (i.e., the listing) and protection of “endangered species” and “threatened species.”

It is implemented jointly by the Services. Where language in the Act is ambiguous and open to interpretation, the Secretaries of the Interior and Commerce (Secretaries) have the discretion to provide a reasonable interpretation of that language. One such ambiguity is the meaning of the phrase “significant portion of its range” (SPR) found in the Act’s definitions of “endangered species” and “threatened species.”

Despite the fact that the definitions of “endangered species” and “threatened species” have been part of the Act since its enactment in 1973, prior to 2007, neither agency had adopted a regulation or binding policy defining or explaining the application of the phrase “significant portion of its range,” an element common to both definitions. Specifically, the Services have never addressed in their regulations: (1) The consequences of a determination that a “species”<sup>1</sup> is either endangered or likely to become so throughout a significant portion of its range, but not throughout all of its range; or (2) what qualifies a portion of a range as “significant.” To address this, the Solicitor of the Department of the Interior (DOI) issued a legal opinion in 2007 addressing several issues regarding the meaning of the SPR phrase (referred to as the “M-Opinion”) (DOI 2007). The M-Opinion’s conclusion regarding the interpretation of the SPR phrase that provided for applying the Act’s protections to a listed species in only a portion of its range was rejected by subsequent court rulings, as explained below, and the M-Opinion was withdrawn on May 4, 2011 (DOI 2011). Following withdrawal of the M-opinion, neither agency

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<sup>1</sup>The term “species” is specifically defined as a term of art in the Act to include “subspecies” and, for vertebrate species, “distinct population segments,” in addition to taxonomic species. 16 U.S.C. § 1532(16). Therefore, when we use the term “species” in this draft policy, with or without quotation marks, we generally mean to refer to this statutory usage. In some instances, however, where we intend to place specific emphasis on the term, we will use quotation marks. Where, on the other hand, the Services intend to use the biological meaning of the term, we will use the term “taxonomic species.”

has had a policy providing a uniform interpretation of the phrase “significant portion of its range.”

Here we notify the public of a draft policy regarding the interpretation and application of the SPR phrase. Specifically, this draft policy includes: (1) An explanation of the consequences of a species being in danger of extinction or likely to become so in an SPR, but not throughout all of its range ; (2) a definition of the term “significant” as it applies to SPR; (3) an interpretation of the term “range” and explanation of how historical range is considered as it applies to SPR; and (4) a means of reconciling our draft interpretation of SPR with the inclusion of “distinct population segment” (DPS) in the Act’s definition of “species.” This draft policy is preceded by a detailed explanation of the conclusions reached in the draft policy, as well as the alternatives we considered.

Our intent is to finalize a legally binding policy that will set forth the Services’ interpretation of “significant portion of its range” and its place in the statutory framework of the Act. This draft policy has been jointly developed by the Services and will be finalized after full consideration of alternatives and public comments.

#### *B. The Statute*

A policy interpretation of the SPR phrase must consider not only the definitions in which the phrase occurs but also other relevant parts of the statute. As noted above, the Act provides for the classification (i.e., the listing) and protection of “endangered species” and “threatened

species.” The Act defines the terms “endangered species” and “threatened species” as follows:

The term “endangered species” means any species which is in danger of extinction throughout all or a significant portion of its range . . . (16 U.S.C. 1532(6)).

The term “threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532(20)).

The Act contains no definition of the phrase “significant portion of its range.” The definition of “species” is also relevant to this discussion. Section 3 defines the term “species” as follows:

The term “species” includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature (16 U.S.C. 1532(16)).

The Act’s definition of “species” originally included taxonomic species, subspecies, “and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature” (Pub. L. No. 93-205, 87 Stat. 884 (1973)). The quoted clause was a precursor for what in 1978 would become, through amendment, the current language: “any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature” (Pub. L. No. 95-632, 92 Stat. 3751 (1978)). In 1996, the Services jointly adopted a

policy to guide implementation of the “distinct population segment” (DPS) concept in listings, delistings, and reclassifications (DPS Policy; 61 FR 4722, February 7, 1996). The DPS Policy looks to the discreteness and significance of populations, as well as their conservation status, to determine whether they qualify for listing. The DPS language is relevant to considering an interpretation of the SPR phrase because they both involve analysis of less than the entire range of a taxonomic species or subspecies in making listing determinations, although the consequences may differ as discussed further in this Policy.

Both prior to and in the years between the issuance of the DPS Policy and the advent of a string of court decisions discussing SPR issues beginning in 2001 (see *Case Law* below), it had generally been understood (although not expressly articulated) by the Services that, given the Act’s definition of “species,” the only way to list less than a taxonomic species or subspecies was as a DPS. For example, in 1976 the FWS listed the U.S. population of the Bahama swallowtail butterfly (41 FR 17736). When the Act was amended in 1978 to limit population listings only to vertebrates, the Service removed the subspecies from the list because the U.S. population was not a distinct subspecies from the Bahama populations and the subspecies to which the U.S. population belonged itself was not threatened (49 FR 34501). Thus, the FWS did not believe the Act allowed listing units below taxonomic species or subspecies, except in the case of vertebrate DPSs. As discussed below, the M-Opinion took the contrary position.

Finally, section 4(c)(1) of the Act states that the lists of endangered species and threatened species “shall refer to the species contained therein by scientific and common name or names, if any, [and] *specify with respect to each such species over what portion of its range it is*



*endangered or threatened* (emphasis added)” (16 U.S.C. 1533(c)(1)). The intent of this language must also be considered in determining the regulatory consequences of an interpretation of the SPR phrase.

### *C. The Legislative History*

Interpretation of the statutory language can be assisted at times by reading the legislative history. However, in this case, the legislative history is somewhat contradictory and is not particularly conclusive as to the role Congress intended the SPR phrase to play.

The precursor to the Endangered Species Act of 1973 was the Endangered Species Conservation Act of 1969 (Pub. L. No. 91-135, 83 Stat. 275) (ESCA). The ESCA defined an “endangered species” by stating: “A species or subspecies of fish or wildlife shall be deemed to be threatened with worldwide extinction whenever the Secretary determines, based on the best scientific and commercial data available to him, . . . that the continued existence of such species or subspecies of fish or wildlife is . . . endangered . . .” (section 3(a)). Thus, to be protected under the ESCA, a species had to be endangered worldwide.

In the 1973 Act, Congress addressed what it saw as limitations in the ESCA. As explained in more detail in a summary developed by DOI explaining the origins of the SPR phrase and its current placement in the Act (DOI 2010) and available for viewing at <http://www.regulations.gov>), the SPR language originated in proposed endangered species legislation drafted by DOI and introduced the previous year as H.R. 13111. (This language was

also included in the bill H.R. 37 introduced in the 93<sup>rd</sup> Congress that would ultimately become the Endangered Species Act of 1973.) It was included in a single sentence that combined aspects of the provisions currently found in sections 3(6), (16), and (20), and 4(a)(1), and (b)(1) of the Act. Section 2(c)(1) of the DOI bill provided that

A species or subspecies of fish or wildlife shall be regarded as an endangered species whenever, in his discretion, the Secretary determines, based on the best scientific and commercial data available to him and after consultation, as appropriate, with the affected States, and, in cooperation with the Secretary of State, the country or countries in which such fish and wildlife are normally found or whose citizens harvest the same on the high seas, and to the extent practicable, with interested persons and organizations, and other interested Federal agencies, that the continued existence of such species or subspecies of fish or wildlife is, in the judgment of the Secretary, either presently threatened with extinction or will likely within the foreseeable future become threatened with extinction, *throughout all or a significant portion of its range*, due to any of the following factors: (i) the destruction, drastic modification, or severe curtailment of its habitat; or (ii) its overutilization or commercial, sporting, scientific, or educational purposes; or (iii) the effect on it of disease or predation; or (iv) the inadequacy of existing regulatory mechanisms; or (v) other nature or manmade factors affecting its continued existence.

(Emphasis added.) That sentence was immediately followed by language now found in section 4(c)(1) of the Act:

[T]he Secretary shall publish ... a list, by scientific and common name of such endangered species, indicating as to each species and subspecies so listed whether such species or subspecies is presently threatened with extinction or likely within the

foreseeable future to become threatened with extinction and, in either case, over what portion of the range of such species this condition exists.

A “Final Environmental Statement” (DOI 1972) on that bill prepared by DOI indicated that DOI intended the SPR language to play the role eventually played by the precursor to the Act’s current DPS language. According to the Final Environmental Statement, “[t]he term ‘significant portion’ of its range is used in the definition of endangered to provide the Secretary with the authority to protect a population unique to some portion of the country without regard to its taxonomic status, or a population that is now endangered over a large portion of its range even if the population inhabiting that portion of the range is not recognized as a distinct subspecies from a more abundant population occurring [sic] elsewhere.” In response to comments, the Final Environmental Statement also states “The term ‘a significant portion of its range’ allows the Secretary to use discretion in listing a distinct population which may be a subspecies, race, form, or a unique or disjunct segment of a species without regard to whether it is a recognized subspecies or not.”

The DOI bill did not include a definition of “species” or the language that was the precursor to the Act’s current DPS language (H.R. 4758, 93d Cong. (1972)). However, in the bill that eventually became the 1973 Act, Congress split up the single sentence from the DOI bill into multiple pieces and placed them in different portions of the Act. Simultaneously, it added the DPS precursor language to the definition of “species,” but did not delete the SPR language. Instead Congress moved the SPR language, without explanation, to the definitions of “endangered species” and “threatened species.”

As a general matter, the various committee reports note a number of problems with the prior legislation that the 1973 Act was intended to fix. *See generally* S. REP. NO. 93-307 (1973); H.R. REP. NO. 93-412 (1973). Unfortunately, the reports did not clearly state which language in the new law was intended to address which problem. Thus, it is unclear what role Congress intended the SPR language (as opposed to the definition of “species” or the addition of the new “threatened species” category) to play. Consequently, the legislative history is not determinative.

#### *D. Case Law*

Past judicial opinions can provide insight into possible statutory interpretations and indicate where courts find support for them in the statutory text, legislative history, and purposes of the Act. Nonetheless, an agency may interpret a statute in a way inconsistent with past judicial opinions if (1) the agency’s interpretation is otherwise entitled to judicial deference, and (2) the court did not conclude that the court’s interpretation was required by the unambiguous terms of the statute, leaving no room for agency discretion. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Because it is our intent that judicial deference will apply to the final policy that results from this draft policy, as provided in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and because we conclude, as have a number of courts, that the relevant statutory provisions are ambiguous, our conclusions ultimately may differ from some of the conclusions reached by the various courts, as discussed below.

Beginning in 2001, a number of judicial opinions have addressed this statutory language. The seminal case was *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) (*Defenders (Lizard)*). The court held that the SPR language was “inherently ambiguous,” finding that it was something of an oxymoron to speak of a species being at risk of extinction in only a portion of its range (*id.* at 1141), and because the Act does not define a “significant portion,” the Secretary has wide discretion to delineate it (*id.* at 1145).

However, the court found that the interpretation FWS offered in that particular litigation was unacceptable because it would allow for listing only when a species “is in danger of extinction everywhere” (*id.* at 1141). The approach FWS described there, which has come to be called the “clarification interpretation,” viewed the SPR language as merely clarifying that a portion of the range of a species could be so important to its conservation that threats there could determine the status of the species overall. Thus, the only circumstance in which a species would be in danger of extinction in a significant portion of its range is one in which it was in fact in danger of extinction throughout all of its range.

The court held that every part of the language of the Act’s definition of “endangered species” must be given meaning. In particular, the SPR phrase, “or a significant portion of its range,” must be given some independent meaning to avoid being rendered superfluous to the “throughout all” language. The court rejected the clarification interpretation because, under that interpretation, there would be no circumstance in which a species that was in danger of extinction in a significant portion of its range would not also be in danger of extinction throughout all of its range. Thus, the SPR language would be superfluous, or redundant to the

other language in the Act. The court also rejected the Plaintiff environmental organization's argument that a specific percentage loss of habitat should automatically qualify a species for listing.

At the conclusion of a chain of reasoning that appears to some extent to have blurred the line between loss of historical range and current threats to habitat, the court concluded that "where. . . it is on the record apparent that the area in which the lizard is expected to survive is much smaller than its historical range, the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a 'significant portion of its range'" (*id.* at 1145). The court suggested that, had FWS done such an analysis, it might have concluded that "enhanced protections" or "different degrees of protection" might be needed for some parts of the species (*id.* at 1146).

In the years after the *Defenders (Lizard)* decision was issued, a number of district courts have addressed issues relating to the SPR language. Most have purported to follow one or more aspects of the Ninth Circuit's opinion (*see, e.g., Ctr. for Biological Diversity v. Kempthorne*, 2007 U.S. Dist. LEXIS 4816 (N.D. Cal. Jan. 19, 2007); *but see Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271 (D.N.M. 2005), *vacated by* No. 06-2049 (10<sup>th</sup> Cir. May 14, 2007); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 2007 U.S. Dist. LEXIS 16175 (D. Colo. Mar. 7, 2007), *vacated by* No. 07-1203 (10<sup>th</sup> Cir, Oct. 22, 2007)).

In 2007, the Solicitor of DOI issued the M-Opinion (DOI 2007). The M-Opinion accepted the primary holding of the *Defenders (Lizard)* decision and concluded that FWS should interpret the

SPR language to have independent meaning. The opinion also interpreted the SPR phrase to authorize FWS to consider application of the Act's protections to less than all members of a taxonomic species, subspecies, or DPS (DOI 2007, p. 15). The M-Opinion drew support for this position from section 4(c)(1) (see *Statute* above), interpreting the language of 4(c)(1) as having substantive effect rather than being merely a recordkeeping provision.

Two recent district court decisions have addressed whether the SPR language allows the Services to list or protect less than all members of a defined species: *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010), concerning FWS's delisting of the Northern Rocky Mountain gray wolf (74 FR 15123, Apr. 12, 2009); and *WildEarth Guardians v. Salazar*, 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010), concerning FWS's 2008 finding on a petition to list the Gunnison's prairie dog (73 FR 6660, Feb. 5, 2008). FWS had asserted in both of these determinations, based on the M-Opinion, that it had authority, in effect, to protect under the Act only some members of a species, as defined by the Act (i.e., taxonomic species, subspecies, or DPS). Both courts ruled that the determinations were arbitrary and capricious on the grounds that the M-Opinion approach violated the plain and unambiguous language of the Act. The courts concluded that reading the SPR language to allow protecting only a portion of a species' range is inconsistent with the Act's definition of "species," which forecloses listing any population that does not qualify as a taxonomic species, subspecies, or DPS.

These two decisions hold that the SPR language may not be used as a basis for listing less than all members of a species. According to these courts, the SPR language requires rangewide listing of species whenever they are endangered or threatened in an SPR, even if they are healthy

in other areas. Thus, the courts concluded that the SPR language “does not qualify where a species is endangered, but rather it qualifies when it is endangered” (729 F. Supp. 2d at 1218). The SPR language is intended to ensure that a species receives protection even if threats are not so widespread that the species is threatened with worldwide extinction (which was the standard under the ESCA of 1969). The courts concluded that once a determination is made that a species meets the definition of an “endangered species” or “threatened species,” it must be placed on the list in its entirety and the Act’s protections applied to all members throughout its range (which protections are thereafter subject to modification through other provisions of the Act, such as sections 4(d), 4(f), and 10(j)).

According to the Montana district court in *Defenders of Wildlife v. Salazar*, it is the DPS concept in the definition of “species,” not the SPR language in the other definitions, that allows the Services flexibility to provide different levels of protection for populations of the same taxonomic species or subspecies. Because the M-Opinion interpretation sought to anchor flexibility in the SPR language, it would impermissibly render the DPS language redundant. 729 F. Supp. 2d at 1225. The court further concluded that the M-Opinion interpretation would thwart the intent of Congress to limit listings below the subspecies level to only vertebrate fish and wildlife by allowing the SPR language to side-step the DPS mechanism and allow flexible listings of invertebrates and plants. *Id.* at 1225–26.

The Montana district court in *Defenders of Wildlife v. Salazar* also found that the section 4(c)(1) language (see *Statute* above), which the M-Opinion had emphasized as supporting the FWS approach, cannot reasonably be read to create substantive ambiguity in the statute, but rather was



a publishing requirement that comes into play only after a listing determination has been made.  
*Id.* at 1220–21.

## **II. Policy Explanation**

### *A. Purpose*

The purpose of this draft policy is to offer an interpretation and application of “significant portion of its range” that reflects a permissible reading of the law and its legislative history, while fulfilling the purposes of the Act. The various relevant statutory provisions together create a variety of tensions and ambiguities. Here, we propose to adopt a reasonable interpretation of these statutory provisions. We conclude that (1) if a species is found to be endangered or threatened in only a significant portion of its range, the entire species is listed as endangered or threatened, respectively, and the Act’s protections apply across the species’ entire range; (2) a portion of the range of a species is “significant” if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction; (3) the range of a species is considered to be the general geographical area within which that species can be found at the time FWS or NMFS makes any particular status determination; and (4) if the species is not endangered or threatened throughout all of its range, but it is endangered or threatened within a significant portion of its range, and the population in that significant portion is a valid DPS, we will list the DPS rather than the entire taxonomic species or subspecies.

As discussed above and in more detail in DOI (2010) and FWS and NMFS SPR Working Group

(2010), the role of the SPR language in the context of the entire statutory scheme created by the Act is not clear from the text itself or the legislative history. However, the Ninth Circuit Court's ruling in *Defenders (Lizard)* indicates that we should give the phrase on either side of the "or" in these definitions operational meaning (*see Defenders (Lizard)* 258 F.3d at 1141–42). We now agree with this interpretation, and we have therefore developed a policy that would give operational effect to the SPR language instead of treating it as merely a clarification of the "throughout all" language. Thus, under our draft policy, a species would be able to qualify as an endangered species in two different situations: (1) If it is in danger of extinction throughout all of its range, or (2) if it is in danger of extinction in a significant portion of its range. The same is true for threatened species.

There are two separate, but interrelated, components to giving the phrase "a significant portion of its range" operational meaning. First, we establish what the consequence would be of a species being endangered or threatened in an SPR. Second, we define "significant," thereby providing a standard for determining when a portion of a species' range constitutes an SPR, and thus when that consequence may be triggered. (We address the consequences issue first because the Services have greater discretion in defining "significant," and those consequences play an important role in the Services' decision as to how to exercise that discretion.) We address each of these in turn.

We note that throughout this policy when discussing SPR and "portion of the range" and similar phrases, we are referring to the *species* within that portion of the range. As explained further below, when analyzing portions of ranges we consider the contribution of the individuals in that portion to the viability of the species in determining whether a portion is significant, and we

consider the status of the species in that portion. Thus, when we refer to “portion of its range,” we most often intend to mean the individuals of the species that occupy that portion. However, for the sake of readability, in this policy we sometimes refer to “a portion of the range” or similar phrases as a short hand for the “species in that portion of its range.”

*B. The First Component: Consequences of a Species Being in Danger of Extinction or Likely to Become so in an SPR*

Given that we have determined that this draft policy would recognize that a species may be an endangered species or threatened species if it is in danger of extinction (endangered) or likely to become so (threatened) in an SPR, but not throughout all of its range, we considered what consequences under the Act flow from such a determination. In particular, we considered two alternative interpretations: a species that is endangered or threatened in an SPR is protected throughout all of its range, or a species that is endangered or threatened in an SPR is protected only in that SPR. The M-Opinion took the latter view. We conclude that the former view is the best interpretation of the Act. Our conclusion is based on an examination of (1) the statutory text, (2) the purposes of the Act, (3) the legislative history, (4) past agency practice, and (5) relevant case law.

First, protection throughout the range of the species is most consistent with the plain meaning of the text of the Act itself. Under section 3(6) of the Act, “any *species* which is in danger of extinction throughout . . . a significant portion of its range (emphasis added)” is an “endangered species.” Thus, if a species is in danger of extinction throughout an SPR, then that species is an

“endangered species.” The same analysis applies to “threatened species.” Moreover, the protections of section 7 and section 9 of the Act make no distinction between portions of range and species; those protections apply to “endangered species” and, in the case of section 7, “threatened species.”

In addition, the Act has a separate definition of “species.” The most logical way to interpret the roles of the three definitions at issue is for the definition of “species” to determine *what* may be protected, and the definitions of “endangered species” and “threatened species” to be limited to the question of *whether* a species must be protected. The courts in the Northern Rocky Mountain gray wolf and Gunnison’s prairie dog cases (*Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1218 (D. Mont. 2010); *WildEarth Guardians v. Salazar*, 2010 U.S. Dist. LEXIS 105253, \*16 (D. Ariz. Sept. 30, 2010) held that “species” is limited to the three items included in the scope of the definition of that term. For the purposes of making listing determinations under the Act, we agree with that view. *See also Alesa Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1163 (D. Or. 2001) (“Congress expressly limited the Secretary's ability to make listing distinctions among species below that of subspecies or a DPS of a species.”). A related point is that the definition of “species” expressly provides for the protection of less than a full taxonomic species under certain circumstances (i.e., when a group of organisms qualifies as a subspecies or DPS). Interpreting the SPR language to allow protections to apply only in the SPR creates unnecessary tension between the SPR language and the DPS language.

The primary difficulty in the text of the statute with interpreting the SPR language to provide rangewide protection is section 4(c)(1) of the Act. That provision directs the Secretary, when

publishing a list of those species found by the Services to be endangered or threatened, to “specify with respect to such species over what portion of its range it is endangered or threatened.” The M-Opinion relied primarily on this provision in concluding that a species listed pursuant to the SPR language was protected only within the SPR within which the species is in danger of extinction or likely to become so (endangered or threatened) concluding that section 4(c)(1) created an ambiguity as to the effect of the SPR language. The alternative to interpreting section 4(c)(1) as supporting the position taken in the M-Opinion is that section 4(c)(1) is in effect a bookkeeping provision that should not be viewed as undermining the plain meaning of the key substantive provisions of the Act. Under this interpretation, the “portion of its range” language in section 4(c)(1) (see *The Statute* above) serves an informational purpose, providing the public with information either as to the portion of the range that led to the species being in danger of extinction or likely to become so (and protected throughout its range), or as to where protections vary below the taxonomic species or subspecies level based on the authority of substantive provisions of the Act (i.e., a DPS under the definition of “species” or an experimental population under section 10(j)).

In fact, since 1980 the FWS has implemented this language in section 4(c)(1) using a column in the published list of Endangered and Threatened Wildlife entitled “Vertebrate population where endangered or threatened.” See 50 C.F.R. 17.11(h); see also 45 FR 13010 (Feb. 27, 1980) (instituting current format of § 17.11(h)). The FWS thus equated section 4(c)(1)’s requirement to specify the endangered or threatened portion of a species’ range with the DPS language in the definition of “species” (“vertebrate population”). And prior to the issuance of the M-Opinion, the FWS used that column to identify listed DPSs.

On balance, we conclude that treating the “portion of its range” language in section 4(c)(1) as informational rather than substantive is the best way to harmonize the various provisions of the Act. *See Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d at 1220-21 (section 4(c)(1) is a publishing requirement that cannot alter a substantive determination; “over what portion of its range it is endangered or threatened” relates to specifying a “species” below the taxonomic level, i.e., a DPS). The conclusion that section 4(c)(1) is itself informational and is not the basis for finding ambiguity in the definitions of “endangered species” and “threatened species” in no way affects the substantive differences in protection that can result from application of other provisions of the Act, such as sections 4(d) and 10(j).

A related argument from the text of the Act is that this interpretation makes irrelevant the “all or” language in the definitions of “threatened species” and “endangered species.” According to that argument, the Services would never need to address the question of threats throughout all of the range of the species, as they would be required to list the species if it is in danger of extinction or likely to become so in any SPR.

That argument, however, fails to take into account the practical way in which the Services actually determine the status of a species. As discussed below in the *Implementation of the policy* section, the first step in our analysis is to determine the status of the species throughout all of its range. Indeed, the analysis at this level will be determinative unless there is a particular reason in the record to analyze the status in something less than the entire range. The Services will only engage in a detailed analysis of portions of the range of the species if they have

substantial information suggesting both that a portion of the range is significant and that the species may be in danger of extinction there or likely to become so due to, for instance, the concentration of threats in an important geographic area. Moreover, if such an analysis is done, the range-wide analysis will provide important context for the SPR analysis. Thus, the “all or” language will also retain independent meaning and play an important role in status determinations.

This conclusion is consistent with both cases that have addressed this argument. In *WildEarth Guardians*, the court rejected the argument that interpreting the Act to protect species range-wide when in danger of extinction in a significant portion of its range made the “all of” language superfluous. 2010 U.S. Dist. LEXIS 105253 at \*11-13 (stating that, in this context, “‘all’ provides an indication of what would make a portion of a species’ range significant”). Moreover, the court suggested that it is reasonable to infer that Congress meant “‘throughout all or a significant portion’” to function as a single concept solely designed to ensure that the extent of impacts across the range was considered. *Id.* at \*12-13 (“Moreover, common English usage accepts some level of redundancy without violating a canon of statutory construction. It was more natural for Congress to say ‘all or a significant portion’ than to just say ‘a significant portion.’ That is the way we speak.”). *Defenders of Wildlife v. Salazar*, likewise rejected the “all of” argument. 729 F. Supp. 2d 1219.

Second, the formal purposes and policies included in the text of the Act itself do not help resolve this interpretive question (*see* 16 U.S.C. 1531). Although those provisions speak to the necessity and importance of protecting endangered species, they do not shed light on what should be

considered an endangered species. More broadly, however, protecting the entire species when it is endangered or threatened in a significant portion of its range is consistent with the congressional intent of the 1973 Act, an important aspect of which was to expand the protection of its predecessors so that action could be taken before a species was threatened with worldwide extinction (S. REP. NO. 93-307 (1973); H.R. REP. NO. 93-412 (1973)). We recognize that this interpretation may lead to application of the protections of the Act in areas in which a species is not currently endangered or threatened with extinction, and in some circumstances may lead to the expenditure of resources without concomitant conservation benefits; however, this concern is reduced by interpreting the word “significant” within the SPR phrase relatively strictly, as discussed below. We have the discretion to implement the Act, where possible, to avoid or minimize expending resources on actions that either do not address threats that led to the species warranting listing or do not advance recovery of the species. While all the provisions of the Act would apply throughout the range of the species, as we discuss under the section *Effects of Policy*, below, we have many tools available to us to focus implementation of the Act on those actions with greatest effect on the conservation of the species. For example, we may modify prohibitions for threatened species through use of special rules under section 4(d) of the Act, focus recovery planning and implementation efforts on specific areas where threats are acting on the species, and use various mechanisms to streamline permitting and consultation processes under sections 7 and 10 of the Act. Thus, we conclude that interpreting the SPR language to protect species rangewide is consistent with the purposes of the Act.

Third, as discussed above, the legislative history does not provide significant insight into the meaning or effect of the SPR phrase. The M-Opinion cites the remarks of Senator Tunney in the



floor debate regarding the Act, which suggest that he understood that the SPR language would allow for a species to be subject to different levels of protection in different portions of its range (119 CONG. REC. 25,669 (1973)). This provides some support for the position reflected in the M-Opinion. Other items in the legislative history could be read to support this position as well, but taken as a whole, the legislative history is unclear as to the specific meaning and application of the SPR phrase. However, for all the reasons discussed herein, we (and the courts that have thus far considered the matter) do not find this statement, or anything else in the legislative history, to be dispositive.

Fourth, our interpretation does not conflict with an established past agency practice, as no consistent, long-term agency practice has been established. The conclusion reached in this draft policy is, as noted above, inconsistent with the M-Opinion, and, consequently, a number of listing determinations made by FWS since the issuance of the M-Opinion. Of course, that opinion has now been withdrawn. Prior to the decision in *Defenders (Lizard)*, neither FWS nor NMFS had explained its interpretation of the SPR language, or expressly explained how it implemented or used that authority in its individual determinations under section 4 of the Act. The Ninth Circuit surmised that a number of the determinations we made in the past that protected only part of the range of a taxonomic species did so on the basis of the SPR language. 258 F.3d at 1145. However, these listings can also be explained as relying on the authority of the DPS language in the definition of “species” or the precursor of that language.

Finally, our interpretation is also consistent with the judicial opinions that have most closely examined this issue. In both *Defenders of Wildlife v. Salazar* and *WildEarth Guardians v.*

*Salazar*, the district courts rejected the argument that the Act allows for protections for listed species to be limited to portions of the range within which a species is determined to be endangered or threatened and held that such an interpretation would be contrary to the plain meaning of the Act. Instead, the courts found that the authority to provide a taxonomic species with different levels of protection stems from the definition of “species” (i.e., the DPS language).

We recognize that previous judicial opinions lend some support to the conclusion that the Secretaries have the authority to list or protect species only in portions of their range. In *Defenders (Lizard)*, although the court did not expressly direct FWS to consider listing or protecting only some members of a species, its discussion implied that FWS could apply varying degrees of protection in different portions of the lizard’s range (258 F.3d at 1144–45; *see also Roosevelt Campobello Intl. Park Comm’n v. U.S. Env’tl Protection Agency*, 684 F.2d 1041, 1050 n.5 (1st Cir. 1982)). However, the question of the authority to provide varying degrees of protection was not briefed in *Defenders (Lizard)*, nor was it central to the court’s decision to vacate the FWS’s listing determination, and both of the district court cases cited above found the Ninth Circuit Court’s reasoning on this particular issue was not applicable. In any event, the Ninth Circuit Court issued its decision without the benefit of a formal agency position, which this policy, when finalized, will constitute (*see Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983–85 (2005)).

### *C. Second Component: The Definition of “Significant” as it Relates to SPR*

Having concluded that the phrase “significant portion of its range” provides an independent basis for listing and protecting the entire species, we next turn to defining “significant” to establish a

standard for when such an independent basis for listing exists. This draft policy includes the following definition of “significant” as it relates to SPR: a portion is “significant” in the context of the Act’s “significant portion of its range” phrase if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction. In this section, we explain why the draft policy defines the term “significant” in this way. This definition of “significant” addresses two questions: (1) how we will measure or on what basis we will determine whether a portion is “significant”; and (2) at what threshold or level of importance we will determine a portion is “significant”? We first explain why we have chosen a biological basis to define “significant.” We then describe our definition’s threshold, or level of importance, a portion must meet for it to be considered “significant” and why that threshold is appropriate.

The Act does not define “significant” as it relates to SPR, and the legislative history does not elucidate Congressional intent. Dictionary definitions of “significant” provide a number of possible meanings; one of the most prominent is “important.” *E.g.*, Random House Dictionary of the English Language at 1326 (unabridged ed. 1967). We conclude that “important” is the most relevant meaning, but that it provides little guidance as to precisely what “significant” means in the context of the definitions of “endangered species” and “threatened species.” We note that one district court interpreted “significant” to mean “a noticeably or measurably large amount.” *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 19 (D.D.C. 2002) (addressing whether FWS had adequately explained its conclusion that three of the four areas in the contiguous United States that historically supported Canada lynx populations were not collectively a significant portion of the range of the lynx DPS’s range). The court did so without

analysis or any reference to alternate meanings, such as “important.” Even if this is a plausible definition, nothing in that Court’s decision explains why there are no other reasonable interpretations. Moreover, we believe that a standard of “noticeably or measurably large” provides little meaningful guidance to the Services or to the public.

Case law and relevant principles of statutory construction and judicial review suggest that the Services have broad discretion in defining “significant,” particularly in the context of creating a policy related to SPR after public notice and comment (see *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983–85 (2005)). In fact, the Ninth Circuit expressly noted that “[t]he Secretary necessarily has a wide degree of discretion in delineating ‘a significant portion of its range,’ since the term is not defined in the statute” (*Defenders (Lizard)*, 258 F.3d at 1145). In exercise of this discretion, the Services have sought to establish a standard that would give meaningful guidance regarding when a portion of a species’ range is significant. To establish such a standard, we must determine first the basis upon which an evaluation of significance must be grounded (i.e., what the portion must be significant for), and second the threshold at which the portion becomes significant on that basis.

#### 1. Biological basis for “significant”

This subsection describes the first part of the definition of “significant” — it lays out the criteria for determining the portion’s contribution to the viability of the species. Although there are potentially many ways to determine which portions of a species’ range could be considered important, and therefore “significant,” we conclude that a definition of “significant” that is

biologically based best conforms to the purposes of the Act, is consistent with judicial interpretations, and best ensures species' conservation. This draft policy's definition would emphasize the biological importance of the portion to the conservation of the species as the measure for determining whether the portion is "significant." It would for that reason describe the threshold for "significant" in terms of an increase in the risk of extinction for the species. By recognizing the species itself as the reference point for determining whether a portion of the range is "significant," we properly give priority to the use of science and biology for decision-making in status determinations, consistent with the Act's requirement to use the best available scientific and commercial data in determining the status of a species (16 U.S.C. 1533(b)(1)(A)). This definition based on the principles of conservation biology is well within the expertise of FWS and NMFS to apply. Finally, the result of using a biological- or conservation-importance approach would be to apply protections and resources to those species in greatest need of conservation and thus this approach would meet the purposes of the Act.

Analyzing "significant" in terms of the conservation of the species at issue is consistent with the Services' past practices, to the limited extent that the Services have addressed the issue. In those instances where the Services have addressed whether a portion of a species' range may be "significant" in a status determination, we have based consideration on the conservation or biological importance of the portion to the species. NMFS examples include: the proposed rule for bearded seal (75 FR 77496, 77507 (December 10, 2010)); the proposed rule for two coral species (70 FR 24359, 24360 (May 9, 2005)); the proposed rule for green sturgeon (70 FR 17386, 17387, 17395 (April 6, 2005)); and the proposed rule for spotted seal (74 FR 53683, 53692-93 (October 20, 2009)). Similarly, FWS has generally considered the contribution to the

conservation of the species when evaluating whether a portion constitutes a significant portion of its range. Examples include the proposed rule for the Colorado portion of the range of Preble's meadow jumping mouse (72 FR 62992, 63017 (Nov. 7, 2007)); final rule for the Wyoming portion of Northern Rocky Mountains DPS of gray wolf (74 FR 15123, 15153 (Apr. 2, 2009)); the 12-month finding for the montane portion of the range of Gunnison's prairie dog (73 FR 6660, 6675 (Feb. 5, 2008)); the Campbell Plateau portion of the New Zealand /Australia DPS of the southern rockhopper penguin (73 FR 77264, 77275 (Dec. 18, 2008)); and the Queen Charlotte Island portion of the British Columbia DPS of Queen Charlotte goshawk (72 FR 63123, 63128 (Nov. 8, 2007)). More generally, the Services as a matter of common practice routinely analyze the biological or conservation importance of areas to listed species in carrying out activities under the Act. It is in fact a long-standing and central component to implementing the Act. For example, the Services consider and analyze conservation importance to the species when establishing recovery units, recovery criteria, and site-specific management actions in recovery plans; when designating critical habitat; and when evaluating the impacts of Federal activities during section 7 consultation. Considering biological or conservation importance is the common central theme necessary to meet the purposes of the Act. Moreover, it is consistent with the little case law that exists on the subject (*see Greater Yellowstone Coalition v. Servheen*, 672 F. Supp. 2d 1105, 1124 (D. Mont. 2009) (approving definition of "significant" based on a variety of factors that indicate the importance of the range to the species' survival and the preservation of the species' ecosystem))).

We evaluate biological significance based on the principles of conservation biology using the concepts of redundancy, resiliency, and representation (Schaffer and Stein 2000). These

concepts also can be expressed in terms of the four viability characteristics used more commonly by NMFS: abundance, spatial distribution, productivity, and diversity of the species. *Resiliency* (abundance, spatial distribution, productivity) describes the characteristics of a species that allow it to recover from periodic disturbance. *Redundancy* (having multiple populations distributed across the landscape; abundance, spatial distribution) may be needed to provide a margin of safety for the species to withstand catastrophic events. *Representation* (the range of variation found in a species; spatial distribution, diversity) ensures that the species' adaptive capabilities are conserved. Redundancy, resiliency, and representation are not independent of each other, and some characteristic of a species or area may contribute to all three. For example, distribution across a wide variety of habitats is an indicator of representation, but it may also indicate a broad geographic distribution contributing to redundancy (decreasing the chance that any one event affects the entire species), and the likelihood that some habitat types are less susceptible to certain threats, contributing to resiliency (the ability of the species to recover from disturbance). Because precise circumstances are likely to vary considerably from case to case, it is not possible to describe prospectively all the classes of information that might bear on the biological significance of a portion of the range of a species. Therefore, the information that determines whether a portion of a range is significant may include, but is not limited to, the concepts described in this paragraph. Further, none of these concepts is intended to be mutually exclusive, and a portion of a species' range may be determined to be "significant" due to its contributions under any one of these concepts.

## 2. The threshold for "significant"

This subsection describes the second part of the significance definition: what threshold the Services would use to determine that a portion's biological contribution to the conservation of the species is so important that the portion qualifies as "significant." Under this draft policy, to determine if a portion of a species' range is significant, FWS or NMFS would ask whether, *without that portion*, the representation, redundancy, or resiliency of the species—or the four viability characteristics used more commonly by NMFS—would be so impaired that the species would have an increased vulnerability to threats to the point that the overall species would be in danger of extinction (i.e., would be "endangered"). If so, the portion is significant. For example, the population in the remainder of the species' range without the population in the SPR might not be large enough to be resilient to environmental catastrophes or random variations in environmental conditions. Or, if the viability of the species depends on the productivity of the population in the SPR, the population in the remainder of the range might not be able to maintain a high-enough growth rate to persist in the face of threats without that portion. Further, without the population in the SPR, the spatial structure of the entire species could be disrupted, resulting in fragmentation that could preclude individuals from moving from degraded habitat to better habitat. If habitat loss is extensive, especially in core areas, remaining populations become isolated and fragmented, and demographic and population dynamic processes within the species can be disrupted to the extent that the entire species is at risk of extinction (e.g., Waples et al. 2007). Finally, if the population in the SPR contains important elements of genetic diversity, without it, the remaining population may not be genetically diverse enough to allow for adaptations to changing environmental conditions. Diversity is generally thought to buffer a species against environmental fluctuations in the short term and to provide evolutionary resilience to meet future environmental changes (e.g., Hilborn et al. 2003).



In evaluating whether a species qualifies for listing because of its status in only a portion of its range, the Services first determine whether that portion is so important to the species as a whole that its hypothetical loss would render the species endangered rangewide. If the answer is negative, that is the end of the inquiry: the portion in question is not significant and the species does not qualify for listing on the basis of the SPR language. If, on the other hand, the answer is affirmative, then the portion in question is significant, and the Service undertakes a detailed analysis of the threats to the species in that portion to determine if the species is endangered or threatened there. That analysis would evaluate current and anticipated threats acting on the species now and into the foreseeable future, the impacts that these threats are expected to have, and the species' anticipated responses to those impacts.

Note that this draft policy's definition establishes a threshold for "significant" that is relatively high. On the one hand, given that the consequences of finding a species to be endangered or threatened in an SPR would be listing the species throughout its entire range, it is important not to use a threshold for "significant" that is too low (*e.g.*, a portion of the range is "significant" if its loss would result in any increase in the species' extinction risk, even a negligible one).

Although we recognize that most portions of a species' range contribute at least incrementally to a species' viability, use of such a low threshold would require us to impose restrictions and expend conservation resources disproportionately to conservation benefit; listing would be rangewide, even if a portion of the range of minor conservation importance to the species is imperiled. Conversely, a threshold for "significant" that is too high (*e.g.*, a portion of the range is "significant" only if threats in that portion result in the entire species' being currently

endangered or threatened) would not give the SPR phrase independent meaning.

The definition of “significant” in this draft policy carefully balances these concerns. By setting a relatively high threshold, we minimize the degree to which restrictions will be imposed or resources expended that do not contribute substantially to species conservation. But we have not set the threshold so high that the phrase “in a significant portion of its range” does not have independent meaning. Specifically, we have not set the threshold as high as it was under the interpretation presented by FWS in the *Defenders* litigation (termed the “clarification interpretation” in the M-Opinion). Under that interpretation, the portion of the range must be so important that *current* imperilment there would mean that the species would be *currently* imperiled everywhere. Under this draft policy, the portion of the range need not rise to such an exceptionally high level of biological significance. (We recognize that if the species is imperiled in a portion that rises to that level of biological significance, then we should conclude that the species is in fact imperiled throughout all of its range, and that we would not need to rely on the SPR language for such a listing.) Rather, under this draft policy we ask whether the species would be in danger of extinction everywhere without that portion, *i.e.*, if that portion were completely extirpated.

Another way to look at it is that, unlike the clarification interpretation at issue in *Defenders* (*Lizard*), this draft policy does not by definition limit the SPR phrase to situations in which it is unnecessary. The clarification interpretation defined “significant” in such a way that a portion of a species’ range could be significant only if the current status of the species throughout its range were endangered or threatened (in particular, as a result of the endangered or threatened status of

the species in that portion of its range). But if the current status of the species throughout its range is endangered or threatened, then the species could be listed even without the SPR phrase. Thus, that definition of “significance” inherently made the statutory SPR phrase unnecessary and redundant. In contrast, the definition in this draft policy does not inherently make the statutory phrase redundant. Under this draft policy, a portion of a species’ range is significant when the species *would be* in danger of extinction rangewide *if* the species were extirpated in that portion; but that will not be the case at the time of the analysis because by definition an SPR is a portion of the current range of the species, and therefore the species cannot yet be extirpated there. In other words, this draft policy’s definition leaves room for listing a species that is not currently imperiled throughout all of its range.

Two examples illustrate the difference between the draft policy’s definition and the clarification interpretation. First, a species might face severe threats only in the portions of the range it uses in one part of its life cycle (Portion A). Because the species cannot complete its life cycle without Portion A, threats in Portion A affect all individuals of the species even if other portions of the species’ range are free of direct threats. In other words, if the species is endangered in Portion A, it is in fact endangered throughout all of its range. Portion A would be an SPR under the clarification interpretation. Under this policy’s interpretation, we would still list this species, but its listing would be based on its status throughout all its range rather than its status in a significant portion of its range.

In contrast, another species may have two main populations. The first of those populations (found in Portion Y) currently faces only moderate threats, but that population occurs in an area

that is so small or homogeneous that a stochastic (i.e., random, unpredictable, due to chance) event could devastate that entire area and the population inhabiting it. Therefore, if it were the only population, the species would be so vulnerable to stochastic events that it would be in danger of extinction. (With two main populations, it is unlikely that both would be affected by the same stochastic events, so the severity of the threats to each population would be reduced, because there would be exchange with the other population following a stochastic event that would help to stabilize the population that has suffered declines.) Thus, without the portion of the range currently occupied by the second population (Portion X), the species would be in danger of extinction. In such a situation, even severe threats to the species in Portion X, as long as they did not in fact result in the extirpation of the species in Portion X, would not cause the species currently to be in danger of extinction throughout all of its range. Portion X would not be an SPR under the clarification interpretation, but it would be an SPR under this draft policy.

More broadly, and as a logical corollary to the reasoning of *Defenders (Lizard)*, any interpretation of the definitions of “endangered species” and “threatened species” must afford practical meaning to each part of the statutory language. None of the four discrete bases, or categories, for listing set forth in the plain language of the statute (that a species is: endangered throughout all of its range; threatened throughout all of its range; endangered in a significant portion of its range; or threatened in a significant portion of its range) may be rendered irrelevant. We conclude that this draft policy’s threshold for determining biological significance will give meaning to all four discrete bases, or categories, for listing. Under our interpretation, there is at least one set of facts that would uniquely fall within each of the four categories or routes to listing (and would not simultaneously fit the standard of another category).

The prototypical scenario in which a species would be considered endangered throughout all of its range would be one in which a species is currently affected by threats to such a degree that they affect the species, directly or indirectly, throughout its entire range and the entire species is rendered in danger of extinction. Similarly, the prototypical scenario whereby a species would be “threatened throughout all of its range” would be one in which a species is currently affected by threats to such a degree that they affect the species, directly or indirectly, throughout its entire range and the entire species is rendered likely to become in danger of extinction in the foreseeable future. Note that fitting the “endangered” or “threatened” category on the basis of impacts “throughout the range” does not necessarily mean that threats must be found to be equally distributed throughout all of the species’ range as a geographical matter. The status of the entire species may be affected if threats are acting in an area that is so critical to the species’ overall status that the threats indirectly affect the entire species, such that any finding that a species is imperiled in the area where the threat is acting directly is in fact tantamount to a finding that the species is endangered overall. For example, when a species’ only breeding population is affected, the entire range is actually affected, because a species cannot continue to exist if it cannot breed successfully.

The prototypical scenario in which a species would be considered endangered based on a significant portion of its range would be one in which the species faces a concentration of threats or impacts (to the degree that the members in that portion are in danger of extinction) in a portion of the range that is biologically very important to the species but not so important that the threats there are currently determinative of the status of the species throughout its range. Similarly, the

prototypical situation where a species would be considered threatened based on a significant portion of its range would be one in which the species faces a concentration of threats or impacts that renders the members in a portion that is biologically very important likely to become endangered within the foreseeable future (but threats there are not currently determinative of the status of the entire species).

The Services recognize that, although each of the four categories retains unique and independent meaning under our draft policy, in practice there is likely to be much overlap among these four categories. In many cases, a species that is endangered in a significant portion of its range would also qualify as endangered in a rangewide review of its status. In other cases, because the determination that a portion of a species' range is significant is largely independent of the determination of the species' current status rangewide, the best available scientific and commercial information may simultaneously support determinations that a species appears to have the status of "endangered" in a significant portion of its range and also to have the status of "threatened" throughout its range. This would occur if a species is found to be not only currently endangered in, but also likely in the foreseeable future to become extirpated from, a significant portion of its range. (This is not necessarily the case, because "endangered" means only that the species is in danger of extinction throughout its range (or in danger of extirpation in a portion of its range, in the context of an SPR), not necessarily that it is likely to become extinct (or extirpated, in the context of an SPR). Because a determination of significance means that, without that portion, the species would be endangered throughout its range, a determination that the species is in fact likely to be without that portion (that is, likely to be extirpated from it)

within the foreseeable future is also a determination that the species is likely to become endangered throughout its range in the foreseeable future. The species would therefore currently also meet the definition of threatened throughout its range. In such a situation, the best available information would support both listing the species as endangered rangewide (because it is endangered in a significant portion of its range) and listing the species as threatened rangewide (because it is likely to become extirpated in a significant portion of its range, and therefore likely to become in danger of extinction throughout all of its range, in the foreseeable future).

While this partial overlap among categories could potentially be confusing to the public or to biologists conducting status evaluations, we conclude that in practice it will not be a significant hurdle to implementing our draft policy. This is because, consistent with the recent court decisions discussed in *Case Law* above, under our interpretation of the statutory definitions, the Services would list and protect a species throughout its range if it meets the categories of endangered or threatened in a significant portion of its range. Viewed against the backdrop of the four categories for listing created in the definitions of “endangered species” and “threatened species,” this leads us to conclude that a species should be afforded, at the rangewide level, the highest level of protection for which the best available science indicates it is qualified in any significant portion of its range. In the last example in the preceding paragraph, the species would be listed as an endangered species.

Therefore, if a species is determined to be endangered in an SPR, under this draft policy, the species would be listed as endangered throughout all of its range, even in situations where the facts simultaneously support a determination that the species is threatened throughout all of its range. However, we recognize that this approach may raise concerns that the Services will be applying a higher level of protection where a lesser level of protection might arguably fit if viewed across a species' range. The Services are particularly interested in public comments on this issue.

We also recognize that the Services could choose to set a lower standard or threshold for "significant" by incorporating the concept of being *likely to become* in danger of extinction *in the foreseeable future* (the threatened standard), rather than being in danger of extinction (the endangered standard), in the definition of "significant." However, this draft definition of "significant" uses the endangered standard to promote a simpler, more straight-forward definition and to avoid the added complexity of the temporal component introduced by the "foreseeable future" language. We specifically request input on whether this draft policy's definition of "significant" should include both the endangered standard and threatened standard, or just the endangered standard. It is important to understand that this does not affect whether our analysis will lead to a listing of "endangered" or "threatened," as that determination is based on the status of the species within the SPR. That is a separate question from whether the portion of the range is sufficiently biologically significant to constitute an SPR in the first place.

#### *D. Range and Historical Range*



When considering an interpretation of the SPR phrase, we must also consider the meaning of the term “range.” The Services interpret the term “range” to be the general geographical area within which the species is currently found and to include those areas used throughout all or part of the species’ life cycle, even if not used on a regular basis. We consider the “current” range of the species to be the range occupied by the species at the time the Services make a determination under section 4 of the Act.

Some have questioned whether lost historical range may constitute a significant portion of the range of a species, such that the Services must list the species rangewide because of the extirpation in that portion of the historical range. We conclude that while loss of historical range must be considered in evaluating the current status of the species, lost historical range cannot be a significant portion of the range. In other words, we cannot base a determination to list a species on the status of the species in lost historical range.

We reach this conclusion based on the text of the Act. As defined in the Act, a species is endangered only if it “is in danger of extinction” in all or a significant portion of its range. The phrase “is in danger” denotes a present-tense condition of being at risk of a current or future, undesired event. Hence, to say a species “is in danger” in an area where it no longer exists—i.e., in its historical range where it has been extirpated—would be inconsistent with common usage. Thus, “range” must mean “current range,” not “historical range.” This interpretation of “range” is further supported by the fact that when determining whether a species is an endangered species, the Secretary must consider the “present” or “threatened” (i.e., future), rather than the past, “destruction, modification, or curtailment” of a species’ habitat or range (16 U.S.C.

1533(a)(1)(A)). Additional support for this interpretation is found in the Act's requirement that a summary of a proposed listing regulation be published in a newspaper "in each area of the United States in which the species is believed to occur" (16 U.S.C. 1533(b)(5)(D)). There is no requirement to publish such notice in areas where the species no longer occurs. Therefore, to determine whether a species is presently "in danger of extinction throughout ... a significant portion of its range," we must focus on the range in which the species currently exists.

Lost historical range may, however, be an important factor in evaluating the current status of the species. The effect of loss of historical range on the viability of the species can be an important consideration in our status determination, and could prompt us to list a species because the loss of historical range has contributed to its present status as endangered or threatened throughout all or a significant portion of its range. In such a case, we do not list a species because it is "endangered" or "threatened" in its lost historical range, but rather because it is "endangered" or "threatened" throughout all or a significant portion of its current range because that loss of historical range is so substantial that it undermines the viability of the species as it exists today. For example, the loss of historical range may have resulted in a species for which distribution and abundance is restricted, gene flow is inhibited, or population redundancy is reduced to such a level that the entity is now vulnerable to extinction or likely to become so within the foreseeable future throughout all or a significant portion of its current range. Conversely, a species suffering a similar loss of historical range would not be listed if viability of the remaining individuals was not compromised to the point of endangering or threatening the species.

In addition to considering the effects that loss of historical range has had on the current and future viability of the species, we must also consider the causes of that loss. If the causes of the loss are still continuing, then that loss is evidence of the effects of an ongoing threat. Loss of historical range for which causes are not known or well understood may be evidence of the existence of threats to the remaining range.

We make listing determinations with respect to current range regardless of the point in time at which we examine the status of the species (12-month listing finding, proposed listing or delisting rule, 5-year reviews, and so forth). However, examining the current status of the species in its current range in no way constrains or limits use and application of the tools of the Act to the species' current range. In fact, reducing a species' vulnerability to threats and ultimately to extinction often requires recovering the species in some or all of its lost historical range. Indeed, the Act's definition of "conserve," the Act's definition of "critical habitat," and the provisions of section 10(j) of the Act all indicate that Congress specifically contemplated that recovering species in lost historical range may be needed to bring a species to the point that it no longer needs the protections of the Act. Thus, examining a species' status in its current range does not set the bar for recovery; rather it is simply the approach that the Act requires us to apply when we examine a species' current and future vulnerability to extinction.

We acknowledge that the Ninth Circuit Court has held that the FWS must consider whether lost historical range is a significant portion of a species' range (*Defenders (Lizard)*, 258 F.3d at 1145) ("where . . . it is on the record apparent that the area in which the lizard is expected to survive is much smaller than its historical range, the Secretary must at least explain her conclusion that the

area in which the species can no longer live is not a ‘significant portion of its range’”). This appears to have been based at least in part on a misunderstanding of FWS’s position, which the Ninth Circuit Court interpreted as a denial of the relevance of lost historical range (see *Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870, 876 (9th Cir. 2009) (“On appeal, the Secretary clings to his argument that lost historical habitat is largely irrelevant to the recovery of the species, and thus the [Act] does not require him to consider it.”). As explained above, the fact that historical range has been lost can be highly relevant to the conservation status of the species in its current range. The Services also consider historical range during recovery planning. For the reasons described above, however, we respectfully disagree with this holding of the Ninth Circuit Court, and conclude that the status of lost historical range should not be separately evaluated; ultimately, it is the conservation status of the then-current range at the time of the listing determination in question that must be evaluated (see *Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271 (D.N.M. 2005), *vacated by* No. 06-2049 (10<sup>th</sup> Cir. May 14, 2007); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 2007 U.S. Dist. LEXIS 16175 (D. Colo. Mar. 7, 2007), *vacated by* No. 07-1203 (10<sup>th</sup> Cir, Oct. 22, 2007)). Thus, if a species “is expected to survive [in an area] much smaller than its historical range,” we would undertake an analysis different than that apparently contemplated by the Ninth Circuit. In fact, two different analyses may be required. First, if the species has already been extirpated in some areas, the Services must determine whether the loss of those areas makes the species endangered or threatened in its current range. Second, if the species has *not* been extirpated from those areas, but is in danger of extirpation there (or likely to become so in the foreseeable future), the Services must determine whether those areas constitute a significant portion of its range, and, if so, list the species in its entirety.

### *E. Relationship of SPR to the Act's DPS Authority*

The Act's definition of "species" includes "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish and wildlife which interbreeds when mature (16 U.S.C. 1532(16))." Thus, the definition of "species" allows, for vertebrates, consideration of the status of a taxonomic species or subspecies over less than its entire range. The phrase "significant portion of its range" similarly also allows us to consider the status of a species over something less than all its range. Because of the potential overlap between these two statutory provisions, we must explain their relationship.

In this draft policy, the definition of "significant" differs for the purpose of SPR analysis from the definition of "significant" defined in our DPS policy and used for DPS analysis. We expect, based on our experience and knowledge of already listed DPSs, that the differences in the two standards, the specific circumstance described by the definition of "significant portion of its range," and the high bar it sets will seldom result in situations in which the population within a SPR for a taxonomic species or subspecies might also constitute a DPS. In those rare circumstances, under this draft policy, we would consider the DPS to be the proper entity for listing.

We considered various possible relationships between the SPR language and the Act's DPS authority. This draft policy includes what we consider to be a reasonable approach. We describe our reasoning below, and we request public comments on it.

## 1. Definitions of “significant” for SPR and DPS

Our interpretation of the DPS language in the statute is explained in the Services’ “Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act” (DPS policy) (61 FR 4722, February 7, 1996). Both that policy and the statutory SPR language employ the concept of “significance.” The DPS policy requires that for a vertebrate population to meet the Act’s definition of “species,” it must be discrete from other populations and must be significant to the taxon as a whole. We considered using the standard for significance under the DPS policy to define “significant” in the SPR language. If the definition of “significant” were the same as that defined in the DPS policy, the range of a DPS would also always constitute an SPR. We note that the converse, that a SPR would always be a DPS, would not always be true because, unlike a DPS, an SPR is not required to be discrete from other populations.

We would then have to consider what would be protected—only the DPS, or the entire taxon (taxonomic species or subspecies) to which it belongs? The first possibility is that when we determine a DPS is endangered or threatened, we would then list the entire taxonomic species or subspecies as a result of the DPS being significant to the taxon as a whole and constituting a SPR. However, this would render the DPS portion of the definition of “species” meaningless, if as a result of a DPS being significant to the taxon as a whole, we list the entire taxon. We conclude that this option is not appropriate because Congress intended that we treat DPSs as “species” themselves. The second possibility would be to list the entire taxon when a plant or

invertebrate is endangered or threatened in an SPR, but only list the distinct population when a vertebrate species is endangered or threatened in an SPR. However, this approach would render the SPR language meaningless with respect to vertebrates. In addition, this could be viewed as contrary to congressional intent to allow greater regard for vertebrates afforded by the Act's definition of "species."

Considering the potential results of using the same standard for significance under the DPS policy to define "significant" in the SPR language leads us to conclude that the two provisions cannot utilize the same definitions for "significant." We also considered revising the DPS policy to either revise or remove the requirement that a population must be significant to the taxon as a whole to qualify as a DPS. However, given the Services' history of use of the DPS policy, and the fact that policy has already been through public review and comment and has been considered by many courts, we declined to take that approach. We conclude that this draft policy's definition of "significant," which sets a high threshold for the purposes of SPR analysis, would help to promote the consistent application of SPR analysis among vertebrates and plants and invertebrates, while maintaining the flexibility afforded by the DPS authority to apply differing statuses (and thus differing management) across the range of vertebrate species.

2. This draft policy's definition of "significant" creates little overlap between SPR and DPS

Although there are similarities in the definition of "significant" under this draft policy and the definition of "significance" in the DPS policy, there are important differences between the two. The DPS policy requires that for a vertebrate population to meet the Act's definition of

“species,” it must be discrete from other populations and must be significant to the taxon as a whole. The significance criterion under the DPS policy is necessarily broad, and could be met under a wider variety of circumstances. This is appropriately so, as the DPS language, unlike the SPR language, allows a population segment to have a different listing status than the taxon to which it belongs. In fact, because a DPS must also be discrete, it may in fact function somewhat independently of the rest of the range, and its status may not directly influence that of the remainder of the taxon.

In contrast, under this draft policy a portion of a species’ range would be significant if its contribution to the viability of the species is so important that without that portion, the species would be in danger of extinction. The definition of “significant” in this draft policy requires a specific set of circumstances that demonstrate a relationship between that portion of the range and the potential future conservation of the species as a whole. The bar for significance under this interpretation of “significant portion of its range” is a higher bar than that established under the DPS policy. This is necessarily so, in part, because the finding that a species is endangered or threatened in an SPR requires listing the entire species.

It should be noted that in general practice, the Services determine what entity(s) meets the Act’s definition of “species” (taxonomic species, subspecies, or distinct population segment of a vertebrate species) prior to analyzing its status as endangered or threatened. This means that typically we would first determine whether we should be analyzing status at the level of taxonomic species, subspecies, or, for vertebrates, DPS. This determination is made based on whether there are any taxonomic distinctions below the level of species, any recognized distinct



populations or division in the species' range, and whether there are differences in management or threats that would indicate it may be appropriate to consider status of entities separately. We would then analyze whether the determined entity(s) is endangered or threatened throughout all or a significant portion of its range. We note that this also applies to analyzing the status of a DPS; a DPS could be listed because it is endangered or threatened in an SPR. In the case where we find a taxonomic species or subspecies of a vertebrate is endangered or threatened in a significant portion of its range, we will generally already have considered whether there are any appropriate DPSs for which we should conduct a status review, so it is unlikely that we would need to ask whether that portion of the species' range occupied by the DPS is also a SPR.

We conclude, based on our knowledge of and experience with the DPS policy, that because of the differences between this draft SPR policy and the DPS policy, including how "significant" is defined in this draft policy and the higher bar it sets, there will seldom be situations in which a DPS is so important that, without the portion of the species' range that the DPS occupies, the species would be in danger of extinction such that the portion would qualify as an SPR under this draft policy. However, we recognize that there may be some limited circumstances where the range of a DPS will also comprise a significant portion of the taxon's range. It may not be possible to entirely eliminate some instances of overlap without considerably altering the DPS policy, and we believe that there would be potential overlap under other possible approaches to defining "significant" as well. Given that circumstances may occur where the range of a DPS will also comprise a significant portion of the taxon's range, we must consider what would be protected in those situations in which the range of a DPS also constitutes an SPR.

3. What would be protected in those situations in which the range of a DPS also constitutes an SPR?

In those circumstances in which the range of a DPS also comprises a significant portion of the taxonomic species' or subspecies' range, there are two possible approaches to what should be protected: (1) List and protect only the DPS; or (2) list and protect the entire taxonomic species or subspecies to which it belongs because it is also an SPR. We conclude that the most appropriate policy position is to list and protect only the DPS. We believe this to be a reasonable interpretation, in that it gives meaning to Congress' intent in authoring the DPS language, and it directs conservation efforts to the appropriate listable entity.

We considered listing the entire taxonomic species or subspecies when the range of a DPS also constitutes an SPR. Under this approach, we could still list a DPS when the range of such a taxon within the DPS is not significant as defined by this draft policy, and therefore not an SPR, and we would therefore not make the DPS provision of the Act meaningless. This would create a consistent application of SPR for vertebrates and for plants and invertebrates. We also would still have the ability to provide additional consideration for vertebrates because we could list DPSs for vertebrates in cases in which the portion of the range occupied by the DPS is not an SPR of the taxonomic species or subspecies (an ability we would not have for plants and invertebrates). However, this would in some circumstances remove our flexibility to apply differing statuses across the range of a vertebrate taxon when it is comprised of multiple DPSs with differing statuses. In the case of species listed under the Act that occur outside the United States, this may unnecessarily restrict international trade, and may run counter to congressional

intent that suggests we should apply differing statuses for species across international boundaries if there are differences in management. For example, a species may have a range that includes several countries. One country may be taking actions to manage threats to improve the species' status within its borders, while the remaining countries are not managing the species and are allowing exploitation. In this case, the population that is being well-managed may qualify as a DPS under the Services' DPS policy as a result of differences in management across international boundaries and may in fact be only threatened in that country while it is endangered everywhere else. However, because the DPS composed of the remainder of the species' range where it is endangered constitutes most of the range of the species, it may also be an SPR that would require us to apply the status of endangered to the entire range of the taxon. If we were required to list rangewide based on the SPR status, we would be unable to apply a different status to the population in the country that is proactively managing the taxon. If a status of threatened cannot be applied to the DPS in that country, special regulations that would allow regulated international trade could also not be applied and much needed revenue to fund continued management of the taxon would not be generated.

We believe that Congress intended us to give consideration to differences in status across the range of a species, especially in the case of internationally listed species. Section 4(b)(1)(A) of the Act directs us, when making a status determination, to take into account "those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas." Legislative history, although not entirely clear on what mechanisms Congress intended

the Services to use, also indicates that we should give consideration to differences in status, recognize and encourage other agencies to exercise their management authorities, and apply differing management where appropriate (*see The Endangered Species Conservation Act of 1972: Hearings on S. 3199 and S. 3818 Before the Subcomm. On the Environment of the Senate Comm. on Commerce, 92d Cong. 109 (1972)* (statement of Curtis Bohlen, Deputy Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior: “It is our hope that this ability to apply selective protections would provide protection to those animals needing it, encourage the agencies which have management and protective authority to exercise that authority and allow the recognition of such efforts”). We also note that a Senate Committee Report discussed the Secretary’s failure to recognize differing status of populations of a species in response to testimony regarding game species listed in foreign countries (S. REP. NO. 97-418(1982)). The DPS authority to apply differing statuses across the range of a vertebrate taxon, along with the use of special regulations for threatened species under section 4(d) of the Act, is one of the few mechanisms available to us to consider and recognize efforts made by States or foreign nations in our application of protections of the Act. This draft policy’s definition of “significant,” which sets a high threshold for the purposes of SPR analysis, would help to promote the consistent application of SPR analysis among vertebrates and plants and invertebrates, while maintaining the flexibility afforded by the DPS authority to apply differing statuses (and thus differing management) across the range of vertebrate species. Thus, we conclude that this policy honors this intent.

*F. Alternatives for interpreting the phrase “significant portion of its range”*

In addition to the interpretation proposed in this draft policy, we considered three alternative statutory interpretations of the phrase “significant portion of its range”: (1) That the SPR and DPS language comprise a single authority; (2) that the SPR language provides clarification of the endangered and threatened definitional language; and (3) that the SPR language provides an independent basis for listing, and protections of the Act would apply only in the SPR (consistent with the withdrawn M-Opinion).

Under the first alternative interpretation considered, in which SPR and DPS comprise a single authority, the SPR phrase would not provide an independent basis for listing. Instead, the SPR phrase and the DPS language in the definition of “species” would be read together to provide a single authority to list populations. The Services would interpret the SPR phrase to be a descriptive term that places a limitation on the listing of populations of vertebrate taxa by only allowing listing of vertebrate populations that make up a significant portion of the entire taxon’s range. This interpretation is consistent with the stated meaning in DOI’s Final Environmental Statement (DOI 1973) that accompanied the original legislative language drafted by the Nixon Administration: “The term ‘significant portion’ of its range is used in the definition of endangered to provide the Secretary with the authority to protect a population unique to some portion of the country without regard to its taxonomic status, or a population that is now endangered over a large portion of its range even if the population inhabiting that portion of the range is not recognized as a distinct subspecies from a more abundant population occurring [sic] elsewhere.” However, it is unclear how that original intended meaning of this phrase can be ascribed to the different statutory framework in which the phrase was placed in the Act as enacted: the SPR language was moved from the operative language to one set of definitions

(“endangered species” and “threatened species”), and the precursor to the DPS language was included in another (“species”). Under a literal reading of the current language of the Act, the Services determine whether a group of vertebrates is a DPS, and therefore a “species,” independent of the application of the definitions of “endangered species” and “threatened species.” Thus, a group of vertebrates need not inhabit an SPR in order to qualify as a DPS; rather, the entirety of a DPS, like any other “species,” may be listed if it is endangered throughout all of its range or throughout a significant portion of its range. In addition, it is unclear under this interpretation what meaning the “significant portion of its range” phrase would have with regard to plants, since the distinct population segment language applies only to vertebrates (and the precursor language only applied to fish and wildlife).

Under the second alternative considered, the SPR phrase would not provide an independent basis for listing as envisioned in this draft policy. Instead, the phrase would be interpreted as clarifying the extent to which the Services must show that a species is endangered or threatened throughout its range. The language would allow the Services to list a species if we determine that a species is endangered or threatened in at least a portion of its range that is so significant to the whole that it is currently driving the status of the entire species. In other words, we would not need to demonstrate that threats occur throughout the range, or know definitively the status of the species everywhere, provided that we could infer its overall status based on knowledge of its status in a significant portion. This interpretation was specifically rejected by the Ninth Circuit in *Defenders (Lizard)*, which held that this interpretation rendered the SPR language superfluous and inconsistent with the plain meaning of the Act (i.e., it does not give separate meaning to all parts of statute) because it ultimately relied on making a determination about the

status of the whole species, which could already be done on the basis of the “throughout all ... of its range” language. The court concluded that our ability to list a species when we do not know definitively the status of the species in every part of its range, but can infer its overall status based on what we do know, does not rely on the SPR language, but rather relies on the best-available-science standard of the Act. (Note that under all alternatives, the Services could list a species when we do not have complete information but can infer the species’ overall status. However, the alternatives differ in which statutory language is relied on as the authority to do so. The clarification alternative relies on the SPR phrase, whereas the other alternatives rely on the best-available-science standard of the Act to list a species when we do not have complete information but can infer the species’ overall status.)

Under the third alternative considered, the SPR phrase would provide an independent basis for listing, and the protections of the Act would apply only in the SPR. This interpretation (as with the one included in this draft policy) would create additional circumstances in which the Services may list a species. A species could be found to be endangered or threatened throughout all its range, or endangered or threatened in only a significant portion of its range. The SPR phrase would be interpreted as a substantive standard allowing the listing of a species that is endangered or threatened in a significant portion of its range but secure overall. Under this alternative interpretation, protections of the Act would be applied only in the SPR. As explained in *Case Law* above, two courts have concluded this approach violates the plain and unambiguous terms of the Act. Both courts concluded that the terms “endangered species” and “threatened species” must be read consistently with the term “species” as defined in the Act; the SPR language does not provide authority to redefine “species” or to list or protect less than a “species.”

Valid arguments can be made for and against adopting any of the SPR phrase interpretations we considered. In weighing the advantages and disadvantages of each against the other, we determined that the above three alternative interpretations were less acceptable than the interpretation in this draft policy. We found the three alternative interpretations to be less acceptable—and therefore both less desirable and more vulnerable to criticism—primarily due to their inconsistencies with the plain language of the Act, inconsistencies with court decisions on SPR, or both. Our detailed analysis of the SPR phrase interpretations we considered is presented in FWS and NMFS SPR Working Group (2010) and is available at <http://www.regulations.gov>.

### *G. Alternatives for defining “Significant”*

Under alternative interpretations of the SPR phrase, we must also define what is “significant.” There are several options for doing so, each with pros and cons. Depending on which alternative interpretation of the SPR phrase a definition is applied to, there may be additional implications and considerations for applying various definitions of “significant.” Although we considered numerous ideas of how to define significance, they can all be placed into three general categories: (1) Biological/conservation importance; (2) values stated in section 2 of the Act; and (3) size. Our rationale for choosing a biological/conservation importance alternative is explained above. The other alternatives are discussed below.

*Values of the Act:* Values stated in section 2 of the Act could be an alternative way to define



significance. Section 2(a)(3) of the Act states that threatened and endangered species “are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” We could use these values to define whether a portion is significant. One variation on this theme would be to define the U.S. portions of a species’ range to be “significant,” either automatically or based on a determination that the existence of the species in the United States is particularly significant to the Nation. Thus, a species could be listed as endangered in the United States even if its principal range is outside the United States and the U.S. portion of its range only constitutes the periphery of its range. Another option would be to define “significant” as ecologically significant, where a portion of a species’ range would be “significant” if the species in that portion played an important ecological role (such as pollination), regardless of whether the portion of the range contributed substantially to the viability of the species as whole.

*Size alternatives:* Size of the portion of range is another suggested approach for defining significance. There are several ways size of a portion can be defined: percentage of total range, percentage of population(s), percent of habitat within that portion, and so forth. It should be noted that a biological/conservation importance approach may also consider size as a component or method of assessing biological/conservation importance because factors such as size and number of populations, amount of suitable habitat, and so forth, have a bearing on the contribution of an area to the conservation of a species. However, size is one among many factors and is considered in relation to its effect on species’ viability.

As we have discussed previously, congressional intent regarding the SPR phrase is unclear, particularly with regard to what would qualify as significant. The one exception is that Congress

did indicate that we should have the authority to protect species within the United States even when they are more abundant elsewhere in their ranges. However, it is unclear how Congress intended us to do so, and all possible interpretations of the SPR phrase, in combination with any of the possible approaches for defining “significant,” allow us to protect U.S. populations to some extent. The approach to defining “significant” that would give us the most latitude to do so would be one based on values.

We also must consider whether the approaches to defining significance are legally sound.

However, there is some inconsistency in the case law. The Ninth Circuit Court stated that the Secretary of the Interior has “a wide degree of discretion in delineating” what portion of a range is “significant.” One other court indicated that a determination of significance should be based on size. Despite this inconsistency in case law, none of the approaches is inherently inconsistent with the statutory language of the Act. However, for the values and size approaches, developing defensible methodologies for determining significance may be much more challenging, and the Ninth Circuit Court specifically rejected Plaintiff environmental organization’s argument that a specific percentage loss of habitat should automatically qualify a species for listing: “[T]he percentage of habitat loss that will render a species in danger of extinction or threatened with extinction will necessarily be determined on a case by case basis. Furthermore, were a bright line percentage appropriate for determining when listing was necessary, Congress could simply have included that percentage in the text of the [Act]” (258 F.3d at 1144). The court found persuasive the Secretary’s argument that a simple quantitative approach to interpreting SPR would not be appropriate: “The Secretary offers a compelling counter-argument to the Defenders’ suggested approach: A reading of the phrase ‘significant portion of its range,’ that adopts a

purely quantitative measurement of range and ignores fact-based examination of the significance of the threats posed to part of the species' range to the viability of the species as a whole, does not carry out the purpose of the statute. Such an interpretation would fail to protect species in danger of extinction because it might not allow listing of species where areas of range vital to the species' survival-but not the majority of the range-face significant threats”

Of the three approaches to defining significance, the biological/conservation importance approach may be the most scientifically supportable because the reference point is the significance to the species itself. For the values and size approaches, some thresholds of significance would have to be determined that are unrelated to the importance of the portion to the species. However, particularly with a size approach, a single threshold would likely be arbitrary and not be scientifically supportable because of the wide variation in situations and species biology we encounter. Plus, it could not be applied in a systematic and consistent manner. Multiple thresholds for a variety of situations could be considered, but it is likely that we would not be able to account for all possible situations, and we would need to retain some discretion to depart from standards in appropriate circumstances. Although we could likely develop methods, definitions, and/or thresholds under the values approach, judging whether a species has cultural, aesthetic, educational, historical, or recreational value would likely remain very subjective and thus inordinately subject to legal challenge. An additional concern is that a system incorporating values may favor certain kinds of organisms or taxa over others (such as birds that are of value to recreational bird-watchers). Alternatively, we could avoid developing thresholds under values and size approaches and instead broadly consider either size or values in assessing significance, but we would risk applying definitions inconsistently.

We also considered whether any of the approaches to defining “significant” are straightforward enough to be applied and implemented consistently. A size approach with simple thresholds would be the easiest to apply. However, determining appropriate analyses and thresholds would likely not be a simple exercise. Similarly, a values approach would require developing new guidance and analytical tools before we could effectively implement such an approach (although, ultimately, the analysis could be developed in such a way as to result in consistent application). The biological/conservation importance approach, while not necessarily a straightforward analysis, would require the least amount of new guidance because much of the consideration of whether portions are biologically significant to the species is inherent in the threats analyses the Services already conduct, and would build upon the Services’ experience and existing practice, as similar frameworks already exist in the DPS policy and in the FWS draft SPR guidance implementing the M-Opinion (FWS 2008). Because the reference point for significance is the species itself, there would be no one-size-fits-all approach or threshold that could be seen as arbitrary. However, because each analysis would be case-specific, this approach might be difficult to apply consistently. Nevertheless, we recognize that administering many portions of the Act likewise ultimately rely on a degree of professional judgment, which is to some degree inevitable.

The final consideration is whether the approaches would provide a conservation benefit consistent with the purposes of the Act. Values approaches could potentially result in our applying protections and conservation resources when the portion of the range that is endangered or threatened is not biologically important to the conservation of the species even though it may

be significant culturally or otherwise but not contribute to the conservation of the species. In other words, we could be expending resources on portions of the range of species that are biologically unimportant. Size approaches could also have the same result, especially if thresholds are low or if thresholds are not tailored to specific situations and species' life histories. (For example, some wide-ranging species may be viable even if they lose a substantial amount of their range, or a species may be sparsely distributed over large areas at the periphery of its range that contribute little biologically but core areas that constitute smaller proportions of the range may be of much greater importance to the species' viability). We conclude that a biological/conservation importance approach would result in us applying protections and resources to portions that are biologically important and in need of conservation, consistent with the purposes of the Act.

#### *H. Implementation of the policy*

When we arrive at a final policy, after taking into consideration all comments we receive on this draft policy, we intend to issue detailed internal guidance to assist staff and the public in conducting analyses consistent with that policy. To allow the public to understand better how this draft policy would likely be implemented if finalized in substantially the same form, we provide an overview of how we anticipate the policy would be implemented.

The first step in our analysis of the status of a species would be to determine the status of the species in all of its range. If we determined that the species is in danger of extinction throughout all of its range, we would list the species as an endangered species, and no SPR analysis would

be required. If the species was threatened throughout all of its range, we would limit our SPR analysis to the question of whether the species is in danger of extinction in a significant portion of its range; if so, we would list the species as endangered; if not, we would list the species as threatened. If the species was neither endangered nor threatened throughout all of its range, we would determine whether the species was endangered or threatened in a significant portion of its range; if so, we would list the species as endangered or threatened, respectively; if not, we would conclude that listing the species is not warranted.

When we conduct an SPR analysis, we would first identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be significant and endangered or threatened. To identify only those portions that warrant further consideration, we would determine whether there was substantial information indicating that (i) the portions may be significant and (ii) the species may be in danger of extinction there or likely to become so within the foreseeable future. In practice, a key part of this analysis would be whether the threats are geographically concentrated in some way. If the threats to the species were affecting it essentially uniformly throughout its range, no portion would be likely to warrant further consideration. Moreover, if any concentration of threats applied only to portions of the range that clearly would not meet the biologically based definition of “significant” (i.e., the loss of that portion clearly would not reasonably be expected to increase the vulnerability to extinction of the entire species to the point that the species would then be in danger of extinction), such portions would not warrant further consideration.

If we were to identify any portions that warrant further consideration, we would then determine their status (i.e., whether in fact the species was endangered or threatened in a significant portion of its range). Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the “significant” question first, or the status question first. Thus, if we determined that a portion of the range is not “significant,” we would not need to determine whether the species was endangered or threatened there; if we determined that the species was not endangered or threatened in a portion of its range, we would not need to determine if that portion was “significant.”

*I. Interpretation and application of the SPR language prior to finalizing this policy*

While the M-Opinion was in place, the FWS used in its listing determinations the interpretations relating to the SPR language set forth in the M-Opinion. NMFS, on the other hand, has not used those interpretations, but neither has it issued separate guidance. It is our intent to publish a final policy that will provide a uniform standard for interpretation of the SPR language and its role in listing determinations. However, before it can become final the policy must go through public notice-and-comment procedures consistent with the requirements of the Administrative Procedure Act (APA) (5 U.S.C. 553). This notice begins that process.

In the meantime, the Services have an obligation to make numerous determinations in response to petitions to list, reclassify, and delist species, and to meet statutory timeframes. During this interim period, we will not apply this policy as a binding interpretation of the SPR language.

However, during this period, we will consider the interpretations and principles contained in this draft policy as nonbinding guidance in making individual listing determinations. Thus, as nonbinding guidance, we will apply those interpretations and principles only as the circumstances warrant, and we will independently explain and justify any decision made in this interim period in light of the circumstances of the species under consideration. In preparing a final policy, we will consider all comments and information received during the comment period on this draft policy, as well as our experience during the interim experience. Accordingly, we recognize that any interpretation in the final, binding policy may differ from those in this proposal and those applied during this interim period.

### **III. Draft Policy**

Below, we provide the text of our draft policy, which we developed based on the preceding information provided in this document.

#### *Consequences of a species being endangered or threatened in a significant portion of its range:*

The phrase “significant portion of its range” in the Endangered Species Act’s (the Act’s) definitions of “endangered species” and “threatened species” provides an independent basis for listing; thus there are two situations (or factual bases) under which a species would qualify for listing: a species may be endangered or threatened throughout all of its range; or a species may be endangered or threatened in only a significant portion of its range.

If a species is found to be endangered or threatened in only a significant portion of its range, the



entire species is listed as endangered or threatened, respectively, and the Act's protections apply across the species' entire range.

Significant: A portion of the range of a species is "significant" if its contribution to the viability of the species is so important that without that portion, the species would be in danger of extinction.

Range: The range of a species is considered to be the general geographical area within which that species can be found at the time FWS or NMFS makes any particular status determination. This range includes those areas used throughout all or part of the species' life cycle, even if they are not used regularly (e.g., seasonal habitats). Lost historical range is relevant to the analysis of the status of the species, but it cannot constitute a significant portion of a species' range.

Reconciling SPR with DPS authority: If the species is not endangered or threatened throughout all of its range, but it is endangered or threatened within a significant portion of its range, and the population in that significant portion is a valid DPS, we will list the DPS rather than the entire taxonomic species or subspecies.

#### **IV. Effects of Draft Policy**

If made final, this draft policy's interpretation of the "significant portion of its range" language in the Act's definitions of "endangered species" and "threatened species" provides a standard for determining whether a species meets the definitions of "endangered species" or "threatened

species.” The only direct effect of the policy would be to accept or reject as “significant” portions of the range of a species under consideration for listing, delisting, or reclassification. More uniform application of the Act’s definitions of “endangered species” and “threatened species” would allow the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties to better judge and concentrate their efforts toward the conservation of biological resources vulnerable to extinction.

Application of the draft policy would result in the Services listing and protecting throughout their ranges species that previously we either would not have listed, or would have listed in only portions of their ranges. However, this result would occur only under a limited set of circumstances. Under most circumstances, we would anticipate that the outcomes of our status determinations with or without the draft policy would be the same. This comparison is true for both the period prior to the M-Opinion, and the period during which FWS implemented the M-Opinion. The primary difference when compared to the M-Opinion is that a species would be listed throughout all of its range. FWS’s experience with implementing the M-Opinion (which differs from the draft policy primarily in that under the withdrawn M-Opinion we would list the species only within the SPR rather than the entire species) suggests that listings based on application of this draft policy likely would be relatively uncommon. During the time that the M-Opinion was put into effect between March 2007 and May 2011, FWS had determined that a species should be listed based on its status in a significant portion of its range only five times. In those instances where we would list a species because of its status in a significant portion of its range, protections would be applied throughout the species’ range, rather than just in the portion. This outcome would be a permissible interpretation of the statute, and it reflects the policy views

of the Departments of the Interior and Commerce.

Listing a species when it is endangered or threatened in a “significant portion of its range” before it is endangered or threatened throughout all its range may allow the Services to protect and conserve species and the ecosystems upon which they depend before large-scale decline occurs throughout the entire range of the species. This may allow protection and recovery of declining organisms in a more timely and less costly manner, and on a smaller scale than the more costly and extensive efforts that might be needed to recover a species that is endangered or threatened throughout all its range.

Once a species is determined to be an endangered species or a threatened species, the provisions of the Act are applied similarly, regardless of whether the species was listed because it is endangered or threatened throughout all its range or only in a significant portion of its range. As such, if the Services determine that a species is endangered or threatened in a significant portion of its range, we will list the species throughout its range, triggering statutory and regulatory requirements under other sections of the Act.

#### *A. Designation of Critical Habitat*

If a species is listed because it is endangered or threatened in a significant portion of its range, the Services will designate critical habitat for the species. We will use the same process for designating critical habitat for species regardless of whether they are listed because they are

endangered or threatened in a significant portion of their range or because they are endangered or threatened throughout all of their range. In either circumstance, we will designate all areas that meet the definition of “critical habitat” (unless excluded pursuant to section 4(b)(2)) of the Act. “Critical habitat” includes certain “specific areas within the geographical area occupied by *the species* at the time it is listed” and certain “specific areas outside the geographic area occupied by *the species* at the time it is listed” (16 U.S.C. § 1532(5)(A)). Thus, critical habitat designations may include areas within the SPR, areas outside the SPR occupied by the species, and areas that are both outside the SPR and outside the area occupied by the species at the time of listing, as appropriate. If a species is listed, however, as a result of threats in a significant portion of its range, the designation of critical habitat may tend to focus on that portion of its range. For example, with respect to portions of the range of the species not facing relevant threats, the Secretary may be more likely to find that the benefits of excluding an area from designation outweigh the benefits of specifying the area as critical habitat.

#### *B. Section 4(d) of the Act Special Rules*

Determining that a species is threatened in a significant portion of its range will result in the threatened status being applied to the entire range of the species. When a species is listed as threatened, section 4(d) of the Act allows us to issue special regulations “necessary and advisable to provide for the conservation” of the species. This provision in effect allows us to tailor regulations to the needs of the species. When a species is listed as threatened because of its status in an SPR, we will consider the development of a 4(d) rule to provide regulatory flexibility and to ensure that we apply the prohibitions of the Act where appropriate.

### *C. Recovery Planning and Implementation*

Regardless of whether a species is listed because it is endangered or threatened throughout all of its range, or because it is endangered or threatened in only a significant portion of its range, the goal of recovery planning and implementation is to bring the species to the point at which it no longer needs the protections of the Act. Recovery plans must, to the maximum extent practicable, include site-specific management actions and measurable, objective criteria for determining the point at which the species no longer meets the definition of an “endangered species” or a “threatened species.” *See* 16 U.S.C. § 1533(f)(1)(b). In other words, when any established measurable, objective criteria are met, the species would not be likely to become an endangered species in the foreseeable future either throughout all of its range or throughout a significant portion of its range. As with recovery planning and implementation for species that are endangered or threatened throughout all of their ranges, a variety of actions may be necessary to recover species that are endangered or threatened in an SPR. Recovery actions should focus on removing threats to the species, and are thus likely to be focused on those areas where threats have been identified. However, recovery efforts are not constrained to just the significant portion of the range in which the species was originally determined to be endangered or threatened, and may include recovery actions outside the SPR, or even outside the current range of the species. For example, reintroducing a species to parts of its historical range outside the SPR may increase the species’ redundancy and resiliency such that the SPR no longer meets the draft policy’s standard for “significant” (i.e., loss of the species in the SPR would no longer cause the remainder to become endangered).

#### *D. Sections 7, 9, and 10 of the Act*

Regardless of whether a species is listed because it is endangered or threatened throughout all of its range, or because it is endangered or threatened in only a significant portion of its range, the provisions of the Act generally apply to the entire species. A Federal agency is required to consult with FWS or NMFS under section 7 of the Act if its actions may affect an endangered or threatened species anywhere throughout its range. Jeopardy analyses would be conducted at the scale of the species as a whole. Where threats vary across the range of a species, we may use various methods to streamline consultation processes in areas where the species are more secure. We note that threats, population trends, and relative importance to recovery commonly vary across the range for many species, especially as recovery efforts progress. The Services routinely account for this variation in our consultations. We expect to apply the same approach for species listed because they are endangered or threatened in only a significant portion of its range. Similarly, analyses for issuing permits and exemptions under section 10 of the Act would apply throughout the species' range, and we would use our expertise to streamline the processes and apply the appropriate level of protection for the areas under consideration. In the same way, even if a species is listed because it is endangered or threatened in a significant portion of its range, the prohibitions under section 9 of the Act would apply throughout the species' range for endangered species, and as established by special rules pursuant to section 4(d) of the Act for species listed as threatened.

#### **V. Public Comments; Request for Information**

We intend that the final policy on interpretation of the phrase “significant portion of its range” in the Act’s definitions of “endangered species” and “threatened species” will consider information and recommendations from all interested parties. We therefore solicit comments, information, and recommendations from governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties. All comments and materials received by the date listed in the **DATES** section above will be considered prior to the approval of a final document. We seek comments and recommendations on:

(1) Consequences of a species being endangered or threatened in a significant portion of its range:

(a) The draft policy interprets the “significant portion of its range” language to provide an independent basis for listing. Is this an appropriate interpretation? Are the other alternative interpretations we considered more appropriate, and why or why not? Are there other alternative interpretations that we should consider?

(b) When a species is listed due to being endangered or threatened throughout an SPR, should the protections of the Act apply throughout the range of the species? If so, how should we apply those protections?

(2) The definition of “significant”:

(a) The draft policy includes a definition based on biological/conservation importance. Are alternative ways to define “significant” more appropriate, and why or why not? Would such approaches be workable in terms of their transparency, harmony with all key portions of the Act, and ability to be implemented consistently?

(b) We chose a relatively high threshold for “significant” which requires that loss of the portion would cause the overall species to become endangered (“in danger of extinction”). Is this threshold appropriate? Should it be higher or lower? Should the definition reference both “in danger of extinction” and “likely to become endangered,” thus reflecting both the definitions of “endangered species” and “threatened species” as the benchmark for biological significance? Or should it refer only to whether loss of the portion would render the whole “in danger of extinction,” as is currently included in the draft policy?

(3) We recognize that our definition of “significant” in the draft policy has a difficult conceptual underpinning both to analyze and to convey. Would it be appropriate to use another measure, such as percentage of range or population, as a rebuttable presumption as to whether a portion meets the definition of “significant,” or whether a portion does not meet the definition of “significant”? Doing so could potentially streamline analyses and allow us to use our resources more effectively, as well as provide some general guidance to the public on how the standard for “significant” would be applied. Would development of such a measure provide a useful tool? What measure would be an appropriate for a rebuttable presumption, and how would it be rebutted?



(4) Range and historical range: What role should lost historical range play in determining whether a species is endangered or threatened?

(5) Reconciling SPR with DPS authority: What is the proper relationship between SPR and DPS?

(6) We recognize that under the draft policy, a species can be threatened throughout all of its range while also being endangered in an SPR. For the reasons discussed in this document, in such situations we would list the entire species as endangered throughout all of its range.

However, we recognize that this approach may raise concerns that the Services would be applying a higher level of protection where a lesser level of protection may also be appropriate, with the consequences that the Services would have less flexibility to manage the species and that scarce conservation resources would be diverted to species that might arguably better fit a lesser standard if viewed solely across its range. The Services are particularly interested in public comment on this issue.

Please include sufficient information with your submission (such as references to scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

You may submit your information concerning this draft policy by one of the methods listed in the **ADDRESSES** section. If you submit information via <http://www.regulations.gov>, your

entire submission—including any personal identifying information—will be posted on the website. If you submit a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Information and supporting documentation used in preparing this document is available for you to review at <http://www.regulations.gov>, or you may make an appointment during normal business hours at the U.S. Fish and Wildlife Service, Endangered Species Program (see **FOR FURTHER INFORMATION CONTACT**).

## **VI. Required Determinations**

### *A. Regulatory Planning and Review (E.O. 12866)*

The Office of Management and Budget (OMB) has determined that this draft policy is significant and has reviewed it under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

- (a) Whether the rule will have an annual economic effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of government;
- (b) Whether the rule will create inconsistencies with other Federal agencies' actions;

- (c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients; or
- (d) Whether the rule raises novel legal or policy issues.

### *B. Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We are certifying that this policy would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking establishes requirements for NMFS and FWS in listing determinations under the Endangered Species Act. NMFS and FWS are the only entities that are directly affected by this rule, and they are not considered to be small entities under SBA's size standards. No other entities are directly affected by this rule.

This draft policy, if made final, would be applied in determining whether a species meets the Act's definitions of "endangered species" or "threatened species." However, based on agency experience, we predict application of this policy interpretation would affect our determinations in only a limited number of circumstances. This would likely only result in a small number of additional species listed under the Act and application of the Act's protective regulations.

We cannot reasonably predict those species for which we will receive petitions to list, delist, or reclassify, or whether a species' specific circumstances would result in us listing a species based on its status in an SPR. We therefore cannot predict which entities (other than the Services) would be affected by listing a species as endangered or threatened based on its status in an SPR or the extent of those impacts. However, given our experience implementing the Act, we believe few if any entities would be affected.

In addition, section 4(b) of the Act requires that we base decisions to list, delist, or reclassify species "solely on the best scientific and commercial data available." In other words, we cannot consider economic or socioeconomic impacts in our status determinations (48 FR 49244, October 25, 1983). In status determinations that would apply this policy, we would not consider the economic impacts of those listings. However, the Act also requires that we give notice of and seek comment on any proposal to list, delist, or reclassify any species prior to a final decision. Our proposed rules to list, delist, or reclassify species would indicate the types of activities that may be affected by resulting regulatory requirements of the Act. Entities that may be affected may review and comment on this or any other aspect of our proposed rules.

*C. Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) On the basis of information contained in the “Regulatory Flexibility Act” section above, this draft policy would not “significantly or uniquely” affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this policy would not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the draft policy would not place additional requirements on any city, county, or other local municipalities.

(b) This draft policy would not produce a Federal mandate on State, local, or tribal governments or the private sector of \$100 million or greater in any year; that is, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. This policy would impose no obligations on State, local, or tribal governments.

*D. Takings (E.O. 12630)*

In accordance with Executive Order 12630, this draft policy would not have significant takings implications. This policy would not pertain to “taking” of private property interests, nor does it directly affect private property. A takings implication assessment is not required because this policy (1) would not effectively compel a property owner to suffer a physical invasion of property and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This policy would substantially advance a legitimate government interest

(conservation and recovery of endangered and threatened species) and would not present a barrier to all reasonable and expected beneficial use of private property.

*E. Federalism (E.O. 13132)*

In accordance with Executive Order 13132, we have considered whether this draft policy would have significant Federalism effects and have determined that a Federalism assessment is not required. This draft policy pertains only to determinations to list, delist, or reclassify species under section 4 of the Act, and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

*F. Civil Justice Reform (E.O. 12988)*

This draft policy does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of the Executive Order 12988. This draft policy would clarify how the Services will make determinations to list, delist, and reclassify species under section 4 of the Act.

*G. Government-to-Government Relationship with Tribes*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951, May 4, 1994),

Executive Order 13175, the Department of the Interior Manual Chapter 512 DM 2, and the Department of Commerce American Indian and Alaska Native Policy (March 30, 1995), we have considered possible effects on federally recognized Indian tribes and have determined that there are no potential adverse effects of issuing this draft policy. As noted above, we cannot reasonably predict those species for which we will receive petitions to list, delist, or reclassify, or whether a species' specific circumstances would result in us listing a species based on its status in an SPR. We therefore cannot predict which entities, including federally recognized Indian tribes, would be affected by listing a species as endangered or threatened based on its status in an SPR or the extent of those impacts. Given our experience implementing the Act, we believe few if any entities, including tribes, would be affected.

However, the Act requires that we give notice of and seek comment on any proposal to list, delist, or reclassify any species prior to a final decision. Our proposed rules to list, delist, or reclassify species would indicate the types of activities that may be affected by resulting regulatory requirements of the Act. Any potentially affected federally recognized Indian tribes would be notified of a proposed determination and given the opportunity to review and comment on the proposed rules.

#### *H. Paperwork Reduction Act*

This draft policy does not contain any new collections of information that require approval by Office of Management and Budget (OMB) under the Paperwork Reduction Act. This policy would not impose recordkeeping or reporting requirements on State or local governments,

individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

#### *I. National Environmental Policy Act*

We are analyzing this draft policy in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior Manual (318 DM 2.2(g) and 6.3(D)), and National Oceanic and Atmospheric Administration (NOAA) Administrative Order 216-6. We will complete our analysis, in compliance with NEPA, before finalizing this proposed policy.

#### *J. Energy Supply, Distribution or Use (E.O. 13211)*

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This draft policy, if made final, is not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

#### *K. Clarity of this Policy*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule or policy we publish must:



- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the policy, your comments should be as specific as possible. For example, you should tell us the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

### **References Cited**

A complete list of all references cited in this document is available on the Internet at <http://www.regulations.gov> or upon request from the Endangered Species Program, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

### **Authors**

The primary authors of this draft policy are the staff members of the Endangered Species Program, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Arlington, VA 22203, and the National Marine Fisheries Service's Endangered Species Division, 1335 East-West Highway, Silver Spring, MD 20910.

### **Authority**

We are taking this action under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).

Dated: December 6, 2011

Signed: Daniel M. Ashe

Director, Fish and Wildlife Service

Dated: December 6, 2011

Signed: Samuel D. Rauch III

Deputy Assistant Administrator for Regulatory Programs, National Marine  
Fisheries Service

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