



MARINE MAMMAL COMMISSION

12 March 2012

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

Daniel M. Ashe, Director
Fish and Wildlife Service
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Samuel D. Rauch, III
Acting Assistant Administrator for Fisheries
National Marine Fisheries Service
1335 East-West Highway
Silver Spring, MD 20910

Dear Messrs. Ashe and Rauch:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the *Federal Register* notice (76 Fed. Reg. 76918) published jointly by the Fish and Wildlife Service and the National Marine Fisheries Service proposing a draft policy interpreting the phrase “significant portion of its range” as used in the Endangered Species Act. The draft policy is an effort to align the Services’ interpretation with court decisions on the phrase’s meaning and to resolve ambiguities in the statutory language. In general, we found the background and evaluation accompanying the draft policy to be well considered, thorough, and very helpful in identifying the relevant issues. However, the Commission has some concerns about specific aspects of the draft policy.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the Fish and Wildlife Service and National Marine Fisheries Service—

- revise the draft policy by defining the word “significant” in the phrase “significant portion of its range” so that a portion is not considered significant only if the loss of that portion places the entire species in danger of extinction;
- revise the draft policy by defining the word “significant” in the phrase “significant portion of its range” in a way that recognizes the ecological and/or evolutionary significance of various parts of a species’ range to the species and the ecosystem, and that does not diminish the species’ resilience or potential to adapt in response to rapidly changing environmental conditions, or rule out the possibility that areas that do not now constitute good habitat might become so as a consequence of the same processes that are causing the loss or degradation of presently occupied areas;
- revise the draft policy to ensure that it gives the Services the ability to apply their expertise and exercise reasonable discretion in determining what constitutes a significant portion of a species’ range;
- expand the draft policy’s interpretation of “significant” to cover not only species that are in danger of extinction but also those likely to become so in the foreseeable future; and

- give priority to listing a species range-wide on the basis of its representing a significant portion of the species' range even when a distinct population segment also qualifies for listing on that basis;

RATIONALE

Policy and purpose of the Endangered Species Act

The draft policy interprets a portion of a species' range to 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 key question regarding any such interpretation is whether it conforms to the letter and intent of the Endangered Species Act. The purposes of the Act include "...to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species...."

The policy proposed by the Services, although well-considered, falls short in several important respects. Most importantly, under this policy, species could be lost throughout substantial portions of their range—even entire ecosystems—and still not qualify for added protection under the Endangered Species Act. Two current examples highlight this shortcoming.

First, the National Marine Fisheries Service is considering whether listing the ringed seal is warranted. The ringed seal is thought to consist of five subspecies: *Pusa hispida hispida* (Arctic), *P.h. ochotensis* (Sea of Okhotsk, Kamchatka), *P.h. botnica* (Baltic Sea), *P.h. ladogensis* (Lake Ladoga), and *P.h. saimensis* (Lake Saimaa). Climate disruption threatens to degrade the habitat of the Arctic ringed seal, leading to snow and ice conditions unsuitable for successful reproduction or supporting the survival of weaned pups to independent feeding. The only predicted exception is the Canadian Arctic Archipelago, where most projections indicate that the right snow and ice conditions are more likely to persist for the remainder of the century. If Arctic ringed seals can reproduce only in the Canadian Archipelago, then their population may decline from several million to hundreds (or perhaps tens) of thousands, and they are likely to be extirpated throughout extensive portions of their current range. Furthermore, not only would the ringed seal population decline, but because of its role as a keystone species, its decline would have substantial implications throughout the Arctic marine ecosystem. Nonetheless, under the proposed definition of significant, the Arctic ringed seal subspecies might not be listed if the National Marine Fisheries Service determined that the portion of the population in the Canadian Archipelago would persist even if the subspecies were to disappear from all other parts of its range. In the Commission's view, such an outcome would be contrary to a plain reading of the phrase "significant portion of its range" and with the Act's purpose of conserving the ecosystems upon which endangered and threatened species depend.

Second, recent studies indicate that eastern and western "stocks" of gray whales (*Eschrichtius robustus*) in the North Pacific Ocean may be part of a single reproductive population with different individuals or groups having seasonal fidelity to different areas outside the breeding season. For years, the two "stocks" have been viewed as distinct populations based on their geography and demography. If this new evidence leads to a finding that the whales on either side of the North

Pacific basin do not constitute a distinct population segment, but rather comprise a single population, then protections afforded to the highly endangered western segment could be withdrawn because the species in the eastern part of its range is not at risk of extinction and would not be so if the whales were lost from the western part of its range. Here, again, the proposed interpretation could mean that we are willing to accept the loss of gray whales throughout the coastal ecosystems of eastern Asia. It is difficult to imagine that such a loss would be “insignificant.”

In essence, the Service’s proposed policy establishes a dependence between the word “all” and the phrase “a significant portion of its range.” That is, negative influences on only a portion of a species cannot be considered significant unless, ultimately, it affects the entirety of the species, or the species throughout all of its range. In fact, one could make an argument that such a definition functionally removes “significant portion of its range” from the definitions of endangered and threatened species because no portion would be considered on its own merit—it would only be considered in the context of all, or the entirety of, the species. For all these reasons, the Marine Mammal Commission believes that the proposed definition of “significant” is inconsistent with a plain reading of the Act and recommends that the Fish and Wildlife Service and National Marine Fisheries Service revise their draft policy by redefining the word “significant” in the phrase “significant portion of its range” in a way that it does not depend on the entire species being in danger of extinction if that portion is lost.

Alternative considerations—ecological and evolutionary significance

The Commission offers several alternatives for redefining “significant.” These alternatives allow the Services to consider the species in both ecological and evolutionary contexts. In an ecological context, the range of many species extends across multiple ecosystems. For example, a large whale population might occur in the North Pacific Ocean, be concentrated in the Gulf of Alaska, but also occur in the Bering Sea or Sea of Okhotsk. The loss of the population in any one of those ecosystems would be significant at the species and ecosystem level and, therefore, extirpation from an ecosystem might be considered a loss from a significant portion of its range. That is, one alternative consideration might be to define significance to include loss from an ecosystem. Such an approach would be entirely consistent with recent efforts by the Administration to focus on ecosystem-based management. As part of that effort, federal agencies are recognizing large ecosystems that might be useful for this purpose (i.e., Gulf of Mexico, California current, Gulf of Alaska).

The Services also should consider alternatives at smaller ecological scales. For any given population the Services should be able to identify (or should not discount) portions of a range that are important for supporting vital functions (e.g., reproduction, feeding, refuge from predators). Such areas are reasonably considered significant portions of a species’ range, even if they occur in multiple locations (e.g., multiple feeding locations). Thus, areas deemed crucial to support vital functions provide a basis for identifying significant portions of a species’ range. In addition, certain areas within a species’ distribution may constitute “sources” in the sense that the populations in those areas have positive growth rates, whereas surrounding areas are “sinks” because they are not sufficient to support positive growth. Hence, certain portions of a species’ range might be considered significant because they are essential for supporting population growth. Other areas

might be considered significant because they provide vital refuges from intermittent or common threats (e.g., disease or bycatch in fisheries). Thus, portions of a species' range reasonably could be considered significant for a variety of ecological reasons.

In an evolutionary context, any approach that allows a population to decline as a result of human impacts throughout a significant portion of its range undermines that population's ability to adapt to new selective forces. Populations must have the capacity to adapt if they are to persist. Species often persist because they occur in diverse habitats subject to varied selective forces, and such diversity enables their adaptation through the process of selection acting upon their various subpopulations. Although these subpopulations may appear to be redundant, they may be essential to the persistence and resilience of the species as a whole. It would be incongruous for our new national ocean policy to recognize the challenges to species conservation wrought by rapidly changing environmental conditions and, accordingly, to place great emphasis on adaptation and resilience, while the Services propose a definition that could allow substantial reduction of the ranges of wildlife species and compromise their potential to adapt.

In both an ecological and evolutionary context, the Services should be mindful that our ability to conserve species depends on a mixture of policy, management, and science, and is an uncertain endeavor at best. An area should not have to be among the last portions of a species' range before it is considered significant and the species is listed and given protection under the Endangered Species Act. Extinction is often an incremental process, although climate disruption is posing new risks of rapid species decline from large-scale stochastic events (e.g., large losses in Arctic sea ice). The key to conservation and maintenance of healthy ecosystems is not to wait until we have little more to work with than the last remnants of species that have been declining over time. Therefore, the Marine Mammal Commission recommends that the Fish and Wildlife Service and the National Marine Fisheries Service revise their draft policy by defining the word "significant" in the phrase "significant portion of its range" in a way that recognizes the ecological significance of various parts of a species' range to the species and the ecosystem, and that does not diminish the species' resilience or potential to adapt in response to rapidly changing environmental conditions, or rule out the possibility that areas that do not now constitute good habitat might become so as a consequence of the same processes that are causing the loss or degradation of presently occupied areas. Although it is possible that some environmental changes may actually benefit selected species, our conservation strategy should not depend on such outcomes.

Using reasonable discretion

As just described, the proposed definition likely will lead to an emergency room or crisis-based approach to conservation. The Commission does not see how such an approach can be considered to be consistent with the purposes of the Endangered Species Act, for it will not ensure that ecosystems upon which listed species depend are conserved.

This binding policy removes the Services' ability—and responsibility—to apply reasonable discretion for the purpose of meeting the goals of the Endangered Species Act and discounts the expertise that was the basis for giving the Services their management responsibilities. Situations will vary depending on the species being considered, their life histories, and the threats they face, and the

Services will need discretion to tailor or adapt their decision making to suit those situations. Therefore, the Marine Mammal Commission recommends that the Fish and Wildlife Service and the National Marine Fisheries Service revise their draft policy to ensure that it gives them the ability to apply their expertise and exercise reasonable discretion in determining what constitutes a significant portion of a species' range. Certainly, the Services should list a species when its loss in a portion of its range would cause the remainder of the species to be in danger of extinction. However, this reason should not be the only justifiable basis for listing and those other reasons should not be categorically discounted.

Threshold of significance

In the *Federal Register* notice, the Services ask for comments on whether a lower standard should be incorporated within the policy. In particular, the Services ask for comments on adding the words "likely to become" endangered to that standard. Doing so would allow either Service to consider a portion of a species' range as significant if, in the absence of the species from that range, the species would be at risk of becoming endangered within the foreseeable future (i.e., it would meet the definition of a threatened species). A lower standard that reflects the Act's definition of a threatened species is consistent with the purposes and intent of the Act and should be included.

First, we note that the rationale for using the higher standard states in part that "...this draft definition of 'significant' uses the endangered standard [and not the threatened 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" (76 Fed. Reg. 76996, column three, first complete paragraph). Elsewhere, however, the notice states that, as a general practice, after determining what taxonomic level should be considered, the Services would "...then analyze whether the determined entity(s) is endangered or threatened throughout all or a significant portion of its range" (76 Fed. Reg. 76998, column three, second complete paragraph). Given that this would be the standard practice and that it would require considering whether the species meets the definitions of either threatened or endangered both within the species' entire range and within the area considered to be a significant portion of the species' range, it does not appear that adding the "foreseeable future" language would add greatly to the complexity of analyses already contemplated. In any case, we do not believe analytical burdens should be a determining factor for deciding whether listing a species is warranted. Rather, the listing decision should be based on the species' biological status and the threats to its continued existence.

Second, we find the exclusion of the standard for threatened species from the policy definition of the term 'significant' to be inconsistent with analyses provided elsewhere in the notice that discuss the draft policy's underlying rationale and intent. For example, the discussion comparing the draft policy with the withdrawn policy (i.e., the "M-Opinion") states that "under this [draft policy] interpretation, 'the portion of its range' language...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* (emphasis added)...or as to where protections vary below the taxonomic species or subspecies level..." (36 Fed. Reg. 76991, column three, first complete paragraph). The Commission believes that it is important to be consistent in the draft

policy, and that it also is important to include the “or likely to become so” language in the meaning of “significant.”

Similarly, the description of the draft policy’s effect and value states that, by listing a species when it is endangered or threatened under this policy, it “...may allow protection and recovery of declining organisms in a more timely and less costly manner and on a smaller scale than more costly and extensive efforts that might be needed to recover a species that is endangered or threatened throughout its range” (36 Fed. Reg. 77003, second column, first complete paragraph). If listing under this draft policy would occur only if the species’ extirpation from the significant portion of its range would result in it being endangered, it is not clear how this policy would prevent species from becoming threatened throughout their range. That is, under the draft policy, a species would not be listed and would not receive protection if extirpation from the identified significant portion of its range left it only threatened throughout the remainder of its range. Thus, failure to include language from the definition of “threatened species” in the meaning of “significant” would be contrary to the Services’ goals and the legislative intent of the Act, which call for protection of both endangered and threatened species. Accordingly, the Marine Mammal Commission recommends that the Fish and Wildlife Service and National Marine Fisheries Service expand the draft policy’s interpretation of “significant” to cover not only species that are in danger of extinction but also those likely to become so in the foreseeable future.

Specific comments

On page 77004 of the *Federal Register* notice, the Services asked for responses to specific questions. The Commission’s responses are as follows.

(1)(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?

Yes, the Commission believes that the “significant portion of its range” language constitutes an independent basis for listing. We see no reason for questioning that interpretation based on a plain reading of the Act.

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

Yes. Consistent with legislative intent and judicial rulings, the Act’s protections should apply to the entire species (i.e., biological species, subspecies, or distinct population segment). In all cases involving endangered and threatened species, the goal should be to recover the species. With that in mind, the Commission believes that protections should be developed and implemented to achieve that goal. That does not mean that the Services cannot or should not adapt or tailor protections according to the situation.

(2)(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?

Yes, as described above, the Commission believes that a portion of a species’ range can be determined to be significant on the basis of a number of demographic, ecological, and/or evolutionary considerations. These alternative definitions are consistent with the Act and provide a biologically realistic basis for managing such species.

(2)(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?

No, as described above, the Commission does not agree with the proposed threshold. It undermines the Services’ ability to use reasonable discretion, creates an emergency room or crisis-based approach, and undermines a species’ ability to adapt the changes we (the human species) are causing to our natural world. As recommended above, the threshold should be modified to cover species that are likely to become endangered in the foreseeable future, thus allowing for more preventative and possibly less disruptive or expensive responses.

(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 (sic) appropriate for a rebuttable presumption, and how would it be rebutted?

The Commission believes that it may be useful to develop such guidelines for defining significance, but it does not support creating one-size-fits-all requirements that are binding. The intent of the Act is to conserve species. No single set of requirements will suffice in all cases because of the extraordinary degree of evolutionary and ecological variation among species. The Services were given the responsibility for conserving species with the expectation that they would apply their considerable expertise to each case. Pre-determined guidelines may streamline decision-making, but they do not necessarily improve it. Significant reduction in a species’ range, particularly when coupled with reduced abundance, could be a sufficient basis for listing even if that portion fails to meet some predetermined percentage of the species’ overall range.

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

The loss of historical range from human activities should be included in any consideration of a species' status. In almost all cases, extinction is the culmination of a long process of decline, possibly punctuated by episodes of rapid loss. Preventing extinction and promoting recovery require a careful analysis of a species' trend and the cumulative factors that affect that trend over time. Loss of a species' habitat in the past may be an important consideration because the past is often a good predictor of the future, the past may provide important insights into the factors causing decline, and the past also may provide important insights into the efficacy of conservation measures. To ignore the past would be to define a species' status on the basis of a snapshot, which does not make sense in this context.

We note that "threatened destruction, modification, or curtailment" of a species' habitat or range is the first of the five listing criteria set forth in section 4(a)(1) of the Act. It is not clear that separate consideration of historic range needs to be included in the policy concerning significant portion of a species' range. If loss of historic range is such that the species is in danger of extinction or is likely to become so within the foreseeable future, it would merit listing on that basis alone.

(5) Reconciling "significant portion of its range" with "distinct population segment" authority: What is the proper relationship between these two authorities?

The Commission believes that the proper relationship between a distinct population segment and a population considered for listing based on problems in a significant portion of its range are clear from a plain reading of the Act. The Act identifies the unit to conserve as a species, and defines "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature." A plain reading of the Act indicates that, for vertebrate species, a distinct population segment is relevant to the question of what unit to conserve, whereas the term "significant portion of its range" applies to the question of whether it warrants the added protections of the Act—if it is endangered or threatened in a significant portion of its range, then it warrants such protections.

Under the draft policy, in those cases when an area meets the standard for being considered a significant portion of a species' range and the population that inhabits that portion constitutes a distinct population segment, the Services have indicated that the latter determination would take precedence. That is, only the distinct population segment would be listed, rather than the species as a whole, even though the absence of the species from that portion of its range would, by definition, place the entire species in danger of extinction. If the Services adopt the proposed definition of significance, then the Marine Mammal Commission disagrees with this approach and believes that in this situation, under a conservation-based approach, the species should be listed range-wide.

Limiting listing to a distinct population segment when it also constitutes a significant portion of the species' range creates an anomaly as to how vertebrates versus other species (invertebrates and plants) are treated. Because the Act does not recognize distinct population segments of invertebrates and plants, an invertebrate or plant species would be listed throughout its entire range if it were threatened or endangered throughout a significant portion of its range. In contrast, under the draft policy, if a vertebrate species were endangered or threatened in a significant portion of its range, but that portion also constituted a distinct population segment, then only that segment would

be listed. This result is contrary to the policy behind defining the term “species” to include distinct population segments of vertebrate species. The recognition of distinct population segments was intended to provide greater protection to vertebrate populations by allowing them to be listed before the species as a whole qualifies for listing. Under the draft policy, however, vertebrates would be given lesser protection than other species, by allowing the distinct population segment to be listed separately even when the survival of the species as a whole would be placed at risk by the loss of the species from a significant portion of its range. To address this inconsistency, the Marine Mammal Commission recommends that, whenever a distinct population segment also qualifies for listing as a significant portion of a species’ range, the Fish and Wildlife Service and National Marine Fisheries Service give priority to listing the species on the basis of the latter.

The Commission notes that to make this point clearly, it has had to differentiate between the terms species and distinct population segment. The Services similarly drew this distinction in their draft policy. However, this may lead to some confusion because, under the statutory definition of the term “species,” a distinct population segment is considered a species. The Commission believes that this point should be clarified in the Services’ policy, perhaps by adding a new subsection to the section on the “Relationship of SPR to the Act’s DPS Authority” (section E). Among other things, the Service should note that, because a distinct population segment of a vertebrate species is considered a species under the Act, the distinct population segment could be listed because it is considered endangered or threatened throughout a significant portion of its range.

(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.*

The Commission believes that the Act gives the Services sufficient discretion to use their resources wisely in efforts to recover endangered and threatened species. The act of listing a species is analogous to providing a medical diagnosis. The treatment must depend on, or be tailored to, the nature of the problem(s) leading to the diagnosis or, in this case, the listing. Thus, the notion that listing status dictates the measures that must be taken to recover a species is true only to a degree. A review of recovery efforts for marine mammals, for example, would indicate clearly that the measures taken to recover endangered and threatened species vary, sometimes markedly, depending on circumstances and, particularly, on whether recovery actions interfere with other human activities. Therefore, the Commission does not agree with the implication behind this question.

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Messrs. Daniel M. Ashe and Samuel D. Rauch, III

12 March 2012

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I hope these comments and recommendations are helpful. Please call if you have any questions about them.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael L. Gorkin for".

Timothy J. Ragen, Ph.D.
Executive Director