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Docket No. FWS-R9-ES-2011-0031

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


Dear Director Ashe and Deputy Assistant Administrator Rauch:

Defenders of Wildlife submits the following comments on the U.S. Fish and Wildlife Service’s (“FWS”) and National Marine Fisheries Service’s (“NMFS”) (collectively “the Services”) above-referenced proposal regarding the definition of the phrase “significant portion of its range” (“SPR”). We commend the Services for their interest in bringing greater clarity and consistency to the administration of the Endangered Species Act (“ESA”). In addition, we strongly endorse the Draft Policy’s rejection of the U.S. Department of the Interior Solicitor’s 2007 legal opinion on “The Meaning of “In Danger of Extinction Throughout All or a Significant Portion of Its Range.” M-Opinion 37013 (March 16, 2007). However, we have significant concerns regarding the proposed new definition of SPR. In particular, the policy’s unreasonably narrow focus on species viability fails to accommodate the ESA’s broader species conservation goals and purposes and is inconsistent with well established legal precedent regarding SPR. We suggest alternative approaches to defining SPR that we believe are more reasonable and closely aligned with the ESA.

A. We support rejection of the M-Opinion and endorse the alternative interpretation to extend ESA protections throughout a species’ entire range upon a determination that the species is endangered or threatened in a significant portion of its range.

Until fairly recently, it had been the nearly uniform practice of the Services, when deciding whether to list a species (or subspecies or distinct population segment (“DPS”) of a species), to do so either everywhere the species (or subspecies or DPS) occurred or not at all.
Because the ESA defines both “endangered” and “threatened” species as a species that is in danger of extinction, or likely to become so, “throughout all or a significant portion of its range,” the Service’s view was that if a species was imperiled in “a significant portion of its range,” it had to be listed everywhere, even including those particular areas where it was not in peril.

In 2007, the U.S. Department of the Interior Solicitor issued a special legal opinion called an M-Opinion setting forth an interpretation of the effect of finding that a species is endangered or threatened in just a significant portion of its range. The M-Opinion provided that upon such a determination, the species would be listed, and the protections of the ESA would extend only to that portion of its range deemed to be significant and where the species was determined to be endangered or threatened. Contrary to longstanding Services practice, the M-Opinion allowed the listing and delisting of species on a state-by-state basis.

The M-Opinion was subsequently relied upon by the FWS in several listing determinations including: the partial delisting of the Northern Rockies distinct population segment (“DPS”) of gray wolves, 74 Fed. Reg. 15123 (April 12, 2009); the finding on a petition to list the Gunnison’s prairie dog, 73 Fed. Reg. 6660 (Feb. 5, 2008); and the partial listing of the Preble’s Meadow jumping mouse in Colorado but not in Wyoming. 73 Fed. Reg. 39790 (July 10, 2008). All three actions were subsequently challenged and two different federal courts declared the wolf and prairie dog actions unlawful on grounds that the M-Opinion’s approach to SPR violated the plain and unambiguous language of the Act, which forecloses the listing or delisting of any “species” that does not qualify as a taxonomic species, subspecies or DPS. See Defenders of Wildlife v. Salazar, 729 F. Supp. 2d 1207 (D. Mont. 2010) and WildEarth Guardians v. Salazar, 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010) (Gunnison’s).

These decisions held that a species – i.e., species, subspecies or DPS – must be listed throughout its range whenever it is found to be endangered or threatened in a significant portion of its range. As Judge Molloy concluded in finding the FWS’s partial delisting of the Northern Rockies DPS of wolves arbitrary and capricious and in violation of the ESA, the SPR language “does not qualify where a species is endangered, but rather it qualifies when it is endangered. Defenders of Wildlife v. Salazar, 729 F. Supp. 2d at 1218 (emphasis added).

After these two cases were decided, and with additional cases pending challenging the validity of the M-Opinion, the Secretary requested a voluntary remand of the Preble’s rule and pledged to withdraw the M-Opinion. Center for Native Ecosystems v. Salazar, 795 F. Supp. 2d 1236 (D. Colo. 2011) (Preble’s). See also National Ass’n of Home Builders v. Salazar, Civ. No. 10-832 (OK) (D.D.C.) (an industry challenge to the M-Opinion).1

Defenders agrees with the court’s interpretation of the ESA in *Defenders of Wildlife* and supports the FWS’s rejection of the M-Opinion, which was formally withdrawn by the Solicitor on May 4, 2011 (M-37024). We agree that the consequence of a species being in danger of extinction or likely to become so in a significant portion of its range should be that the entire species shall be listed throughout its range. This is the most historically and textually consistent approach to listing species under the ESA.

**B. The Draft Policy’s definition of SPR is flawed.**

1. *The Services have failed to set-forth a rational justification for defining SPR in a narrow manner that will limit the protection of species under the ESA.*

The Services explain that their proposed definition of SPR sets a “relatively high threshold” meant to “minimize the degree to which restrictions will be imposed or resources expended that do not contribute substantially to species conservation.” We do not agree that this is an appropriate basis for defining a term that was actually meant to expand the authority of the Services to protect species under the ESA before they declined to the point where they could be considered threatened or endangered throughout the entirety of their ranges. We infer from this statement that, as currently defined through litigation and case law, the Services believe SPR has or could lead to the improper application of the ESA and protection of species otherwise undeserving of protection. We disagree.

In fact, the Draft Policy has failed to set-forth a single example demonstrating how SPR has or is being utilized by biodiversity conservation advocates to obtain the listing of species as threatened or endangered that biologically or legally should not be protected under the ESA, or in a manner otherwise inconsistent with the statute or legislative history. To the contrary, as explained in greater detail below, we believe the proposed definition of SPR would unreasonably and unlawfully constrain the obligation of the ESA to protect species and their habitats, and adopts an approach to species’ conservation that can best be characterized as “how low can you go” before invoking the protections of our most important biodiversity conservation law.

2. *The Draft Policy proposes an unreasonably high threshold for “significant” that is inconsistent with the ESA’s goal of protecting a species that is endangered or threatened in less than its entire range.*

The Draft Policy proposes the following definition of a 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.” The Services acknowledge that their proposed standard is “relatively high” but

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assert that their interpretation “leaves room for listing a species that is not currently imperiled throughout all of its range.” We disagree. In fact, we have been unable to identify a single hypothetical or more importantly real-world example where the Services’ proposed definition would lead to a finding that a species is or could be threatened with extinction in a SPR and not also threatened or endangered throughout its entire range.

Indeed, the only example provided in the Draft Policy explicating the Services’ proposed test in practice is hypothetical and actually reinforces the flaws with this approach. That hypothetical example describes a species consisting of two populations, population Y, which “currently faces only moderate threats” but which “occurs in an area that is so small or homogenous that a stochastic [] event could devastate” the entire population, and population X. The Services explain that under its proposed formulation, population X would constitute a SPR because without it the entire species, consisting solely of population Y, would be in danger of extinction due to its small size. The Services go on to explain that, “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 Y, would not cause the species currently to be in danger of extinction throughout all of its range.” However, the Services never explain why a species consisting of a small or homogeneous population that is already threatened with extirpation due to stochastic events – Portion Y – and a second population X facing “severe threats,” is not currently threatened with extinction throughout all of its range.

In *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) (rejecting the Service’s denial of listing for the flat-tailed horned lizard), the government suggested an interpretation of SPR that would make a species eligible for protection under the ESA if it “faces threats in enough key portions of its range that the entire species is in danger of extinction, or will be within the foreseeable future.” *Id.* at 1141 (emphasis in original). As the court pointed out, however, if “the effect of extinction throughout ‘a significant portion of its range’ is the threat of extinction everywhere, then the threat of extinction throughout ‘a significant portion of its range’ is equivalent to the threat of extinction throughout all its range.” *Id.* (emphasis in original). In other words, the court held that the government’s definition conflated the standard for listing a species based on the threat of extinction in just a SPR with the threat of extinction throughout its entire range. In so doing, the government’s approach rendered SPR superfluous and violated the rule of statutory construction requiring that effect be given to all of a statute’s provisions.

The Draft Policy, like the government’s proffered definition of SPR in *Defenders of Wildlife*, improperly conflates the term “significant” with the viability of the entire species. By establishing an unreasonably high threshold for finding a portion of range to be significant, the Draft Policy violates the same rule against surplusage and, therefore, is not a reasonable interpretation of the ESA.
3. Narrowly defining SPR solely in terms of species viability and current range is contrary to the ESA and principles of conservation biology.

While the ESA was clearly meant to prevent the extinction of species, a close reading of the statutory language and the legislative history suggests that Congress intended to incorporate a broader geographical or ecological concept into the goal of listing and recovering endangered and threatened species, and a principal purpose of the ESA is to “provide a means whereby the ecosystems upon which threatened and endangered species depend may be conserved . . ..” 16 U.S.C. § 1531(b) (emphasis added). Additionally, the ESA declares that species “are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(3) (emphasis added). It is difficult to reconcile a definition of SPR that would disqualify a species that has been eliminated from the overwhelming majority of its historic range from the protections of the ESA, so long as the viability of the species was relatively secure on some small remaining percentage of its range, with Congress’ interest in conserving the ecosystems upon which species’ depend and the aesthetic, ecological, historical, and recreational values of species. The Services’ exceptionally restrictive approach to SPR is also contrary to the ESA’s principle goal of protecting species in the United States.

Congress, when it enacted the law in 1973, noted that the ESA marked a “significant shift” away from prior federal endangered species legislation which protected only species facing “worldwide extinction,” H.R. Rep. No. 412, 93d Cong., 1st Sess. 10 (1973), and that the new law was meant to “provide protection throughout the nation for animals which are either endangered or threatened . . .” S. Rep. No. 307, 93d Cong., 1st Sess. 3 (1973) (emphasis added). Indeed, the text of the ESA itself emphasizes this focus on “the Nation’s heritage in fish, wildlife, and plants,” 16 U.S.C. § 1531(a)(5) (emphasis added), and concern that “various species of fish, wildlife, and plants in the United States have been rendered extinct . . ..” Id. § 1531(a)(1). Congress explicitly authorized the listing of species threatened or endangered in just a portion of their range at least in part to protect species and their aesthetic, ecological, and recreational, etc. values in the United States irrespective of whether or not such domestic populations were necessary to ensure the viability of some larger taxonomic species most of which might be found somewhere else in the world. 2

The ESA’s focus on conserving domestic populations is also apparent in that several of the ESA’s most important post-listing substantive provisions only apply to species within U.S.

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2 A recent paper in Conservation Biology concluded: “Congress intended the ESA’s concept of endangerment to be broader than the biological concept of extinction risk and to encompass human-centered and ecological goals that are furthered by a species presence across much of its former range.” Carroll, et al., 24 CONSERVATION BIOLOGY at 396. Moreover, even the now withdrawn M-Opinion concluded that the Services, in determining whether a portion of a species range is significant, “could consider … the portion of the range in terms of the various values listed in the Act that would be impaired or lost if the species were to become extinct in either that portion of the current range or in the current range as a whole.” M-Opinion at 11.
borders. Most notably, the section 9 prohibition on ‘take,’” the designation of critical habitat and by regulation the section 7 consultation duties, are all limited in application to species in the U.S. To be sure, Congress reaffirmed this focus on conserving species in the U.S. in 1979 during consideration of amendments to eliminate or restrict the listing of distinct vertebrate populations segments under the ESA, noting that “the U.S. population of an animal should not necessarily be permitted to become extinct simply because the animal is more abundant elsewhere in the world.” S. Rep. No. 151, 96th Congr., 1st Sess. 7 (1979) (emphasis added).

As the Ninth Circuit aptly noted in quoting Aldo Leopold, “[t]he text of the ESA and its subsequent application seems to have been guided by the following maxim:

There seems to be a tacit assumption that if grizzlies survive in Canada and Alaska, that is good enough. It is not good enough for me . . . . Relegating grizzlies to Alaska is about like relegating happiness to heaven; one may never get there.”

Defenders of Wildlife v. Norton, 258 F.3d at 1145 (quoting Aldo Leopold, A SAND COUNTY ALMANAC 277 (1966)). An interpretation of the ESA that would deem the historic range of grizzly bears and that of other species, including wolves and bald eagles, in the lower 48 states as insignificant simply because their viability is assured by secure populations in Canada and Alaska is plainly inconsistent with this principle.

Courts that have rejected the Services’ past efforts at narrowly defining SPR have also interpreted the term to mean more than just species viability and current range, and to instead encompass broader geographical or ecological factors. In the seminal case on SPR involving the flat-tailed horned lizard, the U.S. Court of Appeals for the Ninth Circuit examined the legislative history and past agency practice and concluded that “a species can be extinct ‘throughout . . . a significant portion of its range’ if there are major geographical areas in which it is no longer viable but once was.” Defenders of Wildlife v. Norton, 258 F.3d at1145 (emphasis added). Applying this standard, the court rejected the FWS’s argument that the lizard’s historic habitat on private lands was insignificant because the species’ viability was secure on public lands. The court also held that, “where . . . it is on the record apparent that the area in which [a species] is 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 (emphasis added). The Draft Policy, which provides “that the status of lost historical range should not be separately evaluated” and that instead the only factor to be considered “is the conservation status [i.e., viability] of the then-current range at the time of the listing determination in question . . . .” (emphasis added), is clearly at odds with the Ninth Circuit’s holding in Defenders of Wildlife, which we believe more accurately tracks the ESA’s operating principles and goals.
Other courts have reached similar conclusions. In *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9 (D.D.C. 2002), the court held that the FWS’s determination that three of the four Canada lynx regions constituting the lynx lower 48 DPS were insignificant because the species viability or persistence was secure in the fourth region, was contrary to the ESA and its legislative history and was not a reasonable interpretation of the term SPR. Indeed, the court reasoned that the FWS’s singular focus on the one region of the species’ range where it was relatively secure and to effectively write-off the remaining three-quarters of the species’ historic range where it was most imperiled and possibly even extirpated, “is antithetical to the ESA’s broad purpose to protect endangered and threatened species,” *id.* at 26, and “contrary to the expansive protection intended by the ESA.” *Id.* at 27.

In a case involving a challenge to the reclassification of the legal status of wolves in the lower 48 states the court again rejected an interpretation of SPR narrowly focused on species viability. In *Defenders of Wildlife v. Norton*, 354 F. Supp. 2d 1156 (D. Or. 2005), the Service created and then downlisted two wolf DPSs – the Eastern DPS consisting of the western Great Lakes states and the northeast states, and the Western DPS encompassing the Rocky Mountains region and Pacific northwest – which collectively comprised a 30-state area. Both DPSs were downlisted from endangered to threatened based on the Service’s determinations that currently unoccupied historical range outside of two core wolf recovery areas – the northern Rockies for the Western DPS and the western Great Lakes for the Eastern DPS – was insignificant because it was not necessary for long-term viability of the species. In other words, the Service determined that the then current range of the wolf in the lower 48 states, i.e., the western Great Lakes and Northern Rockies, was the only significant portion of the species’ range. *Id.* at 1167. In rejecting this determination, the court reasoned that “[t]he Secretary’s conclusion that the viability of two core populations in the Eastern and Western DPSs makes all other portions of the wolf’s historical or current range insignificant and unworthy of stringent protection is contrary to Ninth Circuit precedent and the ESA.” *Id.* at 1168. Moreover, the court held that “[b]y ruling out all other portions of the wolf’s range because a core population ensures the viability of a DPS, the Secretary’s interpretation ‘has the effect of rendering the phrase [SPR] superfluous,’” and is therefore not a reasonable interpretation of the ESA. *Id.*

Excluding lost historical range from ever being considered a SPR is also inconsistent with the prior listing and recovery of species that at one time had no current range and existed

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3 The Draft Policy states that range shall be defined as “the general geographical area within which that species can be found at the time FWS or NMFS makes any particular status determination.” It further states that lost historical range “cannot constitute a significant portion of a species’ range.” 76 Fed. Reg. at 77002. This approach has been strongly criticized by NMFS biologists because it results in the perverse situation where portions of a species current range where threats exist would be considered for the purposes of listing the entire species, but once the threats have actually resulted in extirpation of the species from that portion, then that portion would no longer be evaluated. Robin S. Waples, *et al.*, *Legal Viability, Societal Values, and SPOIR: Response to D’Elia et al.*, 22 CONSERVATION BIOLOGY 1075 (2008).
solely in captivity, including California condor, Mexican gray wolf, red wolf and black-footed ferret. The reintroduction into the wild of these species, and the recovery of other species that have been eliminated from large segments of historical range, is only made possible if presently unoccupied habitat remains potentially useful for recovery purposes through application of the protections of the ESA. The Draft Policy states that “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,” and that “reducing a species’ vulnerability to threats and ultimately to extinction often requires recovering the species in some or all of its lost historical range.” But of course, by eliminating or greatly constraining the ability to list species that have lost most or all of their historical range, the Services’ proposal, by definition, will constrain and limit the tools available under the ESA to recover such species, which are only made available after a species is listed.4

While the Services are plainly entitled to some deference in interpreting the term SPR, such deference is not unlimited and must be bound by the text of the statute and its legislative history. See Chevron v. N.R.D.C., 467 U.S. 837 (1984). We believe the Services’ proposed definition of SPR is at odds with the ESA’s statutory language and legislative history, as well as firmly established case law, and therefore, is not a reasonable interpretation of the statute.

Below we recommend two alternative approaches to defining SPR which we believe are more reasonable and aligned with the ESA’s species’ conservation goals.

C. Defenders suggests the following alternative approaches to defining SPR.

We accept the Services’ assertion that finalizing a legally sound interpretation of SPR through notice and comment rulemaking is necessary to provide clarity and consistency in the administration of the ESA. To assist the Services in achieving this goal, we are suggesting alternative frameworks for defining a SPR guided by the following goals or principles. First, SPR must be defined in a manner consistent with the ESA’s goals and purposes and that will ensure the protection of species and habitats in the United States. Second, any definition should seek to align with relevant case law and past agency attempts to interpret SPR in a reasonable and legally sound manner. In other words, we believe it is neither necessary nor prudent to reinvent the wheel. Finally, to the extent consistent with the first two goals, SPR should be interpreted consistent with the principles of conservation biology.

We agree with the Draft Policy that, in defining “significant” as it relates to SPR, reference to common usage or dictionary definitions is appropriate and that the most relevant such meaning is “important.” Determining what is important should be guided by the ESA’s principles of conservation biology.

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4 Carroll, et al., propose that “range, in the context of SPOR’s application to defining species listing and recovery, means historic range that would provide suitable habitat if application of what the ESA defines as ‘conservation’ measures removed or mitigated the threat factors that led to the listing of a species as threatened or endangered.” 24 CONSERVATION BIOLOGY at 398-99.
purpose and, in particular, its goal of conserving the various species of fish, wildlife and plants in the United States and the ecosystems upon which they depend. Additionally, by authorizing the listing of species before reaching the point of range-wide endangerment, the SPR language provides an opportunity to initiate up-stream solutions and to get an early start on species conservation. Accordingly, we believe the critical question to ask is whether a portion of range, historical or current, is important to the successful conservation of the species – defined broadly as meaning multiple populations maintained across the range of the species in representative ecological settings (see, e.g., Kent H. Redford, et al., What Does It Mean to Successfully Conserve a (Vertebrate) Species? 61 BioScience 39 (2011)) – with a particular emphasis on species and their ecosystems in the U.S. This question could be answered by applying one of two similar analytical frameworks: the 3-R Framework or the Services’ test for significance in the DPS Policy.5

The conservation biology concept known as the 3-Rs refers to the three essential elements of successful species conservation: representation, resilience and redundancy. M.L. Shafer & B.A. Stein, Safeguarding Our Precious Heritage, in Precious Heritage: The Status of Biodiversity in the United States 301-322 (B.A. Stein et al. eds., 2000). The three elements, in summary, are as follows:

**Representation**

The principle of representation has been described as “saving some of everything.” Id. More specifically, representation embraces the concept that “successful biodiversity conservation means saving more than species themselves.” Id. It means also saving “the ecological and evolutionary patterns” that generate and support species as well as “populations of each species in the array of different environments in which it occurs.” Id.

**Resilience**

The principle of resilience speaks generally to a species’ ability to persist over time and withstand periodic disturbance and is often associated with population size. Thus, for example, a species consisting of large populations existing distributed throughout the ecological range of the species will tend to be more resilient than one consisting of smaller less well-distributed populations.

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5 As with the Services’ Draft Policy, these alternatives only address the issue of whether some portion of a species’ range is “significant” enough to potentially warrant listing of the entire species under the ESA. If a portion of range is determined to be significant, the Services must then evaluate the status of the SPR based on the best available scientific data and the ESA’s section 4 listing factors. It is only if, after that analysis, the Services conclude that the SPR is threatened or endangered, does the entire species – i.e., taxonomic species, subspecies or DPS – then qualify for listing as an endangered or threatened species under the ESA.
Redundancy

Redundancy is often associated with the meta-population concept and embraces the notion of risk-spreading and the preference for multiple populations scattered throughout a species’ range rather than having all of your eggs in one basket.

As Carroll et al. correctly concluded, “[t]he 3-R framework parallels the ESA in that it links the concepts of geography and viability by combining protection of representative examples of ecosystem types or species populations with two additional factors [resiliency and redundancy] typically associated with viability.” Carroll et al., 24 CONSERVATION BIOLOGY at 399. Aligning the 3-R framework with the ESA’s goal of recovery, Carroll et al., defines range to include historic range that would provide suitable habitat if application of the ESA’s protections and conservation measures removed or mitigated the threat factors responsible for a species’ imperilment.

We support this formulation of defining SPR and note that it has been utilized by the Services in making SPR determinations before. For example, in evaluating whether Vancouver Island represented a SPR of the Queen Charlotte Goshawk, the FWS stated that “a significant portion of a species’ range . . . is an area that is important to the conservation of the species because it contributes meaningfully to the representation, resiliency, or redundancy of the species.” 74 Fed. Reg. 56757, 56766 (Nov. 3, 2009). The FWS went on to explain that “[t]he contribution of the range portion must be at a level such that its loss results in a decrease in the ability to conserve the species” but that “[i]t does not mean however, that if such portion of the range were lost, the species as a whole would be in danger of extinction immediately or in the foreseeable future . . . .” Id. (emphasis added).

The DPS Policy, which has been in effect for more than fifteen years and is therefore a familiar framework for the Services, employs a similar approach to defining “significance.” The DPS Policy asks the Services to evaluate a population segment’s “biological and ecological significance . . . in light of Congressional guidance” to determine whether the population segment is significant or important to the conservation of the species or taxon to which it belongs. This question is answered based on an evaluation of four non-exclusive factors including:

1. Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon.
2. Evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon.
3. Evidence that the discrete population represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or
4. Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

We believe that the Services should consider a consistent definition of significance that encompasses these factors; indeed, it seems illogical for the agencies to have one policy that deems these factors relevant to a significance determination for the purposes of making a DPS finding, yet excludes them from consideration in making a SPR assessment. Further, especially given the Services’ recognition in the preamble to the proposal that one of Congress’s specific purposes in adopting the SPR language was the conservation of imperiled species and habitats in the United States, the final policy should make explicit that the importance of preserving species as part of intact ecosystems in the U.S. will be a relevant factor in the agencies’ evaluation of significance independent of whether the loss of the U.S. range will necessarily undermine the species’ survival or conservation globally.

D. Relationship of SPR to the ESA’s DPS Authority.

If the range of an SPR also constitutes a DPS, the Draft Policy would have the Services list only the DPS, rather than the entire taxonomic species or subspecies. The stated rationale is that the alternative approach (listing the higher taxonomic unit) would “remove our flexibility to apply differing statuses across the range of a vertebrate taxon when it is comprised of multiple DPSs with differing statuses.” The only example the Services give of this problem, however, concerns listed species that occur outside the United States. In those cases, the listing of an entire species or subspecies would purportedly “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.” In effect, the Services propose to deny rangewide protection for species deserving of that protection, based primarily on the coincidental overlap between the boundaries of an SPR and a DPS.

We believe the Services have not provided an adequate rationale for the decision to list only the DPS. The Services’ concern hardly applies to species occurring in the United States, where the absence of international boundaries makes it difficult to carve out multiple DPSs with differing statuses based on political boundaries. Even for foreign listed species, the Services’ rationale is undermined by the fact that section 4(d) allows the Services to tailor the level of ESA restrictions for “threatened” species in a manner that accounts for management differences among countries. For example, less restrictive section 4(d) rules can apply to countries that are properly conserving their listed species.

It is our understanding that the Services are reevaluating the DPS Policy. We urge the Services as part of that reevaluation to consider initiating a separate notice and comment process with the goal of formulating a more rational approach to reconciling Congressional intent in authorizing the listing of a species based on SPR with the authority to list DPSs.
Conclusion

We appreciate the opportunity to comment and look forward to working with the Services to develop an approach to listing species that is biologically appropriate, historically consistent, and legally sound. Unfortunately, for all of these reasons detailed above, we cannot support the Service’s proposed definition of the phrase “significant portion of its range.” We believe it is inconsistent with both principles of conservation biology and congressional intent.

We urge the Services to consider instead an approach that is not wholly limited to the biological importance of a portion of a species range. Although biological importance will no doubt be critical in evaluating significance, the text and history of the ESA, and the Services’ own past interpretation of the Act, suggest a broader analysis based on both viability and geography is required. We believe the 3R framework and the DPS Policy offer two potential bases for a definition that better embodies the conservation values and purposes of the ESA. Moreover, a more flexible standard would provide the Services’ the regulatory flexibility to conserve of the Nation’s biodiversity heritage and take steps necessary to prevent extinction.

Thank you for the opportunity to comment on this very important species conservation and ESA policy matter.

Sincerely,

Jamie Rappaport Clark
President and CEO